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Emotional Regulation and Judicial Behavior

Terry A. Maroney*

Judges are human and experience emotion when hearing cases, though the standard account of judging long has denied that fact. In the post-realist era it is possible to acknowledge that judges have emotional reactions to their work, yet our legal culture continues to insist that a good judge firmly puts those reactions aside. Thus, we expect judges to regulate their emotions, either by preventing emotion's emergence or by walling off its influence. But judges are given precisely no direction as to how to engage in emotional regulation.

This Article proposes a model for judicial emotion regulation that goes beyond a blanket admonition to "put emotion aside." While legal discourse on judicial emotion has been stunted, scientific study of the processes of emotion regulation has been robust. By bringing these literatures together for the first time, the Article reveals that our legal culture does nothing to promote intelligent judicial emotion regulation and much to discourage it.

An engagement model for managing judicial emotion promises to reverse this maladaptive pattern. It provides concrete tools with which judges may prepare realistically for emotional situations they necessarily will encounter, respond thoughtfully to emotions they cannot help but feel, and integrate lessons from such emotions into their behavior. Importantly, the medical community has begun to pursue just such a program to promote competent emotion regulation by doctors.

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The engagement model is far superior to all its alternatives. Other regulation strategies, such as avoidance, are fundamentally incompatible with judges' professional responsibilities. Suppressing the expression and experience of emotion—encouraged by the status quo—is costly and normatively undesirable. Suppression is unrealistic, exacerbates cognitive load, impairs memory, and can paradoxically increase emotion's influence while rendering that influence less transparent. The judicial-engagement model, in contrast, leverages the best of what the psychology of emotion regulation has to offer. It puts a name to what extraordinary judges already are doing well and makes it available to all judges. By setting aside not judicial emotion but, rather, the crude manner in which we have asked judges to manage it, we stand materially to improve the quality of judging.

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INTRODUCTION

“Judges, being flesh and blood, are subject to the same emotions and human frailties as affect other members of the species.”¹

Hon. Thomas B. Finan, in his opinion in State v. Hutchinson

“We’re not robots [who] listen to evidence and don’t have feelings. We have to recognize those feelings and put them aside.”²

Hon. Sonia Sotomayor, testifying before the U.S. Senate Judiciary Committee

Judges are human and experience emotion when hearing cases. Judges regularly are angered by misbehaving lawyers and litigants.³ They routinely encounter disturbing evidence that can provoke not just anger but disgust.⁴ Litigants’ unhappy lives can prompt sadness.⁵ The inability to fix all the ills paraded before them can make judges feel frustrated, even depressed.⁶ As litigation generally follows harm or grievance, such unpleasant emotions may be the most frequent.⁷ But judges also experience more pleasant emotions. They may feel joy when a needy child is placed with a family, or hope when a

1. *State v. Hutchinson*, 271 A.2d 641, 644 (Md. 1970).

2. Andrew Malcom, *Sotomayor Hearings: The Complete Transcript, Part 1*, TOP OF THE TICKET, (July 14, 2009, 9:57 AM), <http://latimesblogs.latimes.com/washington/2009/07/sonia-sotomayor-hearing-transcript.html>.

3. See, e.g., *In re Duckman*, 898 A.2d 734 (2006) (describing how trial judge admitted being very angry at lawyer who refused order to consult with client before withdrawing plea).

4. See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2646 (2008) (reciting horrifying medical evidence of effects of child rape).

5. See, e.g., *People v. Cerda*, No. B146553, 2002 WL 418156, at *4 (Cal. Ct. App. Mar. 19, 2002) (“It’s sad [that the defendant] started out very young and God knows there was nobody there to tell him right from wrong. . . . [I]t’s sad and it makes the court sad . . .”).

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

7. Adam Liptak, *No Argument: Thomas Keeps Five-Year Silence*, N.Y. TIMES, Feb. 13, 2011, at A1 (quoting Thomas as saying, “I tend to be morose sometimes. . . . There are some cases that will drive you to your knees.”); see also Benjamin Weiser, *Judge Recalls Rationale for Imposing 150-Year Sentence*, N.Y. TIMES, June 28, 2011, at A1 (describing interview with Judge Denny Chin, in which he reported being “particularly moved” by story of a widow whose late husband’s savings, along with her own, were stolen by Bernard Madoff in massive Ponzi scheme).

drug court defendant completes treatment and promises to turn his life around.⁸ Even crafting a tightly reasoned, well-written opinion can generate feelings of pride.⁹ Emotionless judges are “mythical beings,” like “Santa Claus or Uncle Sam or Easter bunnies.”¹⁰

Yet legal accounts long have perpetuated the conception of the emotionless judge. This author previously has explored the depth and persistence of this cultural script of judicial dispassion.¹¹ The idea that a good judge is able to insulate her decision making from any emotional influence is deeply rooted in European Enlightenment notions of rationality and objectivity, to which emotion was thought to be opposed.¹² Indeed, in 1651, Thomas Hobbes declared that the ideal judge is “divested of all fear, anger, hatred, love, and compassion.”¹³ This notion became so entrenched that, two and a half centuries later, a leading continental theorist pronounced such judicial dispassion to be a “fundamental tenet of Western jurisprudence.”¹⁴ In the United States at the time of the Founding, emotionless judging was seen as part and parcel of the democratic structure itself: necessary to the process of taming the self-interested passions of the public.¹⁵

Over the course of the twentieth century, however, the script of judicial dispassion has been slightly moderated. When a standard account is in

8. See, e.g., JAMES L. NOLAN, *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* 99–104 (2001); Deborah Chase & Peggy Fulton Hora, *The Best Seat in the House: The Court Assignment and Judicial Satisfaction*, 47 *FAM. CT. REV.* 209 (2009).

9. See, e.g., Interview by Susan Swain, C-SPAN, with the Hon. Antonin Scalia (June 19, 2009), available at <http://supremecourt.c-span.org/assets/pdf/AScalia.pdf> (transcribing interview in which Justice Scalia describes how he does not enjoy writing but enjoys “having written,” and finds it “more fun” to write dissents).

10. *Unites States v. Ballard*, 322 U.S. 78, 93–94 (1944) (Jackson, J., dissenting) (attaching that description to “dispassionate judges”).

11. Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 *CALIF. L. REV.* 629, 630 (2011) (defining “judicial dispassion” synonymously with “emotionless judging”); see also *id.* at 636 & n.27 (showing how the twin meanings of dispassion, “*emotionless* and *impartial*,” came to be linked).

12. Maroney, *supra* note 11, at 633–34 (showing how emotionless judging “has come to be regarded as a core requirement of the rule of law, a key to moving beyond the perceived irrationality and partiality of our collective past”).

13. THOMAS HOBBS, *LEVIATHAN* 203 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651), quoted in Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 *RUTGERS L.J.*, 1, 40 (1998).

14. Karl Georg Wurzel, *METHODS OF JURIDICAL THINKING* (1904), translated in *SCIENCE OF LEGAL METHOD: SELECTED ESSAYS* 298 (Ernest Bruncken & Layton B. Register eds., 1917) (“[A]bsence of emotion is a prerequisite of all scientific thinking,” including judging); see also Maroney, *supra* note 11, at 635 (explaining how Wurzel’s vision cohered with the Langdellian concept of “law as science”).

15. Maroney, *supra* note 11, at 634–36 (citing, inter alia, JAMES MADISON, *THE FEDERALIST* No. 49, at 317 (Clinton Rossiter, ed., 1961) (“It is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government.”)); see also Kathryn Abrams & Hila Keren, *Who’s Afraid of Law and the Emotions?*, 94 *MINN. L. REV.* 1997, 2005 (2010) (describing judges’ “paradigmatic status,” which has been understood to require “the separation of legal reason from emotion”).

significant tension with everyday experience, dissenting voices eventually tend to emerge; such has been the case with judicial emotion. The early twentieth-century legal realists, particularly Benjamin Cardozo and Jerome Frank, called attention to the inevitability of emotional influences as part of their broader project of recognizing the many ways in which judges are human.¹⁶ This aspect of the realists' message, which lay largely dormant for decades, was rediscovered by a small group of judges and theorists at the end of the century. For example, in the mid-1980s Justice William J. Brennan urged a new look at what Cardozo called the interplay of "reason and passion" in judging.¹⁷ In the following decades, Richard A. Posner and a handful of other scholars were on record assuming that emotion does influence judicial decision making.¹⁸ Showing the staying power of the realists' core insight, the basic point that judges are human is now relatively uncontroversial. In the post-realist era, therefore, it has become possible to acknowledge that judges have emotional reactions to their work.¹⁹

This moderated account of judicial experience has remained paired with the goal of dispassion. Most of the early legal realists appeared to assume that the point of acknowledging judicial emotion was to better control it, and many of the new emotional realists have done the same.²⁰ As revealed in debates about judicial "empathy" spurred by the 2009 confirmation hearings of Justice Sonia Sotomayor, the idea that it is harmful to allow emotion to influence judging remains widespread.²¹ If the pre-realist vision of the "good judge" was of one who felt no emotion whatsoever, the contemporary vision is of one who recognizes her emotions and firmly puts them aside.²²

16. Maroney, *supra* note 11, at 652–57 (excavating the half-submerged emotion theories of these legal realists, including Benjamin Cardozo and Jerome Frank).

17. Maroney, *supra* note 11, at 657–58 (citing William J. Brennan, Jr., *Reason, Passion, and "The Progress of Law,"* 10 *CARDOZO L. REV.* 3 (1988)).

18. Maroney, *supra* note 11, at 657–64 (analyzing work of scholars and judges whom the author dubs the "new emotional realists").

19. *Id.* at 664 ("The new emotional realists have largely stopped fighting over the premise[] that judges *qua* judges have emotions").

20. Maroney, *supra* note 11, at 668. The exceptions have been those judges and theorists who have argued that emotion is an indispensable guide to judicial action, or—more commonly—that emotion sometimes can play a positive role in judicial decision making. *See id.* at 668–71. As explored further *infra*, this author endorses the latter view. *See id.* at 671 (characterizing a view of judicial emotion as normatively variable as "the clearly correct choice . . . in light of contemporary emotion scholarship"), but adoption of that view is not essential to most aspects of the argument propounded herein.

21. Maroney, *supra* note 11, at 636–40. One senator declared that judicial emotion puts "nothing less than our liberty" at stake; *id.* at 638 & n.34 (quoting Senator Orrin Hatch). Numerous political stakeholders and commentators insisted that it tends in the direction of subjectivity and irrationality; *see id.* at 637–39; *see also id.* at 631 & n.5 (citing commentator who in 2010 characterized accusation of empathic judging as "radioactive"); Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 *B.U. L. REV.* 1049, 1065 (2006) [hereinafter Posner, *The Role of the Judge*] (asserting that a judge would be criticized if he were to explain a decision in terms of his emotions).

22. *See, e.g., supra* note 2 (citing testimony of Sonia Sotomayor to that effect); *see also*

Thus, under both the traditional account of judging and its post-realist iteration, we expect judges to manage emotion, either by preventing its emergence or by walling off its influence. That is, to invoke a psychological concept, what we expect of a good judge is good “emotion regulation.”²³ At the same time, judges are given no direction as to how to engage in emotional regulation beyond simply shutting off their emotions—which seems like a tall order even for the most determined judge.

This Article proposes a model for emotion regulation on the bench that goes beyond a blanket admonition to “put emotion aside.” To do so, it joins for the first time two previously disconnected areas of inquiry: the jurisprudential study of judicial behavior and the psychological study of emotion regulation.

While legal discourse on the inevitability of judicial emotion and the necessity of regulation has been stunted, scientific study of the processes of emotion regulation has been robust.²⁴ In that literature, emotion regulation is understood to encompass any attempt to influence what emotions we have, when we have them, and how those emotions are experienced or expressed.²⁵ So defined, it is a process in which all people regularly engage.²⁶ When at a funeral, one generally feels differently than one does at a wedding. If one does not feel differently, one tries to—and if the effort fails, one will at least try to project the socially appropriate emotion.²⁷ Similarly, when at work, one generally is expected to engage and display emotion differently than in one’s private life.²⁸

Judges, like all people, try to regulate their emotions so as to conform to social expectations, their desired self-image, and the norms of their profession. The ability to regulate emotion flexibly in response to these various and shifting demands is a hallmark of what is popularly known as “emotional

Maroney, *supra* note 11, at 641–42 (noting continuing “sting” of the “emotional judge” label, because of which a judge may feel compelled to insist either that he experienced no emotion or was able “fully to set it aside”).

23. See *infra* note 25 (defining emotion regulation).

24. HANDBOOK OF EMOTION REGULATION, at xi–xiv & fig.P.1 (James J. Gross ed., 2007) (noting that academic citations to “emotion regulation” have increased dramatically since 1991); Sander L. Koole, *The Psychology of Emotion Regulation: An Integrative Review*, 23 COGNITION & EMOTION 4, 5 (2009) (“[O]ne of the most vibrant areas in contemporary psychology”).

25. James J. Gross, *Antecedent- and Response-Focused Emotion Regulation: Divergent Consequences for Experience, Expression, and Physiology*, 74 J. PERSONALITY & SOC. PSYCHOL. 224 (1998) [hereinafter Gross, *Antecedent- and Response-Focused*]; see also Iris B. Mauss et al., *Culture and Automatic Emotion Regulation*, in REGULATING EMOTIONS 39, 40 (Marie Vandekerckhove et al. eds., 2008) (defining emotion regulation as “deliberate or automatic changes in any aspect of the emotional response, including the eliciting situation, attention, appraisals, subjective experience, behavior, or physiology”).

26. James J. Gross & Ross A. Thompson, *Emotion Regulation: Conceptual Foundations*, in HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 3, 7–8; see also Koole, *supra* note 24, at 5 (asserting that people engage in “some form of emotion regulation almost all of the time”).

27. See *infra* Part II.

28. See *infra* Part I (explicating the concept of “emotional labor”).

intelligence,”²⁹ a sort of intelligence to which judges may aspire. But the very idea of judicial emotional intelligence is absent from the discourse. Because our legal culture alternates between round denial that judges experience emotion and blithe insistence that any emotion can simply be put aside, it does nothing to promote intelligent emotion regulation in judges. Indeed, the culture does much to discourage it.³⁰

This pattern can and should be reversed. The science of emotion regulation illuminates both the ways in which our traditional approach is misguided, as well as the path forward.³¹ For example, though the traditional approach presupposes that judges easily can manage feeling on the bench, psychology teaches us that the processes of emotion regulation are complex, effortful, sometimes counterintuitive, and counterproductive if poorly deployed.³² Emotion regulation may be pursued by way of a diverse array of strategies, each with distinct costs and benefits.³³ Attempts to influence emotions may have “paradoxical or unintended effects,” just as efforts to influence thoughts do.³⁴ Further, different strategies for regulating emotion have different effects on decision making.³⁵ Applying these insights to the judging context casts the flaws of our current approach into sharp relief. It reveals that the regulatory strategies we implicitly promote—such as the

29. Daniel Goleman’s bestselling *Emotional Intelligence: Why It Can Matter More than IQ* has spawned an industry devoted to cultivating “EQ.” See generally DANIEL GOLEMAN, <http://www.danielgoleman.info> (last visited Sept. 16, 2011). The concept also has gained traction in academic psychology. See also PSYCHOLOGY OF EMOTION: INTERPERSONAL, EXPERIENTIAL, AND COGNITIVE APPROACHES 162 (Paula M. Niedenthal et al. eds., 2006); Nicola S. Schutte et al., *Antecedent-Focused Emotion Regulation, Response Modulation and Well-Being*, 28 CURRENT PSYCHOL. 21, 23 (2009) (“emotional intelligence” includes “managing emotion in the self”) (citing John D. Mayer et al., *Emotional Intelligence: Theory, Findings, and Implications*, 15 PSYCHOL. INQUIRY 197 (2004)).

30. See *infra* Section IV.A; see also Maroney, *supra* note 11, at 640, 642, 678 (explaining how deep stigma associated with expressions of judicial emotion discourages intelligent analysis of its impact and role).

31. All psychological studies, of course, should be applied to law with care. The external validity of most relevant research, including in emotion regulation, is not fully certain, as many (but not all) such studies take place in laboratories and as virtually none have used judges as subjects. See Frederick Schauer, *Is There a Psychology of Judging?*, in THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 103 (David Klein & Gregory Mitchell eds., 2010). Further, emotion-regulation research historically has focused on so-called “negative” emotions, such as fear, disgust, and anger, and regulation of so-called “positive” emotions (such as happiness) is less well understood. See James J. Gross, *Emotion Regulation: Past, Present, Future*, 13 COGNITION & EMOTION 551 (1999). The model herein explicated proceeds with these caveats firmly in mind, seeking to apply to law lessons as to which there is a relatively strong scientific consensus.

32. See *infra* Parts II & IV.

33. See *infra* Section II.C.

34. Gross, *supra* note 25, at 224; see also Koole, *supra* note 24, at 6 (“[S]ome forms of emotion regulation ironically bring about the very emotional outcomes that people hope to avoid.”). See *infra* Section IV.B.

35. Renata M. Heilman et al., *Emotion Regulation and Decision Making Under Risk and Uncertainty*, 10 EMOTION 257 (2010) (discussing empirical evidence that “different regulation strategies could have different decision implications”).

suppression of emotional experience—are the ones most likely to incur far more cost than benefit; conversely, those most likely to be beneficial—such as the public sharing of emotional experience—are the ones we most stigmatize.

By proposing a psychologically grounded model for judicial emotion regulation, this Article also contributes to broader debates about judicial behavior. First, it begins to fill an important gap in research on the psychology of judicial decision making. Though such research has grown in scale and importance in recent decades, the failure to address questions of judicial emotion is perhaps its most conspicuous omission.³⁶

Second, the Article reinforces and extends the literature applying to judges certain insights from behavioral law and economics. That literature documents not only that judges are prone to the same heuristics and biases as are other human beings, but also that these factors influence their judging—and not always for the better. For example, judges overweight small risks and underweight large ones, just as most people do.³⁷ They also are prone to anchoring, hindsight, and egocentric biases, and they rely on ostensibly nonrational decisional tools such as intuition.³⁸ This Article demonstrates another way in which judges are human, and, in so doing, it identifies a promising new area calling for further research.

Third, this Article helps to address one of the thorniest normative issues in contemporary law-and-emotion theory: the role that emotion *ought* to play in judicial decision making.³⁹ While a small group of judges and theorists—most notably Judge Posner—has insisted that emotion rightly plays some role, to date none has proposed a coherent theory of that role.⁴⁰ This Article articulates one facet of such a theory: because emotions reflect perceptions, beliefs, and values, judges can extract from their emotions lessons that may be relevant to specific legal issues before them. More broadly, those lessons may be integrated into judges' understanding of legal constructs, such as mercy.⁴¹

The Article, therefore, both takes the post-realist account of good judging on its own terms and pushes at the edges of that account. It shows how judges

36. See David Klein, *Introduction*, in *PSYCHOLOGY OF JUDICIAL DECISION MAKING*, *supra* note 31, at xv (noting absence of attention to role of emotion, despite its promise as “an important area of inquiry for students of judges”).

37. W. Kip Viscusi, *How Do Judges Think About Risk?*, *AM. L. & ECON. REV.* 26, 36 (1999).

38. John C. Anderson et al., *Evaluation of Auditor Decisions: Hindsight Bias and the Expectation Gap*, 14 *J. ECON. PSYCHOL.* 711 (1993); Chris Guthrie et al., *Inside the Judicial Mind*, 86 *CORNELL L. REV.* 777 (2001); Marianne M. Jennings et al., *Outcome Foreseeability and Its Effects on Judicial Decisions* (unpublished manuscript). Judges' damage awards in hypothetical cases are concretely influenced by anchoring their thoughts to an irrelevant dollar amount. See Guthrie et al., *supra*, at 787–94; see also Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 *U. CHI. L. REV.* 571 (1998). Their faulty risk assessments also cause personal injury damage awards to deviate from cost-benefit models. See Viscusi, *supra* note 37, at 26.

39. Maroney, *supra* note 11, at 668 (describing this “normative difficulty”).

40. *Id.* (demonstrating lack of theoretical and descriptive specificity).

41. See *infra* Section III.C.

interested in setting emotion aside might try to do so, with the greatest chance of success and at the least cost; however, it also suggests that the goal of dispassion itself be reconsidered.⁴² The ideal of the dispassionate judge thus might be replaced by that of the emotionally well-regulated judge.

To these ends, the Article proceeds as follows. Part I sets forth the problem: judges experience emotions, those emotions must be regulated, and judges have no extant models for how to do so. This Part begins by introducing the sociological construct of “emotional labor.” Emotional labor is emotion regulation that takes place in a work context and is driven by professional goals and expectations;⁴³ it therefore is a useful frame within which to discuss what judges do on the bench. This Part then draws on three sources of evidence to show that judges perform emotional labor. First, though many judges deny emotion, emotional expression sometimes nonetheless leaks through. Second, judges sometimes openly admit the impact of emotion. Indeed, this Part describes a conversation with the Honorable Alex Kozinski in which he does just that. Third, two small studies of magistrates and trial judges reveal how difficult those judges perceive emotion regulation to be. This Part ends by asking how, given what we know about the psychology of emotion regulation, judges can perform their emotional labor in the most productive manner.⁴⁴

Part II supplies the necessary scientific foundation for answering that question. It shows why emotion must be regulated, explains the hedonic and utilitarian motivations that drive emotion regulation, and introduces the major regulation strategies, which are organized into two general and contrasting types: *suppression* and *engagement*. Importantly, it clarifies that regulation is vital whether one believes emotion to be helpful or harmful to decision making. Finally, this Part outlines the potential costs and benefits attending diverse strategies, shows that poor regulatory choices can be remarkably impervious to correction through experience, and reminds us that regulation never can be expected fully to extinguish emotion. This overview sets the stage for a comparison of the net benefit of the proposed model relative to its alternatives.

Part III uses these lessons to construct a new model—the *emotional engagement* model—for judicial emotion regulation. This Part demonstrates that engagement strategies are, in general, the best suited to the judicial task, and it shows how judges may make use of them. Judicial engagement with emotion gives judges tools with which to prepare realistically for inevitable emotional challenges, process and respond thoughtfully to any emotions they

42. See Maroney, *supra* note 11, at 651, 681 (advocating that the script be put aside because “the theoretical foundation from which the script of judicial dispassion has been meaningfully eroded”).

43. ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 7 (1983).

44. See, e.g., Klein, *supra* note 36, at xiii (positing that the psychology of judging asks, “Knowing what we do about people generally, what should we expect of people put in the positions that judges are and asked to do what they do?”).

may have, and integrate those emotions into their decisional processes and professional self-concept. To demonstrate further the promise of an engagement model, this Part points to an instructive parallel between the regulatory challenge facing judges and that facing doctors. Engagement efforts currently gaining traction within medical education point the way toward what we ought to be doing in the judging context.

Part IV further demonstrates the value of the proposed model by showing the inadequacies of the alternatives. It shows, as an initial matter, that avoidance and mindfulness strategies are generally—though not invariably—incompatible with the judicial task. Even weightier objections adhere to strategies designed to suppress the expression and experience of emotion. Suppression, though implicitly encouraged by our legal culture, is both unrealistic and normatively undesirable, and its costs generally are not outweighed by benefits. Moreover, this Part argues that judicial emotion suppression is just the sort of maladaptive regulatory cycle that becomes non-self-correcting. Finally, this Part notes that suppression of emotion is not just bad for judging—it is bad for judges. Suppression’s pedigree is, in short, poor evidence of its value.

The Article concludes by reflecting more broadly on our concept of the “good judge.” Many judges will, over the course of their careers, develop sound and flexible strategies for coping with emotion. But they do so despite our collective efforts, not because of them. To improve judicial decision making, we should embrace a model that would enable all judges to work with—rather than suppress—their emotions.

I.

JUDGES’ EMOTIONAL LABOR AND THE CHALLENGE OF EMOTION REGULATION

This Part demonstrates the problem of judicial emotion regulation. Emotion in judging is not itself the problem; the problem, rather, is that collective silence on the impact of emotion on judging frustrates our ability to discern and shape how judges cope with their emotions in practice.⁴⁵ That silence is perpetuated by the pressure judges feel to deny that emotion plays any part in their decision making.⁴⁶ This Part therefore ferrets out evidence of judicial emotion regulation from a variety of sources, including qualitative studies of active judges. It demonstrates that emotion does play an inevitable part in judicial decision making and that judges lack any viable, transparent model for regulating it.

The first step in this analysis is to recognize that judges are engaged in an occupation that involves “emotional labor.” The term was coined by the

45. Maroney, *supra* note 11.

46. Posner, *supra* note 21, at 1065 (asserting that “[t]he role of emotion . . . is concealed” because a judge would be criticized for revealing it).

sociologist Arlie Hochschild in her seminal 1983 work *The Managed Heart*.⁴⁷ Hochschild defined emotional labor as the work of managing one's emotions so as to "create a publicly observable facial and bodily display" in conformance with the expectations of one's profession and workplace.⁴⁸ What sort of emotional experience and expression is considered appropriate for any given profession or workplace will vary enormously.⁴⁹ Actors, for example, are expected to bring a high level of emotional engagement to their work; electricians are not. Hochschild's field research involved airline flight attendants, who are expected both to project pleasant, calm feelings at all times and to facilitate those feelings in customers.⁵⁰ In contrast, the bill collectors she studied were expected to display negative emotions, such as anger, and to foster feelings of fear in the debtors with whom they interacted.⁵¹ One's position in a workplace hierarchy also will have an impact. Some emotional intimacy may be considered appropriate when speaking with a close professional peer, but not with a supervisor. Further, service professionals (such as flight attendants) work with "emotional supervisors" who monitor and punish noncompliance, whereas professionals—Hochschild mentions both doctors and judges—are largely self-policing.⁵² What is constant is that all jobs will impose emotion norms that one must work to satisfy. Such labor may entail either "deep acting," in which the worker seeks to change her emotions to conform to workplace norms, or "surface acting," in which she changes merely those emotions' external manifestation.⁵³

The emotional-labor construct has become enormously influential in sociology, particularly in the study of organizational behavior.⁵⁴ Recently,

47. HOCHSCHILD, *supra* note 43, at 7 ("[E]motional labor is sold for a wage and therefore has exchange value.") (emphasis removed).

48. *Id.*

49. Mauss et al., *supra* note 25, at 47 (noting that profession deeply influences regulation).

50. HOCHSCHILD, *supra* note 43, at 1–9.

51. *Id.* at 137–38.

52. *Id.* at 153 (arguing that professionals "supervise their own emotional labor by considering informal professional norms and client expectations"); *id.* at 52–53 (stating that the "art" of emotional labor is passed "from judge to law clerk, professor to graduate student, boss to rising subordinate"); *id.* at App. C; see also Sharyn Roach Anleu & Kathy Mack, *Magistrates' Everyday Work and Emotional Labour*, 32 J.L. & SOC'Y 590, 614 (2005) (asserting that judges' emotional labor also is monitored by the public and lawyers, and sometimes by higher courts); Alicia A. Grandey, *Emotional Regulation in the Workplace: A New Way to Conceptualize Emotional Labor*, 5 J. OCCUPATIONAL HEALTH PSYCHOL. 95 (2000).

53. HOCHSCHILD, *supra* note 43, at 35–48. Though the distinction may appear subtle, it is anything but. Hochschild frequently draws on the craft of acting to illustrate her emotional-labor constructs. *Id.* Similarly, this author is reminded of an exchange she once had in a workshop with Patrick Stewart, then best known as a master Shakespearean actor. Stewart was frustrated that the student, in his estimation, was reading the lines with the intention of projecting the character's emotion, rather than inhabiting the character and naturally projecting the emotion. The student protested that this seemed like "a very fine line." Stewart, incredulous, responded, "My child, it is the very opposite of a fine line. It is a deep gulf." When the student re-read the scene, all assembled burst into applause; the apparently subtle shift was immediately, dramatically evident.

54. Grandey, *supra* note 52, at 95 (noting that emotional labor is now widely recognized,

academic psychologists have noted its close relationship with emotion regulation. Simply put, emotional labor is “emotion regulation that occurs within work contexts.”⁵⁵ Emotion-regulation research thus provides a valuable tool for measuring the costs and benefits—both for workers and for their work—of the regulatory processes activated by attempts to comply with workplace norms.⁵⁶

For judges, the ideal of judicial dispassion supplies the workplace norm; they are expected both to feel and project affective neutrality.⁵⁷ Because affective neutrality is not a naturally occurring human state, at least not when we encounter emotion-provoking stimuli,⁵⁸ judges must engage in emotional labor in order to comply with it. However, expressions of judicial emotion are heavily stigmatized.⁵⁹ Not only does this stigma make judges’ labor particularly hard, as a practical matter it makes the study of judicial emotion regulation difficult because it reduces the number of instances in which the work of managing emotion is frankly acknowledged.

Yet we can locate some evidence of judges’ emotional labor. Perhaps the clearest public acknowledgment of the phenomenon came during Justice Sotomayor’s 2009 Senate confirmation hearings.⁶⁰ Facing the hostile implication that she might bring to the Court an “empathic” or “emotional” judging style, she was quick to insist that, while she is not a “robot,” she takes care to put emotion aside when hearing and deciding cases.⁶¹ Other judges have taken a similar approach, noting the emotions prompted by cases before them,⁶² but declaring their intention to override the emotional response and prevent it from entering the reasoning process.⁶³ In burial disputes, for example, which often involve a combination of grisly details, grieving litigants, and vitriolic family dynamics, judges have voiced the “dismay,” “sympathy,” and “difficulties and embarrassment” with which they have had to grapple before

though it once was “ignored in the study of organizational behavior”).

55. Vanda L. Zammuner & Cristina Galli, *The Relationship with Patients: “Emotional Labor” and Its Correlates in Hospital Employees*, in *EMOTIONS IN ORGANIZATIONAL BEHAVIOR* 251, 254 (Charmine E.J. Härtel et al. eds., 2005).

56. *Id.* at 252–53 (seeking to bridge the gap between sociological research on emotional labor and psychological research on emotion regulation).

57. Maroney, *supra* note 11, at 656–58; Anleu & Mack, *supra* note 52, at 599.

58. *See supra* Section II.A.

59. Posner, *supra* note 21, at 1065.

60. A fuller account of the judicial-emotion narratives in the Sotomayor hearings is found in Maroney, *supra* note 11.

61. *See supra* note 2.

62. *See supra* notes 1–10.

63. *See, e.g.,* State v. Cutts, No. 2008CA000079, 2009 WL 2170687, at *36 (Ohio Ct. App. Jul. 22, 2009) (Delaney, J., concurring) (“I am saddened by the tragic loss of life this case presents and sympathize with the families of all involved. But, when I put on the robe as judge, I must not let my feelings, my emotions, . . . influence my review and application of the law.”); Commonwealth v. White, 910 A.2d 648, 658 (Pa. 2006) (reporting statement by trial judge that he must set aside the fact that a juvenile defendant’s “life circumstances make my heart weep”).

coming to a decision.⁶⁴ Virtually always, such an admission is accompanied by an overt commitment to ignore those sentiments, a display of dispassion that serves to reinstate the judge's image as an embodiment of legal authority.

In addition to these episodic displays, some judges have not only openly addressed the inevitability of coping with emotion, but have gone on to suggest that emotion might play some legitimate role in their decisional processes.⁶⁵ Judge Irving Kaufman, for example, has written that when the law provides the judge "with decisional leeway, we do well to recognize that our intuition, emotion and conscience are appropriate factors in the jurisprudential calculus."⁶⁶ Judge Posner, too, has acknowledged judges' emotional labor, asserting that "it would be misleading to say that good judges are less 'emotional' than other people. It is just that they deploy a different suite of emotions in their work from what is appropriate both in personal life and in other vocational settings."⁶⁷ He does not, unfortunately, go on to define the contents of that judge-specific "suite," though he offers some relevant hints. Judge Posner suggests, for example, that judges are motivated to do a good job because they fear being shamed.⁶⁸ He also muses that happiness and anger might unduly curtail judicial deliberation.⁶⁹ To date, though, Judge Posner has not offered a fuller account of judicial emotion, nor—most relevant here—has he attempted to specify how judges go about managing the emotions he believes them invariably to have.⁷⁰

Ninth Circuit Chief Judge Alex Kozinski, in conversation with this author, has demonstrated a preliminary move toward the introspection that could facilitate development of such an account.⁷¹ He recounted two vivid examples

64. Heather Conway & John Stannard, *The Honours of Hades: Death, Emotion, and the Law of Burial Disputes* (2010) (unpublished manuscript) (citing a variety of such cases in Ireland, England, and Australia); see also Berman Swartz, Comment, *Property—Nature of Rights in Dead Bodies—Right of Burial*, 12 S. CAL. L. REV. 435, 436 (1939) ("Judges beneath the juridical robes react more or less as do average citizens. . . . We are here concerned with a field of law wherein human emotions, sentiment and a feeling of morality are more apt to play an important part . . .").

65. Maroney, *supra* note 11 (tracing the line from the Legal Realists to the "new emotional realists," including Brennan and Posner).

66. Irving J. Kaufman, *The Anatomy of Decisionmaking*, 53 FORDHAM L. REV. 1, 16 (1984).

67. Richard A. Posner, *FRONTIERS OF LEGAL THEORY* 245 (2001); see also Maroney, *supra* note 11, at 659–61 (discussing Posner's account of judicial emotion in, inter alia, RICHARD A. POSNER, *HOW JUDGES THINK* (2008) [hereinafter POSNER, *HOW JUDGES THINK*] and *FRONTIERS OF LEGAL THEORY*); POSNER, *HOW JUDGES THINK*, *supra*, at 119 ("[P]erhaps few judges are fully inoculated against the siren song of an emotionally compelling case."); *id.* at 106 ("The character of an emotional reaction, at once gripping and inarticulate, does not make emotion always an illegitimate or even a bad ground for a judicial decision.").

68. POSNER, *HOW JUDGES THINK*, *supra* note 67, at 38 ("Criticism can induce guilt as well as shame, of course.").

69. *Id.* at 110 ("Beware the happy or the angry judge!").

70. *Cf. id.* at 119 (echoing idea that "setting sympathies aside" is part of "playing the judicial game").

71. Interview with the Hon. Alex Kozinski, Chief Judge, U.S. Court of Appeals for the Ninth Circuit, in Nashville, Tenn. (Feb. 6, 2010) [hereinafter Kozinski Interview].

of cases in which his emotions were directly engaged. In both, he reported that he expended considerable effort to examine those emotions and to attempt to channel them appropriately. In the first case, *United States v. Kojayan*,⁷² the judge recalled becoming extremely angry upon learning that a prosecutor had lied in court about material elements of the state's case. As to the second, also a criminal case, Chief Judge Kozinski recounted how he was unexpectedly affected by evidence that the defendant had made one "very big mistake" that jeopardized her entire life—deciding to act as a drug mule. Evidence of that mistake triggered memories of what he regarded as a similarly big mistake of his own—negligently allowing his son to crawl into traffic.⁷³ Those memories awakened in him feelings of intense dread and fear. In both instances, the Chief Judge reported, he deliberated over how best to manage his emotions in light of the legal issues presented, and eventually he was able to integrate his feelings into his decisional process.⁷⁴

Perhaps the best evidence of judicial emotion and the necessity of its regulation lies in two small case studies. The first is a pilot study of Australian magistrate judges, which was designed, in part, to measure the relevance of Hochschild's emotional-labor construct.⁷⁵ Australian magistrates handle the vast majority of civil and criminal actions, and are most directly analogous to state trial-court judges in the U.S. system.⁷⁶ Importantly, researchers noted that these judges work in the shadow of a professional norm precisely mirroring the standard account described in this Article.⁷⁷ This norm dictates that judges "not be swayed" by emotion, and deems any judicial action that is so swayed to be "irrational."⁷⁸ Against this backdrop, the surveyed judges reported a significant amount of emotional labor of two sorts.

The first entails handling the emotions of litigants and other court participants.⁷⁹ This sort of emotional labor is, to be sure, quite understudied, but its popular legitimacy is clear: we expect judges to control the emotions of others.⁸⁰ For example, judges are expected to instruct jurors about how they are to handle their emotions,⁸¹ regulate the admission of emotionally charged

72. *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993).

73. Chief Judge Kozinski discussed this case, though with less attention to its emotional aspects, in Alex Kozinski, *Teetering on the High Wire*, 68 U. COLO. L. REV. 1217 (1997).

74. See *infra* Section III.C.

75. Anleu & Mack, *supra* note 52, at 592 (describing study as the first to explore how magistrates "regulate their own emotions and display of feelings and those of court users," which had not before "been examined in any depth"). Anleu is a sociologist; Mack is a law professor.

76. *Id.* at 593–96 (describing work of magistrate judges).

77. *Id.* at 599–601 (describing "feeling rules" applied to Australian judicial officers).

78. *Id.* at 601–02.

79. *Id.* at 614 (noting that such labor is designed to instill a positive impression of court system); see also Gross & Thompson, *supra* note 26, at 8 (defining "extrinsic" regulation as that which entails the management of others' emotions).

80. See, e.g., Weiser, *supra* note 7, at A20 (describing "excruciating pressure" on sentencing judge to "balance the law, the public's emotions, and his own deeply held beliefs").

81. See *California v. Brown*, 479 U.S. 538, 542–43 (1987) (approving of "anti-sympathy

evidence,⁸² and control emotional displays and outbursts.⁸³ Such other-oriented, or extrinsic, labor fits with relative comfort into the ideal of dispassionate judging. Indeed, we likely believe that a judge who is properly distanced from her own emotions is better equipped to handle those tasks.

But—of even greater relevance here—the Australian magistrates also reported a second sort of emotional labor: expending effort to manage their own emotions.⁸⁴ These emotions ranged from sympathy to revulsion, but the most frequently reported emotions were negative. One magistrate, for example, characterized his work as “seeing absolute misery passing in front of you day in, day out, month in, month out, year in, year out.”⁸⁵

Such findings are echoed in a recent study of twenty-two U.S. state-court judges in Minneapolis and St. Paul.⁸⁶ The study, consisting of open-ended interviews by two professors of rhetoric, was meant to explore the “emotionology” of victim impact statements, not judicial emotion.⁸⁷ However, the judges sometimes commented on their own emotions in response to such statements. For example:

One judge . . . recalled a DWI case in which a young child almost lost his life. His mother delivered an impact statement in which she described how she thought her son was going to die. “I remember thinking,” the judge said, “I am going to cry.” But he regained what he thought was necessary composure because “you are not supposed to cry on the bench when you are a judge.”⁸⁸

Other judges reported feeling frustration, anger, and compassion when hearing such cases, emotions prompted both by the underlying facts and by the impact statements.⁸⁹

Thus, in both of these studies, judges reported performing emotional labor directed toward controlling their own emotions. Indeed, they reported such labor even when they were not asked about it directly, but where the cases about which they were asked inevitably entailed such labor.

instruction”); *Saffle v. Parks*, 494 U.S. 484, 493 (1990) (same).

82. See FED. R. EVID. 403 (1999).

83. See *Carey v. Musladin*, 549 U.S. 70, 76 (2006) (noting that lower courts have “diverged widely” in treatment of emotional displays in the courtroom, but declining to establish any standards); see also Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851 (2009).

84. Anleu & Mack, *supra* note 52, at 614.

85. *Id.* at 611.

86. See Mary Lay Schuster & Amy Proppen, *Degrees of Emotion: Judicial Responses to Victim Impact Statements*, 6 LAW, CULTURE & HUMAN. 75 (2010).

87. The study therefore focused on the judges’ other sort of emotional labor—managing the emotions felt and expressed by others, particularly crime victims. *Id.*

88. *Id.* at 89.

89. *Id.*

Just as important, the judges in both these studies reported that regulating their emotions is difficult.⁹⁰ One Australian magistrate, reflecting on his work with child welfare cases, said:

I have a problem walking away and just erasing everything I've heard about families and the stress that they're under, the treatment children have been dished out, what will happen to them for the rest of their lives. I just find it difficult to walk away from that and go home to my own children and look at them and think 'Oh, God', you know. I usually find I try to be more patient with my own children when I go home after a day in the [family court]. So it's just the sadness; there is no good news.⁹¹

Even more starkly, one magistrate described herself as being stuck between poor options:

Now, there's two things that can happen to you. Either you're going to remain a decent person and become terribly upset by it all because your emotions – because your feelings are being pricked by all of this constantly or you're going to become – you're going to grow a skin on you as thick as a rhino, in which case I believe you're going to become an inadequate judicial officer because once you lose the human – the feeling for humanity you can't really – I don't believe you can do the job.⁹²

This magistrate felt trapped between the Scylla of too much emotion and the Charybdis of no “feeling for humanity” at all.

Notably missing in this account is a third option, by which the judge is able to remain “a decent person”—and, thus, a competent professional—and handle the emotional challenges gracefully, without constantly being “terribly upset.”⁹³ This magistrate's perception of nothing but bad options was, unfortunately, echoed by many of the Minnesota judges. They reported feeling that, as the legal system tends “to strip away emotions,” they were “working in a factory of sorts in which [they] are just grinding these cases out,” and worried that they were in the process becoming “sort of insulated and numb.”⁹⁴ These magistrates and judges have no models for that third option, one that reflects

90. Anleu & Mack, *supra* note 52, at 611 (quoting one judge, reflecting on that difficulty, as saying “that's what you get paid for, I guess”); Schuster & Propen, *supra* note 86, at 89 (citing judges' assertion that listening to victim impact statements can be “powerfully painful”).

91. Anleu & Mack, *supra* note 52, at 613. The authors do not identify the gender of the magistrates who provided this quote and the next. However, they note that both male and female magistrates reported emotional labor, and propose that gender might have some impact on how such labor is performed.

92. *Id.* at 612.

93. Anleu and Mack posit that judges' emotional labor can entail significant costs on judges themselves, including “distress and emotional exhaustion.” Anleu & Mack, *supra* note 52, at 612.

94. Schuster & Propen, *supra* note 86, at 89. This danger was recognized by Hochschild as well. HOCHSCHILD, *supra* note 43, at 90 (“A principle of emotive dissonance, analogous to the principle of cognitive dissonance, is at work. Maintaining a difference between feeling and feigning over the long run leads to strain.”).

functional, performance-facilitating emotion regulation. Unfortunately, this is not surprising: the continuing stigma surrounding judicial emotion effectively stymies its development.

In sum, this Part has shown that judges experience emotions that they must regulate, that such regulation is difficult, and that they are given no guidance on how to carry it out. All that judges are given is a simple command: feel no emotion, and, if you do, put emotion aside. Once we move past that simple command, the challenge is to develop a viable model for judicial emotion regulation. It is to that challenge that this Article now turns.

II.

A THEORETICAL ACCOUNT OF EMOTION REGULATION

To understand what the psychology of emotion regulation has to offer in constructing a model for judicial behavior requires that one first understand that field's fundamentals. This Part therefore explains why emotion needs to be regulated at all, including what motivates people to regulate their emotions. It then introduces the range of regulatory strategies that humans employ, as well as their potential costs and benefits. Parts III and IV delve deeper into each of these concepts in the course of applying them to judges.

A. Why Regulate Emotion?

In Western political philosophy, the dominant view long has been that emotion is “more primitive, less intelligent, more bestial, less dependable, and more dangerous than reason.”⁹⁵ If one adheres to this view, as law traditionally has,⁹⁶ the need for emotion regulation is obvious. Regulation is the mechanism for controlling emotion's pernicious influence and achieving rationality, much as a master controls a slave.⁹⁷ But that once-dominant view is experiencing a precipitous decline.⁹⁸ The last century, particularly its last two decades, witnessed a veritable explosion of academic interest in emotion—not just in psychology but also in philosophy, history, and the neurosciences.⁹⁹ This scholarship is diverse, but has generated a consensus that emotion is an evolved,

95. Robert C. Solomon, *Philosophy of Emotions*, in HANDBOOK OF EMOTIONS 3, 3 (Michael Lewis et al. eds., 3d ed. 2008).

96. See Maroney, *supra* note 11; see also Anleu & Mack, *supra* note 52, at 602 (asserting that the traditional legal story is that “emotions are inappropriate to judicial office”).

97. Solomon, *supra* note 95, at 3 (remarking that the “metaphor of master and slave” is one of “the most enduring metaphors of reason and emotion”).

98. Maroney, *supra* note 11, at 648 (cavassing evidence of a “dramatic shift in how emotion and reason are thought to interact”).

99. Maroney, *supra* note 11, at 676 (describing that explosion and consequent availability of a new emotional epistemology); Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119 (2006) (noting substantial uptick in research on emotion, and analyzing its relation to legal theory); see generally THE OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES (David Sander & Klaus R. Scherer eds., 2009) (compiling much contemporary emotion theory from various disciplines).

adaptive mechanism, necessary for survival, social cohesion, and practical reason.¹⁰⁰ Emotion responds to stimuli in our environment; it reflects our valuation of those stimuli in light of individual and collective goals. Its phenomenology facilitates responses in service of those goals, and its outward expression serves to communicate our beliefs and needs to others.¹⁰¹ Literal absence of emotion cannot, under this account, be the desired end of regulatory effort.

From a contemporary viewpoint, then, emotion regulation requires a more sophisticated justification, based not on a prejudgment of emotion's invariant value but, rather, on contextual evaluation of that value. That emotion is now understood to be of enormous value to thought, reason, and action does not signify that it must be allowed free rein.¹⁰² Indeed, despite the continued cultural traction of the reason/emotion dichotomy,¹⁰³ popular conceptions of good emotion regulation do not generally involve assessment of the degree to which a person has banished emotion. Rather, they involve assessment of whether the person has the right emotions, in the right situation, for the right reasons, and to the right degree.¹⁰⁴ These judgments may be internal, as when we measure whether we feel comfortable with our emotional state, whether in the moment or as a general matter. They also may be externally oriented, entailing a social judgment of one's character and values. "As the individual

100. Marie Vandekerckhove et al., *Regulating Emotions: Culture, Social Necessity, and Biological Inheritance*, in *REGULATING EMOTIONS*, *supra* note 25, at 1, 1 ("Research on emotions in the past 20 years has increasingly portrayed emotions as highly functional phenomena of crucial evolutionary significance and biological grounding—in individual as well as in social and cultural terms."); Arvid Kappas, *Psssst! Dr. Jekyll and Mr. Hyde are Actually the Same Person! A Tale of Regulation and Emotion*, in *REGULATING EMOTIONS*, *supra* note 25, at 15, 18.

101. Robert W. Levenson, *Human Emotion: A Functional View*, in *THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS* 123, 125 (Paul Ekman & Richard J. Davidson eds., 1994); see generally Maroney, *supra* note 11 (explicating contemporary view of emotion).

102. See Jennifer S. Beer & Michael V. Lombardo, *Insights into Emotion Regulation from Neuropsychology*, in *HANDBOOK OF EMOTION REGULATION*, *supra* note 24, at 69 ("free expression is [not] always adaptive"); Gross, *supra* note 31, at 558 ("However real the many benefits of emotion, then, it is important not to overstate the advantages of acting in accord with untrammelled emotional impulses."); Vandekerckhove, *supra* note 100, at 1–2.

103. That traction is particularly strong in legal culture. Kathryn Abrams, *The Progress of Passion*, 100 *MICH. L. REV.* 1602, 1602 (2002) (book review of *THE PASSIONS OF LAW* (Susan A. Bandes ed., 1999)) (noting that the "dichotomy between reason and the passions," like "an abandoned fortress . . . casts a long shadow over the domain of legal thought").

104. See, e.g., Tanja Wranić et al., *Intelligent Emotion Regulation: Is Knowledge Power?*, in *HANDBOOK OF EMOTION REGULATION*, *supra* note 24, at 393–407, 393 (invoking popular conceptions of "emotional intelligence," including ability to recognize and manage emotion in light of context and goals). Aristotle, too, said as much:

[F]ear and . . . anger and pity . . . may be felt both too much and too little, and in both cases not well; but to feel them at the right times, with reference to the right objects, towards the right people, with the right motive, and in the right way, is what is both intermediate and best, and this is a characteristic of virtue.

JAMES R. AVERILL, *ANGER AND AGGRESSION: AN ESSAY ON EMOTION* (1982) (quoting ARISTOTLE, *NICOMACHEAN ETHICS* 1106b20, in *THE BASIC WORKS OF ARISTOTLE* 958 (R. McKeon ed., 1941)).

who laughs at a funeral or fails to show guilt after committing a crime will tell us, there are few quicker routes to social scorn than inappropriate emotion.”¹⁰⁵

Humans, therefore, are highly motivated to regulate their emotions, motivation that may be either *hedonic* or *utilitarian*.¹⁰⁶ Hedonic motivation is fairly straightforward: it refers to the desire to avoid unpleasant, painful feelings (often referred to as “negative” emotions) and to seek out pleasant ones (often referred to as “positive” emotions).¹⁰⁷ One reason to regulate one’s emotions, then, is to maximize pleasure and decrease pain.¹⁰⁸ When we feel sad, we may try to find ways to feel better. When we feel angry, we may try to find ways to calm down. When we feel happy, we may try to extend the moment. However, “[f]eeling good and not feeling bad are not invariant emotion regulation motivations;”¹⁰⁹ one may override the hedonic impulse when doing so confers some benefit. As “short-term pleasure and long-term utility do not always coincide,” if unpleasant emotions have utility, people would be expected to seek them out—or at least tolerate them—in order to achieve that utility.¹¹⁰ Conversely, they would be expected to forego opportunities for pleasant emotion. Indeed, that is precisely what people do.¹¹¹

Such utilitarian regulation may be *task-responsive*, as when one seeks to magnify or inhibit emotions to enhance performance in a particular situation.¹¹² For example, one may try to get “psyched up” for a test or important game, replacing fear with excitement.¹¹³ A different goal might be *impression management*, in which one guards against the negative social judgment that follows defiance of an emotion norm.¹¹⁴ Such norms may attend a temporary

105. Beer & Lombardo, *supra* note 102, at 69; see also John A. Bargh & Lawrence E. Williams, *The Nonconscious Regulation of Emotion*, in HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 429, 434 (“[I]f we were seemingly not concerned over a threat to the community or group, these would signal that our goals are not the same as the others’, and this would threaten our standing within our group.”).

106. Maya Tamir et al., *Business or Pleasure? Utilitarian Versus Hedonic Considerations in Emotion Regulation*, 7 EMOTION 546, 546 (2007).

107. PSYCHOLOGY OF EMOTION, *supra* note 29, at 157; Koole, *supra* note 24, at 14. It is common in the affective-sciences literature to use the terms *positive* and *negative* as synonymous with *pleasant* and *unpleasant*. This usage accurately describes emotions’ hedonic attributes but carries an erroneous connotation as to their normative status. All emotions are adaptive, and their normative value in any given instance depends on how well they respond to any given situation, whether they are manifested in pathological ways, and whether they reflect accurate beliefs and good values. Tamir et al., *supra* note 106, at 552. However, the terminology is so prevalent that avoiding its use would be cumbersome.

108. *Id.* at 546.

109. PSYCHOLOGY OF EMOTION, *supra* note 29, at 157–58.

110. Tamir et al., *supra* note 106, at 546 (“[U]tilitarian considerations play an important, if underappreciated, role in emotion regulation”).

111. *Id.*

112. Koole, *supra* note 24, at 14 (showing how emotion-regulation processes are used to satisfy “priorities that are set by specific norms, goals, or tasks”).

113. Tamir et al., *supra* note 106, at 546.

114. PSYCHOLOGY OF EMOTION, *supra* note 29, at 158.

role, such as being a guest at a wedding (expected to feel and display happiness), or longer-term roles, such as spouse (expected to take and show joy in the other's success). These forms of utilitarian emotion regulation may be *prosocial* if they attend to relational concerns, as when one hides emotion to avoid hurting someone's feelings or endures negative emotion for someone else's benefit.¹¹⁵ For example, the winner of a prestigious academic contest may suppress expressions of pride when talking to his best friend, who lost. A parent taking a terrified child to her first day of kindergarten may feel a painful level of empathy with the child, or perhaps even guilt, but she will tolerate those emotions if she believes kindergarten to be sufficiently important to the child's development. Finally, utilitarian regulation can be *self-protective*. One may need to suppress or feign emotion in order to protect personal safety—such as not showing fear to a threatening other. In a situation of mixed emotions, one may choose to focus on just one in order to elicit salutary reactions from others—such as expressing sadness rather than jealousy to one's flirtatious spouse, in the hopes of spurring concern rather than defensiveness.¹¹⁶

Thus, just as emotion is adaptive, so too is the capacity to regulate it. Regulation serves to “fine-tune” our emotional system to “socio-cultural contexts,”¹¹⁷ providing “important flexibility to our behavioral repertoire.”¹¹⁸ Emotion regulation is a mechanism by which one may pursue a diversity of goals in complex and shifting environments characterized by multiple—sometimes competing—demands.¹¹⁹ It is profoundly shaped by expectations as to what emotions are appropriate to feel and express in particular situations, as well as to how they are to be felt and expressed. Such emotion norms may be explicitly taught, as is done with children,¹²⁰ or disseminated through the diffuse mechanisms of culture.¹²¹

115. *Id.*

116. *Id.*

117. Vandekerckhove et al., *supra* note 100, at 3.

118. Richard J. Davidson et al., *Neural Bases of Emotion Regulation in Nonhuman Primates and Humans*, in HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 47, 47; *see also* DANIEL M. WEGNER, WHITE BEARS AND OTHER UNWANTED THOUGHTS: SUPPRESSION, OBSESSION, AND THE PSYCHOLOGY OF MENTAL CONTROL 122–24 (1989).

119. Gross, *supra* note 31, at 551–73 (arguing that emotional regulation can resolve conflicts between emotional and cognitive judgments, as in moral problems requiring choice between utilitarian and nonutilitarian outcomes; ultimatum games; and intertemporal choice); Samuel M. McClure et al., *Conflict Monitoring in Cognition-Emotion Competition*, in HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 204, 204–05 (offering, as a stylized example, TV character Jack Bauer's conflict between saving from terrorists either one person to whom he is emotionally tied or millions of unknown persons).

120. *See* Susan D. Calkins & Ashley Hill, *Caregiver Influences on Emerging Emotion Regulation: Biological and Environmental Transactions in Early Development*, in HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 229.

121. Batja Mesquita & Dustin Albert, *The Cultural Regulation of Emotions*, in HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 486, 487 (suggesting that cultural norms commonly are dichotomized into feeling rules—what one is supposed to feel—and display rules—what emotion one is supposed to communicate, and how).

This account thus far explains the *why* and *what* of emotion regulation. What remains to be explored is the *how*.¹²²

B. Emotional Regulation Strategies

People have access to a wide variety of regulatory strategies with which to perform their emotional labor. Emotion regulation strategies exist along a “continuum from conscious, effortful, and controlled” to “unconscious, effortless, and automatic,” and efforts that once were the former can over time become the latter.¹²³ They may be engaged either before or after the emotion arises.¹²⁴ Regulation might entail changing the emotion-eliciting situation, changing one’s thoughts about that situation, or changing one’s responses to that situation.¹²⁵

Though there are many different ways to categorize this range of strategies, they may be loosely grouped according to their consonance with a fundamental distinction between types of emotion—avoid and approach.¹²⁶ Put simply, certain emotions, such as fear, tend to entail a motivation to withdraw from the emotion-evoking stimulus (like an advancing bear), whereas others, like anger, tend to entail a motivation to engage with it (as with the urge to strike out against someone who has insulted your family). With emotion regulation, the emotional reaction is itself the stimulus. Thus, regulatory strategies may be grouped roughly according to whether they entail a motivation to avoid the emotion or, rather, to approach it. In this Article, these types are labeled *suppression*, capturing the range of strategies aimed at avoiding or withdrawing from emotion, and *engagement*, capturing the range of those that accept a level of contact with it.¹²⁷

122. PSYCHOLOGY OF EMOTION, *supra* note 29, at 159 (noting that if emotion norms dictate “how to respond in an emotionally appropriate way, and emotion regulation motives explain why people modify their emotions in view of emotion norms,” emotion regulation strategies describe the methods by which they do so).

123. Gross & Thompson, *supra* note 26, at 8.

124. Heilman et al., *supra* note 35, at 263.

125. Gross & Thompson, *supra* note 26, at 10. Another common emotion regulation strategy is to alter one’s subjective and physical state through use of drugs and alcohol. Josh M. Cisler et al., *Emotion Regulation and the Anxiety Disorders: An Integrative Review*, 32 J. PSYCHOPATHOLOGY & BEHAV. ASSESSMENT 68, 75 (2010). Because this tactic is so obviously off-limits to judges when in their professional role, this Article does not discuss it.

126. There is no single agreed-upon taxonomy of regulation strategies. Koole, *supra* note 24, at 11–12. The binary categorization proposed herein is useful because it groups together individual strategies that proceed from a similar set of metacognitions and motivations. Cf. George Loewenstein, *Affect Regulation and Affective Forecasting*, in HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 180–203, 181 (suggesting two categories, “those that involve altering one’s appraisal of a situation, and those that involve distraction or suppressing of thoughts or feelings”); Brian Parkinson & Peter Totterdell, *Classifying Affect-Regulation Strategies*, 13 COGNITION & EMOTION 277 (1999) (adopting approach/avoid distinction).

127. The range of strategies aimed at avoiding or withdrawing from emotion might just as easily be referred to by the label “disengagement,” that is, the opposite of engagement. Adopting that terminology would avoid a potential confusion between the category and certain of the specific

1. *Suppression Strategies*

Suppression is designed to either prevent emotion entirely or eliminate its subjective and behavioral manifestations.

Avoiding the Emotional Stimulus. One strategy is to avoid situations because of their anticipated emotional effect. Such *situation selection* “requires an understanding of the likely features of remote situations, and of expectable emotional responses to those features,” on the basis of which one constructs desired environments.¹²⁸ For example, if a person knows from experience that being in the same room with her father-in-law causes her to feel angry, she can seek to prevent ever being in the same room with him. Situation selection is not always possible, though, not just because of social obligation but also because “backward- and forward-looking biases make it difficult to appropriately represent past or future situations” for purposes of planning to avoid them.¹²⁹ And, obviously, life frequently serves up surprises.

If a situation is unavoidable, or if one has failed to anticipate the need to avoid it, it might instead be *modified* so as to minimize its emotional effects.¹³⁰ In this instance, the person might seat her father-in-law at the opposite end of the dinner table to prevent conversation. Modification strategies also include *attentional deployment*—that is, choices as to whether to pay attention to emotion-provoking aspects of a situation. For example, one could choose to cover her eyes or ears.¹³¹ Even if one keeps eyes and ears open, attention can be redirected internally. One common way to redirect attention is *distraction*, which may include, to give some common examples, thinking about something else or singing quietly to oneself.¹³² By using any one of these tools to avoid perception of the emotion-eliciting stimulus, one can avoid the emotion.

If, however, a situation cannot be avoided or its emotional attributes fully modified, one may instead choose to suppress the resulting emotional experience and its expression.

Anticipatory Suppression of Emotional Experience. If the situation is anticipated, one may decide in advance simply not to feel any emotion in

strategies it embraces, such as behavioral suppression. However, the term “disengagement” sounds passive in a way that may disguise the effortful nature of certain avoid/withdraw strategies; it also may inadvertently signal an unwarranted degree of confidence in one’s ability easily to disengage from emotion. Recognizing that each choice has pros and cons, this Article chooses the term “suppression” as better capturing the range of strategies urged upon judges in contemporary legal culture. Thanks to James Gross for suggesting this alternative terminology, which may prove to be of use in future explorations of the topic.

128. Gross & Thompson, *supra* note 26, at 11.

129. *Id.*

130. *Id.* at 12 (explaining that situation modification involves “modifying external, physical environments”).

131. See Mauss et al., *supra* note 25, at 41.

132. Gross & Thompson, *supra* note 26, at 13; Gal Sheppes & Nachshon Meiran, *Divergent Cognitive Costs for Online Forms of Reappraisal and Distraction*, 8 *EMOTION* 870, 871 (2008); Loewenstein, *supra* note 126, at 190.

response to it.¹³³ Such anticipatory suppression sometimes is thought of as steeling oneself or going into an emotional lock down. Imagine Lady Macbeth urging her wavering husband to ignore his fear and guilt and to focus instead on the goal of taking Duncan's throne: "screw your courage to the sticking-place," she tells him, "and we'll not fail."¹³⁴ Ultimately, Macbeth was unable to succeed in quelling emotion; his failing was a common human one. If an emotion emerges or re-emerges despite one's firmest intentions, or if one has failed to anticipate the need to steel against it, it can be denied or repressed.

Denial and Repression. *Denial* refers to cognitive disengagement from the emotion within the self.¹³⁵ For example, "a person might feel angry (say, for losing a soccer tournament) but not wish to admit these feelings to himself because they do not adhere to his ideal self (for example, being a good loser). To do so, he might deny feelings of anger."¹³⁶ Denial also might entail not pretending that the emotion never existed but, instead, insistence that it has been extinguished ("I am over it"). Such denial may operate at the surface level, as when the person realizes the continued viability of the emotion but sees utility in disclaiming it, or it may be deep, as when the person sincerely believes he has extinguished the emotion. At its strongest, denial becomes what Sigmund Freud called *repression*, the literal forgetting of disturbing emotional memories and their displacement into the unconscious.¹³⁷

Behavioral Suppression. Finally, one may suppress not the experience of emotion but only its outward manifestation. *Behavioral suppression* involves inhibition of expressive behavior, such as facial expressions (for example, smiling or grimacing), verbalizations (such as cheering or groaning), or bodily movement (for example, cringing or jumping for joy). Corresponding to Hochschild's "surface acting," it entails masking the true emotional state with an expression reflecting either neutrality (as with a "poker face") or a desired one (as with a fake smile).¹³⁸

Each of these strategies is designed to create distance between the self and one's emotional experience and expression, whether as a preemptive strategy or a reactive one.

133. See Gross & Thompson, *supra* note 26, at 14. Anticipatory suppression is here distinguished from Gross's concept of reappraisal, discussed in the following Section. Barnaby D. Dunn et al., *The Consequences of Effortful Emotion Regulation When Processing Distressing Material: A Comparison of Suppression and Acceptance*, 47 BEHAV. RES. & THERAPY 761, 764 n.2 (2009) (classifying antecedent commitment to nonemotionality as a form of emotion suppression).

134. WILLIAM SHAKESPEARE, *MACBETH* act 1, sc. 7.

135. See, e.g., Mauss et al., *supra* note 25, at 40–41 (defining denial as cognitive disengagement); Phillip R. Shaver & Mario Mikulincer, *Adult Attachment Strategies and the Regulation of Emotion*, in HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 446–65, 452 (characterizing denial as one way to keep emotional systems "deactivated").

136. Mauss et al., *supra* note 25, at 40.

137. See, e.g., WEGNER, *supra* note 118, at 7 (explaining Freudian meaning of repression).

138. HOCHSCHILD, *supra* note 43, at 35–43.

2. Engagement Strategies

Instead of avoiding or suppressing emotion, however, one can choose to engage with both its existence and its particulars.

Cognitive Reappraisal. The first engagement strategy is *cognitive reappraisal*,¹³⁹ which, being relatively complex, requires a commensurately complex explanation. It directly targets a core component of emotion: the assessment of environmental stimuli and their relation to one's goals. For example, if one feels fear at the sight of an advancing snake, she has determined that the object is a snake, considered what she knows about snakes, and judged it to represent a threat to her personal safety, something she values.¹⁴⁰ This cluster of perceptions, judgments, and motivations are what psychologists call an appraisal.¹⁴¹ To reappraise connotes a change in either the perception (it's not a snake, it's a curvy stick), the evaluative judgment (that particular type of snake is harmless), or the goal (my physical safety is not something I value).¹⁴² Corresponding to Hochschild's "deep acting," reappraisal involves changing one's thoughts in order to feel the desired emotional state, which may then be reflected genuinely.¹⁴³

Like a suppression strategy, reappraisal can be either anticipatory or reactive.¹⁴⁴ Antecedent reappraisal involves pre-commitment to a set of beliefs

139. See Gross & Thompson, *supra* note 26, at 16–17.

140. See Wranik et al., *supra* note 104, at 397 (“[F]ear/anxiety is thought to be associated with evaluating the situation as threatening; sadness with helplessness in an undesirable situation where there is little or no hope of improvement; anger with blaming someone else for an undesirable situation; and guilt with blaming oneself.”); Richard S. Lazarus, *Universal Antecedents of the Emotions*, in *THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS*, *supra* note 101, at 163, 164 (asserting that all emotions can be reduced to such “core relational themes”).

141. Nico H. Frijda et al., *The Influence of Emotions on Beliefs*, in *EMOTIONS AND BELIEFS: HOW FEELINGS INFLUENCE THOUGHTS* 1, 1 (Nico H. Frijda et al. eds., 2000) (explaining that under cognitive appraisal theory emotions “result from how the individual believes the world to be, how events are believed to have come about, and what implications events are thought to have”); Koole, *supra* note 24, at 13.

142. Gross & Thompson, *supra* note 26, at 16–17.

143. HOCHSCHILD, *supra* note 43, at 35–43.

144. Elaboration on a point of departure from Gross's influential framework here is in order. Gross classifies reappraisal as antecedent-focused, meaning it is engaged prior to emotion elicitation. This use of the term is potentially misleading, as one can cognitively change one's relationship to a stimulus, or ideas about a stimulus, either before or after encountering it. Reappraisal more naturally should describe the latter, for it suggests that one already has engaged in an appraisal—for example, “this person has threatened me by yelling in my face”—that needs to be rethought—for example, “I am mistaken, he was yelling to his friend”—in order for the emotional trajectory to be altered. Reappraisal is a new belief applied to a past or ongoing stimulus; the anticipatory version might instead be called a “pre-appraisal.” Gross has argued that reappraisal is properly thought of as antecedent-focused even if initiated once emotion is underway, for it then is antecedent to a new emotional event. Gross & Thompson, *supra* note 26, at 16–17. While this is true, the reappraisal is still logically subsequent to the first event. Cognitive reframing may well have different effects when engaged during, as opposed to before, the emotion episode of interest. See Sheppes & Meiran, *supra* note 132, at 870. Therefore, in this Article I distinguish between “anticipatory” (or “antecedent”) and “reactive” reappraisal.

or attitudes designed to channel one's reaction to an anticipated emotional stimulus in the desired direction.¹⁴⁵ For example, the woman consistently angered by her father-in-law might consider whether there is another way to frame his behavior. She may conclude that her father-in-law "talks only about himself because he doesn't have many friends," meaning that when he starts talking about himself his behavior will elicit sympathy rather than anger.¹⁴⁶ Similarly, one might decide to think of an upcoming "romantic date as an opportunity to learn about somebody new instead of as an opportunity to be negatively evaluated,"¹⁴⁷ which might prompt excitement instead of anxiety.

Emotions also may be cognitively reframed once they are underway.¹⁴⁸ Such reactive reappraisal "involves attending to the emotional situation but changing its emotional meaning," by changing either one's relationship to it—"I am the adult here"—or one's beliefs about it—"my son is not trying to make me crazy, he is just being a typical teenager."¹⁴⁹

Disclosure. Emotions also may be regulated by engaging the support of others. *Disclosure* "entails a description, in a socially shared language, of an emotional episode to some addressee by the person who experienced it."¹⁵⁰ This often takes the form of talking about the experience, but can include writing, singing, producing artwork, or any other form of expressive activity.¹⁵¹ Disclosure may be designed to engage others in the process of cognitive reappraisal, as when others help pick apart the experience and find ways to reframe it. For example, if our hypothetical dinner-party host feels insulted by her father-in-law, she might discuss the incident with another relative in an attempt to determine whether the insult was inadvertent or deliberate, and whether it is worth being upset over. Disclosure may also entail not changing the emotion but finding ways to live with it more comfortably. For example, persons who have lost a family member may talk with one another to help identify ways in which their painful experiences have carried some benefit, such as clarifying what matters in their lives.

145. See *PSYCHOLOGY OF EMOTION*, *supra* note 29, at 169–70.

146. Mauss et al., *supra* note 25, at 41.

147. Cisler et al., *supra* note 125, at 70.

148. Sheppes & Meiran, *supra* note 132, at 870–71.

149. *Id.* at 871 (further subdividing these mechanisms as "self-focused," or "decreasing the sense of personal meaning of the situation," or "situation-focused," in which one reinterprets the external events); see also *PSYCHOLOGY OF EMOTION*, *supra* note 29, at 163, 169 (giving further examples); Oliver P. John & James J. Gross, *Individual Differences in Emotion Regulation*, in *HANDBOOK OF EMOTION REGULATION*, *supra* note 24, at 351, 353 (presenting evidence that people report trying to control their emotions by changing the way they think about the emotion-provoking situation).

150. Bernard Rimé, *Interpersonal Emotion Regulation*, in *HANDBOOK OF EMOTION REGULATION*, *supra* note 24, at 467.

151. *Id.* at 466–85; see also *Expressive Writing with Feedback*, THE ONLINE RESEARCH CONSORTIUM, <http://www.utsyc.org/Write> (last visited Sept. 16, 2011) (setting forth experimental "expressive writing" project in the laboratory of James Pennebaker, University of Texas-Austin Department of Psychology).

Mindfulness. A final regulation strategy, one that has received particular attention of late, is mindfulness.¹⁵² A mindfulness approach is drawn in large part from the Buddhist tradition and is geared primarily toward therapeutic goals, such as the treatment of clinical depression, anxiety, and chronic pain.¹⁵³ Its essence is nonjudgmental observation and acceptance of all mental phenomena, including emotion.¹⁵⁴ It directs attention to, not away from, the emotion, but it does not seek directly to influence or change that emotion. Mindfulness, sometimes also referred to as a metacognitive approach, often includes meditation, muscular relaxation, and voluntary control of one's breathing.¹⁵⁵ It is thought to facilitate emotion regulation by a counterintuitive mechanism that might be called gaining control by letting go.¹⁵⁶

C. Potential Costs, Benefits, and Limits of Regulatory Strategies

As the prior discussion revealed, people motivated to regulate their emotions—for either hedonic or utilitarian reasons, or both—make a fundamental choice either to withdraw from or approach the emotion (and the stimuli that prompt it), and then make further choices as to a specific regulatory strategy within the chosen category. Before delving into these concepts as applied to judges, this Part briefly broadens the lens to focus on factors that frame those choices and their consequences. It introduces the notion that regulatory strategies carry distinct costs and benefits; explains one critical reason why people may choose and persist in strategies that are, on balance, maladaptive; and shows why it is unrealistic to expect any given regulatory strategy to be fully effective.

First, all regulatory strategies carry potential costs and benefits. These are not, as a general matter, invariant: all regulatory strategies have occasional utility, just as all have potentially maladaptive manifestations.¹⁵⁷ For this

152. Richard Chambers et al., *Mindful Emotion Regulation: An Integrative Review*, 29 CLINICAL PSYCHOL. REV. 560 (2009).

153. Chambers et al., *supra* note 152, at 561. More recently, mindfulness is being conceptualized as a tool for helping children focus and regulate emotion. See Mindful Schools, www.mindfulschools.org (last visited Sept. 14, 2011); SUSAN GREENLAND, *THE MINDFUL CHILD: HOW TO HELP YOUR KID MANAGE STRESS AND BECOME HAPPIER, KINDER, AND MORE COMPASSIONATE* (2010).

154. Koole, *supra* note 24, at 27. Mindfulness thus entails elements of both engagement and disengagement, as it contemplates deliberate attention to the emotion but disengagement from emotion's usual evaluative components. However, it entails no suppressive elements.

155. *Id.* at 28.

156. Chambers et al., *supra* note 152, at 563, 566 (arguing that mindfulness can “facilitate a healthy engagement with emotions” instead of a pathological desire to control them).

157. See, e.g., U. MICH. EMOTION & SELF-CONTROL LAB., <http://selfcontrol.psych.lsa.umich.edu> (last visited Sept. 14, 2011) (exploring differences between adaptive and maladaptive iterations of regulatory strategies). For example, distraction can be highly adaptive in a situation where disturbing stimuli cannot otherwise be avoided and where exposure could cause serious trauma. Consider this dialogue from the biographical movie *The Blind Side*:

Leigh Anne: I swore I'd never ask but . . . how'd you make it out of there, Michael?

Michael: When I was little, and something awful was happening, my Mama would tell me

reason, researchers agree that the most critical regulatory capacity is flexibility.¹⁵⁸

That said, some strategies tend more toward particular types of costs and benefits, and thus tend to be more or less well suited to particular contexts.¹⁵⁹ For example, some emotion regulation strategies are more effortful than others. It takes particular effort to override a hedonic motivation with a utilitarian one; similarly, it can be hard work to control one's facial expressions.¹⁶⁰ Such an expenditure of effort consumes cognitive resources, leaving the person with fewer resources with which to perform other tasks.¹⁶¹ Behavioral suppression tends to impair memory; cognitive reappraisal tends to enhance it.¹⁶² Reactively suppressing emotional experience tends to increase physiological arousal; mindfulness tends to decrease it.¹⁶³ Repression is correlated with poor mental and physical wellbeing; the opposite is true of disclosure.¹⁶⁴ These points are explored further at later junctures. The critical point here is that the relative advantage of any given regulatory strategy is profoundly context-driven, for an effect that may be beneficial in one situation could be a liability in another.

However, one's choice of strategy can be driven by factors other than the relevant attributes of the particular context, including by unconscious factors,¹⁶⁵ creating the potential for systematically maladaptive choices. Certainly this is true for various forms of mental illness.¹⁶⁶ Of greater relevance here, though, is

to close my eyes. She was trying to keep me from seeing her do drugs or other bad things. And she'd say, "Keep 'em closed till I say so." And then when she was finished or the bad things were over, she'd say, "now when I count to three, you open your eyes and the past is gone, the world is a good place, and it's all gonna be ok."

Leigh Anne: You closed your eyes.

JOHN LEE HANCOCK, *THE BLIND SIDE* 125 (Green Rev., Apr. 28, 2009) (script). Such a strategy would, however, become maladaptive for the adult such a child becomes, if that adult finds that the only way he can manage difficult situations is to close his eyes. Similarly, while specifically attending to the specifics of an emotional experience can be highly adaptive, *see infra* Part III, it can become counterproductive if it hardens into obsessive rumination. *See* Susan Nolen-Hoeksema et al., *Rethinking Rumination*, 3 *PERSP. ON PSYCHOL. SCI.* 400–24 (2008).

158. Nancy Eisenberg et al., *Effortful Control and Its Socioemotional Consequences*, in *HANDBOOK OF EMOTION REGULATION*, *supra* note 24, at 287–306, 290 (“[W]ell-regulated people . . . respond flexibly to the varying demands of experience”); James J. Gross, *Emotion Regulation: Affective, Cognitive, and Social Consequences*, 39 *PSYCHOPHYSIOLOGY* 281, 289 (2002) [hereinafter Gross, *Emotion Regulation*] (warning of dangers of “inflexibly” and invariably seeking to override emotion).

159. Grandey, *supra* note 52, at 105 (“Because emotion regulation may be performed in different ways, it is possible that some methods are more effective than others and may thus impact performance on the job.”).

160. Eisenberg et al., *supra* note 158, at 287–88 (explaining effortful control).

161. *See, e.g.*, Dunn et al., *supra* note 133, at 762 (referencing “series of well controlled studies” showing consequences of behavioral suppression). *See generally infra* Part IV.

162. *Compare infra* notes 312–14, with *infra* note 187.

163. *Compare infra* notes 366–69, with *infra* note 155.

164. *Compare infra* notes 380–81, with *infra* notes 392–93.

165. Bargh & Williams, *supra* note 105, at 430 (calling attention to nonconscious emotion regulation).

166. *See* Laura Campbell-Sills & David H. Barlow, *Incorporating Emotion Regulation into Conceptualizations and Treatments of Anxiety and Mood Disorders*, in *HANDBOOK OF EMOTION*

the fact that even healthy persons' regulatory choices are strongly influenced by their implicit beliefs about emotion itself. This makes sense: one chooses a strategy based on an idea about what is likely to work, which depends on an idea about the nature of the thing to be regulated. Thus, the often-unexamined lay beliefs people hold about emotion are powerfully linked to the regulatory strategies they choose to engage.¹⁶⁷ Importantly, simple beliefs about emotion dispose one to simple, even crude, regulatory strategies.¹⁶⁸ For example, a person with little understanding of emotion's components, function, and value may regularly resort "to simple rules[,] such as 'if I feel angry . . . then I suppress all expression of this emotion when I am in public.'"¹⁶⁹ Similarly, people who think of emotion as a relatively fixed "entity," rather than something complex, contextual, and malleable, have little incentive to expend effort and energy trying out varied regulation strategies.¹⁷⁰ Overly simplistic or ineffective regulatory choices, which are common, therefore can be remarkably impervious to correction through experience.¹⁷¹

Finally, all efforts at regulation have limits. Indeed, emotion's inherent power itself limits regulation's reach. Much of emotion's value derives from being to some degree involuntary. If one "function of feeling states is to motivate us to do what we need to do to secure [our] goals," that function "would be undermined if we had the ability to regulate our own affect at will."¹⁷² If one loves one's child, for example, one is disposed to care for her, and failure or inability to do so will be cause for suffering. The feeling cannot easily be extinguished, and its persistence is a signal of the value ascribed to the child. Were the emotion fully controllable, it would lose that informational and motivational value.

Individual variation also plays a role; some people are simply more adept than others at shaping their emotional experience and expression.¹⁷³ However, not even persons relatively skilled at emotion regulation function optimally all the time. Consider one particularly spectacular example of regulatory failure in the workplace, drawn from the flight-attendant context earlier studied by Hochschild. In August 2010, veteran JetBlue flight attendant Steven Slater did something he never had done before: he angrily cursed out a rude passenger on the airplane's public address system, grabbed a beer, and exited the plane via

REGULATION, *supra* note 24, at 542, 543 ("[M]any clinical features of anxiety and mood disorders may be considered as maladaptive attempts to regulate unwanted emotions").

167. Wranik et al., *supra* note 104, at 400, 403 (noting that the "way individuals represent their emotions shapes the way they regulate them," including "if and why we choose to regulate, and the strategies we ultimately employ"); Koole, *supra* note 24, at 22 (asserting that strategies are driven by implicit and explicit beliefs about emotion); Tamir et al., *supra* note 106, at 731–44.

168. See Wranik et al., *supra* note 104, at 398; John & Gross *supra* note 149, at 366.

169. Wranik et al., *supra* note 104, at 398.

170. John & Gross, *supra* note 149, at 366.

171. Loewenstein, *supra* note 126, at 197.

172. *Id.* at 181.

173. John & Gross, *supra* note 149.

the escape slide.¹⁷⁴ What makes that wildly inappropriate display instructive is that it does not happen more often. Slater became a folk hero because he embodied the fantasies of people who find it difficult constantly to rein in their emotions at work, but nonetheless manage to do so.¹⁷⁵

Therefore, though emotion regulation is a crucial tool for personal wellbeing and professional success, and though people are highly motivated to practice it, it often will fail fully to extinguish emotion. Just as people “have some capacity to intentionally direct their own thoughts,” we have some capacity to manipulate our feelings—but that capacity often falls short.¹⁷⁶

* * *

As this Part has shown, emotion regulation is necessary to harness emotion’s adaptive value across situational variables; serves both hedonic and utilitarian goals; is shaped by cultural, social, and workplace norms; and can be achieved by way of a diverse set of strategies. Each of these strategies comes with various potential costs, like memory impairment, and benefits, such as decreased physical arousal. Persons with strong regulatory skills have the flexibility and judgment to engage the strategy that will best serve situational demands. However, simplistic notions of emotion tend to discourage the development and exercise of those skills. Finally, emotion regulation never will be a failsafe method for actually eliminating emotion or “setting it aside.”

With these fundamentals firmly in mind, we may begin to imagine how a model for judicial emotion regulation might unfold.

III.

THE EMOTIONALLY ENGAGED JUDGE: A MODEL FOR EMOTION REGULATION ON THE BENCH

As the prior Parts made clear, judicial emotion regulation is not an *if*, or even a *when*—it is a *how*. Given a choice, judges should engage in those regulatory tactics with the greatest predictable benefits and with predictably fewer effects that impair the type of decision making in which we expect them to engage.¹⁷⁷ A viable model of judicial emotion regulation must thus maximize benefit and minimize cost, but it must also do more: it must be achievable. It must be accessible to ordinary judges in the ordinary course of their work, and it must, at its core, be compatible with the essence of the judicial function—

174. Corey Kilgannon & Liz Robbins, *Flight Attendant Had Long Imagined Escaping Down Chute*, N.Y. TIMES: CITY ROOM (Aug. 11, 2010, 4:43 PM), <http://cityroom.blogs.nytimes.com/2010/08/11/flight-attendant-had-long-imagined-escaping-down-chute-2> (bringing together news reports and video footage related to Slater incident).

175. In discussing the incident, Slater remarked that flight attendants frequently contemplate such actions but “never actually do it.” *Id.*

176. Lowenstein, *supra* note 126, at 180–81.

177. These costs may be called either *decision costs* (referring to the harmful impact of emotion regulation strategies on judges’ decision making, not to the costs of making decisions) or *error costs*. See, e.g., ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 166–68 (2006).

fair, clear-eyed perception and resolution of disputes within the frame established by law. This Part offers such a model.

This model proposes that judicial emotion is, virtually always, best regulated not by turning away from it, but rather by turning toward it.¹⁷⁸ The emotional engagement model herein imagined offers judges tools with which to prepare realistically for the emotional stimuli they encounter, respond thoughtfully to any emotions that arise, and integrate those emotions meaningfully into their decisional and learning processes. The model does not pretend to provide a checklist or rigid template; competent judicial emotion regulation, like all competent emotion regulation, depends upon flexibility and judgment in responding to a full array of real-time challenges. Rather, the model identifies relatively stable structural attributes of the context of judging that render particular strategies generally more or less well suited to that context.¹⁷⁹ It also assigns higher value to strategies that, by their nature, are more flexible. After explaining the model, which relies primarily on the strategies of cognitive reappraisal and disclosure, this Part concludes by summarizing its essential features.

A. Preparing Realistically for Judicial Emotion

The first, and possibly most promising, strategy for judicial emotion regulation is anticipatory cognitive reappraisal. Reappraisal engages the power of thought to shape one's relationship to, and processing of, emotional stimuli. It provides a concrete tool with which judges can prepare for emotional stimuli in such a way as to diminish their emotional impact. Importantly, it appears to do so with minimum cognitive costs—in fact, it can actually improve both attention and memory.

1. Using Thought to Change or Diminish Emotion: Experimental Evidence

Recall that anticipatory cognitive reappraisal involves thinking about an emotional stimulus before actually encountering it, so as to foster the desired emotional state.¹⁸⁰ Such reappraisal can facilitate the substitution of one emotion for another—for example, trading anger for sympathy.¹⁸¹ Of perhaps even greater interest for judges, it also can help a person move toward relative

178. WEGNER, *supra* note 118, at 175.

179. The judicial engagement model, then, provides a new frame within which more granular assessments may be pursued. Judging has certain core attributes but also embraces myriad subcultures and task domains. For example, appellate judges' work is quite different from that of trial judges; that difference may affect the frequency with which judges in those different settings call on certain engagement strategies, or how easy it is to avoid suppression strategies. Regulation also will be affected by variables as diverse as the type of case presented, time pressures, and the presence and behavior of others. Further theoretical and empirical work is needed to flesh out how judges do, and should, regulate their emotions in light of these variables and the complex tradeoffs they create.

180. *See supra* notes 139–43.

181. *See supra* note 146.

emotional neutrality. For example, one may decide to look at gruesome photos as would a doctor trying to make a diagnosis.¹⁸² Indeed, one of the most consistent findings in the psychology of emotion regulation is that this technique is, in the laboratory, relatively effective in reducing an otherwise natural emotional response.¹⁸³

This effect has been demonstrated, for example, in a series of studies in which participants are shown emotionally provocative film clips or slides. Before seeing these images, subjects are alerted to their likely impact; for example, in one study they were informed that the slides would show people who had been seriously injured. Some participants are told to suppress visible emotional behaviors, and some are given no regulation instructions at all.¹⁸⁴ The other participants, of most interest here, are given some version of the following instruction:

We will show you the slides in just a moment. Please view them carefully and listen to the accompanying background information. In addition, we would like to see how well you can control the way you view things. Therefore, it is very important to us that you try your best to adopt a neutral attitude as you watch the slides. To do this, we would like for you to view these slides with the detached interest of a medical professional. In other words, as you watch the slides, try to think about them objectively and analytically rather than as personally, or in any way, emotionally relevant to you. So, watch the slides carefully, but please try to think about what you are seeing in such a way that you don't feel anything at all.¹⁸⁵

Compared to behavior-suppression and no-instruction subjects, persons who are given this sort of neutral-observer instruction reliably show decreased behavioral and subjective measures of emotional response.¹⁸⁶ For example, they show no elevation in physiological activation, such as increased heart rate or sweating. They also report feeling less emotionally aroused. They naturally display fewer telltale emotional expressions, likely because their actual emotional experience is dampened.

The laboratory studies also show that these benefits of short-term, focused anticipatory reappraisal are relatively cost-free. Relative to persons instructed to suppress emotional expression, the reappraisal subjects demonstrate intact

182. Jane M. Richards & James J. Gross, *Emotion Regulation and Memory: The Cognitive Costs of Keeping One's Cool*, 79 J. PERSONALITY & SOC. PSYCHOL. 410, 416 (2000).

183. Gross & Thompson, *supra* note 26, at 14.

184. See Richards et al., *supra* note 182.

185. *Id.* at 415. Similar instructions have been used in many experiments. See, e.g., Sheppes & Meiran, *supra* note 132, at 871.

186. See, e.g., Heilman et al., *supra* note 35, at 258 (“[R]ecent studies offer evidence that the acute use of reappraisal effectively decreases physiological arousal”) (citing M. R. Delgado et al., *Regulating the Expectation of Reward via Cognitive Strategies*, 11 NATURE NEUROSCIENCE 880–81 (2008)).

cognition, suffer no decrease in memory, and may even show enhanced nonverbal memory.¹⁸⁷

Such results, demonstrating the power of thought to either redirect or dampen emotional experience at relatively low cost, have been consistently replicated.¹⁸⁸ Indeed, similar effects have been shown in other studies with very different experimental designs. In a classic 1964 study, for example, experimental subjects watched an explicit film of a tribal circumcision ceremony, known to provoke disgust. Some were instructed to think about positive aspects of that ritual, such as the boys' pride in the ceremony and its relevance to their community status.¹⁸⁹ Focusing on those meanings reduced disgust, with no ironic increase in physiological reaction. Indeed, the participants reported not just a more pleasant emotional state but better concentration.¹⁹⁰ Another classic study demonstrated that even children can make use of this technique. Four-year-olds were presented with a choice: if they could wait for an experimenter to return to the room, they would receive two treats (such as marshmallows); if they instead rang a bell before he returned, they would receive only one. Some of the children were primed to think about the treats in a fashion unconnected to their hedonic value—for example, to think of marshmallows as “white, puffy clouds”—while others were primed to think of them as “yummy and chewy.” The neutral-primed children were far more able to tolerate the uncomfortable emotional state and held off ringing the bell three times longer.¹⁹¹

As these examples show, redirecting thought to aspects of an experience that tend toward the desired emotional state is relatively effective and cost-free. So long as those aspects are relevant and attention is not drawn away from

187. Gross, *Antecedent- and Response-Focused*, *supra* note 25, at 224 (presenting evidence that strategy decreases emotion experience and behavioral expression with no impact on memory); Gross, *Emotion Regulation*, *supra* note 158, at 281; Loewenstein, *supra* note 126, at 183–84; Jane M. Richards, *The Cognitive Consequences of Concealing Feelings*, 13 CURRENT DIRECTIONS PSYCHOL. SCI. 131 (2004) (“[C]hanging how we think about an event to neutralize its emotional impact[] leaves cognitive functioning intact.”).

188. Sheppes & Meiran, *supra* note 132, at 870 (“[R]eappraisal leaves memory of the emotional situation intact or, in some cases, even improves recall”).

189. PSYCHOLOGY OF EMOTION, *supra* note 29, at 169 (describing R.S. Lazarus & E. Alfert, *Short-Circuiting of Threat by Experimentally Altering Cognitive Appraisal*, 69 J. ABNORMAL & SOC. PSYCHOL. 195–205 (1964)).

190. This author recently conducted a parallel self-experiment at an infant's ritual circumcision. While many in the gathering covered their eyes or conveniently arranged to be out of the room, I stood in the front, watched the procedure, and focused my thoughts on how this child was being welcomed into his family and community, and on the pride his parents and grandparents felt in passing on their valued traditions. I felt no disgust or anxiety. *Cf.* Loewenstein, *supra* note 126 (reporting a similar self-experiment with focused attention to pain).

191. See Loewenstein, *supra* note 126, at 184 (discussing Walter Mischel & Nancy Baker, *Cognitive Appraisals and Transformations in Delay Behavior*, 31 J. PERSONALITY & SOC. PSYCHOL. 419 (1975)); see also Walter Mischel & Ozlem Ayduk, *Willpower in a Cognitive-Affective Processing System: The Dynamics of Delay of Gratification*, in HANDBOOK OF SELF-REGULATION 99–129 (Kathleen D. Vohs & Roy F. Baumeister eds., 2004); McClure et al., *supra* note 119, at 212–14.

critical features of the situation—as would be the case with, for example, distracting oneself by staring at a painting on the wall¹⁹²—such redirection can facilitate performance.

2. *Thinking (and Feeling) Like a Medical Professional: An Instructive Parallel*

In considering how these results might help judges learn to anticipate and shape their emotional reactions, one sort of experimental task presents the most obvious parallel: adopting the perspective of a medical professional.¹⁹³ It therefore is instructive here to consider why that perspective appears to work for these purposes, an exploration that provides a deeper understanding of how reappraisal can function in a professional context.

Like judges, doctors regularly must engage in emotional labor. They necessarily encounter stimuli that naturally provoke strong emotions.¹⁹⁴ Doctors must, for example, handle dead bodies, bodily fluids, and intimate parts of the human body; they also must confront the causes and effects of serious illness and death on the individual, family, and societal levels.¹⁹⁵ Moreover, doctors have been acculturated to a strong professional norm of dispassion.¹⁹⁶ Even doctors' white coats are designed to signal emotional neutrality, paralleling one role of the black robe.¹⁹⁷ Thus, although the work of the doctor and that of the judge undoubtedly is different, the emotion regulation challenge is strikingly similar, as is the normative backdrop against which it operates.

Anticipatory reappraisal long has been at the heart of how medical education has prepared doctors to meet that challenge, though the profession had not until recently spoken of it in these terms. Medical school seeks to facilitate large-scale cognitive transformation by habituating students to distinct patterns of engagement with potent stimuli.¹⁹⁸ For example, Hochschild describes how teaching hospitals historically have “staged” the students' first autopsy so as to manage their emotions. Instructors cover the corpse's face and genitalia, model high-level technical skill, focus on the information imparted by

192. See *infra* Section IV.A.

193. See *supra* note 185.

194. Zammuner & Galli, *supra* note 55, at 251 (noting that health care professionals deal with patients' “suffering, pain, anger and helplessness, and deal with death-associated issues,” and therefore often are “burdened with negative feelings such as anxiety, fear, embarrassment, and, possibly, the despair their ‘clients’ feel.”).

195. Allen C. Smith III & Sheryll Kleinman, *Managing Emotions in Medical School: Students' Contact with the Living and the Dead*, 52 SOC. PSYCHOL. Q. 56, 59 (1989).

196. *Id.* at 57 (explaining how doctors were trained to embrace an “ideology of affective neutrality”; as we “associate authority in this society with an unemotional persona, . . . professional socialization” involves “development of an appropriately controlled affect”).

197. Zammuner & Galli, *supra* note 55, at 252.

198. See, e.g., Smith & Kleinman, *supra* note 195, at 59 (discussing how students must touch genitalia and “see feces, smell vomit, touch wounds, and hear bone saws,” experiences that cause embarrassment, guilt, and disgust).

extracted organs, and use scientific language.¹⁹⁹ Medical students thus are helped to experience the concrete value of dissection to their training and development, and thus to their ability to succeed professionally and help patients.²⁰⁰ This reframing of the experience of handling a dead body can redirect the emotion away from disgust or sadness and foster instead a sense of excitement and interest. Focusing on the professional role also will motivate selective attention to those aspects of a situation that are most relevant to competent performance, which frequently will be emotionally salient aspects—for example, grotesque discharge—that a layperson would be expected to try and avoid. Such experiences, over time, ideally ripen into an attitude that enables previously disturbing stimuli to obtain a different meaning relative to doctors' goals.²⁰¹

It therefore is not accidental that the role of “medical professional” is the one used with relative efficacy in the experimental literature on anticipatory reappraisal.²⁰² That attitude tends to realign each of the core components of an emotion: perception of a stimulus, evaluation of both the nature of and one's relationship to that stimulus, and valuation of one's goals relative to the threat or opportunity the stimulus represents.²⁰³ A gruesome wound (the sort of image typically shown in the experiments) becomes a source of valuable information; a doctor is someone who can perceive and understand that information, and the doctor's relative utility is in being able to act on that information to help the wounded person. Thus realigned, the appraisal effortlessly triggers a new emotional experience—or may cause the situation to fail to register as emotionally salient at all.

Interestingly, as complex as this process is, the experiments show that laypersons appear able temporarily to “drop in” to this role. Because most laypersons have at least a basic sense of what is important to a doctor, being instructed to think like one likely helps them see gruesome images as imparting important information to which it is important to attend closely. Setting aside for the moment the question of whether non-medical-professionals can maintain such an attitude, the evidence at a minimum is that such deliberate role adoption is relatively effective and cost-free “during a short period of time

199. HOCHSCHILD, *supra* note 43, at 49–50.

200. Medical students thus learn to recast disturbing situations cognitively; the stimuli become “mechanical” or “analytical problems,” “intellectual puzzles” to solve. Smith & Kleinman, *supra* note 195, at 60.

201. HOCHSCHILD, *supra* note 43, at 49–51; Smith & Kleinman, *supra* note 195, at 60, 62 (“[A]natomical and procedural details become personally insignificant but academically significant,” and students come to experience “the excitement of practicing ‘real medicine,’ the satisfaction of learning, and the pride of living up to medical ideals.”).

202. *See supra* note 169 (presenting experiments in which reappraisal subjects were asked to adopt the attitude of a medical professional).

203. *See supra* Subsection II.B.2.

in the context of a laboratory experiment,” when the emotional stimulus is somewhat anticipated.²⁰⁴

3. *Anticipatory Cognitive Reappraisal in the Judging Context*

The anticipatory cognitive reappraisal that appears effective in the medical context also holds great promise for judges. It fits with relative ease into our standard account of judging, as it promises some measure of affective neutrality. Moreover, it relies primarily on the power of thought, a mental facility that, unlike emotion, we happily associate with judges. Like that of a doctor, the role of a “judge” is one that helpfully can focus cognition. Indeed, embedded in our collective mental model of the competent judge is the role of “objective” and “neutral” arbiter, which requires a form of thought that is highly “technical” and “analytical”—the same words experimental subjects are asked to associate with doctors.²⁰⁵ Legal education, the primary training ground for judges, also pursues an implicit program of cognitive realignment. Just as doctors are trained to look at a grisly wound to gather information critical to task performance, lawyers are trained to look for the legal elements of a claim (or lack thereof) buried in messy human situations. Sometimes the parallel is even tighter: a judge might be called upon to examine photos of a wound, just as a doctor would—for example, to evaluate whether it appears defensive, as asserted by an expert. The theater of judging—donning the robe, appearing on a raised bench, being addressed by honorifics—provides regular reminders of the judge’s role, as does donning a white coat and answering to “doctor.”

The frame of law, then, as much as the frame of medicine, provides structural elements necessary to achievement of cognitive reappraisal, or what Hochschild would call deep acting. Indeed, when we contemplate our instincts as to what would constitute good judicial emotion regulation, once we understand reappraisal we likely will recognize it as promising that which we envision.²⁰⁶ Similarly, when judges report feeling like they are able to put emotion aside,²⁰⁷ they likely are referring to the effect of some form of reappraisal—though they, and we, have not previously had the language to describe it.

The fact that we have lacked that language matters. Without understanding anticipatory reappraisal it is not possible to engage it fully, strategically, or consistently. Though the experimental literature proves that the

204. Cisler et al., *supra* note 125, at 78–79 (noting there are “surprisingly little data” on long-term use).

205. See *supra* note 185 (reflecting such instructions).

206. Thanks to Chris Guthrie and Phoebe Ellsworth, as well as to faculty members at the Louisiana State University Law Center, for confirming their agreement with this instinct. Cf. Martha C. Nussbaum, *Emotion in the Language of Judging*, 70 ST. JOHN’S L. REV. 23, 24–25 (1996).

207. See, e.g., Schuster & Proppen, *supra* note 86, at 89 (quoting judge who reported that “I think I am able to put things behind me in order to just keep living. I seem to be able to finish something and be done with it and not have it haunt me too long.”).

strategy can be engaged episodically, evidence from medicine suggests that, to develop into a sustainable pattern, anticipatory reappraisal must be both trained and practiced—something our legal culture does not do, at least not transparently. Law school, the primary training ground for judges, does not, as a rule, seek to teach emotion regulation strategies.²⁰⁸ Research revealed no instance in which judicial training institutes have done so.²⁰⁹ Judges are simply left to figure it out on their own.

The medical parallel strongly indicates that this is a serious mistake. Historically, doctors were also left to figure this challenge out on their own, with negative repercussions for both the doctors and their work product.²¹⁰ Emotion regulation was relegated to a “hidden curriculum” within medical school.²¹¹ And while young doctors were learning the skills and internalizing the goals necessary to professional competence, they were often taking the dispassionate persona to an undesirable extreme. Some students would brag about the level to which they dehumanized other humans, whether cadavers or live patients.²¹² Medical students were losing empathy for patients with each year of training, and many showed levels of “emotional withdrawal and disengagement” that concretely impaired their performance.²¹³ Doctors were likely to perceive themselves as caught between the same Scylla and Charybdis

208. Randy Cohen, *When Med Students Post Patient Pictures*, N.Y. TIMES MAG., Feb. 13, 2011, at 21.

209. A search for programs offered by the Federal Judicial Center and the National Center for State Courts revealed no judicial training on emotion; nor does either organization offer any publications on the topic. See NAT'L CENTER FOR STATE COURTS, <http://www.ncsc.org> (last visited Sept. 16, 2011); FED. JUD. CENTER, <http://www.fjc.gov> (last visited Sept. 16, 2011). Recent discussions with emotion-research colleagues in Western Europe suggest that this gap may be less pronounced there, where national systems for judicial selection tend to incorporate training beyond law school to a degree unmatched in the United States. This represents a promising site for future research.

210. See generally Jason M. Satterfield & Ellen Hughes, *Emotional Skills Training for Medical Students: A Systematic Review*, 41 MED. EDUC. 935 (2007) (explaining that medical education has paid inadequate attention to development of emotional awareness and skills, and reviewing evidence that such skills can be trained); Daisy Grewal & Heather A. Davidson, *Emotional Intelligence and Graduate Medical Education*, 300 J. AM. MED. ASS'N 1200, 1200–02 (2008) (proposing that medical training would benefit from deliberate inclusion of emotional intelligence training).

211. Smith & Kleinman, *supra* note 195, at 56, 66 (“Affective socialization proceed[ed] with no deliberate control, but with profound effect”).

212. See *id.* at 63 (“[I]n order to manage their own feelings, [medical] students sometimes manufacture or exaggerate negative conclusions about the patient or project their own feelings onto the patient.”).

213. See, e.g., Grewal & Davidson, *supra* note 210, at 1201; Satterfield & Hughes, *supra* note 210, at 936; Myrle Croasdale, *Students Lose Empathy for Patients During Medical School*, AM. MED. NEWS (Mar. 24/31, 2008), <http://www.ama-assn.org/amednews/2008/03/24/prsb0324.htm> (noting that emotionally disengaged students scored more poorly on standardized tests of communication skill); see also Smith & Kleinman, *supra* note 195, at 57 (stating that regulation strategies affect “the medicine [students] learn and threaten their individual wellbeing”).

as did the Australian magistrate, and many were choosing the path of the “rhino” skin.²¹⁴

Therefore, medical professionals are now seeking explicitly to train regulatory strategies.²¹⁵ In so doing, they have internalized methods that long have been embraced by certain other professions not hobbled by a similar “ideology of affective neutrality,”²¹⁶ such as the field of social work.²¹⁷ The evidence, thus far, is promising. Not only have medical professionals with higher “emotional intelligence” ratings been shown to demonstrate better clinical performance,²¹⁸ but these skills also appear to be teachable. A recent meta-analysis of such efforts, underway in both pre- and post-graduate settings, concluded that “all controlled trials showed positive outcomes.”²¹⁹ There is no reason why judicial training could not follow the example of medicine. Though

214. Anleu & Mack, *supra* note 52, at 612; *see also* POSNER, *HOW JUDGES THINK*, *supra* note 67, at 119 (“Just as doctors tend to be callous about sick people, judges tend to be callous about pathetic litigants because they have seen so many of them.”); Gross & Thompson, *supra* note 26, at 9 (“[C]ognitive strategies that dampen negative emotions may help a medical professional operate efficiently in stressful circumstances, but also may neutralize . . . empathy, thereby decreasing helping.”).

215. Grewal & Davidson, *supra* note 210, at 1200–02; Kant Patel, *Physicians for the 21st Century: Challenges Facing Medical Education in the United States*, 22 *EVALUATION & HEALTH PROFS.* 379 (1999); Satterfield & Hughes, *supra* note 210, at 935–41; Anemona Hartocollis, *Getting into Med School Without Hard Sciences*, *N.Y. TIMES*, July 30, 2010, at A1; Stacey Teicher Khadaroo, *Medical School Reinvented: Adding Lessons in Compassion*, *CHRISTIAN SCI. MONITOR*, Sept. 15, 2009, at 2; Felice Aull, *Mission Statement*, *MED. HUMAN.*, <http://medhum.med.nyu.edu> (last visited Sept. 16, 2011); *The New Pathway MD Program*, *HARV. MED. SCH.*, <http://hms.harvard.edu/pme/newpathways.asp> (last visited Sept. 16, 2011).

216. Smith & Kleinman, *supra* note 195, at 56.

217. *See* HOCHSCHILD, *supra* note 43, at 53. Hochschild discusses the example of professionals who work with highly disturbed children. Such children often act in such a way as to naturally provoke anger, frustration, even fear. In order to help such children, these professionals must manage their emotions by learning how “to *experience* the child, not simply a proper way to seem to feel.” *Id.* That training process includes learning about why these children act as they do and what is proven to help. Those thoughts help the professional focus on her role vis-à-vis the child, which then fosters a productive emotional attitude—feeling “sympathy and tenderness,” even toward a child “who kicks, screams, and insults” her. *Id.* at 5.

218. Grewal & Davidson, *supra* note 210, at 1201 (describing study involving nurses); *see also* Satterfield & Hughes, *supra* note 210, at 936 (“[M]anagement of emotions in the self may impact on provider wellbeing, provider satisfaction, professionalism and patient outcomes”).

219. Grewal & Davidson, *supra* note 210, at 1201 (showing that training improved measurable indicators of emotion skill); Satterfield & Hughes, *supra* note 210, at 935, 939 (“[E]motion skills, much like physical examination skills, can be regarded as a properly defined, teachable (and measurable) skill set . . .”). Of course, maladaptive patterns persist, underscoring the reality that reform must be large scale and long term. Consider a recent letter to an ethics column, in which the writer recounted that medical-student friends had posted pictures on Facebook “with captions like ‘a 5-foot-9 Hispanic male walks into a bar . . .’ under a picture of a patient with a piece of rebar piercing his abdomen.” Randy Cohen, *When Med Students Post Patient Pictures*, *N.Y. TIMES MAG.*, Feb. 13, 2011, at 21. While acknowledging that “battlefield humor” is a coping mechanism, the columnist and a doctor with whom he consulted worried that, “[r]ather than simply giving doctors sufficient emotional distance to function effectively, this sort of horsing around might harden their hearts, making them less able to regard a patient as fully human. Such a transformation is not inevitable, but it is worth considering, particularly in a doctor’s training. And many med schools do consider that . . .” *Id.*

it would run counter to the standard account of judging, such training would allow judges to leverage existing models in service of realistic preparation for the emotional stimuli they are certain to encounter.

Anticipatory reappraisal, in sum, is of enormous value to judges because it asks them to think differently, not simply to feel differently. It involves engagement with the appraisals underlying the emotional states they hope to alter. A strong professional role concept, like that of doctor or judge, ideally will embed a system of beliefs and goals that will shape reappraisal in service of competent performance.²²⁰ To harness all of the strategy's benefits, it must be both practiced and transparently pursued. By allowing one to look closely rather than look away, such reappraisal can foster clear-headedness rather than hard-heartedness.

Anticipatory reappraisal is not, however, a complete strategy for judicial emotion regulation. As the medical example suggests, attempting to screen out literally all emotional reactions can have deleterious effects.²²¹ Nor is such an expectation realistic. One must accept some emotional persistence and the consequent need for real-time adjustment; reappraisal can be stymied by unanticipated situations and stimuli or unanticipated reactions to anticipated stimuli. Effective reappraisal therefore sometimes explicitly involves an if-then plan to cope with residual emotion.²²² Further, as the following Section explicates, judges may formulate and engage reappraisal processes after an emotion has begun to develop.

B. Responding Thoughtfully to Judicial Emotion

The efficacy of anticipatory reappraisal—though impressive—is relative, not absolute.²²³ In the real world in which judges work, many situations “cause individuals to get somewhat emotional before they start trying to control these emotions.”²²⁴ Instead of regarding emotion as a failure, judges may choose to face that emotion, seeking to respond thoughtfully to it.

Reactive cognitive reappraisal, which is much like its anticipatory counterpart except for its time-ordering relative to emotion onset, is a relatively effective method for doing so. Indeed, its mechanisms and effects are quite

220. Heilman et al., *supra* note 35, at 261.

221. Indeed, such an approach easily may harden into rigid anticipatory suppression, which unlike reappraisal comes at a significant cost. *See infra* Section IV.B.

222. *See generally* Inge Schweiger Gallo et al., *Strategic Automation of Emotional Regulation*, 96 J. PERSONALITY & SOC. PSYCHOL. 11 (2009) (presenting experimental evidence of value of formulating an if-then plan for emotion management).

223. *See, e.g.*, Heilman et al., *supra* note 35, at 259–60 & tbl.1 (showing decrease, not elimination, of fear and disgust).

224. Sheppes & Meiran, *supra* note 132, at 873 (discussing experimental subjects asked to let feelings arise before being instructed to adopt a neutral stance). *Cf.* Loewenstein, *supra* note 126, at 188 (taking a “relaxed attitude” about one’s future emotions is more adaptive than being strongly invested in having a specific experience).

similar. Flight attendants, for example, reported to Hochschild that they tried to diffuse anger at unruly, abusive passengers by considering that they might be acting badly because of difficult personal circumstances—such as having experienced a family tragedy.²²⁵ Laypersons also report such efforts, as when one tries to think about a disturbing situation “from a different perspective” to see if a new emotion will thus emerge.²²⁶

Judges, too, can choose to re-interpret stimuli. If a lawyer’s arrogant manner is making the judge angry, she can decide to attribute that manner to insecurity, which might diffuse her anger. Reappraisal may also entail “refreshing” the relevant professional role concept. One study of medical students offered an instructive example: one student was repelled by armpit odor, and whenever she encountered that odor she would deliberately re-focus on the diagnostic importance of examining the armpit.²²⁷ Similarly, a judge might prepare herself to view gruesome autopsy photos, but still find herself struggling with disgust when she does so. By reminding herself exactly why it is important to look closely, she can reestablish the analytic relationship that will allow her to do so.

In each of these iterations, reappraisal requires a relatively high level of self-awareness and focus on the specifics of the emotional experience.²²⁸ It does its work by examining the emotion to see if it can be reframed, rather than by denying it.

Reactive cognitive reappraisal also is relatively cost-free. However, because it “requires overcoming a previously well-established tendency of identifying with the emotional content (formed during the long unregulated duration prior to the strategy initiation),” it is somewhat more costly than its anticipatory counterpart.²²⁹ Though it leaves cognition intact, post-onset reappraisal does consume some self-control resources.²³⁰ This evidence provides an important reminder that all emotion regulation comes at some cost. The most pertinent measurement being a relative one, the costs of reappraisal

225. HOCHSCHILD, *supra* note 43, at 25 (describing “ways that an obnoxious person could be reconceived in an honest but useful way,” such as a victim “of fear of flying”).

226. Loewenstein, *supra* note 126, at 189 (referring to lay subjects’ efforts to “reason about why the objective situation is not so bad”).

227. See, e.g., Smith & Kleinman, *supra* note 195, at 60.

228. Wranik et al., *supra* note 104, at 400 (“The more elaborate the knowledge about emotion categories and underlying appraisal processes, the more likely the individual will learn to quickly reappraise a situation on specific evaluative criteria before an emotion episode becomes problematic or else to recover by focusing on those appraisals and elements of an event or the self that may matter most for the emotional episode.”).

229. Sheppes & Meiran, *supra* note 132, at 871.

230. *Id.* (“Late reappraisal involves attending to the emotional situation (and as such leaves memory intact), but it consumes self control resources, as one has to stop and override the well established previous interpretation when transforming it to a neutral one,” resulting in diminished performance on Stroop tasks).

still are considerably fewer than those of the alternatives. Unlike most suppression strategies, for example, reactive reappraisal leaves memory intact.²³¹

Despite the relative cost advantage of reappraisal in the judging context, other considerations somewhat limit its utility. First, whether anticipatory or reactive, judicial reappraisal is bounded by a reality constraint. Some emotional stimuli cannot be reframed as anything other than what they are. In the experimental literature, for example, subjects sometimes are directed to imagine a disturbing news report to have been faked or a dead person to be an actor playing dead.²³² As useful as this exercise may be in the laboratory, reappraisal in real life is productive only if it is geared toward generating “realistic and evidence-based representations of emotion-provoking situations.”²³³ Judges cannot engage in fantastical thinking about real phenomena. The judge can decide to believe that the rude lawyer acts rudely because he is insecure; that interpretation may be true, and, even if it is not, it may help make the judge’s interactions with the lawyer more productive and less infuriating. However, she cannot pretend that the lawyer is an actor. While the judge may find it easier to look at an autopsy photo if she temporarily pretends it to be a photo of a mannequin, she cannot actually come to believe it is not of a dead person. Because we require judges to be anchored in reality, reappraisal is available to judges only insofar as those reappraisals also are anchored in reality.²³⁴

Second, reappraisal sometimes does its work by narrowing attention. For example, when Carlos Beltrán was exuberantly booed by fans of his former team upon returning to their home stadium, he chose to focus on the fact that they cared about him enough to boo.²³⁵ This sort of selective rethinking can be effective in redirecting emotion, but it may conflict with judges’ professional obligations. It is not always productive to focus judges’ attention disproportionately on those aspects of situations as move them toward the desired emotional state. Because judges are charged with observing and judging an entire case, their attention needs, as much as possible, to be fairly distributed among all of its relevant aspects: the witness’s irritating qualities as

231. *Id.* See *infra* Part IV.

232. PSYCHOLOGY OF EMOTION, *supra* note 29, at 170 (citing T. Kramer et al., *Effects of Stress on Recall*, 5 APPLIED COGNITIVE PSYCHOL. 483 (1991)).

233. Laura Campbell-Sills & David H. Barlow, *Incorporating Emotion Regulation into Conceptualizations and Treatments of Anxiety Disorders*, in HANDBOOK OF EMOTION REGULATION, *supra* note 24, at 550 (stating that it is dysfunctional merely to tell oneself something “that is supposed to make them feel better” or to engage in “Pollyanna” thinking or goal-defeating rationalizations).

234. Again, a similar point may be made for doctors. Medical students sometimes report handling dissections and autopsies by conceptualizing the body as a nonhuman object, such as a toaster or cat. Smith & Kleinman, *supra* note 195, at 61. This level of self-protective reappraisal can be helpful if (as in a vivid dream) one knows it is not true, but cannot be entertained as truth.

235. Bargh & Williams, *supra* note 105, at 436.

well as his charming ones, the mundane question of statutory interpretation as well as the exciting one of first impression.²³⁶

Finally, post-onset reappraisal can simply fail, just like any other strategy could. The more potent the emotion, the less effective one's efforts at reappraisal tend to be.²³⁷ A judge's reaction to an accused serial killer likely may be less easy to rethink than would be any feelings she may have about a person accused of breaching a shipping contract. The same holds true for less complex emotions. A simple, almost reflexive emotion, such as surprise or terror—imagine an object flying quickly toward one's face—has less cognitive content to manipulate relative to socially complicated emotions such as contempt, guilt, or shame.²³⁸ A judge therefore may have a better chance at reappraising her complicated emotional relationship with a troubled but promising drug court client with whom she has repeat interactions than she would her quick reaction to a hostile party she sees only once, and briefly.

Thus, reappraisal is a relatively efficient strategy by which judges may change the post-onset trajectory of an emotion with relatively few costs. But it has limits, meaning some judicial emotions still must be coped with by other means.

C. Integrating Judicial Emotion

Emotions that make it through the twin gates of anticipatory and reactive cognitive reappraisal can, and should, be integrated into judges' decisional and learning processes. The integration stage has two essential components: introspection and disclosure. Integration sometimes will lessen emotion's impact, particularly over time. But its more important effect is to allow the judge to accept that emotion's existence and to cull from it whatever lessons it offers.²³⁹ In this sense, integration is the aspect of the engagement model that poses the most direct challenge to the standard account of judging because it posits that judicial emotion might contain such lessons, some of which will be directly relevant to the judge's decision-making processes.

Emotional introspection. Introspection involves recognition of the emotion and focused attention to its particulars. Though a common lay perception is that such close engagement will magnify emotion's impact, the opposite generally is true. For example, despite the common intuition that distraction will reduce physical pain, focusing on pain can more effectively

236. See *infra* Section IV.A (making similar point as to distraction).

237. See Gross, *supra* note 31.

238. *Id.* (reappraisal most effective in situations in which cognitive appraisal is most accessible).

239. The point is not, however, to allow emotions "free reign." Koole, *supra* note 24, at 25 (pointing to evidence that anger "venting" actually increases anger). Integration also differs from mindfulness, in that it contemplates both noticing the emotion and drawing lessons from it, while mindfulness endorses only the first element. *But see infra* note 295 (positing that some judicial emotions might properly be regulated in a mindful manner).

mitigate it.²⁴⁰ People who attempt to suppress feelings of pain sometimes experience more, not less, discomfort.²⁴¹ Similarly, voluntarily “specifying emotional information results in less intense emotional feelings and physiological arousal, in increased sense of self-efficacy, and in more adaptive behavior and performance.”²⁴² Counterintuitively, the more specific the reflection, the better.²⁴³ Even people with anxiety sensitivity or panic disorder experience less negative emotion when told to attend to, rather than suppress, the specifics of their emotional experience.²⁴⁴ Voluntary, conscious, detailed focus on one’s emotions therefore can lessen their impact—perhaps by making them less mysterious.²⁴⁵

With introspection, people also may be able to find meaning in emotional challenges, as when women with breast cancer come to believe that illness caused them helpfully to reevaluate their lives.²⁴⁶ While identifying that meaning does not lessen the emotion associated with the experience itself, it does enable the person to experience the emotion as less distressing in the broader context of her life. Through introspection, then, emotions can be more easily accepted as an aspect of one’s experience, potentially an instructive one.

Emotional introspection is not entirely foreign to our concept of judging, though it is far more foreign than cognitive reappraisal. Justice Sotomayor, after all, expressed her view that judges must “recognize” their emotions.²⁴⁷ Of course, she immediately followed that statement with one assuming that those emotions may be simply put aside. Because of the associated stigma, judges seldom demonstrate a deeper concept of introspection. The cases discussed by the Honorable Alex Kozinski with this author, however, provide an example of how judicial introspection might function.²⁴⁸

240. WEGNER, *supra* note 118, at 64–65 (explaining that severe pain “appears to ‘break through’ the shield of self-distraction,” and therefore people report less pain when they actually focus attention on the painful sensation than when they attempt distraction); Loewenstein, *supra* note 126, at 197.

241. Loewenstein, *supra* note 126, at 186–87. Even if the physical perception of pain stays steady, deliberate focus can lessen the degree to which it is perceived as distressing.

242. Pierre Philippot, Aurore Neumann et al., *Emotion Information Processing and Affect Regulation: Specificity Matters!*, in REGULATING EMOTIONS, *supra* note 25, at 202.

243. Koole, *supra* note 24, at 27–28 (“Concrete rather than abstract processing of emotional experience also leads to global improvements in cognitive flexibility.”); Wrانik et al., *supra* note 104, at 399 (“[V]oluntarily focusing on specific personal emotional information induces less emotional arousal than does thinking about the same information at a general level.”).

244. Cisler et al., *supra* note 125, at 68.

245. PSYCHOLOGY OF EMOTION, *supra* note 29, at 184 (“[G]radual confrontation with the unwanted emotional thought may be a remedy against the physiological rebound because it facilitates habituation to the unwanted emotional thought, which also reduces the other concomitant emotional responses (i.e., bodily arousal) over the course of time.”).

246. *See id.* at 183.

247. Malcom, *supra* note 2.

248. Kozinski Interview, *supra* note 71.

When Chief Judge Kozinski learned that the prosecutor had lied,²⁴⁹ he did not just notice that he was angry; he sought to determine why he was angry and to decide whether those reasons justified or even compelled some judicial response. Three reasons emerged.²⁵⁰ First, Chief Judge Kozinski was angry on behalf of the public, whose trust the prosecutor had violated. Second, he was angry on behalf of the defendant, whose life had been affected. Finally, he was angry on his own behalf, because the prosecutor had disrespected him, his authority, and the rules of his courtroom. Upon further reflection, he determined that his feelings of being personally affronted were relevant, for a judge must be able to rely on the good faith of litigants. But he also assessed that this reason to be angry was relatively less important to other people. He decided to base his response primarily on vindicating the interests of the public and the defendant and to use his anger as to all three reasons as a metric for the outrageousness of the conduct. The level of self-interrogation modeled by Chief Judge Kozinski in this instance allows a judge to distinguish between cases in which an emotion rightly informs the legal determination and those in which it might instead lead to an intemperate or inaccurate reaction.²⁵¹

Emotional disclosure. Another way to facilitate emotional integration is through disclosure.²⁵² Emotional disclosure is a basic human impulse. Despite individual differences in disclosure frequency and style—persons with a general pattern of suppressing emotion, for example, are far less prone to disclose—most people seek outlets for talking and writing about their emotions, often repeatedly.²⁵³ Disclosure is not usually a mechanism by which people extinguish their emotions. Despite the folk theory that talking about emotion eventually eliminates its impact, this is not always so, particularly for very intense emotions. In fact, each emotional disclosure tends to reactivate the experience.²⁵⁴ Reactivation therefore clearly creates a hedonic motivation for disclosing pleasant emotional experiences. But people paradoxically experience

249. *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993).

250. This analysis was offered by the Chief Judge in the process of re-dissecting the experience with this author. It therefore represents a backward-looking attempt to reconstruct his contemporaneous process. That process may well have been less articulate and more compressed, given that he did not talk it through with another person at the time and as he has continued to think about the incident in the years since.

251. *Cf.* Paoul Poder, *The Political Regulation of Anger in Organizations*, in *REGULATING EMOTIONS*, *supra* note 25, at 291–309, 292 (“perceiving anger as exclusively negative could legitimize an overregulation of anger”); Phillip R. Shaver et al., *Adult Attachment Theory, Emotion Regulation, and Prosocial Behavior*, in *REGULATING EMOTIONS*, *supra* note 25, at 121, 128 (noting importance of distinguishing between (a) “specific,” “functional” expressions of anger and (b) “dysfunctional,” “dissociated” ones).

252. *See generally* James W. Pennebaker, U. TEX., <http://homepage.psy.utexas.edu/HomePage/Faculty/Pennebaker/Home2000/JWPhome.htm> (last visited Sept. 14, 2011) (gathering research on emotion and expressive writing).

253. *PSYCHOLOGY OF EMOTION*, *supra* note 29, at 185–87.

254. *See* Rimé, *supra* note 150, at 470.

disclosure as highly beneficial even if the reawakened emotions are painful,²⁵⁵ suggesting a utilitarian benefit as well.

The utilitarian benefits of emotional disclosure, of which judges may partake, are twofold. First, disclosure is prosocial. Communicating with others helps the discloser feel understood and facilitates receipt of needed support.²⁵⁶ By moving the experience from the individual to the social realm, the discloser strengthens connections to and within the group. Second, and more important for present purposes, disclosure facilitates productive self-knowledge. It engages the self and others in thoughtful analysis in which they further explore emotion's underpinnings and extract its lessons.²⁵⁷ This process can help the discloser arrive at any needed cognitive or behavioral changes—for example, by reorienting beliefs that have caused her to feel angry, or by helping her plan a different course of action in the future. These downstream consequences of disclosure may eventually lead to a lessening of emotion's impact.²⁵⁸ But even when they do not, that impact becomes less distressing because it is better integrated into the person's sense of self.²⁵⁹

Judicial disclosure of emotion is even more foreign a concept than is introspection, but it occupies an important place within the engagement model. Chief Judge Kozinski again provides an example that partially illuminates this previously hidden idea.²⁶⁰ When confronting his own feelings of fear and dread triggered by the drug-mule case, he first practiced the sort of introspection described above. He eventually determined that his emotional reaction—though having nothing literally to do with the case, unlike the case in which his anger stemmed directly from the prosecutor's actions—served as a potent reminder that all people make mistakes, sometimes enormous ones. He therefore chose to extend to that defendant the sort of mercy allowable within applicable legal confines. Importantly, Chief Judge Kozinski then chose to write about the experience in a thoughtful essay, grappling, in part, with the question of whether his private feelings properly influenced his judicial decision.²⁶¹ This rare public act of disclosure helped the judge incorporate the experience into

255. Koole, *supra* note 24, at 27.

256. Rimé, *supra* note 150, at 474 & tbl. 23.1.

257. *Id.* (explaining how sharing can facilitate cognitive change, in which one may abandon prior goals, reorganize motives, modify the symbolic universe that feels disrupted, re-create meaning, and reframe the emotional event).

258. PSYCHOLOGY OF EMOTION, *supra* note 29, at 189 (asserting that disclosure has “long-term benefits because it reduces physiological reactivity, and facilitates emotional adjustment due to the repeated confrontation with and reprocessing of the emotional information”).

259. Emotional experiences are not walled off into an undesired “not-self,” a shame-based dissociation that Freud believed (correctly, as it turns out) to be highly maladaptive. PSYCHOLOGY OF EMOTION, *supra* note 29, at 185 (explaining how in psychoanalytic tradition the “accumulation of non-expressed emotions” is thought to be highly negative); Koole, *supra* note 24, at 27 (arguing that disclosure promotes self-insight).

260. Kozinski Interview, *supra* note 71.

261. Kozinski, *supra* note 73, at 1217. He determined that it did, and reiterated that conviction in the interview.

his own evolving account of the nature of mercy. It did not dampen the emotions themselves; indeed, Chief Judge Kozinski reported that even recounting the story to this author, decades later, reawakened his fear and dread as vividly as if it were the day that his son crawled into the road.²⁶² But it did serve to facilitate introspection and learning.

Further, such a disclosure made transparent what the judge could have—and under the standard account of judging should have—hidden, inviting public evaluation of his decisional process. Chief Judge Kozinski made a similar point about the lying-prosecutor case. He deliberately wrote an opinion that, in his words, “bristled” with anger. That expression of anger, he explained, was an important signal of the degree of his displeasure, thus increasing that opinion’s punishment impact and deterrent value.²⁶³

As these examples show, judicial emotion disclosure can help ensure that emotion makes its way into judicial decision making only in a deliberate, thoughtful, and transparent way, if at all. It also allows others in the legal community, and in the polity, to engage in debate over the legitimacy and value of those emotions.

The integration aspect of the engagement model requires the greatest shift in cultural expectations of judging. Judges’ emotional disclosures become more stigmatized as they move along the continuum from private to public—starting, perhaps, with talking with one’s spouse at the dinner table, to discussion with judicial colleagues, to writing law review articles and books, to inclusion in a written opinion.²⁶⁴ Judges presumably engage in private conversations of the first sort, but our access to them is (rightly) limited. Discussions with colleagues appear to take place seldom, if ever; indeed, Chief Judge Kozinski reported that he “could not imagine” talking about emotion with his judicial colleagues as he had with this author.²⁶⁵ Academic accounts are scarce,²⁶⁶ and overt expressions of emotion in the courtroom or in the written opinion may be,

262. Kozinski Interview, *supra* note 71.

263. *Id.* (including judge’s assertion that an important “moral and pedagogical” function is served by writing an emotionally-infused opinion like *Kojayan*, and reported being told that new prosecutors in that office are required to read the opinion as a teaching tool about “what not to do”). This view is unlikely to be idiosyncratic to Chief Judge Kozinski. Indeed, after reading a draft of this Article, a retired judge from a small, rural jurisdiction contacted this author to report his agreement. In his words, “I found sometimes telling the lawyer my emotional reaction to their argument was helpful to both [of us]. It allowed me to better hear and understand what they were trying to tell me. It allowed them to understand how to address my concerns.” Email from Hon. Richard Erlich to Terry A. Maroney (May 17, 2011) (on file with the author).

264. Posner, *Role of the Judge*, *supra* note 21, at 1065 (stating that a judge would be criticized for explaining his decision “in terms of an emotion”); James Taranto, *The “Empathy” Paradox: Sotomayor Rejects Obama’s Judicial Philosophy*, WALL ST. J. (July 15, 2009), <http://online.wsj.com/article/SB124767724285246273.html> (“It would be politically unwise . . . to say, ‘When deciding a case, I follow my heart.’”).

265. Kozinski Interview, *supra* note 71 (“This is not really something we talk about.”).

266. Maroney, *supra* note 11 (collecting the few such accounts of judicial emotional experience).

and often are, roundly denounced.²⁶⁷ But this need not be so. While judges need not always—or even regularly—disclose their emotional processes in public, the examples offered by Chief Judge Kozinski strongly suggest that doing so sometimes should be accepted—and even regarded as desirable.

Integration, in sum, enables people—including judges—to build “a specific and detailed data bank” about their emotional experiences.²⁶⁸ Even when an experience remains vivid, it can be integrated into memory structures and used “effectively in information processing and behavior” in future situations.²⁶⁹

For these reasons, medical professionals are now experimenting with the approach as well. A similarly strong taboo once prevented medical students from discussing the challenges they faced in learning to manage their emotions, leading many of them to assume they were doing it poorly.²⁷⁰ Now that the taboo is starting to lift, those students may use disclosure techniques to address the problem as a shared one.²⁷¹ For example, a New York school now offers fourth-year medical students a “journaling” course, in which they write about emotional challenges, share and discuss those writings with peers, and seek to integrate these experiences into their overall medical training.²⁷² Such steps designed to facilitate the processes of integration would be just as useful for judges, even if they are strongly at odds with dominant judicial norms.

* * *

This Part has constructed an engagement model for judicial emotion regulation. It may be summarized as follows.

267. See Jeffrey Rosen, *Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun*, NEW REPUBLIC (May 2, 1994, 12:00 AM), <http://www.tnr.com/article/politics/sentimental-journey>.

268. Philippot et al., *supra* note 242, at 206 (“Such knowledge is necessary for effective interpersonal and personal problem solving, and for reducing the tension between the ideal and the real selves.”).

269. Shaver et al., *supra* note 251, at 125.

270. See Smith & Kleinman, *supra* note 195, at 60 (explaining that one consequence of failing openly to address emotional regulation is that medical students believed others were better at it than they were, and handled the difficulty “privately, only vaguely aware that all students face the same problem”).

271. See *id.* (stating that “deafening silence” prevented medical students “from defining the problem as shared, or from working out common solutions”).

272. Conversations with Carina G. Biggs, M.D., Assistant Professor of Surgery, Director of Trauma Education, Division of Trauma and Surgical Critical Care, S.U.N.Y. Downstate Medical Center (Oct. 15, 2010 & Jan. 21, 2011). To the limited extent that such discussions are taking place in legal education, it is within the context of clinical programs. See, e.g., Laurel E. Fletcher & Harvey M. Weinstein, *When Students Lose Perspective: Clinical Supervision and the Management of Empathy*, 9 CLINICAL L. REV. 135 (2002); Ann Juergens, *Practicing What We Teach: The Importance of Emotion and Community Connection in Law Work and Law Teaching*, 11 CLINICAL L. REV. 413 (2005); Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCHOL. PUB. POL’Y & L. 1173 (1999); Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259 (1999). For a rare exception, see Grant H. Morris, *Teaching with Emotion: Enriching the Educational Experience of First-Year Law Students*, 47 SAN DIEGO L. REV. 465 (2010). However, even within clinical education (of which not all law students take advantage) attention to emotion is sporadic.

Judges are best able to manage their emotions by turning toward them. Anticipatory cognitive reappraisal allows the judge to leverage the power of thought and the structures of law in order to shape the perception and evaluation of emotionally salient stimuli. When successful, reappraisal allows judges to experience the stimuli in a relatively neutral fashion at minimum cost to cognition and memory, or even with a boost in those capacities. This sort of emotion regulation may be accommodated into existing models of judging with relative ease, but only if the ideology of affective neutrality is loosened enough to allow purposeful training in and commitment to the strategy. Important though this step would be, it would not be sufficient, for some judicial emotion is unavoidable.

The second step of the model contemplates that unanticipated or residual emotions may be cognitively reframed. Such reactive reappraisal, though relatively effective, is not always appropriate—for example, where it would require entertaining nontruthful narratives or directing attention away from important details. Judges, even more than other people, need to be open to emotion without seeking always to rethink it.

The third step, therefore, is integration, which makes use of both introspection and disclosure. Introspection requires that judges turn squarely toward the emotion in order to ascertain to what it is responsive, whether its underlying appraisals are accurate, whether it reflects beliefs and values that appropriately are enshrined in law, and the implications of those assessments for their judging. Disclosure draws others into that process, which helps judges learn from experience, allows others to challenge or support their handling of that experience, and serves the democratic goal of transparency.

These three stages of the engagement model push with progressive strength against the standard account of emotionless judging. That account should yield to the model, which is simultaneously pragmatic and aspirational: it provides both a concrete set of tools for managing emotion at a minimum cost and a normative account of how judicial emotion might impart something of value. This conclusion is buttressed by the fact that a similar approach is gaining ground among doctors, who face strikingly similar challenges.

The next and final Part further shows the value of the engagement model by demonstrating its superiority relative to the possible competitors, including the status quo.

IV.

WHY THE ENGAGEMENT MODEL IS SUPERIOR TO ITS ALTERNATIVES

The preceding Part made the positive case for the engagement model. This Part demonstrates its superiority relative to the possible alternatives. Because the watchword of functional emotional regulation is flexibility,²⁷³ the point is

273. PSYCHOLOGY OF EMOTION, *supra* note 29, at 193 (“[A]bility to flexibly adjust the way

not that other strategies are never necessary or productive in the judicial context. The point is that they seldom are, and even then only as an occasional supplement to engagement.

The Part begins by showing why avoidance and mindfulness strategies generally are inapposite to good judging. It goes on to argue that the standard account of judging incentivizes behavioral and experiential suppression of emotion, both anticipatory and reactive, and makes the case that such suppression is both unrealistic and normatively undesirable. Only behavioral suppression sometimes—but only sometimes—is so necessary as to justify its costs. This Part concludes by noting that the engagement model, unlike its alternatives, promises happy side benefits for judges' health and professional longevity.

A. Avoidance and Mindfulness Are Generally Inapposite to Good Judging

In determining the relative merits of emotion regulation strategies, context is paramount.²⁷⁴ The unique context of judging renders two common regulation strategies generally incompatible with competent performance of the judicial function.

The first strategy is avoidance. Judges have limited ability to avoid or meaningfully alter emotion-provoking situations. This is largely so because judges are expected to perform the first sort of emotional labor documented by the empirical studies: managing the emotional experience of others.²⁷⁵ The avoidance techniques of situation selection and modification are key to that other-oriented emotional labor. For example, the judge can in some circumstances allow an alleged victim of child sexual abuse to testify outside the presence of the accused in an effort to protect that child from emotional trauma.²⁷⁶ The judge may also decide to exclude gruesome autopsy photos from evidence, if she determines that jurors will experience an outsized emotional reaction with little informational payoff.²⁷⁷ She may allow victim impact statements on the theory that victims may find in them some relief from emotional pain, but she also may limit their number;²⁷⁸ similarly, she may curtail spectators' displays of grief or anger in order to control the emotional tenor of the courtroom.²⁷⁹ But as this is the regulatory function judges are expected to serve vis-à-vis litigants, witnesses, spectators, and fact-finders, they are severely constrained in their ability to achieve similar results for

one regulates one's emotions . . . is related to . . . health.") (second omission in original) (internal quotations omitted).

274. See *supra* Section II.A.

275. See *supra* Part I.

276. *Maryland v. Craig*, 497 U.S. 836 (1990); *Coy v. Iowa*, 487 U.S. 1012 (1988).

277. See, e.g., *FED. R. EVID.* 403 (1999).

278. Schuster & Proppen, *supra* note 86, at 89.

279. See, e.g., *Carey v. Musladin*, 549 U.S. 70, 76 (2006).

themselves.²⁸⁰ To take action in any of these situations, the judge must face the emotional stimuli whose effects she is attempting to control. She must share the courtroom with the defendant, examine the photographs, listen to the impact statements, and so on. The judge simply does not have the avoidance option she may extend to others.

The same holds true for situations in which the judge is not seeking to orchestrate the emotions of others, but instead faces a situation that affects only her. If a lawyer's rude behavior to the judge sparks anger, for example, she generally cannot simply leave the courtroom.²⁸¹ The judge's ability to modify emotionally charged situations is largely constrained by the necessity of keeping a court running. It also may be constrained by law. If the judge is afraid of a defendant, for example, she may be able to make some modifications to assuage her fear—such as bringing in additional guards—but not so many as to prejudice a jury.²⁸² Nor can the judge routinely engage in aggressive distraction tactics, such as thinking of something else or reading something unrelated. She is unable to practice this sort of avoidance precisely because it works too well. While distraction is effective in blocking out emotional stimuli, and thus interrupting the progression of the associated emotion, it is equally effective in blocking out much else that is going on. Not surprisingly, distracted persons reliably demonstrate “impoverished recall” of the situations from which they are distracting themselves.²⁸³ Judges must, at a minimum, pay attention.

Perhaps the most effective and permissible avoidance strategy would be to avoid situations the judge routinely finds most challenging by thoughtfully choosing the court in which she works. For example, some judges have indicated that they would like to avoid assignments in “Coroner’s Court,” as the cases heard there are particularly “depressing.”²⁸⁴ Conversely, judges may choose assignment to a so-called alternative court, such as drug court, if they believe that those cases are likely to be more hedonically satisfying.²⁸⁵ Judges certainly are free to make such choices, and they should do so if they find themselves better suited to certain types of assignments. But this is only a

280. Grandey, *supra* note 52, at 98 (stating that workers “may not have the breadth of situation modification that is available outside of a work role”).

281. *But see infra* note 287 (noting report from a retired judge that sometimes he did just that).

282. She cannot, for example, shackle the defendant to a table absent clear necessity, much as she might want to. *See Deck v. Missouri*, 544 U.S. 622 (2005).

283. Sheppes & Meiran, *supra* note 132, at 871 (explaining that distraction causes “impairment of the emotional-situation encoding process”).

284. Anleu & Mack, *supra* note 52, at 604 (discussing findings in ROGER DOUGLAS & KATHY LASTER, *REFORMING THE PEOPLE’S COURT: VICTORIAN MAGISTRATES’ REACTIONS TO CHANGE 20* (1992)).

285. *See generally* Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement*, 74 NOTRE DAME L. REV. 439, 469 (1999); DONALD J. FAROLE, JR. & AMANDA B. CISSNER, *CTR. FOR COURT INNOVATION, SEEING EYE TO EYE: PARTICIPANT AND STAFF PERSPECTIVES ON DRUG COURTS 5* (2005).

marginal strategy. Many judges work in courts of general jurisdiction and have virtually no control over what types of cases land in their courtrooms. Even those who work in specialized courts hear a wide range of cases that will provoke an equally wide range of emotions. Some family court cases, like adoptions, will be joyful; some commercial cases will involve sympathetic families made destitute by fraud; some drug court clients will make the judge angry even if others make her proud. Judges cannot avoid hearing cases properly before them, regardless of the emotional reactions they may provoke.

Avoidance, then, is seldom permissible. To be sure, a judge might be able to engage in light forms of stimulus avoidance and modification, particularly when not in the courtroom.²⁸⁶ She might, for example, be able to choose when to read briefs or review evidence that is likely to be either pleasing or upsetting, take breaks, and introduce peripheral distractions or mood-changers, such as music.²⁸⁷ But, as a general matter, avoidance is unavailable to judges because its indulgence is incompatible with core requirements of their work.

Mindfulness, too, is of only limited value to judges. Recall that the goal of mindfulness is sustained attention to emotional experience combined with “metacognitive insight,” in which emotions “are perceived to be transient, insubstantial mental events.”²⁸⁸ Indeed, mindfulness specifically rejects the “habitual tendency” to treat emotions as if they might reflect “an accurate view of reality.”²⁸⁹ One consequence of that ontological stance is to reject the “widespread belief that [emotional] reactions are sometimes necessary—for example, justified indignation at injustice.”²⁹⁰ Instead, one is asked to withhold any judgment of emotion—say, that it is pleasant or unpleasant, desired or not,

286. Medical students, for example, try to avoid some stimuli in small ways. See Smith & Kleinman, *supra* note 195, at 64–65 (giving as example covering a corpse’s pubic hair when examining other parts of the body).

287. Cf. Karen Allen & Jim Blascovich, *Effects of Music on Cardiovascular Reactivity Among Surgeons*, 272 J. AM. MED. ASS’N 1172 (1994) (reporting their findings that surgeons who chose music to play when operating demonstrated both reduced autonomic reactivity and improved performance). Judges may even be able to use some of these techniques in the courtroom on occasion. The retired judge who reached out to this author reported that he did sometimes walk out of his courtroom if something happened to make him “really upset.” He would take some time to calm down and think, then walk back in and respond to whatever had happened. That judges cannot practice this sort of momentary avoidance most, or much, of the time does not mean they never can do so. Erlich, *supra* note 263.

288. Chambers et al., *supra* note 152, at 562 (“[P]erceiving thoughts to be simply thoughts, rather than as an ontological reflection of reality”); see also Cisler et al., *supra* note 125, at 70 (“noticing the emotion-based sensations without attempting to alter them”); Dunn et al., *supra* note 133, at 761 (explaining that mindfulness encourages people to “adopt an accepting, observing, non-judgmental relationship to their emotions”).

289. Chambers et al., *supra* note 152, at 567–68. In contrast, Western regulatory models encourage adoption of “more accurate or more psychologically beneficial representations of reality.” *Id.*

290. *Id.* at 567–68 & n.4 (offering the “caveat” that it is good to be afraid of a snake that may kill you).

appropriate or not—so as to unlink the emotion from its usual impact on thought and action.²⁹¹

These aspects of mindfulness render it largely incompatible with judging. The core tenet of mindfulness is withholding judgment; the core mission of judging is to judge. The objects of mindfulness and judging are, to be sure, different. Mindfulness asks that a person not judge her emotions; judging asks that she judge the merits of a claim, the state of the law, or the truthfulness of a witness. But being nonjudgmental as to one's emotions often is fundamentally incompatible with being judgmental as to these other objects. For example, if a judge feels outrage upon learning that a public official has seriously abused the rights of an innocent citizen, it would be counterproductive to hold that outrage in awareness without judging it. The outrage is a relevant, if partial, metric of the outrageousness of the conduct, which may be relevant to the legal issues, such as whether the act "shocks the conscience."²⁹² More, judges cannot subscribe to the ontological claim. Just as judges must judge, they must adopt an account of reality. Imagine that a judge is afraid of a witness or litigant. A reason not to act on that fear would be if it were based on the person's physical resemblance to another, demonstrably dangerous, person. A reason to listen to the fear (and order more security, perhaps, or seek to be removed from the case) would be because the person has threatened the judge or her family.²⁹³ The differential legitimacy of those two fearful states as a basis for judicial action depends entirely on their differential relationship to relevant aspects of reality. A truly mindful attitude, however, would be indifferent as to that differential.

As with avoidance, mindfulness might be helpful if lightly engaged on the margins. Some of its methods can be embraced without commitment to its nonjudgmental ontology.²⁹⁴ A judge might learn, for example, to deliberately slow her breathing during trying moments. Integration also may include the adoption of a nonjudgmental attitude toward certain unalterable emotions, a process by which the judge can be forgiving of her own humanity.²⁹⁵ In

291. Among distance runners there is a saying that captures this idea: "pain is inevitable, but suffering is optional." HARUKI MURAKAMI, *WHAT I TALK ABOUT WHEN I TALK ABOUT RUNNING*, at vii (2008). Rather than try to ignore pain, runners will pay attention to it (for example, because it might give important information about injury or hydration needs) but disengage from judgment of that pain as negative.

292. See *Cnty. of Sacramento v. Lewis*, 523 U.S. 833 (1998) (adopting the "shocks the conscience" test); *Rochin v. California*, 342 U.S. 165, 172 (1952) (same). Conversely, a family court judge's happiness upon finalizing the adoption of a needy child by a loving family should be regarded positively. That emotion reflects the benefit the judge has rendered, which in turn feeds professional satisfaction and makes less pleasant courtroom moments more bearable.

293. See A.G. Sulzberger, *3 U.S. Judges Testify in a Death Threat Case*, N.Y. TIMES, Mar. 2, 2010, at A28 (detailing the testimony of Seventh Circuit Judges Richard A. Posner, William J. Bauer, and Frank Easterbrook, in a case in which a radio talk show host said each deserved to be killed for upholding Chicago's handgun ban; in explaining why they took the threat seriously, Judge Easterbrook cited "the murders of a federal judge's husband and mother by a man unhappy with a court ruling").

294. Cf. Evan R. Seamone, *Judicial Mindfulness*, 70 U. CIN. L. REV. 1023 (2002).

295. Cf. Satterfield & Hughes, *supra* note 210, at 937 fig.1 (stating that emotional regulation

general, though, both strategies are off the judicial table. Avoidance tends to entail an unacceptable level of disengagement from the situations judges are called on to mediate, and mindfulness tends to ask judges to withhold the sorts of judgment they ought to make.

B. Emotional Suppression Is Harmful to Judging

The remaining competitors to the judicial-engagement model are the other suppression strategies: behavioral suppression, anticipatory suppression of emotional experience, denial, and repression. Only the first sometimes is necessary. Each of these strategies is individually costly, and collectively they are undesirable, even dangerous. After demonstrating how the script of judicial dispassion implicitly encourages these suppression tactics, this Section explores in greater depth their many disadvantages, particularly for judges.

1. The Status Quo Encourages Judicial Emotion Suppression

The standard account of emotionless judging does not exist in a vacuum; rather, it flows from a specific set of beliefs about emotion itself, beliefs that motivate those who hold them toward emotional suppression. The underlying beliefs—which long have animated legal theory—are that emotion is stubborn and irrational, the necessary enemy of objectivity and reason.²⁹⁶ That simplistic view has, in popular culture, been slightly eroded by the emotional-intelligence construct,²⁹⁷ and it has been largely abandoned in the sciences.²⁹⁸ However, in Western legal culture it remains firmly entrenched.²⁹⁹ The crude view of the target encourages a commensurately crude view of the manner in which it should be confronted.³⁰⁰ as with an enemy in battle, emotion must be pushed back or eradicated.³⁰¹ The combination of collective silence about judicial emotion, the public expectation that judges both be and appear emotionless, and simplistic underlying theories of emotion combine to encourage suppression.

skills for doctors should include “self-forgiveness”). This is perhaps the most promising aspect of mindfulness for judges. A metacognitive approach may be particularly helpful when judges experience emotions about emotions—for example, being angry or ashamed for feeling emotion despite efforts to set it aside. If there is no obvious case-relevant lesson to draw from the emotion, which sometimes will be the case, the most productive step for the judge might be simply to notice the emotion, accept its existence, and disengage from any judgment of it, including a negative self-judgment. Full exploration of the potential benefits of metacognitive approaches for judges goes beyond the scope of this Article, and is deserving of greater research.

296. See Maroney, *supra* note 11.

297. Vanda L. Zammuner, *Men's and Women's Lay Theories of Emotion*, in *GENDER AND EMOTION* 48 (Agneta H. Fischer ed., 2000).

298. Maroney, *supra* note 11, at 643–51.

299. See Abrams, *supra* note 103, at 1602.

300. See *supra* Subsection II.B.3. (showing how simplistic beliefs about emotion drive simplistic regulatory strategies); *PSYCHOLOGY OF EMOTION*, *supra* note 29, at 157 (explaining that regulation is affected by whether a person’s “knowledge of . . . emotions is well developed or extensive”).

301. Anleu & Mack, *supra* note 52, at 599 (asserting that “suppression of emotion” is “a key attribute of traditional conceptions of the [judicial] profession”).

This conclusion is supported by the fact that medical students during the pre-reform period, operating within a similar belief structure, reported feeling obligated to suppress emotion. Medical students reported that they hid their feelings “behind a cloak of competence” and expected to be able “get control of themselves through sheer willpower.”³⁰² One student explained that because feelings “don’t fit” with what was expected of her as a young doctor, she “was going to learn to get rid of them.”³⁰³ She continued: “Don’t know how yet, and some of the possibilities are scary. What’s left when you succeed?” Said another, “It’s kind of dehumanizing. We just block off the feelings, and I don’t know what happens to them.”³⁰⁴

Judges, too, feel such pressure to suppress their feelings. The Australian magistrates and Minnesota trial judges seemed equally daunted by, and afraid of the ill effects of, that blunt approach, though they believed this to be what was expected of them.³⁰⁵ Perhaps more alarmingly, other judges may take pride in their ability to succeed at it. Consider the following statement on the record by a criminal-court trial judge:

I learned a long time ago when I first became a judge, when there is an offer and it’s not accepted and you go to trial . . . [, and the] defendant is convicted, then I’m sitting here going to sentence the defendant, and all I hear is a lot of loud tear-jerking pleas. Lawyers . . . try to get the Judge to feel sorry. DAs try to get the Judge to be angry, and I’m past all that. I’m not moved by emotion one way or the other. I’m just kind of like an iceberg, but there is no heating. I’m just here.³⁰⁶

Being an “iceberg” should no more be the goal of emotion regulation than should acquiring a “rhino skin.” But such would appear to be the goal of the status quo approach. And, as the following Subsections show, that approach has consequences.

2. Behavioral Suppression, Though Sometimes Necessary, Is Extremely Costly

One of the primary ways in which judges presently might be expected to conform to the ideal of emotionless judging is through behavioral suppression, that is, the effortful masking of emotions. Judges freely admit to such surface acting, to use Hochschild’s term, as the impression it creates is central to image maintenance.³⁰⁷ Unfortunately, behavioral suppression imposes significant costs. The empirical evidence of these costs is among the clearest in the literature, largely because behavioral suppression is the easiest strategy to test

302. Smith & Kleinman, *supra* note 195, at 57.

303. *Id.* at 68.

304. *Id.* (noting that similar socialization happens in military training).

305. *See supra* Part I.

306. *People v. Carter*, No. C053369, 2009 WL 626113 (Cal. Ct. App. Mar. 12, 2009).

307. Schuster & Propen, *supra* note 86, at 89 (asserting that judges “feel the need to conceal how the emotions conveyed in impact statements can affect them or suffer loss of authority,” and therefore “suppress their own emotional affect”).

experimentally.³⁰⁸ More, such surface acting does not change judges' experience of emotion in the way that might be expected.

The first sort of cost is cognitive load. Because it entails the override of a naturally patterned reaction, behavioral suppression is effortful; more importantly, the effort is both of the type and of sufficient magnitude as to detract from the cognitive resources available for other important tasks. For example, participants instructed to conceal the outward expression of their emotions while watching film clips performed more poorly on a subsequent anagram-solving exercise than did persons not asked to suppress.³⁰⁹ The expenditure of regulatory effort impaired their ability to carry out subsequent tasks that were themselves cognitively challenging. Conversely, executing a cognitively challenging task—being told to suppress an emotionally neutral thought—has been shown to impair subjects' subsequent ability to suppress emotionally expressive behavior.³¹⁰ Such results have been robustly replicated.³¹¹ Cognitive capacity is a limited resource. Behavioral suppression draws heavily against its balance, leaving fewer resources available for problem-solving and other forms of self-control.

Second, behavioral suppression impairs memory. Studies consistently have shown that suppression of emotional expression impairs memory for information encountered during the suppression period.³¹² Experimental subjects told to suppress their visible emotional reactions to film clips, for example, showed worse recall of information imparted by the film clips. They also reported being less confident in their memories, suggesting that the impairment was sufficiently severe as to reach conscious awareness.³¹³ Studies such as this one demonstrate memory costs even when one is only an observer of the emotional stimulus. Not surprisingly, such costs also accrue when one is a participant. In another study, married couples were asked to discuss an emotionally charged area of conflict. Those persons who also were instructed to suppress emotional expression during the exchange showed impaired memory

308. Loewenstein, *supra* note 126, at 200 n.7 (noting that behavioral suppression is more frequently tested experimentally than is “suppression of subjective feelings”).

309. PSYCHOLOGY OF EMOTION, *supra* note 29, at 172 (citing Roy F. Baumeister et al., *Ego Depletion: Is the Active Self a Limited Resource?*, 74 J. PERSONALITY & SOC. PSYCHOL. 1252 (1998)).

310. *Id.* (citing Mark Muraven et al., *Self-Control as a Limited Resource: Regulatory Depletion Patterns*, 74 J. PERSONALITY & SOC. PSYCHOL. 774 (1998)); Kappas, *supra* note 100, at 26 (noting costs to “cognitive resources” and “impact on social relations”).

311. Dunn et al., *supra* note 133, at 762 (referencing “series of well controlled studies” showing consequences of behavioral suppression); Richards, *supra* note 187, at 131 (showing that behavioral suppression also impairs “communication[] and problem solving”).

312. Jane M. Richards & James J. Gross, *Personality and Emotional Memory: How Regulating Emotion Impairs Memory for Emotional Events*, 40 J. RES. PERSONALITY 631 (2006); Richards, *supra* note 187, at 131; Richards & Gross, *supra* note 182, at 410.

313. PSYCHOLOGY OF EMOTION, *supra* note 29, at 171 (discussing Richards & Gross, *supra* note 182, and Jane M. Richards & James J. Gross, *Composure at Any Cost? The Cognitive Consequences of Emotion Suppression*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 1033 (1999)).

for the verbal content of the conversation: their minds, otherwise occupied, simply did not as fully capture and encode what was said.³¹⁴

The cognitive load and memory impairments attending behavioral suppression are significant, and not just statistically so. Startlingly, the costs of behavioral suppression, particularly memory impairment, are equivalent to those attending literal avoidance.³¹⁵ In the blunt words of the most prominent contemporary scholar of emotion regulation, behavioral suppression actually makes one temporarily “stupider.”³¹⁶

These costs might nonetheless appear worthwhile if behavioral suppression were significantly to advance the goal of emotional neutrality to which judges are told to aspire—however, it does not. Behavioral suppression has little efficacy in down-regulating subjective experience—that is, helping the suppressor feel less of the emotion.³¹⁷ It may even exaggerate some aspects of that experience. Those same experimental subjects told to suppress their visible emotional reactions to film clips, for example, showed increased physiological arousal.³¹⁸ Similar results have been demonstrated elsewhere; behavioral suppression may block emotion’s external bodily expression, but the internal bodily concomitants of emotion continue and often amplify.³¹⁹

Further, the subjective impact that behavioral suppression does have is non-bidirectional. It is easier to magnify emotion with behavioral manipulation than it is to suppress it. While exaggerating emotional expressions can increase the subjective experience of pain, for example, suppression does not decrease it.³²⁰ And to the extent that behavioral suppression can sometimes affect emotional experience, it does so far more easily with positive emotions than negative ones.³²¹ Thus, a judge who suppresses the expression of happiness may make herself somewhat less happy, but if she suppresses the expression of anger she is not at all likely to feel less angry. Experimental studies

314. PSYCHOLOGY OF EMOTION, *supra* note 29, at 171 (discussing Jane M. Richards et al., *Emotion Regulation in Romantic Relationships: The Cognitive Consequences of Concealing Feelings*, 20 J. SOCIAL & PERSONAL RELATIONSHIPS 599 (2003)).

315. Richards & Gross, *supra* note 312, at 631; Chambers et al., *supra* note 152, at 565.

316. Conversation with James J. Gross (Mar. 5, 2010).

317. Heilman et al., *supra* note 35, at 261–62 (finding that suppression “is ineffective in regulating unpleasant feelings”).

318. PSYCHOLOGY OF EMOTION, *supra* note 29, at 171 (discussing Richards & Gross, *supra* note 182, and Richards & Gross, *supra* note 313).

319. PSYCHOLOGY OF EMOTION, *supra* note 29, at 175 (finding that chronic behavioral suppression may “perpetuate the feelings one is concealing”); Chambers et al., *supra* note 152, at 565 (finding that expressive suppression increases intensity and frequency of sympathetic and cardiovascular activities); Cisler et al., *supra* note 125, at 71 (finding that behavioral suppression increases physical arousal and startle reflex); Kappas, *supra* note 100, at 26 (finding that behavioral suppression leads to an increase of physiological activity).

320. PSYCHOLOGY OF EMOTION, *supra* note 29, at 165.

321. For example, assuming the facial expression of happiness can make one feel happier, and inhibiting its expression can dampen—though not eliminate—positive feelings. *Id.*; see also Chambers et al., *supra* note 152, at 565.

overwhelmingly demonstrate that behavioral suppression “is not an efficient strategy for reducing negative feelings and emotional arousal.”³²²

Behavioral suppression, then, does not eliminate judges’ emotions. To the extent it may change emotional experience to some degree, the impact is markedly unbalanced, leaving intact or even exaggerating the unpleasant emotions that judges are more likely to experience.

But—highlighting the critical importance of context—judges’ surface acting sometimes carries unique benefits that render its costs worth incurring. Specifically, manipulating emotional expression successfully can interrupt emotion’s communicative aspects, which can serve important utilitarian aims.

Consider that emotional expression is a core component of any given emotion’s life-course precisely because it serves to communicate one’s experiences and needs to others. The ability to send and receive such signals through the face, voice, and body greatly facilitates interpersonal relationships and coordination.³²³ Recall the example of the advancing snake: screaming and displaying a fearful face serve to let others know of the danger, both so they can render aid and so they themselves can avoid the danger. It is this same communicative aspect that sometimes motivates and justifies squashing emotional expression.

The first iteration of this other-directed communicative benefit is in modeling a desired emotional state. Hochschild described how flight attendants are required to project feelings of contentment and calm so as to predispose passengers toward those same emotions.³²⁴ Judges can do the same for the court’s “consumers.”³²⁵ A judge’s successful projection of neutrality and calm, even if not genuinely felt, can set the tone for others, and through a process of emotional contagion may actually help them—consciously or not—achieve an emotional state similar to the one she projects.³²⁶

The second iteration is perhaps more important: behavioral suppression of emotion allows the judge to control others’ access to her evaluation of any given situation. Recall the example of hiding evidence of fear when facing a potential attacker. One might do this because to show the emotion communicates an appraisal of the situation, informing the adversary of his relative power and conferring an unwanted advantage. Similarly, it sometimes is important for a judge to prevent others’ perception of her evaluations. This is

322. PSYCHOLOGY OF EMOTION, *supra* note 29, at 166–67.

323. Craig A. Smith et al., *Emotion-Eliciting Appraisals of Social Situations*, in AFFECT IN SOCIAL THINKING AND BEHAVIOR 85, 85 (Joseph P. Forgas ed., 2006); Tom Johnstone & Klaus R. Scherer, *Vocal Communication of Emotion*, in HANDBOOK OF EMOTIONS, *supra* note 95, at 220, 223.

324. HOCHSCHILD, *supra* note 43, at 110–14.

325. Anleu & Mack, *supra* note 52, at 603, 607–11 (showing that surveyed magistrates reported engaging in such emotional modeling).

326. Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 399 (2006) (emotional contagion is a largely unconscious process by which we absorb the emotions of others).

most likely to be of utility in adversarial matters being heard before lay fact-finders. To illustrate: if a witness is testifying in a manner the judge believes to be patently incredible, perhaps because she has knowledge of matters that have been kept from the jury, she may feel contempt.³²⁷ If she were to allow the normal expressions of contempt, such as a curled lip or derisive snort,³²⁸ jurors would be able to deduce from those expressions the underlying appraisal. They would not have access to the precise judgment embedded therein, but would perceive the fact of contempt, from which they easily may deduce that the judge regards the testimony (and the witness) as contemptible. That perception would threaten the decision-making structure of the trial, as jurors have been deputized to make such credibility determinations but would likely defer to the judge's were they to perceive it.

Other situations, in contrast, may call for the judge strategically to suppress or allow expression. Imagine she is in the position of trying to help broker a settlement or serve as a mediator. As emotional expressions signal her evaluation of a party's position and demands, she will want to suppress them where they might unduly advantage one party, but allow them when doing so will facilitate settlement by helping a party accurately perceive its true bargaining position.

Thus, controlling emotional expression sometimes forms an important part of the judge's professional commitments, including the commitment not to unduly influence decisions that have been delegated to others. Behavioral suppression is relatively effective for these communicative purposes. Controlling facial expression, bodily movement, and the sound of one's voice often succeeds in blocking others' perceptions of one's true emotions.³²⁹ In these discrete situations in which behavioral suppression is critical to judicial task performance, then, its costs are worth incurring, for it does tend to achieve the desired benefit, which may be difficult to achieve otherwise.

The efficacy of surface acting, however, has limits. As the renegade JetBlue flight attendant episode reminds us, emotion sometimes simply overtakes control capacity, even when such capacity is so practiced as to be habitual. Judges, too, sometimes "lose it." Consider this report from one of the interviewed Minnesota judges, describing a sentencing hearing:

327. Contempt is often characterized as a mix of disgust and anger, accompanied by an evaluation that the person toward whom it is directed is of lower status. See, e.g., ROBERT C. SOLOMON, *THE PASSIONS: EMOTIONS AND THE MEANING OF LIFE* (1993); Cendri Hutcherson, *The Moral Emotions: A Social-Functionalist Account of Anger, Disgust, and Contempt 7–11* (May 2008) (unpublished Ph.D. dissertation, Stanford University).

328. Paul Ekman & Karl G. Heider, *The Universality of a Contempt Expression: A Replication*, 12 *MOTIVATION & EMOTION* 303 (1988).

329. *PSYCHOLOGY OF EMOTION*, *supra* note 29, at 166. For this same reason, behavioral suppression can impair interpersonal functioning, as interpersonal interactions are flattened. Emily A. Butler et al., *Emotion Regulation and Culture: Are the Consequences of Emotion Suppression Culture-Specific?*, 7 *EMOTION* 30 (2007); see generally Gross & Oliver, *supra* note 149.

I said, “Sir, you are going to prison, and that’s where animals like you belong.” And I usually don’t say that but, if you get called a MF [expletive abbreviated] ten times, and it was by someone who raped a step-daughter, and he’s in your face . . . And I felt bad later. I thought, “OK, you lost your cool.” But I didn’t feel that badly, but I try not to stoop to their level. I felt bad-good.³³⁰

Losing one’s cool, as this judge notes, can be quite hedonically pleasing, and pleasure sometimes will take precedence over utility.

Moreover, despite a judge’s most determined efforts, hints of her emotional state often will leak out. Such leaks—called microexpressions—typically are measured as quick flashes of an emotion’s typified facial expression. These may be consciously detectible only by a trained observer.³³¹ However, even masked emotions may be perceptible to lay persons. Even if the signals do not register consciously, people are remarkably able to sense the emotions of others.³³² Some of this exquisite attunement, an evolutionary mechanism for catching the signals that evolution has designed emotion to send, focuses not just on facial expression but also on bodily actions—think of a person nervously jiggling her leg or leaning away from someone with whom she is pretending to be friendly. Judges sometimes lose the capacity for behavioral control entirely and at other times will communicate emotion despite being relatively controlled. This reality serves as a reminder that behavioral suppression cannot be fully relied upon, even in those situations in which its communication-blocking effects justify the considerable costs of attempting it.

In sum, behavioral suppression is extremely costly. It will not help judges achieve emotional neutrality. It can, however, help them project such neutrality or to project an emotion other than the one they are feeling, which sometimes serves an important utilitarian function. The engagement model, it should be recalled, can serve this function equally well and at a lower cost. If, because of cognitive reappraisal, the judge feels less of the emotion, she will not have to expend anywhere near the same effort to suppress its manifestation. In fact, she may need to expend no effort whatsoever. But as the model contemplates that some emotion will persist, some emotions may need to be masked. The costs of surface acting therefore sometimes must be tolerated. But those costs are greater than we have realized, and the benefits of the strategy are narrower. Its use therefore should be restricted to only those situations in which the

330. Schuster & Proven, *supra* note 86, at 93.

331. Paul Ekman has built an industry centered on detection of the such microexpressions. See Paul Ekman, *Cutting Edge Behavioral Science for Real World Applications*, DR. PAUL EKMAN, <http://www.paulekman.com> (last visited Sept. 17, 2011).

332. Matthew J. Hertenstein & Dacher Keltner, *Gender and the Communication of Emotion via Touch*, 64 *SEX ROLES* 70 (2011) (reviewing and expanding evidence showing that touch, along with facial expression and vocalization, communicates several distinct emotions).

communicative benefits are actually necessary. Behavioral suppression is an occasionally useful tactic, not a steady state toward which a judge should aspire.

3. *Suppressing Emotional Experience Is Unrealistic and Unjustified*

Behavioral suppression targets only the evidence of emotion; other suppression strategies target the emotional experience itself. Such efforts are, as a general rule, unsuccessful and costly. Where they appear to be successful, apparent short-term success generally comes at a serious long-term cost.

a. Anticipatory Suppression Is Unrealistic

First, anticipatory suppression of emotional experience, such as a vow to remain an “iceberg” no matter what, is highly unlikely to be effective. It might well dampen the judge’s subjective experience to some degree. It will not, however, eliminate it. Not all emotions can be headed off at the pass just by willing it to be so.³³³

One reason, often discussed in the behavioral law and economics literature, is the frequency of error in affective forecasting. Affective forecasting refers to one’s predictions as to the nature, intensity, and duration of future emotional states.³³⁴ People tend to be accurate as to what emotions will follow future events; for example, winning the lottery is likely to make one happy, losing a limb is likely to make one sad, and most people would accurately predict those reactions. But people tend to be quite inaccurate about both the intensity with which they will experience these emotions and their duration.³³⁵

Why these distortions are so pervasive is not entirely clear, but they likely stem from systematic errors in imagining the specifics of the future event, meaning projection and reality are mismatched. For example, one will imagine winning the lottery as a standalone event, but it will be experienced as part of a holistic life story.³³⁶ Other aspects of one’s life—such as the continued existence of health difficulties—will attenuate the lottery’s impact. Some situations provoke complex and mixed emotions, but we may imagine them

333. Chambers et al., *supra* note 152, at 566; Koole, *supra* note 24, at 6 (“[P]eople may still display unwanted emotions despite their best efforts.”). The converse also is true: not all emotional experiences can be called into being by willing it to be so. In fact, that exercise of will can make the desired state less likely. Loewenstein, *supra* note 126, at 186 (reporting that conscious effort to be happy resulted in a decline in happiness).

334. Loewenstein, *supra* note 126, at 186–88; see also Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 *IND. L.J.* 155 (2005).

335. Loewenstein, *supra* note 126, at 187; Blumenthal, *supra* note 334, at 167–70; John Bronsteen et al., *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 *COLUM. L. REV.* 1516 (2008); John Bronsteen et al., *Welfare as Happiness*, 98 *GEO. L.J.* 1583 (2010).

336. Blumenthal, *supra* note 334, at 167, 172–75. The distance between imagination and reality also can result in an emotional reaction that is utterly unlike the predicted one. For example, if a person wins the lottery the day after her child dies for lack of an expensive medical treatment, the sudden influx of money is more likely to provoke anguish than joy.

more simplistically.³³⁷ Affective forecasting errors may stem as well as from incorrect intuitions about how highly novel events will make us feel.³³⁸ If one has never seen an autopsy photo, it is easy to under-or-over-estimate how disturbing it will be. These errors create distance between the emotional experiences for which one is preparing oneself and the ones that actually unfold, lessening the effectiveness of a strict vow to remain unmoved.

Judges, as people, are prone to the affective forecasting errors that can frustrate efforts to prevent emotion.³³⁹ To be sure, many of their predictions are likely to be less distorted than those of laypersons, as many emotion-provoking situations will be far less novel. Compared to a juror, judges are likely to have seen many more autopsy photos and heard many more “tear-jerking pleas.”³⁴⁰ Judicial experience therefore is likely to lead to some improvement in affective forecasting. But even if events unfold as judges expect, they—like all people tend to do—may systematically misjudge the level and duration of their emotional impact.³⁴¹ Indeed, the persistence of such error is made more likely by the expectation that judges should not feel emotion at all, a distortion that discourages the thoughtful reflection on which learning from experience depends.³⁴² Moreover, judges cannot predict every aspect of the situations with which they will be confronted. They simply cannot have seen and heard everything.³⁴³

337. Loewenstein, *supra* note 126, at 187.

338. *Id.* at 187–88.

339. *Cf. supra* notes 28–29 (demonstrating that judges are prone to other sorts of heuristics and biases).

340. *People v. Carter*, No. C053369, 2009 WL 626113 (Cal. Ct. App. Mar. 12, 2009). This sort of habituation is an important aspect of professional acculturation to commonly encountered stimuli. *See* POSNER, *HOW JUDGES THINK*, *supra* note 67, at 119 (“the hand of little employment hath the daintier sense”) (quoting WILLIAM SHAKESPEARE, *HAMLET* act 5, sc. 1).

341. *See supra* note 335.

342. Loewenstein, *supra* note 126, at 197.

343. *See, e.g., Spruill v. Nat’l R.R. Passenger Corp.*, Civ. A. No. 93-4706, 1995 WL 534273 (E.D. Pa. Sept. 5, 1995) (admonishing lawyer for improper rebuttal: “I really didn’t know how to handle the whole thing. . . . [B]ased on my years of experience as a trial judge, I have never seen anything like it.”); *Skyler M. v. Brice H.*, No. B190498, 2007 WL 2109797 (Cal. Ct. App. July 24, 2007) (“All my years of sitting here, I don’t think I’ve ever seen a doctor cry on the witness stand”); *Caldwell v. Lucas*, 13 P.3d 560, 563 (Or. Ct. App. 2000) (weighing evidence that custody-seeking father had serious criminal history of domestic violence but had not harmed his well-adjusted children: “It is a tremendous dilemma. I have never seen anything like it.”). Similarly, even highly experienced trauma surgeons will encounter a novel situation that provokes intense emotion, as the experience of a doctor who tried to save the life of a nine-year-old Tucson girl—killed in the 2011 assassination attempt on a U.S. Congresswoman—poignantly illustrates. Dr. Randall S. Frieze described his experience:

“I’m very glad that I didn’t meet her parents,” he said. “I think I would have had trouble. I would have had emotional . . .” His voice trailed off. “I would have embarrassed myself,” he said. He closed his eyes for just a moment and sighed once more. “I usually don’t get upset.” He add[ed], “I don’t know why, it’s just tough.”

Denise Grady & Jennifer Medina, *From Bloody Scene to E.R., Life-Saving Choices*, N.Y. TIMES, Jan. 15, 2011, at A1 (ellipsis in original).

Even setting aside these weighty objections, anticipatory suppression is a flawed strategy. Researchers consistently have cautioned strongly against the “pitfalls” of committing to such an “unrealistic and inflexible” approach.³⁴⁴ Rather than being a true strategy for avoiding emotion itself, it is likely instead to represent a pre-commitment to behavioral suppression, coupled with the mistaken assumption that such expressive control constitutes experiential control.

Alternatively, anticipatory suppression may represent a pre-commitment to deny or repress any emotion that does emerge. As the following Subsection explains, those reactive experiential suppression strategies are just as unjustified, particularly in the judging context.

b. Denial and Repression Are Costly

Deliberately distancing oneself from emotion, pretending and representing that it does not exist (and perhaps never existed), or literally forcing oneself to forget the emotional experience (and even what prompted it) all carry many of the same costs as behavioral suppression—and then some. This Subsection explores the experimental and clinical evidence of the costs of such reactive experiential suppression; this Part then goes on to show evidence of these strategies’ negative impact on judicial behavior.

i. Cognitive and Memory Costs

As denial and repression are effortful, it is not surprising that they entail many of the same costs as behavioral suppression. Indeed, such costs form an important part of the classic Freudian concept of denial.³⁴⁵ Freud theorized that the defensive “work” of keeping from awareness emotions that are intolerable or incompatible with the ideal self would come at the cost of expenditure of “psychic energy.”³⁴⁶ This is precisely what studies have shown.

First, the cognitive load caused by efforts to ignore or tamp down emotional experience can lead to overly simplistic decision making. This was shown, for example, in a creative study of interpersonal judgment. Experimental subjects were made to act in a way incompatible with their emotional state: specifically, they were instructed to ingratiate themselves to a man who was treating them very rudely, and thus to act pleasantly toward him despite any negative feelings he was causing them to experience. The study combined elements of behavioral and reactive experiential suppression. Subjects were asked, at a minimum, to mask their initial emotion, such as

344. Chambers et al., *supra* note 152, at 566.

345. The more precise Freudian label is “defense.” Drew Westen & Pavel S. Blagov, *A Clinical-Empirical Model of Emotion Regulation: From Defense and Motivated Reasoning to Emotional Constraint Satisfaction*, in *HANDBOOK OF EMOTION REGULATION*, *supra* note 24, at 373, 377 (“The concept of defense in psychodynamic theory represents what was probably the first theory of emotion regulation.”).

346. Westen & Blagov, *supra* note 345, at 377.

anger, but as the task would be greatly facilitated were they actually able to override that emotion, the subjects likely tried to do so. When these subjects later were asked to evaluate aspects of the rude man's personal views, they—more than other subjects—were prone to shallow interpretations reflecting serious logical error. It appears that they were drawn to those illogical interpretations because they were the ones requiring the least evaluative thought.³⁴⁷

Reactively distancing oneself from emotional experience also has been shown to impair memory.³⁴⁸ Pushing emotional thoughts out of mind appears to tax working memory reserves, with the result that even emotionally neutral information about the situation may pass through awareness without being stored for later encoding in longer-term memory.³⁴⁹ Further, what is remembered may be distorted. This is particularly true when episodic denial deepens into repression. Persons who habitually deny and repress negative emotions, for example, have particular difficulty remembering information falling within the *emotionally unpleasant* category.³⁵⁰ Researchers therefore concur that, like behavioral suppression, “internal control” of emotion experience “is costly,” leaving fewer resources available for logic, self-control, and social judgment.³⁵¹

The critical question again being the net of cost against benefit, one must ask whether denial and repression are nonetheless worthwhile in the judging context. They are not. These strategies would carry the same episodic communicative benefits as behavioral suppression if only they were equally effective in masking emotion. This would be so if they were successful in

347. See generally Daniel T. Gilbert et al., *Of Thoughts Unspoken: Social Inference and the Self-Regulation of Behavior*, 55 J. PERSONALITY & SOC. PSYCHOL. 685 (1987); see also Daniel T. Gilbert, *Thinking Lightly About Others: Automatic Components of the Social Inference Process, in UNINTENDED THOUGHT: THE LIMITS OF AWARENESS, INTENTION, AND CONTROL* 189 (James S. Uleman & John A. Bargh eds., 1989). After being made to ingratiate themselves to the rude man (actually one of the experimenters), the subjects were shown politically conservative answers the man had given to a series of questions. They also were told that the experimenters had supplied the man with those answers. The subjects were asked to infer the man's political leanings. Compared with other subjects, the “forced ingratiators” were more likely to conclude that the man was a conservative—even though they knew that his answers were causally unrelated to his political beliefs. See WEGNER, *supra* note 118, at 81–82.

348. Dunn et al., *supra* note 133, at 761 (reporting that subjects asked to suppress both experience and expression of emotion showed diminished free recall).

349. Chris R. Brewin & Laura Smart, *Working Memory Capacity and Suppression of Intrusive Thoughts*, 36 J. BEHAV. THERAPY & EXPERIMENTAL PSYCHIATRY 61 (2005). This study supports the conclusion by showing that greater working memory capacity is associated with greater ability to suppress unwanted negative thoughts. See generally A DICTIONARY OF PSYCHOLOGY 822 (Andrew M. Coleman ed., Oxford 3d ed. 2009) (defining working memory).

350. Matthew S. Shane & Jordan B. Peterson, *Self-Induced Memory Distortions and the Allocation of Processing Resources at Encoding and Retrieval*, 18 COGNITION & EMOTION 534 (2004) (“[M]emory distortions . . . [d]o not appear limited to clinical populations. Rather, self-induced memory distortions appear to occur regularly in the general population . . .”).

351. WEGNER, *supra* note 118, at 81–82; see also Mauss et al., *supra* note 25, at 41, 47–48. Cf. Sheppes & Meiran, *supra* note 132, at 871 (explicating cognitive and memory costs of distracting oneself from an emotional experience).

blocking or erasing the emotion, such that behavioral control would follow naturally. But, as the following Subsection demonstrates, denial and repression are singularly ineffective at emotion elimination. They also entail the danger of emotional rebound.

ii. Ironic Rebound Effects

Ironically, emotional denial and repression may magnify the emotion they purport to eliminate. It is now well understood that thought suppression can have such a rebound effect, in which the effort to control a thought increases its impact.³⁵² Similarly, repression of emotion paradoxically might imbue it with greater salience and power.³⁵³

Our contemporary understanding of thought suppression stems largely from Daniel Wegner's seminal "white bear" studies.³⁵⁴ Inspired by a story that the young Tolstoy "was once challenged by his older brother to stand in a corner until he could stop thinking of a white bear," Wegner and colleagues demonstrated that, indeed, persons told not to think of white bears are largely unable to do so. In fact, they think of white bears *more* frequently once they are released from the command.³⁵⁵ Such ironic effects of thought suppression have since been robustly replicated.³⁵⁶ Indeed, they now form a core of folk-psychological theory: the more one tries not to think about something, the more one thinks about it. Similarly, sometimes the more one concentrates on not doing or saying something, the more likely one is to do or say precisely that thing—even when (or perhaps *because*) it is precisely the *wrong* thing.³⁵⁷

Attempts to deny and repress subjective emotional experiences and thoughts also appear to have rebound effects, magnifying precisely what they aim to neutralize. The white bear studies do not themselves compel this conclusion, as they involved an emotionally neutral stimulus (assuming one has no idiosyncratic emotional connection to white bears). However, this idea was central to Freud's theory of repression. Repressed emotions, Freud asserted, are not neutralized. Instead, the "inhibited intention" becomes an "antithetic idea"

352. PSYCHOLOGY OF EMOTION, *supra* note 29, at 176 (defining rebound effect as the "ironic and counterproductive effect of active suppression of an unwanted thought"); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005) (arguing that ironic effects might magnify influence of evidence a judge vows to ignore).

353. Loewenstein, *supra* note 126, at 190–91 (positing that willing oneself to "be calm, cool, and collected" might "backfire").

354. See WEGNER, *supra* note 118.

355. *Id.* at 4 ("The irony, then, is not only that people found it hard to suppress a thought in the first place, but that the attempt to do this made them especially inclined to become absorbed with the thought later on.").

356. See, e.g., ERIC RASSIN, THOUGHT SUPPRESSION (2005).

357. Daniel M. Wegner, *How to Think, Say, or Do Precisely the Worst Thing for Any Occasion*, SCIENCE, July 3, 2009, at 48–50. Edgar Allen Poe called these actions "the imp of the perverse." *Id.*

or “counter-will,” and those emotions come to “enjoy an unsuspected existence in a sort of shadow kingdom, till they emerge like bad spirits and take control of the body.”³⁵⁸ Wegner, too, clearly believed thought and emotional suppression to be linked, hypothesizing that efforts to control emotional thoughts and experiences also are likely to “throw a monkey wrench into our mental apparatus.”³⁵⁹

Evidence now strongly suggests that Wegner and Freud were correct. As Wegner explained in a recent review of the research:

Unwanted emotions associated with thoughts not only provide a reason to avoid those thoughts but also prompt an unwanted emotional punch when the thoughts return. Emotions we put out of mind are experienced with unusual intensity when the emotional thoughts recur after suppression.³⁶⁰

Such rebound sometimes entails an increase in emotional thoughts one has tried to set aside. For example, people instructed to suppress thoughts of emotional topics before sleep report more frequent dreaming about those topics.³⁶¹ Such emotional rebound is particularly likely when the would-be-suppressor is under conditions of stress.³⁶² The same holds true for conditions

358. Sigmund Freud, *A Case of Successful Treatment by Hypnotism*, in 1 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 117–28 (James Strachey ed., 1953). Freud believed the effects of repressed emotion to be most likely to emerge when the person was under significant strain. *See id.* at 127 (“this mechanism is supremely characteristic of hysteria; however, it does not occur only in hysteria”). As Freud also asserted, a primary reason people try to suppress thoughts in everyday life (as opposed to in laboratories) is because those thoughts cause, or are associated with, unwanted feelings. WEGNER, *supra* note 118, at 22 (noting how Freud “thus transformed the problem of unwanted thoughts into one of unwanted feelings”). Emotional repression is not the only motivation; thoughts also may be unwanted because they encourage behaviors we prefer to avoid, such as eating doughnuts, or reflect beliefs we prefer to reject, such as racism. *Id.* at 26–37.

359. *Id.* at xii (“When we admonish ourselves . . . not to feel something . . . our attempt to say no is often no more effective than a flyswatter held up to stop a cannonball.”).

360. Wegner, *supra* note 357, at 49; *see also* Michael C. Anderson & Benjamin J. Levy, *Suppressing Unwanted Memories*, 18 CURRENT DIRECTIONS PSYCHOL. SCI. 189 (2009).

361. Wegner, *supra* note 357, at 48–50; *see also* Elke Geraerts et al., *Long Term Consequences of Suppression of Intrusive Anxious Thoughts and Repressive Coping*, 44 BEHAV. RES. & THERAPY 1451 (2006) (finding that when asked to evoke and then suppress self-relevant, autobiographical thoughts, participants showed a rebound effect for both positive and anxious thoughts). The rebound effect appears particularly strong for persons who habitually repress emotion. *See id.* (“[R]epressive coping enables individuals to avoid negative and trauma-related thoughts in the short run, but in the long run, . . . leads to intrusive thoughts . . .”). Unfortunately, suppression of emotional thought and suppression of emotional experience seldom are clearly distinguished. *See* Loewenstein, *supra* note 126, at 182 (“skirting” question of whether “if, after committing a gross *faux pas*, one attempts not to think about it,” it is more appropriate to say “one is distracting oneself from one’s thoughts or one’s feelings”).

362. Wegner, *supra* note 357, at 49 (reporting that “when anxious thoughts are suppressed under mental load, their return can rekindle anxiety with particular vigor”, and memories we try to forget actually will be more easily remembered when other stressors tax the conscious effort to forget). Sports psychologists are familiar with this tendency for anxiety and pressure to cause precisely counter-intentional actions, such as the “yips” in golf. *Id.*

of cognitive load. In one experiment, for example, subjects were asked to recall happy or sad past events, and were then told to stop feeling the emotion evoked by those memories. Those subjects that were also given a cognitive-load task (rehearsing a nine-digit number) were not only less able to suppress the emotion but “ironically produced the opposite effect, that is, the rebound of the unwanted emotion.”³⁶³

Other studies, it must be noted, show that rebound in the frequency of emotional thoughts is not inevitable, particularly in the absence of stress and cognitive load, and even suggest that people are relatively more skilled at repressing emotional thoughts than neutral ones.³⁶⁴ But even studies showing no post-suppression rebound have shown that unwanted emotional thoughts may be more intrusive than neutral ones during the suppression period.³⁶⁵ Even more compelling, the evidence shows that suppression entails an increase in the physiological arousal connected to emotional thoughts, whether or not the thoughts themselves increase.³⁶⁶ Thus, people asked to suppress thoughts of an old romantic partner show greater physiological arousal when later allowed to think about him or her.³⁶⁷ A similar finding emerged from a study in which participants were shown a disturbing film of sawmill accidents and instructed not to feel emotion. Though they reported success in feeling “cool and detached,” they showed markedly increased skin conductance.³⁶⁸ Physiological rebound holds where emotional thoughts recur, even if they do not recur with paradoxically increased frequency and even where one is not conscious of any recurrence. In short, under circumstances in which denial and repression may appear to calm the mind, they do not calm the body.³⁶⁹

363. PSYCHOLOGY OF EMOTION, *supra* note 29, at 178 (describing Daniel M. Wegner et al., *Ironic Processes in the Mental Control of Mood and Mood-Related Thoughts*, 65 J. PERSONALITY & SOC. PSYCHOL. 1093 (1993)). These results provide “suggestive support for the idea that the ironic effects under cognitive load were stronger for those who had to suppress their feelings . . . than those who concentrated on the desired feeling.” *Id.*

364. PSYCHOLOGY OF EMOTION, *supra* note 29, at 179–81 (discussing, *inter alia*, Peter Muris et al., *Suppression of Emotional and Neutral Material*, 30 BEHAV. RES. & THERAPY 639 (1992)). The working hypothesis for this differential is that people are more likely to be motivated to avoid unwanted emotions than neutral thoughts.

365. Brewin & Smart, *supra* note 349, at 66.

366. See NATURE OF EMOTION, *supra* note 101, at 235–62 (detailing physiological elements of emotion).

367. Wegner, *supra* note 357, at 49.

368. WEGNER, *supra* note 118, at 149 (“[T]rying to suppress an emotion *while the emotion-producing stimulus is present* yields the same or greater arousal than trying to experience the emotion.”) (citing to Asher Koriat et al., *The Self-Control of Emotional Reactions to a Stressful Film*, 40 J. PERSONALITY 601 (1972)); see also PSYCHOLOGY OF EMOTION, *supra* note 29, at 182 (“The suppression of emotionally exciting thoughts may thus be counterproductive because even though it diminishes the frequency of intrusive thoughts, it causes people to become aroused each time the suppressed thought returns to mind.”); Cisler et al., *supra* note 125, at 72.

369. PSYCHOLOGY OF EMOTION, *supra* note 29, at 181. Persons instructed to repress emotional experience also have been shown to have a slower physical recovery after being exposed to air enriched with carbon dioxide. Cisler et al., *supra* note 125, at 70–71 (citing to M.T. Feldner et al., *Emotional Avoidance: An Experimental Test of Individual Differences and Response Suppression*

Denial and repression therefore entail all of the cognitive and memory costs associated with behavioral suppression. Not only do these reactive attempts to suppress subjective experience stand an equally poor chance of neutralizing emotion, but they add to those costs the danger of emotional rebound.

c. Emotion Suppression Poses a Particular Threat to Judicial Behavior

Thus far, this Part has shown that emotional suppression is a costly strategy and that it is likely to be one to which judges frequently resort. For all the reasons described above, and others given more explicit treatment here, these costs pose a significant challenge to competent performance of the judicial function.

First, judges work under conditions of cognitive load. Unlike most experimental subjects, whose emotional suppression is tested in a short-term, controlled, single-task manner, judges generally must juggle multiple tasks and objectives for sustained periods of time.³⁷⁰ The cognitive and memory costs of suppression therefore are particularly likely to be consequential, and the importance of judicial decision making magnifies concern about such costs. Judges need to think logically about difficult problems, such as contested points of law; accurately perceive and remember events, such as testimony and argument; and make complex interpersonal judgments, such as evaluating tone of voice and body language to gauge litigants' and witnesses' sincerity. These are precisely the sorts of tasks whose performance is impaired.³⁷¹ Some of these effects can be mitigated. For example, writing multiple drafts of an opinion, discussing cases with clerks, and reviewing exhibits and transcripts can fill holes in memory and provide opportunity for reasoned reflection. But not all the effects can be mitigated. Many difficult decisions must be made quickly—such as an immediate ruling on a hearsay objection—and cannot later be undone. Faulty memories can harden; social information such as tone of voice cannot be conveyed in a transcript. As judicial cognitive load is inevitable and its effects significant, it should not be magnified unnecessarily.

Second, these same conditions of cognitive load increase the chances of emotional rebound. Those chances are higher if the judge is acting under conditions of anxiety or stress, as often is the case—particularly in charged adversarial settings that unfold in public view. Suppression's physiological effects are of particular concern. The physical concomitants of emotion, such as

Using Biological Challenge, 41 BEHAV. RES. & THERAPY 403 (2003), and Matthew T. Feldner et al., *Anxiety Sensitivity—Physical Concerns as a Moderator of the Emotional Consequences of Emotion Suppression During Biological Challenge*, 44 BEHAV. RES. & THERAPY 249 (2006).

370. Heilman et al., *supra* note 35, at 259 (“[N]aturally occurring emotions are more salient and valenced than those induced in the laboratory, and their influences on cognition may be more conspicuous.”).

371. Chambers et al., *supra* note 152, at 565 (reporting that suppression particularly impairs recall of social information).

increased sweating and heart rate, dispose one to take or not to take certain actions: consider what it feels like to have a “short fuse” when one is agitated.³⁷² When dissociated from conscious experience, such arousal is particularly dangerous, for it is open to misdirection.³⁷³ Everyday life and folk psychology provide ready examples of this sort of emotional Whac-A-Mole game.³⁷⁴ A parent who seethes with unexpressed anger at his boss may yell at his child for little reason. Similarly, a judge who is consciously disengaged from her emotions but continues to experience physical arousal may blow up over a lawyer’s small infraction. Sometimes we recognize such misdirection; often we do not. The deeper the emotional experience has been buried, the greater the danger. Indeed, one recent study suggests that this combination of conscious suppression with physical arousal is associated with impulsive decision making.³⁷⁵ This is precisely the sort of decision making we least want from our judges.

Third, as suppression does not eliminate judges’ emotional experience but likely just displaces it, it makes emotion’s effects on judging less transparent and predictable—not just to the public, but to judges themselves. Research on judges’ inability to ignore inadmissible evidence offers an instructive parallel. Notwithstanding their commitment to set such evidence aside, judges generally are unable to avoid being influenced by relevant but inadmissible evidence of which they are aware.³⁷⁶ Similarly, emotion is likely to exert influence notwithstanding efforts at suppression. Even setting aside the normative question of whether emotion should play a role in judging, a conversation worthy of far greater exploration than is possible here,³⁷⁷ whatever role it might

372. OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES, *supra* note 99, at 1–2 (noting that such predispositions referred to as “action tendencies”).

373. Misdirection is a danger because physiological arousal tends to take a relatively consistent form across emotional states. Consider that both grief and joy can cause tears, and both fear and anger involve elevated heartbeat. *See* NATURE OF EMOTION, *supra* note 101, at 235–62 (collecting scientific perspectives on whether emotions have distinct physiological patterns). People distinguish between these different states not only on the basis of how they feel in the body but also the thoughts with which they are accompanied. That is, we largely understand our emotions based on the interpretation we give to our arousal. Thus, studies have shown that persons who are unaware of (or out of touch with) the reason for their physiological arousal will search for an explanation in their environment. That explanation may be entirely wrong. WEGNER, *supra* note 118, at 146–48 (discussing classic model of Stanley Schachter & Jerome E. Singer, *Cognitive, Social and Physiological Determinants of Emotional State*, 69 PSYCHOL. REV. 379 (1962)); *see also* A.S.R. Manstead, *A Role-Playing Replication of Schachter and Singer’s (1962) Study of the Cognitive and Physiological Determinants of Emotional State*, 3 MOTIVATION & EMOTION 251 (1979); Donald G. Dutton & Arthur P. Aron, *Some Evidence for Heightened Sexual Attraction Under Conditions of High Anxiety*, 30 J. PERSONALITY & SOC. PSYCHOL. 510 (1974).

374. *Whac-A-Mole*, <http://www.bobsspaceracers.com/whac-a-mole/html-index.htm>.

375. Heilman et al., *supra* note 35, at 258 (citing Karen Pezza Leith & Roy F. Baumeister, *Why Do Bad Moods Increase Self-Defeating Behavior? Emotion, Risk Taking, and Self-Regulation*, 71 J. PERSONALITY & SOC. PSYCHOL. 1250 (1996)).

376. Wistrich et al., *supra* note 352, at 1251.

377. Maroney, *supra* note 11.

actually be playing should, at a minimum, be as transparent as possible, if for no other reason than to facilitate that conversation.

These reasons are sufficient to demonstrate suppression's unjustifiable costs in the judging context. But there is another reason to be wary. Suppression indirectly can harm judging by harming judges.

C. Emotional Suppression Is Bad for Judges

Judges who routinely suppress emotion and its expression eventually are changed by that routine. What began as an episodic response can ossify into a trait,³⁷⁸ and judges risk developing what is known in the psychological literature as a repressive coping style.³⁷⁹ It is abundantly clear from the clinical literature that a repressive coping style is bad for judges as people. Unrealistic, inflexible patterns of coping with emotional demands are associated with poor health outcomes, including anxiety, hypertension, and coronary heart disease.³⁸⁰ Denying and repressing negative emotions, in particular, often takes a toll on psychological wellbeing, hampering one's ability to adjust well to life's challenges.³⁸¹

More important here, a repressive coping style is almost certainly bad for judges *qua* judges. The memory impairments attending repression can become endemic, developing into "global deficits in memory formation."³⁸² Habitual suppression fosters overconfidence in judges' ability to control emotion.³⁸³

378. Bargh & Williams, *supra* note 105, at 437. Once nonconscious, regulation's influence becomes impervious to change, much as the decision effects of emotion itself cannot be consciously regulated if one is unaware of it. *Id.* at 438 ("You can't hit what you can't see.").

379. Geraerts et al., *supra* note 361, at 1451; Koole, *supra* note 24, at 20; Lynn B. Myers & Nazanin Derakshan, *To Forget or Not to Forget: What Do Repressors Forget and When Do They Forget?*, 18 COGNITION & EMOTION 495 (2004) (asserting that emotional repressors are "self-deceivers"); Westen & Blagov, *supra* note 345, at 378.

380. Chambers et al., *supra* note 152, at 564 (noting difficulties that stem from "frequent or automatic attempts to control or suppress emotional experience and expression"); Cisler et al., *supra* note 125, at 68; see generally Oliver P. John & James J. Gross, *Healthy and Unhealthy Emotion Regulation: Personality Processes, Individual Differences, and Life Span Development*, 72 J. PERSONALITY 1301 (2004).

381. WEGNER, *supra* note 118, at 9.

382. Shane & Peterson, *supra* note 350, at 551, 554 (arguing that though "individuals who utilise such motivated cognitive avoidance techniques may rate themselves as happier, and may evidence reduced levels of stress and anxiety after severe trauma, serious cognitive and intellectual effects may result"). Habitual suppressors display significant memory deficits, particularly for negatively valenced material, even when that negatively valenced material was not self-relevant. That is to say, they have worse memory for events that caused bad feelings in other people—not just in themselves. *Id.*

383. Though persons who suppress emotion tend to report experiencing less negative emotion, they exhibit not just impaired cognitive and social skills but also greater physiological reactivity. Mauss et al., *supra* note 25, at 48; see also Ineke Wessel & Daniel B. Wright, *Emotional Memory Failures: On Forgetting and Reconstructing Emotional Experiences*, 18 COGNITION & EMOTION 449, 453 (2004); Shaver et al., *supra* note 251, at 126, 129 (finding that people who claim to be fully in control show dissociation between that belief and nonconscious measures of emotion); Westen & Blagov, *supra* note 345, at 378 (defining disjuncture as "illusory mental health").

Habitual suppression can also manifest in selective criticism of threatening information, trivializing or selectively forgetting such information, making self-serving attributions, inflating one's self-concept, engaging in downward social comparison, and derogating others.³⁸⁴ Emotional suppression too easily can move judges down a path of becoming arrogant and dismissive. Whatever qualities we may want from our judges, those are not among them.

This is not an idle concern; judges sometimes display just such traits. A vivid example of this phenomenon was recently described by the Supreme Court of Florida, which took the radical step of removing from office a judge who repeatedly had treated litigants and lawyers in a callous, rude, condescending, and abusive manner.³⁸⁵ Not only were these undesirable traits apparently caused by the judge's inflexible efforts at emotional suppression, but those same efforts were singularly ineffective at actually controlling his emotions. The judge's own psychiatrist testified that a repressive anger-management style had come to define the judge's personality, with devastating effects on his judging.³⁸⁶ By constantly "striving to demonstrate calm in difficult situations," she testified, the judge eventually "placed himself in" a state of "emotional over-control."³⁸⁷ His drive to control his emotions became so strong that he was unable to "incorporate emotions into his life without worrying he would display inappropriate anger"—which, inevitably and ironically, he did.³⁸⁸

Taken together, this evidence strongly suggests that judges may become overconfident in their ability to eliminate emotion by willing themselves not to feel it, denying that they do, and controlling its outward expression.³⁸⁹

384. Koole, *supra* note 24, at 20; *see also* Shaver et al., *supra* note 251, at 136–37 (stating that persons who habitually avoid emotion are prone to “grumble about the burden” of helping needy others and “express disapproval, lack sympathy and compassion,” and “feel pity, inferior to oneself, and can be accompanied by disgust or disdain. Avoidant attachment (measured with a self-report questionnaire) is inversely associated with endorsing two self-transcendent values, benevolence (concern for close others) and universalism (concern for all humanity”).

385. *In re Sloop*, 946 So.2d 1046 (Fla. 2007) (per curiam). Judge Sloop had (among other offenses) issued nonappearance warrants for eleven traffic-offense defendants, though they had obeyed official instructions to wait in the wrong courtroom. The eleven traffic offenders therefore were handcuffed, chained, taken to jail, strip-searched, and held for nine hours. When later confronted by another judge, Sloop said he did not think it was a “big deal.” *Id.* at 1051; *see also id.* (opining that this was “a very big deal . . . Judge Sloop’s callous disregard for these individuals was the antithesis of his judicial obligations.”).

386. *Id.* at 1052.

387. *Id.* at 1053.

388. Sloop had been accused of misconduct before for failing to control his temper and had agreed to participate in “anger management” therapy. However, the testifying clinicians indicated that “lack of empathy,” tendency to try to over-control emotion, and use of anger as a mechanism to control others had become features of his “personality.” *Id.* at 1053, 1057.

389. WEGNER, *supra* note 118, at 15 (noting “seductive” illusion that we can will ourselves to control thoughts, feelings, and behaviors). Overconfidence has its own downsides, perhaps because it discourages self-examination and learning. *See, e.g.*, Stuart Oskamp, *Overconfidence in Case-Study Judgments*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 287, 292 (Daniel

Suppression's ineffectiveness may itself create another set of emotions—frustration, unhappiness, or even shame, triggered by the judge's failure to satisfy the ideal of emotionless judging.³⁹⁰ Routinely to suppress emotions, then, is "just as rigid as to always *act* on them."³⁹¹

Finally, just as suppression indirectly can harm judging by harming judges, engagement indirectly can benefit judging by benefiting judges. Emotional engagement strategies—such as disclosure—have been shown to "buffer against health risks"³⁹² and are associated with measures of mental health and wellbeing. While primarily relevant to judges as people, this health bonus is also good for judging, as it reduces burnout and increases professional longevity.³⁹³ Though not an independent basis for embracing the engagement model, these additional benefits confirm the wisdom of doing so.

CONCLUSION

This Article has asked that we go beyond the blanket admonition to judges that they simply set emotion aside, and instead to imagine a world in which they are able transparently to manage the emotions they cannot help but feel. Elsewhere I have called for our legal culture to let go of the script of judicial dispassion,³⁹⁴ this Article has shown the sort of analysis in which it is possible to engage once we do. It has offered a model that is grounded in the best of what the psychology of emotion regulation has to offer, that is achievable, and that is compatible with our highest aspirations for judges' professional competence.

The judicial-engagement model puts a name to what extraordinary judges already are doing well. There always have been judges willing to break with script and confess that emotion plays a role in their professional lives. Over time, many undoubtedly also have found ways to cope with it well. Judges high in natural emotional intelligence likely have found it intolerable to implement professionally strategies utterly at odds with those they engage personally, and

Kahneman et al. eds., 1982) (stating that overconfidence can manifest in certainty that is "entirely out of proportion to . . . actual correctness").

390. See Lazarus, *supra* note 140, at 164 & tbl.1 (defining cognitive content of shame as failure to live up to an ego ideal). Whether judges do feel these negative emotions in response to perceived failures of self-control is an interesting empirical issue worthy of exploration. The accounts gathered herein suggest that they likely do. See *supra* note 78 (reporting that Australian magistrates related finding it difficult to live up to the ideal of dispassion); *supra* note 330 (showing that judge felt conflicted, or "bad-good," for being unable to control himself as he thought he was supposed to); *supra* note 295 (suggesting that a metacognitive approach might be appropriate for such emotions about emotions if they cannot otherwise be regulated through engagement).

391. Bargh & Williams, *supra* note 105, at 433 ("emotion regulation . . . should not be just a blanket, unconditional affair of suppressing or attenuating one's emotional reactions").

392. Cisler et al., *supra* note 125, at 79; Grandey, *supra* note 52, at 107.

393. Mauss et al., *supra* note 25, at 52 ("positive consequences such as lower levels of burnout and greater job satisfaction"). Concrete "burnout" costs, such as "less empathy and connection with citizens," have been shown in police officers. Grandey, *supra* note 52, at 104–07.

394. Maroney, *supra* note 11.

on their own have come to unify the two. These, perhaps, are the judges we think of as having a good judicial “temperament,” an oft-invoked but profoundly underspecified quality.³⁹⁵ But they are swimming against the tide. We should take no comfort in the fact that some judges will do naturally what we tell them not to do and will achieve privately what we discourage publicly.

Not only is such a state of affairs disingenuous, but it delegates the possibility of productive emotion regulation only to those judges with unusual personal skill. Certainly there always have been doctors who have managed to avoid the pitfalls of their training because of innate skill, but the profession and those it serves are far better off if doctors with less natural skill come to acquire it. Emotion regulation skills can be learned.³⁹⁶ Sometimes life itself provides the laboratory; some studies indicate that capacity for adaptive emotion regulation tends to increase among the elderly.³⁹⁷ But we should no more leave the process to time as to nature, particularly since poor regulatory skills can become dangerously self-perpetuating. The cramped set of beliefs about emotion built into our judicial ideal is a prime candidate for such a negative cycle, as it stifles experimentation and learning.

The transition to judicial engagement may feel awkward in a legal culture geared so strongly toward suppression. It requires, as a starting point, that judges be at least somewhat aware of their emotions. Once past that threshold, though, engagement fosters increased awareness. The more one practices engagement the more effective it becomes. In contrast, those who suppress their emotions are both less aware of and less in control of them.³⁹⁸ As Wegner suggests, the best way to manage emotion is not to endlessly twist the ratchet toward greater control; we instead must “avoid the avoiding.”³⁹⁹ By fostering emotional engagement we not only support judges: we stand to improve the quality of judging.

395. See John & Gross, *supra* note 149, at 351; Mary K. Rothbart & Brad E. Sheese, *Temperament and Emotion Regulation*, in *HANDBOOK OF EMOTION REGULATION*, *supra* note 24, at 331. The medical analogue might be “bedside manner,” similarly valued but historically neither well-defined nor adequately trained.

396. Wranik et al., *supra* note 104, at 403 (“[W]e are hopeful that many can improve their emotion regulation skills by learning more about emotions and by putting new knowledge into place.”).

397. Susan Turk Charles & Laura L. Carstensen, *Emotion Regulation and Aging*, in *HANDBOOK OF EMOTION REGULATION*, *supra* note 24, at 307.

398. See Grandey, *supra* note 52, at 106; Koole, *supra* note 24, at 19; Shaver et al., *supra* note 251, at 125 (“Inability or unwillingness to deal openly with the causes of painful emotional states confines avoidant people to a single regulatory path: suppressing emotion or dissociating oneself from its manifestations in experience and behavior. . . . These regulatory efforts consist of denial or suppression of emotion-related thoughts and memories, diversion of attention from emotion-related material, suppression of emotion-related action tendencies, and inhibition or masking of verbal and nonverbal expressions of emotion.”).

399. Wegner, *supra* note 357, at 50.

