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# The Dialogue of Heart and Head

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# THE DIALOGUE OF HEART AND HEAD

*Lynne Henderson\**

But what are you going to do about the people who are cursed with both hearts and brains?

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... I'm beginning to think they have to choose.<sup>1</sup>

Justice Brennan in his Cardozo lecture has gently reminded us of something about judging, about being a judge, that legal culture and legal scholars have persistently resisted or overlooked. He has said that a judge cannot truly approach "objectivity" until the judge recognizes the subjective, experiential, and emotional "influences" on his or her reason.<sup>2</sup> He further has stated that "[s]ensitivity to one's intuitive and passionate responses, and awareness of the range of human experience, is . . . not only an inevitable but a desirable part of the judicial process, an aspect more to be nurtured than feared."<sup>3</sup> Despite Justice Brennan's claim that we now accept this version of judging, I believe that fear rather than nurture still prevails. While many scholars are seeking ways to humanize law, the prevailing view of law and judging is that law is reason, that emotion is antithetical to reason and law, that reason and law must control, suppress, and dominate emotion, and that emotion or passion is dangerous. It is not only Justice Brennan's bureaucratic state or "the government"—of which judges are a part—that must blend "rationality and empathy,"<sup>4</sup> but also the judiciary and the legal community.

Law abhors the passion Justice Brennan would give it.<sup>5</sup> And it is not only the law that abhors emotion—philosophy, science, and West-

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<sup>1</sup> D. Sayers, *Gaudy Night* 59 (Avon ed. 1968). The quote may be slightly snatched out of the context of the particular conversation, but it characterizes a major theme of this book, one that I would recommend to academics in the same way Richard Weisberg recommends literature about law to judges in his contribution to this symposium. See Weisberg, *Judicial Discretion, or the Self on the Shelf*, 10 *Cardozo L. Rev.* 105 (1988).

<sup>2</sup> Brennan, *Reason, Passion, and "The Progress of the Law,"* 10 *Cardozo L. Rev.* 3 (1988) [hereinafter Brennan].

<sup>3</sup> *Id.* at 10.

<sup>4</sup> *Id.* at 22.

<sup>5</sup> Chief Judge Patricia M. Wald notes that judges, teachers, "legal gadflies," and "interdisciplinary" all "preach a theology of rules and 'objective' or 'neutral' standards by which the infinite variety of human dilemmas can be categorized and resolved, without getting very in-

ern culture have explicitly condemned it since the Enlightenment. As a result, people cursed with both hearts and brains are often faced with an either/or: either they suppress their hearts or they suppress their brains. The discourse of emotions has perhaps been preserved in literature and poetry, but it is underdeveloped or nonexistent elsewhere, even in psychology. Thus, Justice Brennan's attempts to capture and describe what he means, and the characteristics he thinks are obvious for judges today, seem open to the accusation of hopeless vagueness—"intuition," "passion," "feeling," and "sentiment" are hardly "rigorous." These words instead often carry pejorative connotations in legal discourse. Yet Justice Brennan's other point—that law falls toward rationalistic formalism without some access to other forms of understanding—is an essential one for a subject as deeply concerned with the human condition as is law. His "dialogue between heart and head" is an important beginning,<sup>6</sup> but in a world where the head has been given all the words, it is difficult to have a dialogue. This commentary will attempt to elucidate how that dialogue might take place.

This commentary will suggest that law's denial of the heart has been persistent and is rooted in the tenacity of the belief that reason and desire are separate and irreconcilable. The history of the "antinomy of reason and desire"<sup>7</sup> is a long one, and the values of legality make it especially difficult for lawyers and legal thinkers to accept that emotion and reason are interconnected rather than separated. I will further suggest that the separation of reason and emotion is a false one, using both psychological and feminist perspectives. I will

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volved with the feelings or reactions of people." Wald, *Disembodied Voices—An Appellate Judge's Response*, 66 *Tex. L. Rev.* 623, 623 (1988).

Dean Yudof's response to Dean Getman's appeal for awareness of the human, of emotion, and of experience in legal analysis typifies this reaction. Yudof, *Tea at the Palaz of Hoon: The Human Voice in Legal Rules*, 66 *Tex. L. Rev.* 589 (1988). Dean Getman's essay makes the modest point that the "professional voice" of law frequently interferes with a lawyer's understanding of the human situations law involves. Getman, *Colloquy: Human Voice in Legal Discourse*, 66 *Tex. L. Rev.* 577 (1988). He argues that "[i]n advocacy, being able to convey the client's sense of injury, needs, values, and feelings in a way that elicits understanding and empathy often is far more important than one's ability to cite the relevant rules. . . ." *Id.* at 583. Conversely, Yudof spends a great deal of time defending rules, asserting that "it is natural to think conceptually and abstractly," and that it is "natural for persons to assume that abstract rules and human experience inevitably will conflict." Yudof, *supra*, at 620. Use of the human voice, of empathy, in the legal process would be the end of law, *id.* at 595, or create *qadi* justice. Moreover, "[t]he human voice alone carries some risk of bias, prejudice, and passion." *Id.* at 596. Yudof's overall thesis seems to be that law and the human are necessarily different, and that any role the human voice should have is *external* to "law." *Id.* at 594.

<sup>6</sup> Brennan, *supra* note 2, at 12.

<sup>7</sup> R. Unger, *Knowledge and Politics* 51-55 (1974); D. Westen, *Self & Society: Narcissism, Collectivism and the Development of Morals* 107 (1985).

argue, as Justice Brennan has, that the emotional and experiential knowledge of a judge is valuable, that it is more fearful when it is repressed than acknowledged, and more subject to abuse when denied or suppressed than explicitly recognized. Finally, I will try to explore the reconciliation of rationality and emotion that Justice Brennan seeks.

## I. THE SPLIT OF "REASON" FROM "EMOTION"

In our dominant tradition, [emotionality] has not been seen as an aid to understanding and action. We have a long tradition of trying to dispense with, or at least to control or neutralize, emotionality, rather than valuing, embracing, and cultivating its contributing strengths.<sup>8</sup>

### A. *Historical Influences*

The technological age has produced persons trained in "reason" but split off from the other dimensions of human existence. The splitting off of reason from "desire" dates back at least to the Enlightenment; the *cogito* was an important break for individual value and freedom, but like many great "discoveries," it became twisted and didactic over time.<sup>9</sup> "Emotions" became bad, irrational, and separate from transcendent man. Emotions, passions, and "the natural" became frightening specters that had to be suppressed or controlled by "reason." While it is true that some philosophers, particularly the utilitarians, took emotions into account, they still appealed to reason: objectivity and reason would guide application of the principle of utility.<sup>10</sup> It appears that "neutrality" and "objectivity" became the highest goods, achievable by pure cognition alone. Feelings and bodies

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<sup>8</sup> J. Miller, *Toward A New Psychology of Women* 38 (2d ed. 1986).

<sup>9</sup> This discussion draws on M. French, *Beyond Power* (1985); E. Keller, *Reflections on Gender and Science* (1985); J. Randall, Jr., *The Making of the Modern Mind* (1926). See Minow & Spelman, *Passion for Justice*, 10 *Cardozo L. Rev.* 37 (1988) (excellent discussion of the philosophic history of reason and emotion).

<sup>10</sup> Bentham listed painful and pleasurable emotions as matters to be taken into account in the calculus. J. Bentham, *An Introduction to the Principles of Morals and Legislation* 42-50 (1870). Nevertheless, he disapproved of any role the "principle of sympathy and antipathy" might play in lawmaking. *Id.* at 60-61. See M. French, *supra* note 9, at 288-90.

Hume is the one philosopher that I know of who dealt with the interrelation of reason and emotion in his work, but unfortunately I am unfamiliar with how subsequent scholars developed this approach. See D. Hume, *An Inquiry Concerning Human Understanding* (1955). The "Kantian" tradition, however, maintained the severance. See L. Blum, *Friendship, Altruism, and Morality* (1980). Justice Brennan refers to Thomas Jefferson's "*Dialogue Between My Head & My Heart*," Brennan, *supra* note 2, at 9, but Jefferson appears to ground morals on sentiment alone. *Id.* For a recent work that denies the split in moral philosophy, see L. Blum, *supra*.

and human connection were split off from the ideal and relegated to the not-quite-human domains of women, slaves, and other unfamiliar or feared beings. For example, women could not and did not "reason"; their relegation to the emotional, human, and connected realm ostensibly made them incapable of higher rationality. The Age of Reason rendered any possible dialogue between the heart and head a monologue. Even the Romantic Age's flirtation with the emotional and experiential perpetuated the split by privileging the emotional, again blocking dialogue.

The emphasis on "reason" has maintained its tenacious hold on much of our thinking. Emotions and the emotional realm are seen as bad. They are the source of evil in human nature—mobs, violence, hate—that must be suppressed. Love, sympathy, compassion, and human connection are seen as "mere sentimentality," as "not tough." Stated most strongly, if the "bad" emotions are recognized *at all*, we would have chaos or Naziism. If the "good" emotions are recognized *at all*, we would have lack of rigor and progress.

For example, Roberto Unger is one modern social theorist who has attempted to explore the relation of reason to the "passions"—some of which are not actually emotions but, rather, constitute the "seven deadly sins." Unger's view is not a particularly positive one. Unger divides "passions" into "good" and "bad" and argues that "bad" emotions always threaten to overcome the "good" ones, which are exceedingly fragile.<sup>11</sup> He explains emotions through the dominant vision of fear of the other: all the passions arise from longing and jeopardy.<sup>12</sup> While Unger acknowledges paradoxes in "good" emotions, such as love, he seems less inclined to acknowledge the presence of paradox in "bad" emotions, such as hatred.<sup>13</sup> But hatred, like anger, like fear, can be either "good" or "bad." While anger or hatred can lead to violence and aggression, they also can lead to construction as well. Although, as Unger observes, hatred is aimed at destroying the hated person or thing, and is therefore quite dangerous, the impulse to destroy evil is not altogether "bad." It is the action that follows that can be bad or good. Thus, when we speak of "hatred of injustice," we speak of an affective response to perceived injustice that might lead to a positive change. Obviously, "injustice" has disputed

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<sup>11</sup> R. Unger, *Passion: An Essay on Personality* 220-21, 224 (1984).

<sup>12</sup> *Id.* at 174.

<sup>13</sup> *Id.* at 193-95. Unger distinguishes hatred and envy from "justified indignation," which presumably is rationally determined. *Id.* at 211-19. Love, the "cure" for the vices, is undermined by the fear of another because of the threat the other presents. "[L]ove cannot be pure. It must be accompanied by the presentiment of its own fragility and by at least a suggestion of defensive repugnance and inscrutability toward the other." *Id.* at 221. See *id.* at 220-47.

content, individually and culturally defined, but hatred or anger at "injustice" (hatred and anger may merge here) can strongly influence reason and efforts to eliminate or reconstruct the unjust situation. Certainly if we cease to be *angry* about human oppression, about evil, then we cease to be human, or at least become dangerously detached from human suffering.<sup>14</sup>

The horrors of angry mobs, the French Revolution, lynching parties, and the violence of hatred caution against celebration of emotion. But another emotion, fear, certainly plays a role in our wish to suppress these horrors. Some of that fear derives from the lack of individual control that such phenomena manifest. Control over one's environment through predictability and "rational" management helps alleviate that fear.<sup>15</sup> Further, if all is turned upside down and unpredictable, we may lose ourselves.<sup>16</sup> In many ways, then, reason appears to be safer than emotion. Because being overwhelmed by emotion can be traumatic, we fear it and seek to avoid it. Given current understandings, to speak of being "overwhelmed by reason" as dangerous or frightening seems meaningless. But domination and control become distorted when they become ends in themselves. And this is equally true of the domination of the emotional realm through "reason."

### B. *Images of the Ideal Judge and Reason*

One consequence of the urge to dominate and control is that the law becomes distorted, or "falls" toward formalistic rationality. This happens in two ways: the law can become a closed system of reasoning from rules and principles to conclusions, and it can become a habitual and rigid practice, reproducing itself oblivious to critique or new understanding. The Realist battle against the Formalists, Justice Cardozo's shift in understanding described by Justice Brennan, and Justice Brennan's concern with the formality and rigidity of bureaucratic structures are examples of the battle against law's tendency to

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<sup>14</sup> West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 *Harv. L. Rev.* 1449, 1450 (1986).

<sup>15</sup> At least this is true of people in this culture. Martin Seligman's theory of "learned helplessness," the concern with personal "efficacy" and diminution of stress, developed through control over one's environment, may be a peculiarly American emphasis on instrumentality. M. Seligman, *Helplessness* (1975). To a point, the fear of lack of control over one's environment is healthy one. For example, the progress against famine and disease arising from the fear of and the wish to control nature has added to human well-being.

<sup>16</sup> This surely happens to many persons when their day-to-day worlds collapse. The extreme example of the Nazi concentration camps, with their total, systematic destruction of their victims' points of reference and marks of personal identity, supports this point. See B. Bettelheim, *Surviving and Other Essays* (1979); E. Wiesel, *Night* (1958).

“fall” towards frozen, rather than dynamic, meaning. The danger in the opposite direction is perceived to be a loss of certainty; of whim or caprice at best and the unleashing of horrible human passions at worst.<sup>17</sup> Yet law takes place on a *human* field, and to lose sight of this reality in the search for predictability and control results in abuse of the human, as well as in suppression or repression of the knowledge provided by the emotions. And perhaps nowhere does this tenacious ideology appear more obviously than in the dominant vision of judges that Justice Brennan seeks to disclaim, as well as more subtly in the legal culture’s emphasis on the discourse of “reason.” We still cling tenaciously to the perspective-free, unemotional, impartial, unbiased, and rational model of judging.

Judith Resnik in *On the Bias* looks to specific areas of law and the canons of judicial ethics, finding a persistent ideology of neutral, detached, impartial, and eminently reasonable judges.<sup>18</sup> Ronald Dworkin’s *Hercules* reaches his opinions rationally by reasoning from texts and principles to the “best” interpretation—surely without the benefit of data on emotion.<sup>19</sup> But judges *do* have experiences that influence them and points of view and perspectives, to which they may have strong emotional attachments.<sup>20</sup> To deny this fact is to permit less self-critical and reflective thinking by judges because it allows them to deny that any of these human qualities influence them or affect their decisions.

## II. THE DOUBLE HELIX OF REASON AND EMOTION AND THE JUDICIAL ENTERPRISE

Jerome Frank’s *Law and the Modern Mind*, first published in the 1930’s,<sup>21</sup> was a beginning effort to critique the belief in law-as-reason from the perspective of psychoanalytic theory. Freud had seemingly demolished the notion that man was solely a creature of reason by demonstrating that there are “weird things going on in there.”<sup>22</sup> Drawing on analytic work, Frank stated that: “We cannot, if we would, get rid of emotions in the field of justice. The best we can hope

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<sup>17</sup> Yudof, *supra* note 5, at 594-96; cf. Cohen, Justice Brennan’s “Passion,” 10 *Cardozo L. Rev.* 193, 200 (1988) (fearing that acknowledgement of “passions” in judicial decision making will lead to a lack of “cool, critical thinking before feelings are allowed to erupt into action”).

<sup>18</sup> Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 *S. Cal. L. Rev.* (forthcoming 1988) (draft copy on file with author).

<sup>19</sup> R. Dworkin, *Law’s Empire* 337-41 (1986).

<sup>20</sup> See *infra* text accompanying notes 31-45.

<sup>21</sup> J. Frank, *Law and the Modern Mind* (1936).

<sup>22</sup> Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 *Yale L.J.* 1373, 1390 (1986).

for is that the emotions of the judge will become more sensitive, more nicely balanced, more subject to his own scrutiny, more capable of detailed articulation."<sup>23</sup> He also acknowledged the tremendous resistance to acceptance of the role of "temperament, training, biases and predilections" of judges,<sup>24</sup> which he attributed to emotional attitudes towards law-as-father in childhood.<sup>25</sup> Because Frank tended to view emotions as negatives, he urged that the judge be psychologically sophisticated and that he interrogate himself "so that he might become keenly aware of his own prejudices, biases, antipathies, and the like."<sup>26</sup>

The resistance to exploring emotional influences appears to have continued; Frank's book, his interest in studying how judges reach decisions, and his speculations that they responded to intuitions and justified them *ex post facto*, did not generate much further scholarly inquiry.<sup>27</sup> Frank himself went on to be a judge and the important work he started never continued in legal scholarship. Instead, the realist project of exposing the subjective element of judging gave way to the process school, which was concerned with distinguishing "law" from other disciplines. Process theorists sought to restore doctrinal and institutional constraints on what they perceived to be the threat of unfettered power the realists would give to judges.<sup>28</sup> The process school's emphasis restored dominant legal beliefs about reason, neutrality, objectivity, and impartiality as the way judges should and do decide cases. These beliefs continue, despite the occasional shocks to the system provided by the publication of biographies of Supreme Court Justices<sup>29</sup> or books such as *The Brethren*.<sup>30</sup> The ideal judge was not the human being interrogating his own attitudes, beliefs, and point of view as well as legal materials, but rather Hercules, who objectively canvassed legal materials and his own reasoning for the "best" interpretation.<sup>31</sup>

Something about Frank's book may have been threatening to

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<sup>23</sup> J. Frank, *supra* note 21, at 143.

<sup>24</sup> *Id.* at 115.

<sup>25</sup> *Id.* at 116, 243-52.

<sup>26</sup> *Id.* at 147 n.\*.

<sup>27</sup> Frank's insistence that emotion in its many forms played as determinative a role in judicial decisionmaking as "reason," even though Frank took pains to note that legal rules and principles were indispensable for the conscientious judge, certainly suggested a need for study. *Id.* at 130-31. But while legal scholars make occasional reference to apparent judicial quirks, they have not studied the influence of emotion.

<sup>28</sup> White, *The Anti-Judge: William O. Douglas and the Ambiguities of Individuality*, 74 *Va. L. Rev.* 17, 80 (1988); see J. Ely, *Democracy and Distrust* (1980).

<sup>29</sup> B. Murphy, *The Brandeis/Frankfurter Connection* (1983).

<sup>30</sup> B. Woodward & S. Armstrong, *The Brethren* (1979).

<sup>31</sup> See R. Dworkin, *supra* note 19.



legal scholars as its thesis virtually has been ignored. His work may have been flawed, but it was deserving of further study. Instead, the part of the realist project dedicated to examining the manner in which judges actually decided cases has been dismissively caricatured as the "what the judge had for breakfast" approach. Perhaps legal scholars did not know how to examine or test Frank's claims, perhaps they accepted them as self-evident or perceived them as things to be avoided, perhaps they did not see the rich suggestiveness of the book.<sup>32</sup> A developing literature on the psychodynamics and psychology of presidential decisions, for example, could have suggested a path for following up Frank's work. Yet, with a few exceptions, this has not occurred.<sup>33</sup> Overlooking this early work, however, has had its costs; it has impoverished our understanding of judicial decisions and behavior, creating a void in our knowledge. It also permits us to maintain a "Wizard of Oz" illusion about judging that may be comforting but is also based on a potentially dangerous falsehood.<sup>34</sup>

#### A. *Emotion and Reason*

"Human beings are creatures who both think and feel, and any theory that begins with the assumption of the primacy of either cognition or dynamics can only be a partial theory."<sup>35</sup> The fact was and is, humans are not and have never been computers. Our reasoning capacities, our cognitions, perceptions, and knowledge, are also linked to affective states and affective conditions, and judges are no exception. Reason does not operate independently of our human selves—it is complexly intertwined with the affective and physical worlds. Emotion connects to motivation, for example. Although the classic view

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<sup>32</sup> As the judiciary is insulated from view, another real problem for legal scholars, of course, has been the dearth of information about how judges decide cases. For example, obtaining information about living judges from their former clerks is difficult—there is a vow of silence, formal or not, that is hard to overcome.

<sup>33</sup> For examples of presidential decisionmaking literature see J. Barber, *The Presidential Character* (1977); A. George & J. George, *Woodrow Wilson and Colonel House* (1964); I. Janis, *Victims of Groupthink: A Psychological Study of Foreign Policy Decisions and Fiascoes* (1972); R. Johnson, *Managing the White House: An Intimate Study of the Presidency* (1974). Hirsch's biography of Frankfurter explicitly acknowledges the contributions of Alexander George, for example. H. N. Hirsch, *The Enigma of Felix Frankfurter* 9, 202, 206, 209, 214-15 (1981). White's essay on Justice Douglas also takes a dynamic approach, White, *supra* note 28, and his biography of Earl Warren touches on developmental influences on Warren's life as Chief Justice. G. E. White, *Earl Warren: A Public Life* (1982).

<sup>34</sup> Characterization by Charles Goetz & Robert Scott, *Cleveland-Marshall Faculty Meeting* (March 9, 1988). See Minow & Spelman, *supra* note 9, at 923 n.76; see also Wald, *supra* note 5, at 624 ("And is it better to back away a bit from the cacophony of 'human voices' in some volatile situations so that we can all live in the same society under the mythical umbrella of a cool, dispassionate, principled rule of law?").

<sup>35</sup> D. Westen, *supra* note 7, at 183.

of science portrays scientific work as rational and detached, the scientist in her or his pursuit of a breakthrough feels excitement, anxiety, joy, and despair, all of which motivates her or him to pursue the project. Likewise the judge *may* have the same experiences even though the dominant view of law and judging is also one of a purely rational enterprise.<sup>36</sup> Certainly, lawyers experience these emotions while working on (some) cases or projects, as do law professors, both in teaching and writing.

Yet the manner in which reason and emotion interact is complex and not well understood, in part because of the historic denial of the connection.<sup>37</sup> Emotions (for adults) are not "raw feels" or even "facts," but signal meaning and value as well. Emotion can be a mode of understanding and is a way of knowing something about oneself, one's environment, or a situation. Emotion interacts with cognition in various ways, both consciously and unconsciously.<sup>38</sup> It can be unique to an individual in a particular context or it can be more culturally mediated in a group.<sup>39</sup> For example, consider the affective associations brought up for members of the legal culture by the names "Plessy" and "Lochner."<sup>40</sup> Emotion can illuminate understanding and it can cloud it. Classes or categories become associated with affects, and vice-versa.<sup>41</sup> Consider, for example, the associations connected with the category "mother." Affect can aid or distort memory,<sup>42</sup> and mood influences thought and perception.<sup>43</sup> One emotion can be activated to defend against another, less pleasant, emotion, and this will influence thought accordingly.<sup>44</sup> Emotion remaining unconscious, repressed, or denied can *still* influence thought or motivation.<sup>45</sup> Emotion and reason are not "either/or," but components of thinking and decisionmaking that interact. And ironically, affect can produce reasoning in a certain way. For example, studies have shown that creating an affective state in subjects will influence their answers to later questions.<sup>46</sup>

Judicial decisions do not take place on a purely defined field, be-

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<sup>36</sup> Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. Legal Educ. 518 (1986).

<sup>37</sup> See supra notes 8-11 and accompanying text.

<sup>38</sup> D. Westen, supra note 7, at 64-70, 78.

<sup>39</sup> Id. at 82.

<sup>40</sup> Plessy v. Ferguson, 163 U.S. 537 (1896); Lochner v. New York, 198 U.S. 45 (1905).

<sup>41</sup> D. Westen, supra note 7, at 82.

<sup>42</sup> Id. at 40-41, 54-55, 62.

<sup>43</sup> Id. at 84-91.

<sup>44</sup> Id. at 82-83.

<sup>45</sup> Id. at 66.

<sup>46</sup> Id. at 51-52, 69-70.

cause many cases are messy and human. Reason can take the judge only so far—his or her emotive knowledge may inform his or her choice as well.<sup>47</sup> Emotion can influence judicial decisions in several ways. It can influence the decisionmaker unconsciously, as in an attachment to a particular point of view. For example, a judge may have a certain “ideology” of judging; ideology by its very nature involves emotive as well as reasoned attachment. Emotion can influence a judge’s reaction to the case presented. It can be a catalyst for caution or change. It is closely tied to empathy, which informs the judge of the situation of the persons in a case.<sup>48</sup> A push or a pull can come from emotion, because emotion interacts with and informs cognition. If nothing else, the decision confronting a judge may cause him or her discomfort, which will lead him or her to suppress one side of the case or one solution to the problem.<sup>49</sup> Alternatives initially seen in equipoise cause distress; a decision must nevertheless be made. Accordingly, the decisionmaker discounts one alternative—rationally or not—to justify his or her choice and to reduce discomfort.<sup>50</sup> More than “reason” is operating in such instances, and it may help to explain why judges seemingly ignore perspectives or facts that would raise serious legal problems if acknowledged.

Emotion, as I have noted repeatedly, occupies an unprivileged status in our culture generally and more particularly in law. For example, Roberto Unger’s concern with “bad” emotions and the fragility of “good” ones in large part reflects the fear and bias against emotion of most modern western men.<sup>51</sup> Similarly, feminist writers, while constantly aware of the relegation of the emotional realm to women and its implications for women generally, have often eschewed elaboration of the emotions and their relation to decisions.

One theme that emerges in feminist writing, however, is a sensibility that resists the either/or, and that posits that mind and body, self and other, reason and emotion, interact and are involved with and connected to each other.<sup>52</sup> Rather than a line which has at one end

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<sup>47</sup> I use the awkward “his or her” formulation because the vast majority of judges are male. Nevertheless, there are woman judges and selection of either pronoun would mask both the dominance of male judges and the reality of female judges.

<sup>48</sup> See Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574, 1580, 1592 (1987).

<sup>49</sup> Festinger’s “cognitive dissonance” theory highlights this particular phenomenon. L. Festinger, *A Theory of Cognitive Dissonance* (1957).

<sup>50</sup> *Id.* at 42-45; I. Yalom, *Existential Psychotherapy* 322-23 (1980).

<sup>51</sup> R. Unger, *supra* note 11.

<sup>52</sup> Young, *Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory*, in *Feminism As Critique* 57 (S. Benhabib & D. Cornell eds. 1987); cf. E. Keller, *supra* note 9, at 163 (“[D]ifference . . . does not imply the necessity of hard and fast divisions in nature, or in mind, or in the relation between mind and nature. Division

point emotion, body, and other, and at the other end reason, mind, and self, there is a kind of double helix intertwining and combining these threads. From this comes a view of interconnectedness of reason and desire rather than a split. And the emphasis on interrelatedness creates a different view that perhaps can facilitate the nurture of the emotional realm rather than the fear of it. Because the relationship *is*, attending to it rather than suppressing or denying it will lead to better human and individual understandings.

The difficulty, of course, is in having the relevant community accept *that* vision. In a world attached to the division of reason and emotion and fearful of emotions, a contrary view may not be accepted. And the world of law, like the world of science, may resist this view, because of law's commitment to rationalization and ordering. Feminist legal writers particularly are caught in a trap: To speak of the emotions is to find oneself at the margins, if not excluded altogether, from the discourse of the law. Professor Minow has acknowledged as much when she noted, "[I]f we seek to be understood, let alone succeed, in a court of law, we must fit our claims into existing doctrine. . . . Yet by accepting the game as it is, we risk becoming tokens. . . ." <sup>53</sup> Yet some feminists and feminist legal theorists *are* beginning to explore the meaning of the emotion from the feminist experience. Concern for intimacy, relationships, and care; concern for empathic understanding; stories of emotion, pain, and pleasure; concern for compassionate, responsive judging emerges from some feminist theory. <sup>54</sup> The experiential, concrete, and contextual concern, including the recognition and use of the emotional realm, is one of the concerns of feminism—not that we *can't* abstract, we just refuse to privilege *that* pole in knowledge and discourse.

I have suggested elsewhere that empathy for others, particularly

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severs connection and imposes distance; the recognition of difference provides a starting point for relatedness.").

<sup>53</sup> Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 *Harv. L. Rev.* 10, 65-66 (1987) (footnote omitted); see also Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 *U. Miami L. Rev.* 29, 50-53 (1987) (discusses the benefits and drawbacks of assimilating groups traditionally excluded from the legal profession).

<sup>54</sup> See *supra* note 53; West, *Jurisprudence and Gender*, 55 *U. Chi. L. Rev.* 1 (1988). As Judith Resnik points out, feminist approaches to judging include an experiential aspect both of being a judge and being "a person in the courtroom who lacks the first name 'Judge.'" Resnik, *supra* note 18. Minow urges judges to take the perspective of the other. Minow, *supra* note 53, at 78-82. I have argued that empathy is important to decisionmaking. Henderson, *supra* note 48, at 1592. Robin West has argued that sympathy should have a recognized role in legal theory and in adjudication. R. West, *Taking Preferences Seriously* 56, 79-81 (Center for Philosophy and Public Policy Working Group on Judicial Ethics Working Paper, Fall 1987) (on file with author).

for ones unlike oneself, is important in at least some judicial decisions.<sup>55</sup> Empathy has both emotive and cognitive components: To empathize, one must be able to acknowledge the feeling and situation of another and to identify the feeling. Denial of emotion or inability to experience affect, therefore, blocks empathy. Empathy particularly seems relevant to judicial choice in situations involving the law's effect on human beings. I have posited that the decision will be closer to "the good" if empathic understanding exists. Further, empathic understanding is often vital to understanding the dimensions of the moral choice a judge faces, and it can help reframe the accompanying legal issues. Of course, experiencing affect alone may not be a signal of empathy. Rather, it can be a signal of threat, impatient anger, projection, or pleasure, resulting from the judge's own experiences, biases, prejudices, or beliefs. This, too, is important, because it *tells* the judge something she should take into account.

Generally speaking, decision is related to will, wish to will, and affect to wish.<sup>56</sup> Decision, therefore, is not necessarily always a willed, rational, phenomenon, but may be influenced by affective states. William James, who thought deeply about how decisions are made, described five types of decision, only two of which, the first and the second, involve "willful" effort:

1. *Reasonable decision.* We consider the arguments for and against a given course and settle on one alternative. A rational balancing of the books; we make this decision with a perfect sense of being free.

2. *Willful decision.* A willful and strenuous decision involving a sense of "inward effort." A "slow, dead heave of the will." This is a rare decision; the great majority of human decisions are made without effort.

3. *Drifting decision.* In this type there seems to be no paramount reason for either course of action. Either seems good, and we grow weary or frustrated at the decision. We make the decision by letting ourselves drift in a direction seemingly accidentally determined *from without*.

4. *Impulsive decision.* We feel unable to decide and the determination seems as accidental as the third type. But it comes from *within* and not from without. We find ourselves acting automatically and often impulsively.

5. *Decision based on change of perspective.* This decision often occurs suddenly and as a consequence of some important

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<sup>55</sup> See Henderson, *supra* note 48.

<sup>56</sup> D. Westen, *supra* note 7, at 53; R. May, Love and Will 202-22 (1969); I. Yalom, *supra* note 50, at 303-14 (1980).

outer experience or inward change (for example, grief or fear) which results in an important change in perspective or a "change in heart."<sup>57</sup>

It is a belief in the first as "best" and the third and fourth as "worst" that leads us to cling so tenaciously to purely cognitive models of judicial decisions. The fifth, the "change in heart," is a kind of paradigmatic shift decision,<sup>58</sup> and is the one that can arise from the dialogue of head and heart, from experience, from empathy.<sup>59</sup> This fifth type of decision seems to capture the phenomena Justice Brennan describes when he explains the alternatives to "passion" presented in *Lochner v. New York*<sup>60</sup> and *Goldberg v. Kelly*.<sup>61</sup>

In particular, he is speaking of how empathy could have led to a different result in *Lochner* and did affect the decision in *Goldberg*. In *Lochner*, the Court invoked liberty of contract to strike down a limit on the working hours of bakers, a form of "negative liberty" or liberty as freedom from restraint."<sup>62</sup> Justice Brennan argued that "'negative liberty'" was the wrong "starting point," drawing on Cardozo's observation that negative liberty failed to take into account the existence of equality of bargaining power.<sup>63</sup> The Court overlooked this in *Lochner*, but empathy for workers might have prevented the oversight: Justice Brennan noted that understanding "the plight of an employee whose only 'choice' is between working the hours the employer demands or not working at all" would lead to an intuitive conclusion that such a choice would be "no choice at all."<sup>64</sup> (Actually, it is a choice, but an unconscionable one.) Justice Brennan suggested that judicial recognition of this reality might have led to a different definition of "liberty" in the *Lochner* case.<sup>65</sup>

In *Goldberg*, Brennan noted, understanding the position of those affected by benefit termination helped the Court to conclude that a hearing *after* termination violated due process.<sup>66</sup> He observed that "the human stories that the state's administrative regime seemed unable to hear"<sup>67</sup> affected the court's decision. Although the rules for

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<sup>57</sup> I. Yalom, *supra* note 50, at 315 (footnote omitted) (summarizing W. James, *Principles of Psychology* 365-401 (1983)).

<sup>58</sup> The term is from T. Kuhn, *The Structure of Scientific Revolutions* (1962).

<sup>59</sup> E. Keller, *supra* note 9, at 125-26; Henderson, *supra* note 48, at 1580-81.

<sup>60</sup> 198 U.S. 45 (1905).

<sup>61</sup> 397 U.S. 254 (1970).

<sup>62</sup> Brennan, *supra* note 2, at 10.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 11.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 20.

<sup>67</sup> *Id.* at 21.

termination limited discretion, Brennan stated that the formal rationality of the rules "did not comport with due process. . . . because it lacked that dimension of passion, of empathy, necessary for a full understanding of the human beings affected . . . ." <sup>68</sup>

Martha Minow has articulated a more cognitive view of empathy, but has approached the role of emotions, if obliquely. <sup>69</sup> She has correctly urged judges to acknowledge that pure objectivity is a myth, and has stated that openness to other points of view through conceptual perspective taking is important to moral and legal decisionmaking. <sup>70</sup> Nevertheless, she still seems to be influenced by the either/or of "reason" and "emotion" in law. In particular, Minow states "[t]he plea for judges to engage with perspectives that challenge their own is not a call for sympathy or empathy. . . . Sympathy, the human emotion, must be distinguished from equal respect, the legal command." <sup>71</sup> This distinction, however, seems illusory: the *grounding* for the command of equal respect must be empathy for another human being. Minow's uncertainty as to the relationship of reason and emotion may rest with legal thinking's general acceptance of the either/or, which I have argued is false, and with a belief that emotions, if recognized, will render judges "indecisive and overburdened." <sup>72</sup> Interestingly, and undoubtedly accurately, Minow pointed to an emotion—fear—as the reason we might be "misguided" in "urging judges to allow themselves to be moved by . . . arguments. . . ." <sup>73</sup>

When emotion *or* empathy seemingly would pull in several directions, it is perhaps possible to find a legal or moral principle to resolve the matter. Indeed, there appears to be some kind of operative assumption that "[a]lthough human voices [emotions] usually can be heard on both sides of any legal dispute, we ultimately are forced back to some abstract principle or value to compare, weigh, and choose between these human voices." <sup>74</sup> Such an assumption overlooks the fact that principles or values *also* "pull" in opposite directions or contradict each other, and the tension ultimately cannot be cognitively

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<sup>68</sup> Id.

<sup>69</sup> Minow, *supra* note 53.

<sup>70</sup> Id. at 72-74.

<sup>71</sup> Id. at 77.

At another point, Minow seeks to reconcile "sympathy" and decisionmaking: "I believe we can still decide, even when we are moved by competing views." Id. at 90. And, "one reason we can still decide, amid powerfully competing claims, is that immersion in particulars does not require the relinquishment of general commitments." Id. at 92.

<sup>72</sup> Id. at 90.

<sup>73</sup> Id.

<sup>74</sup> Wald, *supra* note 5, at 625.

resolved.<sup>75</sup> Thus, whatever the source of tension, it seems that often the judge will be inclined to suppress one of the pulls to relieve discomfort.<sup>76</sup>

Justice Brennan has stated that “[i]t is often the highest calling of a judge to resist the tug of . . . sentiments,”<sup>77</sup> appearing to privilege the rational over the emotional. He pointed out that the judge should abide by the “values and guarantees of our system of criminal justice” by resisting the visceral reaction to a brutal crime that tempts the judge “to help prosecute the criminal.”<sup>78</sup> Arguably, Brennan himself has overlooked the “criminal’s” side in this statement, and has failed to acknowledge that sentiments may “tug” in opposite directions although he has argued that sympathy for the “criminal,” at least in capital cases, is important. For example, in *California v. Brown*,<sup>79</sup> a case challenging a death sentence for the rape and murder of a 15-year old girl, a majority of the Court upheld a penalty phase jury instruction telling the jury not to be swayed by “mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.”<sup>80</sup> The defendant had argued that the exclusion of sympathy from the jury’s consideration violated the eighth and fourteenth amendments, and Justice Brennan’s dissent agreed. Justice Brennan argued that compassion, sympathy, and mercy were matters the sentencing jury *must* consider.<sup>81</sup> He noted that “[t]he defendant literally staked his life . . . on the prospect that a jury confronted with evidence of his psychological problems and harsh family background would react sympathetically, and any instruction that would preclude such a response cannot stand.”<sup>82</sup>

Another possible judicial maneuver when emotions pull in opposite directions is to resort to “neutrality” as a solution in the context

<sup>75</sup> I am grateful to Judith Resnik for pointing this out to me.

<sup>76</sup> See *supra* text accompanying notes 49-50.

<sup>77</sup> Brennan, *supra* note 2, at 11.

<sup>78</sup> *Id.*

<sup>79</sup> 107 S. Ct. 837 (1987).

<sup>80</sup> *Id.* at 838.

<sup>81</sup> *Id.* at 842-43, 846.

<sup>82</sup> *Id.* at 849. Justice Brennan made an interesting observation—to this author, at least—in arguing against the majority’s interpretation of the instruction as simply excluding “mere” or, presumably whimsical, sympathy. He wrote:

An average juror is likely to possess the common understanding that law and emotion are antithetical, and an instruction that a wide range of emotional factors are irrelevant to his or her deliberation reinforces that notion. It is simply unrealistic to assume that an instruction ruling out several emotions in unqualified language would be construed as a directive that certain forms of emotion are permissible while others are not.

*Id.* at 844.



of cases in which claims to rights seem to be equal. As Martha Minow has suggested, judges have perspectives, masked by a claim to neutrality and impartiality.<sup>83</sup> When troubling cases of "difference" arise, frequently judges will ignore or trivialize one side of the story under the guise of neutrality, as Minow's discussion of Justice Scalia's dissent in *Johnson v. Transportation Agency* illustrates.<sup>84</sup> *Johnson* involved a challenge to a county's voluntary affirmative action plan by a white man who was passed over for promotion in favor of a woman. While Justice Scalia "provides a generous and sympathetic view of Johnson" (the man), Minow noted that:

Unlike the majority, Justice Scalia gave no description of Joyce's career aspirations and her efforts to fulfill them, and thus betrayed a critical lack of sympathy. . . . Most curious is his apparent inability to imagine that Joyce and other women working in relatively unskilled jobs are, even more so than Johnson, people "least likely to have profited from societal discrimination in the past."<sup>85</sup>

While Minow posited that Justice Scalia was "unaware" of his perspective,<sup>86</sup> it is equally likely that he was very much attached to the perspective of white males and aware or not of *that* attachment, sought a way to trivialize the claim Joyce presented while ostensibly maintaining "neutrality."

As an alternative to denying or masking the role of emotion in judicial reasoning, Judith Resnik has suggested that judges should consider the reality of the other in their decisions; we should "obtain a modification of the official dogma of judging to add the traits of compassion, care, concern, nurturance, identification, and sympath[y] . . . to the list of aspirations for our judges."<sup>87</sup> But she seems to be uncertain that asking judges to be aware of these affect-related states is "good," because detachment from personal responsibility for the persons before them may allow them to decide the case.<sup>88</sup> Yet "detachment" in this sense seems to argue against a judge's awareness of responsibility for choice; it may relieve the very moral anxiety we would want a judge to feel in a given instance.<sup>89</sup> Another of Resnik's concerns, that a mere symbolic "tacking on" of these considerations

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<sup>83</sup> Minow, *supra* note 53, at 45-51; J. Frank, *supra* note 21, at 118-43.

<sup>84</sup> 107 S. Ct. 1442 (1987).

<sup>85</sup> Minow, *supra* note 53, at 50 (footnotes omitted).

<sup>86</sup> *Id.*

<sup>87</sup> Resnik, *supra* note 18. Although these traits are culturally considered to be "feminine," Justice Brennan's speech reminds us that the capacity for these traits is human. See also Henderson, *supra* note 48, at 1582-83 (stressing that the capacity to empathize is innately human).

<sup>88</sup> Resnik, *supra* note 18.

<sup>89</sup> For an eloquent argument that judges *should* feel moral anxiety, see Cover, *Violence and the Word*, 95 *Yale L.J.* 1601 (1986); see also Cover, *The Supreme Court, 1982 Term—Fore-*

will have little influence, is perhaps a more important problem. The point is to integrate care, compassion and sympathy rather than to say "and if you can, please do so." Because there may be an already existing subtext that judges should have at least some compassion for those affected by their decisions, a subtext that may have been evident in the hearings on Bork's appointment,<sup>90</sup> it may be easier to legitimate the aspiration than first appears.

The preceding discussion is meant to suggest that an alternative vision of judging is possible, one that acknowledges and grapples with emotional tugs to see if they *mean* something, and if they illuminate one's moral and legal understanding. Explicitly recognizing that reason and emotion interact, that neither alone can provide ends, but rather that both may face the decisionmaker with the true responsibility of choice, may be part of this vision. At points, Justice Brennan appears to use the term "passion" in this sense.

### III. BABY M.—A CASE OF EMOTIONS AND JUDGING

We expect our judges to be "rational," but we also want our judges to be "wise." Wisdom, judiciousness, is not reducible to accumulation of knowledge, nor is it reducible to insight. Wisdom is more than reason. Born of experience, it is both. It has its "intuitive" elements and its "cognitive" elements. It is based on the dialogue of heart and head, and includes emotion and compassion. Solomon, the model of the wise judge, gambled—reason could not tell him who was the child's mother. His experience, his tuning into *expected* emotions, could explain his solution. Experience and phenomenal reality suggested to him that a mother would sacrifice her own interest rather than have her child harmed and, fortunately, he was right. Because he drew on human reality, he has been enshrined as wise.<sup>91</sup>

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word: Nomos and Narrative, 97 Harv. L. Rev. 4 (1983) (discussing importance of judicial commitment to creating legal meaning responsive to social movements and communities).

<sup>90</sup> Judith Resnik has expressed a concern with Bork's "lack of compassion." See Resnik, *supra* note 18; see also Walsh, In the End, Bork Himself Was His Own Worst Enemy, *The Washington Post*, Oct. 24, 1987, at A1, A16, col. 4 (there was an "impression of Bork as an oddly detached legal scholar, an intellectual without feeling"); Melton, Warner's Vote on Bork Kindles Va. GOP Leaders' Outrage, *id.* at A18, col. 1 (characterizing Bork as a judge who "lacked the record of compassion, of sensitivity, of an understanding of the pleas of the people to enable him to sit on the highest court of the land"). Bork's scholarly opposition to precedents many saw as liberatory and his opinions as a judge suggested to some of his opponents an authoritarian, unsympathetic approach to constitutional law. See *The Bork Nomination*, 9 *Cardozo L. Rev.* 1, 1-530 (1987); Wilson, Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook and Winter, 40 *U. Miami L. Rev.* 1171, 1172-74, 1204-17 (1986).

<sup>91</sup> For a different interpretation of the story, one that emphasizes the change in perspective experienced by the women and Solomon's exercise of power rather than rules, see Minow, *The*

But those were simpler days. How will today's judges deal with such decisions? Not being Solomon, will they be paralyzed by recognizing the emotions tugging at them? Is it not better to resort to principle, rights, and rules than to face the human dimension of a problem where emotions or empathy threaten to pull the judge apart?<sup>92</sup> *In re Baby M.*,<sup>93</sup> the widely publicized "surrogacy contract" case, presented such a scenario.<sup>94</sup> Briefly, a couple, the Sterns, seeking to have a child, contracted through an agency with a woman, Mary Beth Whitehead, to bear Mr. Stern's child. The contract provided that Mrs. Whitehead would receive all medical and dental expenses for the pregnancy plus \$10,000. In return she would surrender the child to the father "immediately upon birth" and cooperate with procedures necessary to terminate her parental rights. After the baby, a girl, was born, Whitehead found she could not give up the child. Mr. and Mrs. Stern picked up the baby, but returned her to Whitehead "for a week," because she was so distressed. Whitehead left the state with the child, and the Sterns went to court to have the contract enforced. Neither the Whiteheads nor the Sterns would give up their claims on the child. The trial court issued an order to show cause; the police took the baby from Whitehead and returned her to the Sterns. The trial court upheld the surrogacy contract, terminated Mrs. Whitehead's parental rights, gave custody of the child to the Sterns, enjoined the Whiteheads and their relatives from interfering with the Sterns' custody, and approved the adoption of the baby by Mrs. Stern.<sup>95</sup> The New Jersey Supreme Court reversed the trial court, held that the contract was illegal, and restored Mrs. Whitehead's "rights." It agreed, however, with the lower court's custody determination. The supreme court remanded the case for determination of White-

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Judgment of Solomon and the Experience of Justice, in *The Structure of Procedure* 447 (R. Cover & O. Fiss eds. 1979).

<sup>92</sup> See Yudof, *supra* note 5, at 605.

<sup>93</sup> 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987), *aff'd* in part and *rev'd* in part, 109 N.J. 396, 537 A.2d 1227 (1988).

<sup>94</sup> The *Baby M.* case inspired a great deal of writing and legislation, as well as an ABC-TV "docudrama." See Coles, So, You Fell in Love with Your Baby, *N.Y. Times* (Book Review), June 26, 1988, at 1 (reviewing E. Kane, *Birth Mother: The Story of America's First Legal Surrogate Mother*, and P. Chesler, *Sacred Bond: The Legacy of Baby M.*); Malcolm, Steps to Control Surrogate Births Stirs Debate Anew, *N.Y. Times*, June 26, 1988, at 1, col. 6, ("Five months after the Supreme Court of New Jersey outlawed commercial contracts for women to bear children for others there, many state legislatures are moving to impose regulations, outright bans and even prison terms."). I do not intend to address in detail the general problem of surrogacy here. For an excellent discussion of the problems of approaching human reproduction from a free-market perspective, see Radin, *Market-Inalienability*, 100 *Harv. L. Rev.* 1849, 1925-33 (1987).

<sup>95</sup> *In re Baby M.*, 217 N.J. Super. at 313, 525 A.2d at 1128.

head's visitation rights and explicitly forbade the original trial judge from hearing the matter.<sup>96</sup>

Reason alone could not decide this case, fraught with human and moral dilemmas. Reason could have decided the issues a priori only if the following premises were undisputed: (a) that baby-selling is illegal and wrong, and (b) that surrogacy contracts are baby-selling, and therefore surrogacy contracts are illegal. Note, however, there undoubtedly is an emotive base for both these premises. Only if the emotive question has been previously resolved is the "pure reason" solution applicable. Reason could not solve the dilemma of Baby M., where the natural parents were fighting over custody, and the problem was one of "purchase" of a baby by her father.

Further complicating the case was a set of facts that escaped easy legal categorization and that undoubtedly created emotional reactions for all of the judges involved. The natural father is the only son of Holocaust survivors, which seems to give his need to procreate some meaning beyond a purely selfish wish to preserve one's gene pool, although it is hard to capture the wish to deny the "final solution" victory.<sup>97</sup> The natural mother is not "unfit" in any relevant sense and was raising two children successfully. She apparently had not been told that the initial psychological interviews conducted by the surrogacy agency psychologist indicated it might be very hard for her to give up her baby to relative strangers, an analysis which subsequent events proved to be accurate.<sup>98</sup> But the natural mother threatened to kill the infant and herself, falsely accused the natural father of sexually abusing her older daughter, and turned the lives of her other two children upside down in her flight.<sup>99</sup> The natural father had by contract tried to strip the natural mother of any "rights" to her child.<sup>100</sup> The potential adoptive mother, a pediatrician, had multiple sclerosis but "could" have risked having a child.<sup>101</sup> She had no legally cognizable "interest" in the fate of the child apart from her husband's, despite the fact that she had been the custodial mother for much of the child's short life. Neither side was willing to give in to the other, one invoking "contract and fatherhood" and one "unconscionability and

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<sup>96</sup> *In re Baby M.*, 109 N.J. at 396, 537 A.2d at 1227.

<sup>97</sup> The existential meaning of denying the Holocaust victory is certainly one I feel unqualified to discuss, although I have a dim understanding of its power and necessity. See H. Epstein, *Children of the Holocaust* (1979); E. Wiesel, *One Generation After* (1982).

<sup>98</sup> *In re Baby M.*, 217 N.J. Super. at 343; 525 A.2d at 1142.

<sup>99</sup> *Id.* at 351, 525 A.2d at 1146; see *In re Baby M.*, 109 N.J. 396, 435 n.9, 455, 537 A.2d 1227, 1247 n.9, 1257 (1988).

<sup>100</sup> 217 N.J. Super. at 344; 525 A.2d at 1143; 109 N.J. at 417, 537 A.2d at 1237.

<sup>101</sup> 217 N.J. Super. at 336-37, 525 A.2d at 1139; 109 N.J. at 413, 537 A.2d at 1235.

motherhood." In such a case, the fact themselves, together with the unreflective categories and affective associations such as "rich" vs. "poor," "mother" vs. "father," and "exploitation" vs. "altruism" and personal experiences as a child and as a parent, create potentially emotional reactions to the situation.

The trial court's opinion could hardly be read as neutral or dispassionate; it is an illustration of the difference between recognition of "the value that awareness of passion may bring to reason" and the problem of giving in "altogether to impassioned judgment."<sup>102</sup> The trial judge's anger with and dislike of the natural mother could not be more apparent from his opinion. His anger undoubtedly influenced his decision to ignore principles of family and criminal law in enforcing the contract so that he could strip Whitehead of her "rights" as well as custody. The trial judge's hostility might well have been based on her threat to kill the child—something Solomon would have considered as well—and her misrepresentations, but the opinion is striking in its fury and bias against her.<sup>103</sup> For example, the opinion goes out of its way to criticize Whitehead's "dominance" of her then husband and her statement that her husband's alcoholism was "'his problem'"—a statement anyone who has attended Al-Anon meetings would find perfectly appropriate.<sup>104</sup> Moreover, while finding her competent to contract, the trial court repeatedly criticized her for dropping out of high school, for being "uneducated," and for being "impulsive."<sup>105</sup>

Evidence of the trial judge's anger towards Whitehead and consequent treatment of the issues presented also appears in his declarations that the "intense desire to propagate the species is fundamental" and the "desire to reproduce blood lines . . . to exert a powerful and pervasive influence."<sup>106</sup> Even if this were so, the judge's odd failure to acknowledge how this "powerful influence" only applied to the man and not the woman, is hardly "rational." Instead, the judge refused to acknowledge any analogy to private adoption law, which gives

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<sup>102</sup> Brennan, *supra* note 2, at 11.

<sup>103</sup> Another possible explanation for the trial judge's anger, suggested by my colleague Jim Wilson, could be a kind of emotional contagion and its resulting focus on (and misattribution to) one of the parties. The emotionally-charged nature of the proceedings could have affected the judge; the anger he felt may have found an outlet in his attack on Mary Beth Whitehead.

<sup>104</sup> 217 N.J. Super. at 340, 396-97, 525 A.2d at 1141, 1169-70. Apparently one of the experts, Dr. Lee Salk, "saw a problem with Rick's alcoholism." *Id.* at 363, 525 A.2d at 1152. What that problem was, however, beyond Whitehead's "dominance," was never articulated. An alcoholic parent's or stepparent's potentially damaging effect on a child never entered into the court's "best interest" determination explicitly.

<sup>105</sup> 217 N.J. Super. at 338, 354, 393-97, 525 A.2d at 1140, 1147, 1152, 1168-70.

<sup>106</sup> *Id.* at 373, 331-32, 525 A.2d at 1158, 1136.

birth mothers a “grace period” in which to change their minds, and upheld the contract’s requirement that the mother surrender the child at birth.<sup>107</sup> The problem is not so much the trial judge’s anger as his failure to recognize it explicitly and to interrogate whether that anger justified upholding a contractual, market-based approach to deciding the fate of a human infant. He missed *that* moral and legal dimension in his opinion by denying the existence of analogous law and principles.

The New Jersey Supreme Court found that surrogacy contracts for pay *were* the equivalent of baby selling, despite the fact that the “sale” was to the father.<sup>108</sup> It seemed to celebrate motherhood over fatherhood, but not without trying to understand the perspectives of both natural parents. The court referred to analogous principles of law to void the contract and suggested strongly that the human dimensions of surrogacy were such that perhaps it should not be permitted at all.

A legislative provision that the husband has parental “rights” when his wife is artificially inseminated suggested that the same might hold true the other way around.<sup>109</sup> The court rejected the analogy of sperm donation to surrogacy, relying on the significantly greater time commitment involved in carrying a child to term to distinguish the two.<sup>110</sup> Although the court did not explicitly rely on the anonymity and parental disinterest presumably underlying the prototypical sperm donor case or on the implications of the material connection of the woman with the child, distinctions which seem more compelling than time alone, the court did suggest that these dimensions were the determinative ones.<sup>111</sup> The court further dismissed the father’s inter-

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<sup>107</sup> Id. at 372-73, 525 A.2d at 1157-58.

<sup>108</sup> 109 N.J. at 437-38, 537 A.2d 1248.

<sup>109</sup> Id. at 441 n.10, 537 A.2d at 1250 n.10.

<sup>110</sup> A sperm donor simply cannot be equated with a surrogate mother. The State has more than a sufficient basis to distinguish the two situations—even if the only difference is between the time it takes to provide sperm for artificial insemination and the time invested in a nine-month pregnancy—so as to justify automatically divesting the sperm donor of his parental rights without automatically divesting a surrogate mother.

Id. at 450, 537 A.2d at 1254.

<sup>111</sup> [W]e think it is expecting something well beyond normal human capabilities to suggest that this mother should have parted with her newly born infant without a struggle. Other than survival, what stronger force is there? . . . We do not find it so clear that her efforts to keep her infant, when measured against the Sterns’ efforts to take her away, make one, rather than the other, the wrongdoer. The Sterns suffered, but so did she. And if we go beyond suffering to an evaluation of the human stakes involved in the struggle, how much weight should be given to her nine months of pregnancy, the labor of childbirth, the risk to her life, compared to the payment of money, the anticipation of a child and the donation of sperm?

ests by emphasizing a statutory preference for mothers in the event of a custody dispute at birth: "[t]he probable bond between mother and child, and the child's need, not just the mother's, to strengthen the bond, along with the likelihood, in most cases, of a significantly lesser, if any, bond with the father—all counsel against temporary custody in the father."<sup>112</sup> It is not clear what basis the court has for assuming infants cannot bond with fathers as a matter of principle. While bonding and attachment *are* essential for human infants, it is a contingent social fact that it is usually the mother who is the primary caretaker.

Unlike the trial court, the New Jersey Supreme Court properly recognized the natural mother's pain. The court was correct in grasping the meaning of pregnancy and childbirth to most women; to mandate a severance of the connection against the woman's will would be cruel and deny her humanity. The court emphasized the irony of the case, stating, "[w]e do not know of, and cannot conceive of, any other case where a perfectly fit mother was expected to surrender her newly born infant, perhaps forever, and was then told she was a bad mother because she did not."<sup>113</sup>

Ironically, both courts gave custody of the child to the Sterns. Perhaps both could be said to have indulged in class prejudice.<sup>114</sup> While the court's sympathy for Whitehead's plight seems based more on idealized or questionable descriptions of "mother" than the actualities (the mother and baby lived in "roughly twenty different hotels, motels, and homes," hardly the kind of stable or nurturing environment an infant ideally should have) the reality of Whitehead's life did influence its decision.<sup>115</sup> The court took account of the instability of Whitehead's life, Mr. Whitehead's alcoholism (although only insofar

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Id. at 459-60, 537 A.2d at 1259.

<sup>112</sup> Id. at 462, 537 A.2d at 1261.

<sup>113</sup> Id. at 459, 537 A.2d at 1259. Feminists have also pointed out that a contract using a woman as a mere incubator further degrades women. See M. Atwood, *The Handmaid's Tale* (1986) (a powerful novel exploring this concern).

Peggy Radin has carefully analyzed the potential impact of commodification of both women and children in her article, observing that surrogacy privileges the male genetic line, reinforces oppressive gender roles, and renders children vulnerable to being identified in monetary terms. See Radin, *supra* note 94.

<sup>114</sup> Robert Coles, in his review of Phyllis Chesler's book, suggests that class influenced both lawyers and doctors. Coles, *supra* note 94, at 35.

<sup>115</sup> 109 N.J. at 455-57, 537 A.2d at 1257-58. While this observation could be said to reflect class prejudice, it is meant to capture what must have been an unsettling and insecure environment for the baby. If I am less than sympathetic to the form of Whitehead's flight, it is because of concern for the child, who has been overlooked repeatedly in the debate about the *Baby M.* case. I must confess an emotive bias in favor of children regardless of the social class of the parents.

as it affected his employment), and agreed with the "expert" testimony and the trial court on who would be the "best" parents. The fact that the Sterns had been the baby's primary caretakers for a considerable time also could have disposed the court to allow them to have custody. It would have been damaging to uproot the child once again, although Whitehead's lawyers argued that the invalidity of the original court order should have prohibited the Sterns from asserting this point.<sup>116</sup>

How do you empathize *at all* with people who seem more willing to have the child cut in half than give up their claims?<sup>117</sup> There is a real temptation to say "a plague on both your houses." Instead, the New Jersey Supreme Court suggested that "[w]hile probably unlikely, we do not deem it unthinkable that, the major issues having been resolved, the parties' undoubted love for this child might result in a good faith attempt to work out the visitation themselves, in the best interest of their child."<sup>118</sup> An appeal to care, to love, by the court was, undoubtedly, the best it could do.

The decision is not without its flaws. First, the supreme court did adopt a certain existential stance toward human reproduction and parenting that renders the father *irrelevant as a person*, perhaps to compensate against the needless trashing of the mother by the trial court. Although the physical contribution is minor, and many fathers (most?) are detached, the latter seems more culturally contingent, the result of a gendered society, than necessarily true. Thus, while pragmatically it makes sense to prefer women's choices about custody of children because of existing power structures, it is not at all clear that the capacity of men to be involved with infants and children should be denied. Second, the custodial mother was excluded from the legal categories defining the interest of those involved; she was relevant only as a custodian, not as a feeling person. Further, the natural mother's ex-husband had no standing or interest, either, and again was relevant only to the custody determination. And finally, although there was much *said* about the best interests of the child, the court subordinated her interests to the claims of the battling parents.

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<sup>116</sup> Cf. Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 Harv. L. Rev. 727, 768-74 (1988) (discussing rule giving custody to primary caretaker in child custody disputes as preferable to joint custody or best interests determination; but argues preference should be for mothers and therefore may be at odds with my observation).

<sup>117</sup> The Sterns insist on calling her Melissa; Mary Beth Whitehead insists on calling her Sara. Hanley, *Baby M's Mother Wins Broad Visiting Rights*, N.Y. Times, Apr. 7, 1988, at A1, col. 2, B5, col. 5 (trial court encouraged Whitehead-Gould to stop calling child Sara).

<sup>118</sup> 109 N.J. at 468, 537 A.2d at 1264.



On remand, a trial judge ordered extensive visitation privileges for the natural mother.<sup>119</sup> Whitehead will be free to contest custody in the future, as is her "right," even though the child could suffer greatly for the "rights" of her parents.

While the New Jersey Supreme Court took great care to establish the primacy of the interests of the natural mother, it recognized the pain caused on all sides, and suggested strongly that surrogacy—even uncompensated—might lead to more pain than the law should permit:

[Surrogacy] can bring suffering to all involved. Potential victims include the surrogate mother and her family, the natural father and his wife, and most importantly, the child. . . . [I]t can also, as this case demonstrates, cause suffering to participants, here essentially innocent and well-intended.

.....  
If the Legislature decides to address surrogacy, consideration of this case will highlight many of its potential harms.<sup>120</sup>

I do not think "innocence" or portraying anyone other than the child a "victim" is helpful. Nevertheless, the court seems to be saying that the legislature and the law, because of human experience and feeling, not pure rationality, and certainly not market-place rationality, should anticipate that reason will *not* prevent harm in surrogacy arrangements. Because of the pain caused, the law should prohibit surrogacy contracts or at least refuse to enforce them. The court's suggestion seems to be a type of "paternalism," although one might be tempted to characterize this as a prohibition on any contracting away of parental rights, much as we do not allow someone to contract away their liberty or to become a slave. We *do* allow a woman to surrender her "rights" in adoptions, however, so that explanation is less persuasive than it first appears to be. Equally unpersuasive is the court's argument that surrogacy contracts do not require any inquiry into fitness of the parents. While inquiry is true of agency adoptions, private adoptions often have no such requirement.<sup>121</sup> Paternalism—in a positive sense—seems to provide the best explanation for prohibiting surrogacy contracts.<sup>122</sup>

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<sup>119</sup> *In re Baby M.*, 225 N.J. Super. 267, 273-74 (Ch. Div. 1988) (order of weekly, summer, and holiday visits).

<sup>120</sup> 109 N.J. at 469, 537 A.2d at 1264.

<sup>121</sup> The trial court noted the potential for exploitation of the mother in private adoptions, 217 N.J. Super. at 371, 525 A.3d at 1157, but did not specifically note the problem of perfunctory, or nonexistent, background evaluations.

<sup>122</sup> See West, *supra* note 54, at 67. Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563 (1982).

The court, while leaving open the legality of uncompensated surrogacy, seems to have grappled with the emotional and human issues in such cases and concluded this is something too humanly painful to allow. This solution is one that might be available in cases of tugs in equipoise—a kind of paternalistic intervention. In other cases, saying “we will not permit this” or “we will not review this” may be a bailing out from emotional discomfort and moral choice. Arguably, the Supreme Court’s retreat from monitoring capital punishment is, in part, a bailout maneuver.<sup>123</sup> The New Jersey Supreme Court in *Baby M.* also suggested another solution that could be useful by refusing to impose a winner-takes-all outcome. It appealed to the parties to consider their love for the child as a way to end the fight, to seek resolution in relationship. There are other times when courts will have to choose and acknowledge that the choice is not a comfortable one.

Not all cases are emotionally-laden, and certainly few are as emotionally-charged as *Baby M.*. But some cases, perhaps many, appear “easy” because of some prior emotional resolution, or worse, a refusal to acknowledge the emotional associations inherent in them. Awareness of the interaction of reason and emotion, the dialogue of heart and head, may enable a judge to see cases in new and better ways, to reformulate the dimensions of what seems to be an “easy,” if unfortunate, decision. Perhaps this is Justice Brennan’s hope for the dialogue—a way to avoid the rigidity of frozen legal understandings.<sup>124</sup>

### CONCLUSION

Emotions and empathy should be officially recognized as influences on judges and legal actors. This is not to say that emotions should become dominant—that would be a perpetuation of the either/or. Rather, emotions should be recognized as a valid source of information. As Justice Brennan has said, the “internal dialogue of reason and passion, does not taint the judicial process, but is in fact central to its vitality.”<sup>125</sup> Judges do operate under the constraints of the nature of judging, constraints such as precedent and the publication of opinions.<sup>126</sup> Judges are not totally free, nor are they totally bound. They are trained in law and legal argument, they influence

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<sup>123</sup> Weisberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305. See *McClesky v. Kemp*, 107 S. Ct. 1756 (1987); *Lockhart v. McCree*, 476 U.S. 162 (1986); *The Supreme Court, 1986 Term—Leading Cases*, 101 Harv. L. Rev. 119, 138-59 (1987).

<sup>124</sup> Brennan, *supra* note 2, at 11-12, 22-23. See, e.g., Minow & Spelman, *supra* note 9.

<sup>125</sup> Brennan, *supra* note 2, at 3.

<sup>126</sup> *Id.* at 8. For a cautious view of the effect of restraints on a judge’s political preferences, attitudes, and attachments, see Wilson, *supra* note 90. *Duncan Kennedy* has more thoroughly

and are influenced by legal materials and legal culture. Judges would not be judges, and lawyers would not be lawyers, if they did not acknowledge or consider the laws, doctrines, and principles that are the very nature of their enterprise. But perhaps they can listen to and use the materials more effectively and more humanely, if they do not try to take refuge in the pretension of "pure reason" alone.

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elaborated the constraints a judge might experience in a case in his article. Kennedy, *supra* note 36, at 526-29.