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(What We Talk About When We Talk About) Judicial Temperament

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(WHAT WE TALK ABOUT WHEN WE TALK ABOUT) JUDICIAL TEMPERAMENT

TERRY A. MARONEY

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(WHAT WE TALK ABOUT WHEN WE TALK ABOUT) JUDICIAL TEMPERAMENT

TERRY A. MARONEY*

Abstract: Judicial temperament is simultaneously the thing we think all judges must have and the thing that no one can quite put a finger on. Extant accounts are scattered and thin, and either present a laundry list of desirable judicial qualities without articulating what (if anything) unifies the list or treat temperament as a fundamentally mysterious quality that a judge either does or does not have. Resting so much—selection, evaluation, discipline, even removal—on such an indeterminate concept is intellectually and practically intolerable. Polarized debates over Justice Kavanaugh’s fitness to sit on the Supreme Court made clear just how badly we need a common vocabulary to guide our discourse on judicial temperament. This Article—the first extended scholarly treatment of the topic—posits that, because judicial temperament is a psychological construct, we ought to draw upon psychology to understand it. It therefore taps a deep well of scientific research to construct a new psycho-legal theory of judicial temperament. It conceives judicial temperament as a deep-seated, relatively stable set of specific personal traits—separable from intellect, training, and ideology—that, in dialectic with specific judicial environments and the predictable demands of judging, drive behaviors that affect how justice is delivered and perceived. The critical trait dimensions of a judge’s temperament are positive emotionality, negative emotionality, kindness, and self-regulation. The combination of these traits determines how well or poorly her temperament will fit with any given judicial assignment. Although judicial temperament is somewhat malleable, potential for change is constrained. This scientifically grounded theory shows why some seldom-mentioned attributes—like courage—are temperamental, and other commonly-cited ones—such as commitments to equality and diversity—are not. This Article provides a principled alternative to the folk-wisdom manner in which judicial temperament traditionally has been defined and assessed. Setting the theoretical

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terms for empirical testing of its claims—and with the potential to transform processes for judicial selection, evaluation, and support—the psycho-legal theory posited here shows what we should be talking about when we talk about judicial temperament.

INTRODUCTION

*[I]t seems to me that temperament is the key to everything else that one does on the bench.*¹

*Elusive as it is important, judicial temperament is notoriously hard to define.*²

The 2018 nomination of Justice Brett Kavanaugh to the U.S. Supreme Court sparked the most significant public debate over judicial temperament in modern history. After his testimony before the Senate Judiciary Committee, a large and diverse group of detractors—including several thousand law professors—declared that his unprecedented displays of anger, discourtesy, and partisanship at that hearing revealed Kavanaugh to be temperamentally unfit.³ Supporters (including Kavanaugh himself, writing in his own defense) declared the opposite, and asserted that his behavior, though unusual, was appropriate for one who believed himself to be so unfairly accused, and pointed to his many years on the D.C. Circuit without a single temperamental complaint.⁴

Tempests pass. Justice Kavanaugh was confirmed; the temperamental debate moved aside to await the next controversy; and we are, by and large, none

¹ *Confirmation Hearings on Federal Appointments: Confirmation of Appointees to the Federal Judiciary Before the S. Comm. on the Judiciary*, 105th Cong. 41 (1997) [hereinafter *Confirmation Hearings I*], <https://archive.org/details/confirmationhear973unit/page/40/mode/2up> [<https://perma.cc/NT49-PGRE>] (statement of Hon. Jeremy Fogel, nominee for the U.S. District Court for the Northern District of California).

² JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 6–7* (2006).

³ Opinion, *The Senate Should Not Confirm Kavanaugh: Signed, 2,400+ Law Professors*, N.Y. TIMES (Oct. 3, 2018), <https://www.nytimes.com/interactive/2018/10/03/opinion/kavanaugh-law-professors-letter.html> [<https://perma.cc/K32T-4794>]; see Ross K. Baker, Opinion, *Even with Jeff Flake's FBI Investigation, Brett Kavanaugh Is Unfit to Serve*, USA TODAY (Sept. 30, 2018), <https://www.usatoday.com/story/opinion/2018/09/28/brett-kavanaugh-s...committee-vote-nomination-christine-blasey-ford-column/1454562002/> [<https://perma.cc/66AQ-XJTK>] (“Kavanaugh was not simply angry; he was unhinged.”).

⁴ Orrin Hatch, Opinion, *Brett Kavanaugh's Righteous Anger*, WALL ST. J. (Oct. 2, 2018), <https://www.wsj.com/articles/brett-kavanaughs-righteous-anger-1538519713> [<https://perma.cc/YT53-4H4B>]; Brett M. Kavanaugh, Opinion, *I Am an Independent, Impartial Judge*, WALL ST. J. (last updated Oct. 4, 2018), <https://www.wsj.com/articles/i-am-an-independent-impartial-judge-1538695822> [<https://perma.cc/RQ75-WVJ8>]; Rachel Ventresca, *Ken Starr: Kavanaugh's Reputation Is 'Unblemished'*, CNN (Oct. 5, 2018), <https://www.cnn.com/2018/10/05/politics/ken-starr-kavanaugh-op-ed-cnntv/index.html> [<https://perma.cc/3TUR-2YCT>].

the wiser. For all the heat thrown off, we remain at best marginally more enlightened about what judicial temperament is, what function it serves, and how it can be discerned. This narrative trajectory is not new. It is time for that trajectory to change.

Judicial temperament is simultaneously the thing we think all judges must have and the thing that no one can quite put a finger on. And yet being perceived as having a good temperament can get a judge confirmed or elevated; a perception of bad temperament can stop her at the gate, or, if she already is serving, get her reprimanded or removed from the bench.⁵ Indeed, long before the Kavanaugh moment, former Senator Joseph Biden stated that in evaluating federal court nominees he and his colleagues “worry . . . most [of all] about temperament.”⁶ It is intellectually and practically intolerable to have so much rest on so indeterminate a concept. If this key ingredient of judicial fitness remains as “[e]lusive as it is important,” it will remain a cipher in which one sees what one wants, in whose lack one sees what one fears.⁷ We need to know what we are talking about when we are talking about judicial temperament.

It is not that people have not tried to wrangle the concept of judicial temperament; they have. Such efforts, however, are scattered, relatively thin, and tend to follow one of two approaches. The first approach is to present a laundry list of desirable judicial qualities and behaviors without articulating what, if anything, unifies the list.⁸ The second approach, in contrast, treats judicial temperament as a fundamentally mysterious quality that one either has or does not have.⁹ Both approaches do a deep disservice to a critical measure of judicial fitness.

The list-of-good-things approach, for its part, is unduly capacious. Consider this sweeping concept offered by the prominent legal commentator Jeffrey Rosen, who wrote that temperament embraces “personality, character, up-

⁵ William G. Ross, *The Questioning of Lower Federal Court Nominees During the Senate Confirmation Process*, 10 WM. & MARY BILL RTS. J. 119, 131 (2001) [hereinafter Ross, *Questioning*] (describing how U.S. District Court nominee Frederica Massiah-Jackson’s nomination was withdrawn after temperament questions were raised—for example, by a sidebar in which she told a lawyer to “shut your fucking mouth” and another instance in which she stated, “I don’t give a fuck”).

⁶ *Confirmation Hearings I*, *supra* note 1, at 667 (statement of Sen. Biden); see Edward J. Devitt, *Ten Commandments for the New Judge*, 65 AM. BAR ASS’N J. 574, 574 (1979) (quoting a former lord chancellor of Great Britain as saying, “a kindly and patient man who is not a profound lawyer will make a far better judge than an ill-tempered genius”) (ellipses omitted).

⁷ ROSEN, *supra* note 2, at 6; see Sheldon Goldman, *Selecting Lower Court Federal Judges on the Basis of Their Policy Views*, 56 DRAKE L. REV. 729, 741 (2008) (describing judicial temperament as a “vague” concept); Larry W. Yackle, *Choosing Judges the Democratic Way*, 69 B.U. L. REV. 273, 307–09 (1989) (characterizing the notion of judicial temperament as “unruly” in comparison to qualifications such as “integrity, intelligence, education, experience, [and] stamina”).

⁸ See *infra* notes 10–12 and accompanying text.

⁹ See *infra* notes 13–16 and accompanying text.

bringing and education, formative career experiences, work habits, and behavior when interacting with others.”¹⁰ We see similar sweep (and only partial overlap) in the definition of temperament used by the influential American Bar Association (ABA) Standing Committee on the Federal Judiciary (ABA Standing Committee): “compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias and commitment to equal justice under the law.”¹¹ Other nominations for the category include humility, collegiality, wit, pragmatism, likability, “the capacity and inclination to treat litigants as equals,” sensitivity to racial and gender issues, not being addicted to drugs or alcohol, and absence of a criminal record.¹²

A concept that devolves to a highly diverse list of attributes that may or may not relate to one another lacks analytic precision. It provides us inadequate tools with which to distinguish one person from another and fails to reflect the reasons for doing so. We may as well ask whether the person is, or would be, a “good judge.”

It is no surprise, then, that the second approach utilizes this exact method, which suffers not from too much diverse content but from few descriptors at all. Without clear parameters upon which to rely, those asked to opine about an actual or potential judge’s temperament typically fall back on a thumbs-up-or-down. Common among the assessments of now-Justice Elena Kagan, for example, was this comment: “[h]er temperament is splendid.”¹³ The late Justice Antonin Scalia once offered an opposing but equally conclusory self-

¹⁰ ROSEN, *supra* note 2, at 8.

¹¹ AM. BAR ASS’N, ABA STANDING COMM. ON FED. JUDICIARY, WHAT IT IS AND HOW IT WORKS 3 (2017) [hereinafter HOW IT WORKS]. Many state standards echo this language. *See, e.g.*, AM. BAR ASS’N, STANDING COMM. ON FED. JUDICIAL INDEP., STANDARDS ON JUDICIAL STATE SELECTION 7 (2000); UTAH STATE COURTS, MANUAL OF PROCEDURES FOR JUSTICE COURT NOMINATING COMMISSIONS 19–20 (2016) (defining judicial temperament as “common sense, compassion, decisiveness, firmness, humility, open-mindedness, patience, tact and understanding”); *see also* Yackle, *supra* note 7, at 307 (“[T]he genuine content of these ‘qualifications’ begs for explanation.”).

¹² Yackle, *supra* note 7, at 309 (contemplating that judicial temperament might refer to prudence, Solomonic justice, or capacity to “keep the morally equivalent interests of all citizens in view”); *see* James J. Alfini & Jarrett Gable, *The Role of the Organized Bar in State Judicial Selection Reform: The Year 2000 Standards*, 106 DICK. L. REV. 683, 704 (2002) (outlining the argued characteristics of judicial temperament); William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 650 (1987) [hereinafter Ross, *Functions, Roles, and Duties*] (quoting Laurence Tribe); Ross, *Questioning*, *supra* note 5, at 131; Jeffrey S. Sutton, *A Review of Richard A. Posner, How Judges Think (2008)*, 108 MICH. L. REV. 859, 875 (2010) (book review) (defining temperament as “[o]pen-mindedness, not taking oneself too seriously, wit, self-awareness, humility, being a generous and respectful colleague, and being willing to work at getting it right . . . as Posner (and I) would agree”).

¹³ *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. of the Judiciary*, 111th Cong. 572 (2010) (statement of Kim J. Askew, Chair, Standing Committee on the Federal Judiciary, American Bar Association, quoting questionnaire respondent).

assessment. Asked, “Is there such thing as an ideal judicial temperament, and if so, what is it?” he replied, “If there is one, I don’t have it.”¹⁴

With no clear criteria to distinguish *splendid* from *bad*, or either pole from the points in between, the utility of the concept is difficult to discern. The concept could even have negative utility. Because of its murkiness, “judicial temperament often has been a smoke screen for other objections to a nominee’s candidacy.”¹⁵ When Louis Brandeis was nominated to the U.S. Supreme Court, for example, the *New York Sun* called him “utterly and even ridiculously unfit,” and a group of “prominent Bostonians, including the president of Harvard, signed a petition” attacking his temperament.¹⁶ That accusation now seems wildly off base in light of the reverence with which many now regard both Brandeis the man and Brandeis the judge. The objection was likely motivated by ideology, politics, and anti-Semitism.¹⁷ Some may make a similar critique today by asserting that among the strongest predictors of whether one criticized or defended Kavanaugh’s temperament was the extent to which one was antagonistic to or aligned with his ideology.

Politics can thus infect temperament-talk, but it can also shed light on this concept. The 2016 presidential campaign of Donald Trump sparked its own significant public discourse on temperament.¹⁸ Trump’s detractors uniformly attacked his temperamental fitness to be president¹⁹ by complaining about “impulsivity,” “lack of restraint,” reactivity when taunted, and love of “creat-

¹⁴ Email from Alexander Boni-Saenz, Assistant Professor, Chicago-Kent College of Law, to author (Sept. 9, 2015, 6:48 PM) (on file with author) (recounting public exchange from February 13, 2012, between Professor Boni-Saenz and Supreme Court Justice Antonin Scalia).

¹⁵ Ross, *Functions, Roles, and Duties*, *supra* note 12, at 649; see William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 34–37, 65 (1990) [hereinafter Ross, *Participation*] (illustrating how personal ideology can be used to assess nominees under the guise of objective criteria).

¹⁶ Ross, *Participation*, *supra* note 15, at 7; see Ross, *Functions, Roles, and Duties*, *supra* note 12, at 649 (providing examples of judicial temperament being used to signify ideology or specific beliefs and values, such as racism).

¹⁷ Ross, *Functions, Roles, and Duties*, *supra* note 12, at 649 n.84.

¹⁸ Indeed, the sudden public focus on temperament calls to mind the sudden public focus on “empathy” occasioned by President Obama’s nomination of Justice Sonia Sotomayor. Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CAL. L. REV. 629, 631 (2011); Peter Baker, *In Court Nominees, Is Obama Looking for Empathy by Another Name?*, N.Y. TIMES (Apr. 25, 2010), <https://www.nytimes.com/2010/04/26/us/politics/26memo.html> [https://perma.cc/MWY6-KX5A].

¹⁹ See, e.g., John Kelly, *From Jefferson to Donald Trump: A Brief History of Presidential “Temperament,”* SLATE (Aug. 15, 2016), http://www.slate.com/blogs/lexicon_valley/2016/08/15/from_jefferson_to_donald_trump_a_brief_history_of_presidential_temperament.html [https://perma.cc/T37P-URNM]; Dan P. McAdams, *The Mind of Donald Trump*, THE ATLANTIC (June 2016), <https://www.theatlantic.com/magazine/archive/2016/06/the-mind-of-donald-trump/480771/> [https://perma.cc/ZD36-ENXP].

ing disorder.”²⁰ The concern was not, however, a cleanly partisan one. Even his supporters were nervous. Trump’s temperament was their single biggest worry.²¹ That rare bipartisan convergence evidenced a baseline, shared belief that some clusters of durable personal traits make individuals more or less suited to particular positions of authority. These clusters are distinct from other qualifications for those positions of authority, such as adequate and relevant training. They also are distinct from the ideological orientations that different segments of the populace may prefer or not prefer when filling those positions. Whether we are talking about judges or other government officials, then, we are trying to capture something elemental about the human being. In order to predict how he or she will *act* in a specific set of circumstances, we are trying to get a sense of what he or she *is like*.²²

So far, so good. But this episode in American political history further demonstrates how elastic the concept of temperament can be. During the 2016 campaign, Trump declared temperament to be his “strongest asset, maybe by far.”²³ He characterized his temperament as a “winning” one, that is, consisting of knowing “how to win”—not a quality commonly seen on any temperamental inventory, diverse though they are.²⁴ In a statement with strong parallels to the judicial context, a prominent commentator observed that “a president’s temperament is his most important quality and it is the hardest to measure in the candidates.”²⁵ Like “leadership,” “character,” and “values,” the concept—whether applied to executive officials or judges—can “get shapeless pretty fast.”²⁶

²⁰ Peter Wehner, Opinion, *Why I Cannot Fall in Line Behind Trump*, N.Y. TIMES (Jan. 21, 2017), <https://www.nytimes.com/2017/01/21/opinion/sunday/why-i-cannot-fall-in-line-behind-trump.html> [<https://perma.cc/CD39-P3JV>]; see Adam Howard, *Trump’s Mental State Is Becoming a Campaign Talking Point*, NBC NEWS (Aug. 2, 2016), <http://www.nbcnews.com/news/us-news/trump-s-mental-state-becoming-campaign-talking-point-n621556> [<https://perma.cc/LJS7-GVXZ>].

²¹ According to a pre-election Pew survey, 34% of Trump supporters worried about his temperament. PEW RESEARCH CTR., IN THEIR OWN WORDS: WHY VOTERS SUPPORT AND HAVE CONCERNS ABOUT—CLINTON AND TRUMP 2 (2016), <https://www.people-press.org/wp-content/uploads/sites/4/2016/09/09-21-16-campaign-release.pdf> [<https://perma.cc/J94W-7D65>]. One opined that Trump was like a “temperamental child saying anything in an attempt to get what he wants.” *Id.* Clinton supporters voiced no concerns about her temperament; their greatest worry was trustworthiness. *Id.* at 3.

²² CHARLES S. CARVER & MICHAEL F. SCHEIER, PERSPECTIVES ON PERSONALITY 37 (7th ed. 2012).

²³ Katie Zezima, *Trump: My Strongest Asset ‘Is My Temperament,’* WASH. POST (Sept. 27, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/09/27/trump-my-strongest-asset-is-my-temperament/?noredirect=on&utm_term=.64b851b72659 [<https://perma.cc/948E-2ZQ5>].

²⁴ *Id.*

²⁵ John Dickerson, *How to Measure for a President*, SLATE (Oct. 1, 2012), http://www.slate.com/articles/news_and_politics/politics/features/2012/how_to_measure_a_president/_how_to_measure_for_a_president_temperament_is_a_president_s_most_important_attribute_and_the_hardest_to_examine_.html [<https://perma.cc/23M3-PMDJ>] (explaining how words like temperament are “used by politicians to critique their opponent without having to explain exactly what they mean”). It is a fair question whether we require different temperaments of executive officials and judges. Although Doris

Our concept of judicial temperament need not, and should not, remain simultaneously so vital and yet so shapeless. This Article seeks to articulate judicial temperament's theoretical core and, in so doing, to fundamentally reorient how we think and talk about it. It posits that, because judicial temperament is a psychological construct, we ought to use psychology to understand it. The psycho-legal theory of judicial temperament offered by this Article proposes that we ought to think of judicial temperament as a deep-seated, relatively stable set of specific personal traits—separable from intellect, training, and ideology—that, in dialectic with judicial environments and the predictable demands of judging, drive behaviors that we may deem desirable or undesirable according to the dominant normative expectations of our era. This way of thinking about *judicial* temperament synergizes with how our sister discipline of psychology conceptualizes *human* temperament. The psycho-legal theory offers a sharper notion of how judicial temperament operates structurally and of what it consists substantively.

This Article represents the first substantial scholarly exploration of judicial temperament, and the first of any length to recruit psychological insights. Part I offers an overview of extant notions of judicial temperament, particularly the deep-rooted idea that the *good judge* is characterized, in part, by highly personal, non-intellectual traits.²⁷ It echoes a philosophical tradition in which moral virtues—defined by Aristotle as temperance, justice, prudence, and fortitude—are distinguished from intellectual ones.²⁸ Indeed, some centuries after Aristotle, Senator Lindsey Graham, when questioning Neil Gorsuch at his confirmation hearing for the Tenth Circuit, emphasized that “being a judge is more than being smart.”²⁹ To predict who will be a good judge, “you have got to understand people underneath.”³⁰ This Part examines how we have attempted to specify both the desired qualities that lie underneath and the behaviors those

Kearns Goodwin, for one, suggests there is something unique about presidential temperament, her account bears striking overlap with commonly cited aspects of judicial temperament. Peter Grier, *Donald Trump, Hillary Clinton, and the Question of Temperament*, CHRISTIAN SCI. MONITOR (Sept. 22, 2016), <https://www.csmonitor.com/USA/Politics/2016/0922/Donald-Trump-Hillary-Clinton-and-the-question-of-temperament> [<https://perma.cc/D7JP-YZ9N>] (quoting Kearns Goodwin and other historians as listing humility, empathy, and patience; liking people; resilience; and not being disposed to “wallow[] in anger or resentment” as “basic qualities” for a president, ones “that are useful in a wide range of situations”).

²⁶ Dickerson, *supra* note 25.

²⁷ See *infra* notes 42–105 and accompanying text.

²⁸ See generally ARISTOTLE, NICOMACHEAN ETHICS (W.D. Ross trans., Batoche Books 1999) (c. 384 B.C.E.).

²⁹ *Confirmation Hearings on Federal Appointments: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 36 (2006) [hereinafter *Confirmation Hearings II*], <https://www.congress.gov/109/chrg/shrg32199/CHRG-109shrg32199.pdf> [<https://perma.cc/45GL-G69G>] (statement of Sen. Graham).

³⁰ *Id.*

qualities are thought to promote. Though variance abounds, temperament generally is understood to manifest in patience, level-headedness in challenging moments, and being a good colleague; to be rooted in dispositions such as compassion and open-mindedness; and to be separable from other aspects of judicial competence—like intelligence—and from other influences on judicial behavior—like ideology.³¹ These core ideas are essentially correct, though incomplete, inadequately specified, and undertheorized.

The psychological literature on temperament and personality, particularly the foundational work of Jerome Kagan, is enormously helpful in remedying these defects.³² In psychology, temperament refers to trait-level individual dif-

³¹ See *infra* notes 106–273 and accompanying text; see also FED. JUDICIAL CTR., COMPETENCIES FOR UNITED STATES JUDGES 33 (2018) (defining judicial temperament narrowly as the “quality of acting with dignity and humility and treating others with courtesy and discretion, even in challenging situations,” and detailing its outcomes).

³² An important point of nomenclature here deserves mention. When this Article refers to psychological concepts of temperament, it means to embrace that discipline’s study of trait-level individual differences and their implications in adults. Although the psychological literature traditionally has distinguished between such phenomena in child development—historically labeled *temperament*—and adult manifestations of those phenomena—historically labeled *personality*—this theoretical and linguistic divide is declining. See Mary K. Rothbart, *Advances in Temperament: History, Concepts, and Measures*, in HANDBOOK OF TEMPERAMENT 3, 9 (Marcel Zentner & Rebecca L. Shiner eds., 2012) (“In recent years, concepts of temperament and personality in adulthood and childhood have increasingly come together . . .”); Marcel Zentner & Rebecca L. Shiner, *Fifty Years of Progress in Temperament Research: A Synthesis of Major Themes, Findings, and Challenges and a Look Forward*, in HANDBOOK OF TEMPERAMENT, *supra*, at 673, 673 (“Placing research on the heritability and biology of adult temperament and the study of child temperament under one roof galvanized the field and helped to forge the identity of the field of temperament as it is known today.”). Further, adult temperament is now understood to refer to a smaller and more deeply-rooted set of intrapersonal attributes than does personality. See Jaap J.A. Denissen et al., *Personality Development Across the Life Span*, in WILEY-BLACKWELL HANDBOOK OF INDIVIDUAL DIFFERENCES 77, 77–84 (Tomas Chamorro-Premuzic et al. eds., 2011) (exploring the overlap between research on personality and temperament).

Further, this Article does not seek to examine psychological, psychiatric, or physical disorders. Temperament, like many other factors, does have some bearing on clinical disorders; it may, for example, moderate responses to adversity, or be associated with greater risk of particular psychopathologies. Liliانا J. Lengua & Theodore D. Wachs, *Temperament and Risk: Resilient and Vulnerable Responses to Adversity*, in HANDBOOK OF TEMPERAMENT, *supra*, at 519, 519–21. The complicated interplay of temperament and clinical disorder falls outside the reach of this Article, and is nowhere near a straight-enough line to require the theory proposed herein to account for it. The important issues associated with physical and mental illness in the judiciary is the focus of a relatively new move toward supporting judicial wellness, itself worthy of deeper study. See generally AM. BAR ASS’N, COMMISSION ON LAWYER ASSISTANCE PROGRAMS, JUDGES HELPING JUDGES, THE JUDICIAL ASSISTANCE INITIATIVE: RESOURCES & EDUCATION 44–61 (2010) [hereinafter JUDGES HELPING JUDGES] (providing information on good judicial mental health and resources to support it); U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, A WELLNESS GUIDE FOR JUDGES OF THE NINTH CIRCUIT COURTS (2015), https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/lis_colap_2015_Wellness_Guide.pdf [<https://perma.cc/E4PS-F4UV>] (addressing challenges to the mental health of judges and providing strategies to improve it).

ferences that underlie the ways in which different people react to, and cope with, similar situations.³³ Part II sets forth two fundamental insights from that literature that undergird a new psycho-legal theory of judicial temperament.³⁴

First, temperament has a structural component. Temperament constrains how any given person may act, and is an important determinant of behavior, particularly behavior when under stress. Because of these structural attributes, a judge's core temperamental traits are relatively hard to shake, and behavior in highly stressful situations is at least somewhat (and perhaps highly) diagnostic of those traits. Temperament's structure, however, is complex and interactional. Its implications are co-determined by the unique mix of traits within a person, the attributes of the environment within which the person is asked to function, and the interaction between the two. Therefore, rather than conceptualize judicial temperament as a unitary quality that one has or does not have, as we generally have done, we should recognize a range of judicial temperaments that will fit poorly or well with particular judicial assignments.

Second, temperament has a substantive component, consisting of stable patterns of emotional experience and self-regulation. When we talk about judicial temperament, then, we ought to be talking largely about emotion—both the emotional traits that sit at a person's core and the behaviors those traits promote. The psycho-legal theory proposes that the substantive underpinnings of a desirable judicial temperament are, first, stable tendencies toward positive, prosocial emotions, dispositional kindness, and low levels of habitual negative emotionality, and, second, relatively high levels of skill with emotional regulation.³⁵ The theory does not call for perfection, and not every judge is expected to have an ideal temperament. Every judge should, however, clear the baseline conditions of being relatively low in negative emotionality, possessing at least some demonstrable trait kindness, and having at least moderate levels of emotional regulation.

This psycho-legal theory articulates the core of what we ought to talk about when we talk about judicial temperament. It has wide-reaching implications. It can shape mechanisms of judicial selection, training, support, and discipline, not just for the U.S. Supreme Court—a small target that draws enormous attention—but for the tens of thousands of lower court judges in federal, state, municipal, and administrative courts across the country.³⁶ It can inform

³³ Rothbart, *supra* note 32, at 3.

³⁴ See *infra* notes 106–273 and accompanying text.

³⁵ See *infra* notes 106–273 and accompanying text.

³⁶ RON MALEGA & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION, 2011, at 1 (Nov. 2013), <https://www.bjs.gov/content/pub/pdf/sco11.pdf> [<https://perma.cc/WAQ9-3S3Y>] (finding there to be over 27,000 state court judges); *Biographical Directory of Article III Federal*

how we sort people into the specific judicial roles in which they are most likely to thrive. It would also allow us to construct and support environments that maximize judges' chances of thriving, and minimize their chances of failure, given their expected range of temperaments.³⁷

The psycho-legal theory also presents particular dangers. If the primary vice of extant accounts is indeterminacy, the primary vice of this one may be overdeterminacy. There is nothing in this new account that guarantees that shortcoming, but there is reason to worry that it may manifest. Part III concretizes those dangers by showing the ways in which our human drive to categorize ourselves has manifested in analytical schemes ranging from silly to evil to clumsy.³⁸ After cautioning against such approaches, Part III invites robust, empirically-grounded exploration of the many ways in which the psycho-legal theory of judicial temperament could be used.³⁹ Part III argues further that the psycho-legal theory explains why commitment to diversity and equality should not be regarded as factors of temperament, though influential accounts cast them as such.⁴⁰ Such commitments should instead be recognized as independent requirements for judicial service in a diverse, democratic society.

Finally, Part IV returns to the Kavanaugh nomination, presenting it as a lost opportunity for productive dialogue on the nature of judicial temperament. It further explores how the psycho-legal theory could have provided a sound, disciplined frame within which to have that dialogue.⁴¹

This Article concludes by positing that the psycho-legal theory gets to the heart of the matter. It both explains what judicial temperament is and predicts how it may be assessed and, perhaps, improved.

I. WHAT WE HAVE TALKED ABOUT WHEN WE HAVE TALKED ABOUT JUDICIAL TEMPERAMENT

*Temperament, perhaps most critically, affects how judges decide cases.*⁴²

The core judicial mission—to effectively decide cases—encompasses a wide range of behaviors. Most obviously, it includes the work of making legal

Judges, 1789–Present, FED. JUDICIAL CTR., <https://www.fjc.gov/history/judges> [<https://perma.cc/QL5N-6XUK>] (listing over 1,200 Article III federal judges).

³⁷ Given the psycho-legal theory's applicability to all these pivotal moments, this Article uses the term "judge" to signify both persons who already are serving in a judicial role and those who are seeking judicial office.

³⁸ See *infra* notes 274–311 and accompanying text.

³⁹ See *infra* notes 278–285 and accompanying text.

⁴⁰ See *infra* notes 286–311 and accompanying text.

⁴¹ See *infra* notes 312–325 and accompanying text.

⁴² Sutton, *supra* note 12, at 875.

and factual decisions—decisions about what the law is or what it requires in a given situation, how to exercise discretion, how broadly or narrowly to define legal questions, what versions of reality to credit, what level of deference to give other institutional actors, and so on. Although these aspects of judging draw the lion’s share of scholarly attention, other aspects of judicial behavior are also important, both because they have independent value and because they are closely intertwined with that decision making. How judges interact with the public, lawyers, litigants, jurors, witnesses, court staff, and one another, for instance, matters. Judges also act as colleagues, employees, employers, and supervisors. They may embrace the role of court manager, civic role model, or public intellectual.

Judicial temperament speaks to this broader understanding of what judges do.⁴³ Though it has implications for legal and factual decision making, it concerns itself not with whether a judge is intellectually capable of parsing a statute, or the interpretive philosophy she will employ in doing so, but rather with how she will handle the job’s inherent challenges and how she will treat people along the way. As Supreme Court Chief Justice Roberts has written, excellence in judging entails “long hours, exacting skill, and intense devotion—while promising high stress, solitary confinement, and guaranteed criticism.”⁴⁴ A person can have extraordinary intellect and training and yet be a miserable failure at handling these parameters of judicial life.⁴⁵ That failure may manifest itself as an inability to carry out the decisional tasks of which she is capable—for example, routinely denying meritorious objections because she is distracted from, irritated with, or disinterested in what attorneys have to say. Failure may also rear its head in callousness, arrogance, burnout, displays of disrespect—both to the public and to judicial colleagues—and psychological and physical ailments.⁴⁶

⁴³ See MARLA N. GREENSTEIN, AM. JUDICATURE SOC’Y, HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS 73 (2d ed., 2004), http://www.judicialselection.com/uploads/documents/Handbook_for_Judicial_Nominating_Co_C46CEF0C61755.pdf [<https://perma.cc/K5NR-SV67>] (“The judge’s job includes contact with lawyers, members of the public and court employees and requires an inordinate amount of an elusive quality called judicial temperament.”).

⁴⁴ CHIEF JUSTICE JOHN G. ROBERTS, JR., 2016 YEAR-END REPORT ON THE FEDERAL JUDICIARY 8 (2016), <http://www.supremecourt.gov/publicinfo/year-end/2016year-endreport.pdf> [<https://perma.cc/8DLT-Q7KN>]. Although Chief Justice Roberts was speaking specifically of U.S. District Judges, the sentiment is equally true of appellate judging, though some sources of stress are different. See *infra* notes 158–163 and accompanying text.

⁴⁵ Michael J. Gerhardt, *Judicial Selection by the Numbers*, 32 FLA. ST. U. L. REV. 1197, 1205–06 (2005) (stating that not all judges are able to “handle the intense pressures that come with the responsibilities” of the position).

⁴⁶ See JUDGES HELPING JUDGES, *supra* note 32, at 1–2, 44–57, 65, 70 (presenting range of problems that impaired judges can face, including mental health disorders and burnout, some of which may manifest in intemperate actions and misconduct).

Our enduring concern with judicial temperament reflects a shared notion that the non-intellectual aspects of a judge's personal makeup matter. They may promote or hinder judges' ability to carry out the basic functions of their jobs.⁴⁷ They may promote or hinder the collegiality on which court functioning depends—something particularly important in the appellate courts, in which all decision making is a joint enterprise.⁴⁸ They may promote or hinder judges' longevity and well-being—independently worthy goals, but also important to preserving the investment society sinks into judges and the hard, disruptive work required to discipline or remove them.⁴⁹ They may promote or hinder judges' ability to grasp and care about the stories behind, and impacts of, their work. They may promote or hinder the public displays of respect and concern that, as the procedural justice literature shows, are critical to public confidence in the courts.⁵⁰

In short, temperament has real consequences for judges' well-being, the quality of justice in individual cases, the soundness of the judiciary as an insti-

⁴⁷ See FED. JUDICIAL CTR., *supra* note 31, at v (stating that temperament is “essential for successful performance”).

⁴⁸ See Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1639–40 (2003) (explaining the importance of collegiality in an appellate court). Frayed collegial bonds were starkly exposed in former Judge Richard Posner's recent, highly contentious departure from the Seventh Circuit. In a hastily self-published book, Posner detailed his disputes with colleagues and—ignoring an ethics command that he not do so—included internal memos and emails, annotated by his comments. Patricia Manson, *Posner Says Friction on 7th Circuit Bench Led to His Retirement*, CHI. DAILY L. BULL. (Sept. 6, 2017), <https://www.chicagolawbulletin.com/archives/2017/09/06/posner-bench-friction-9-6-17> [<https://perma.cc/P66E-UYME>]; Joe Patrice, *The Seventh Circuit's War with Judge Posner Really Escalated Quickly*, ABOVE THE LAW (Oct. 31, 2017), <https://abovethelaw.com/2017/10/the-seventh-circuits-war-with-judge-posner-really-escalated-quickly/> [<https://perma.cc/49AQ-JPAJ>]; Matthew Stiegler, *Posner's New Book Is Bananas, but You Might Want It Anyway*, CA3BLOG (Sept. 18, 2017), <http://ca3blog.com/judges/posners-new-book-is-bananas-but-you-might-want-it-anyway/> [<https://perma.cc/9TB9-SXB7>].

⁴⁹ See Terry A. Maroney & James J. Gross, *The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective*, 6 EMOTION REV. 142, 142 (2014) (explaining how effective tools for emotion regulation can benefit judges' ability to manage work); see also Douglas Keith, *Impeachment and Removal of Judges: An Explainer*, BRENNAN CTR. FOR JUST. (Mar. 23, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/impeachment-and-removal-judges-explainer> [<https://perma.cc/HTY4-M2FZ>] (overviewing state and federal removal processes and stating that “[i]mpeachment of judges is rare, and removal is rarer still”); *Methods of Judicial Selection: Removal of Judges*, NAT'L CTR. FOR STATE COURTS., http://www.judicialselection.com/judicial_selection/methods/removal_of_judges.cfm?state [<https://perma.cc/92SD-XFT9>] (detailing state-by-state requirements for judicial removal).

⁵⁰ See Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 6 (2008) (finding that a public perception of procedural fairness—created by letting people's voices be heard, showing neutrality, treating people respectfully, and inspiring trust—generates positive emotions in the public and increases voluntary cooperation and compliance with legal authorities); Kristina Murphy & Tom Tyler, *Procedural Justice and Compliance Behaviour: The Mediating Role of Emotions*, 38 EUR. J. SOC. PSYCHOL. 652, 652 (2008) (showing how procedural justice changes peoples' emotions, which in turn affects their compliance behaviors).

tution, and the level of respect with which the public regards that institution. Hence the high stakes, and hence the intolerability of leaving the construct so ill-defined.

This Part first elucidates what concepts are captured in the notion of temperament.⁵¹ Section B then highlights concepts that fall outside of this category, and therefore should not be regarded as temperamental.⁵² Section C explores how temperament is discussed in the psychological and legal fields, respectively, and finds a common ground between the two.⁵³

A. *What Judicial Temperament (Arguably) Is*

The construct of judicial temperament is ill-defined, but not entirely undefined. The few extant scholarly treatments offer some theoretical insights, though they tend not to explain how they ought to be operationalized.⁵⁴ In contrast, judicial selection guidelines and processes, codes of conduct, performance evaluation standards, and disciplinary norms—together delineating the spaces within which (and criteria by which) temperament is used to initiate, guide, measure, and terminate judges' careers—largely lack a theoretical basis.⁵⁵ Nevertheless, some value may be teased out of extant accounts.

When scholars have talked about judicial temperament conceptually, they generally invoke four basic structural ideas. First, temperament is located in the person, not the office. Second, temperament drives the behavior of that person in that office. Put together, these ideas yield the central assumption that a judge with temperament *x* will, in environment *y*, act predictably with behavior *z* but not behavior *q*. We look under the robe because how a person is con-

⁵¹ See *infra* notes 54–69 and accompanying text.

⁵² See *infra* notes 70–100 and accompanying text.

⁵³ See *infra* notes 101–105 and accompanying text.

⁵⁴ See, e.g., ROSEN, *supra* note 2, at 2; Ross, *Functions, Roles, and Duties*, *supra* note 12, at 64–65; Ross, *Questioning*, *supra* note 5, at 129–32; Yackle, *supra* note 7, at 309–10; Sutton, *supra* note 12, at 875.

⁵⁵ See HOW IT WORKS, *supra* note 11, at 3 (providing general criteria for temperament without any support); Marla N. Greenstein et al., *Improving the Judiciary Through Performance Evaluations*, in THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 225, 233–36 (Gordon M. Griller & E. Keith Stott, Jr eds., 7th ed. 2001) (suggesting judicial temperament as a tool for assessment, but failing to explain what it is); Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URB. L.J. 1053, 1070 (2002) (providing only a sentence to define judicial temperament). For a comprehensive overview of the element of temperament in performance evaluation, see *Judicial Performance Evaluation*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <https://iaals.du.edu/projects/judicial-performance-evaluation> [<https://perma.cc/P6SB-AXWZ>]. Sometimes the construct is invoked and left completely undefined, as in the Uniform Code of Military Justice. See James T. Hill, *Achieving Transparency in the Military Panel Selection Process with the Preselection Method*, 205 MIL. L. REV. 117, 137 (2010) (citing 10 U.S.C. § 825(d)(2) (2006), which requires the convening authority to consider judicial temperament but provides no further explanation).

structed determines how he or she will function. Given this focus on predicting function, the third idea is that judicial temperament is valued not as a free-standing virtue but instead because we believe it produces desirable behaviors in the daily work of judging. Fourth, temperament is thought to be conceptually separable from other desirable judicial qualities, such as adequate legal training, and from other influences on behavior, such as ideological commitments. These foundational ideas are, as it turns out, nicely in line with the psychological literature, as Part II.A demonstrates.⁵⁶ The problem with the extant literature is that it inadequately articulates these foundational ideas about temperament's structure; further, it does not ground them in the relevant psychology.

At the substantive level, distilling extant treatments of judicial temperament reveals that certain characteristics repeatedly surface in the construct's taxonomies. One such quality is compassion, an emotional response to perceiving and caring about another's distress.⁵⁷ Another commonly cited trait is patience, judged by the ability to be even-tempered and exercise restraint in trying situations.⁵⁸ Dignity also is mentioned with moderate frequency, as here:

⁵⁶ See *infra* notes 110–127 and accompanying text.

⁵⁷ C. Daniel Batson, *Compassion*, in OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES 91, 91 (David Sanders & Klaus R. Scherer eds., 2009). A tendency to feel compassion is the first quality emphasized by the influential ABA Standing Committee. HOW IT WORKS, *supra* note 11, at 3. The ABA Standing Committee evaluates the “integrity, professional competence and judicial temperament” of every nominee for an Article III judgeship in the United States, as well as Article IV appointments in the territories. See *id.*; see also ALASKA JUDICIAL COUNCIL, JUDICIAL RETENTION SURVEYS: JUDGES ELIGIBLE FOR RETENTION IN 2014, TECHNICAL REPORT 8 (2014), <http://www.ajc.state.ak.us/retention/retent14/techrpt14.pdf> [<https://perma.cc/V7G3-RRRC>] (using temperament as a retention criterion, rated on a basis of “courtesy and freedom from arrogance” and a manifestation of “human understanding and compassion”); AM. BAR ASS’N, STANDARDS ON STATE JUDICIAL SELECTION: REPORT OF THE COMMISSION IN STATE JUDICIAL SELECTION STANDARDS 7 (2000) (prioritizing compassion similarly); Alfani & Gable, *supra* note 12, at 704. Snapshot views of Senate Judiciary Committee hearings on Article III appointments reflect a similar perspective. Nominees in a 1998 hearing, asked to explain their concept of judicial temperament, made consistent and specific mention of compassion. *Confirmation Hearings I*, *supra* note 1, at 7, 267, 643. Even Chief Justice Roberts has emphasized that a district judge must “temper[] firm and decisive judgment” with “compassion.” ROBERTS, *supra* note 44, at 4.

⁵⁸ GREENSTEIN, *supra* note 43, at 71. The ABA Guidelines for the Evaluation of Judicial Performance (ABA Performance Guidelines) define temperament as “patience . . . dignity and understanding,” a simple construction that gives that trait high prominence. AM. BAR ASS’N, SPECIAL COMM. ON EVALUATION OF JUDICIAL PERFORMANCE, GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE 15 (1985) (outlining a model approach to assessment of sitting judges); UTAH STATE COURTS, *supra* note 11, at 19; Carl Tobias, *The D.C. Circuit as a National Court*, 48 U. MIAMI. L. REV. 159, 188 (1993) (referring to a proposed, but not adopted, definition of judicial temperament as “dignity, sensitivity and understanding”); see also FED. JUDICIAL CTR., *supra* note 31, at 33 (a judge with good judicial temperament “[e]xhibits patience and exercises civility, courtesy, and tact in all interactions”); HOW IT WORKS, *supra* note 11, at 3; Gerhardt, *supra* note 45, at 1205 (“[A] district judge may largely work alone in deciding cases but still needs a great deal of patience to sit through long trials and other legal proceedings.”).

“[t]o be dignified a judge must possess ‘quiet, tactful ways, and calm yet firm assurance.’”⁵⁹ Confusingly, dignity sometimes is treated not as a trait but, rather, as an institutional image or value that is promoted by judges with a proper set of traits.⁶⁰ Indeed, it is common for discussions of temperament to elide lines between traits (for example, being a dignified person), the behaviors promoted by those traits (acting in a dignified manner), and the values served by those behaviors (promoting a positive image of the judiciary).⁶¹ Similarly, frequent invocations of demeanor capture not a trait so much as the multiple ways in which a judge—through facial expressions, tone of voice, and bodily movements—projects valued traits, including compassion, patience, and dignity, but also calm, respect, and humility.⁶² Collegiality, another oft-named quality, similarly is described as both a “generous and respectful” attitude towards one’s judicial fellows and the concrete actions by which that attitude is manifested.⁶³ Finally, three other qualities that appear to be both highly valued and commonly regarded as temperamental are being open-minded, even-handed, and committed to equality.⁶⁴

Beyond this (relatively) common core, extant accounts propose an array of other traits and behaviors, such as humor, likeability, common sense,

⁵⁹ GREENSTEIN, *supra* note 43, at 73 (quoting J. Bernard L. Sheintag, The Benjamin N. Cardozo Lectures, The Personality of the Judge (1943), in THE PERSONALITY OF THE JUDGE 42 (1944)); FED. JUDICIAL CTR., *supra* note 31, at 33.

⁶⁰ The ABA Performance Guidelines invoke both uses, defining judicial temperament as consisting of personal dignity and cautioning that “a judge without good judicial temperament can do great harm to the dignity of the position.” AM. BAR ASS’N, *supra* note 58, at 15.

⁶¹ See AM. BAR ASS’N, *supra* note 58, at 15 (calling for judges to act in a dignified manner); GREENSTEIN, *supra* note 43, at 73 (describing dignity as a trait); Burke & Leben, *supra* note 50, at 6–7 (discussing dignity for its effect on judicial image).

⁶² See FED. JUDICIAL CTR., *supra* note 31, at 33 (describing the extent to which a judge “[e]xhibits an even tone, a calm voice, and appropriate body language under pressure”); JUDICIARY STATE OF HAW., JUDICIAL PERFORMANCE PROGRAM 2016 REPORT 4 (2016), <http://www.courts.state.hi.us/wp-content/uploads/2016/03/JP16REPT.pdf> [<https://perma.cc/9J5S-CDYX>] (measuring “compartment” by reference to courtesy, compassion, patience, and absence of bias and arrogance); see also ARTHUR H. GARWIN ET AL., AM. BAR ASS’N, ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 194–95 (3d ed. 2016) (construing Rule 2.8(B), a requirement that judges maintain a proper judicial demeanor, as a temperamental construct); Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 N.Y.U. ANN. SURV. AM. L. 497, 518 (2009) (discussing how judicial demeanor is seen as an indicator of judicial impartiality).

⁶³ See FED. JUDICIAL CTR., *supra* note 31, at 25, 33 (providing behaviors and expected outcomes associated with judicial collegiality); Gerhardt, *supra* note 45, at 1205–06 (emphasizing the importance of collegiality); Sutton, *supra* note 12, at 875 (reflecting the view that temperament includes “being a generous and respectful colleague”).

⁶⁴ See HOW IT WORKS, *supra* note 11, at 3 (asking nominees be considered on “open-mindedness . . . freedom from bias and commitment to equal justice”); Gerhardt, *supra* note 45, at 1205–06; Goldman, *supra* note 7, at 741 (describing how a judge should be fair and impartial when administering justice).

warmth, and willingness to work hard.⁶⁵ The diversity of this array reminds us of how elusive the concept of judicial temperament remains. Further, it is at this juncture that scholars tend to fall into despair, and end up characterizing the construct as so “vague,”⁶⁶ “unruly,”⁶⁷ and “capable of so many definitions”⁶⁸ that “it is difficult to conceive of how so amorphous a criterion could be made more precise.”⁶⁹

B. What Judicial Temperament (Arguably) Is Not

One strategy for countering such despair is to define the elusive construct via contrast with its supposed opposite. As the Utah application for judicial office states, “Judicial temperament is a quality which is not easily identifiable, but . . . [i]ts absence can usually be fairly ascertained.”⁷⁰

One rare (if abbreviated) scholarly treatment of temperament, offered by Lawrence Solum, explicitly reasons in this fashion. Grounding his claims in Aristotelean virtue ethics, Solum identifies the foundational judicial virtues—that is, dispositions of mind or will that underlie just decisions—as temperance, courage, good temper, intelligence, wisdom, and justice.⁷¹ It being easier to identify consensus on traits and behaviors we do *not* want in our judges, he draws out the nature of each judicial virtue by contrast with an opposing vice.⁷² Solum maps the contemporary concept of judicial temperament onto the virtue of “good temper,” or *proates*, which he juxtaposes with the vice of excessive anger. He is not uniformly anti-anger, unlike many Stoics.⁷³ He urges instead that *proates* requires “proportionate anger,” which “alerts us to wrongs and motivates us to respond to them” but avoids misguided or outsized displays.⁷⁴ Amusingly, Solum illustrates this virtue by way of Star Trek. He proposes that Mr. Spock (were he a judge) would react “with equanimity to even the most severe courtroom provocations,” but is too logical and cold, while Dr. McCoy is “hot-tempered,” and “we imagine him flying off the handle” when provoked.⁷⁵ Captain Kirk is just right, however, by being both “appropriately

⁶⁵ Ross, *Questioning*, *supra* note 5, at 130–33; Sutton, *supra* note 12, at 875.

⁶⁶ Goldman, *supra* note 7, at 741.

⁶⁷ Yackle, *supra* note 7, at 309.

⁶⁸ Ross, *Questioning*, *supra* note 5, at 130.

⁶⁹ Ross, *Participation*, *supra* note 15, at 65.

⁷⁰ GREENSTEIN, *supra* note 43, at 93 (quoting the Utah Application for Judicial Office).

⁷¹ See generally Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65 (2006) (exploring the conceptual boundaries of justice in our legal system).

⁷² Laurence B. Solum, *A Tournament of Virtue*, 32 FLA. ST. U. L. REV. 1365, 1368–76 (2005) (discussing judicial vices that are universally disliked).

⁷³ *Id.* at 1372.

⁷⁴ *Id.* at 1373.

⁷⁵ *Id.*

outraged by bad behavior and injustice but nonetheless remaining ‘in control’ and responding in an appropriate manner.”⁷⁶ Solum thus isolates the virtue of what I have called “righteous judicial anger.”⁷⁷ He treats it as the sum total of good judicial temperament, conversely casting highly dysregulated displays of anger as the essence of poor temperament.⁷⁸

Indeed, the psycho-legal theory concurs that dysregulated displays of anger are one reflection of a poor temperament, and the over-the-top variety contribute significantly to the initiation of judicial disciplinary proceedings.⁷⁹ Even a cursory examination of such disciplinary cases, however, shows Solum’s formulation to be unduly narrow.⁸⁰ Consider this example from New York, in which a judge was censured on temperamental grounds for being angry, but also for being:

arrogant, dictatorial, demeaning, loud, and degrading, and [for] having attempted to frighten parties into settlement [T]he judge’s conduct amounted to a lack of judicial temperament which manifested itself by shouting at parties, rudeness, abusive and bullying behavior, and some instances of extremely high-handed conduct and abuse of authority.⁸¹

Other sources similarly reflect the view that broader indicators of poor temperament are “arrogance, impatience, pomposity, irascibility, arbitrariness or tyranny,”⁸² “rudeness, nastiness, and arrogance,”⁸³ and use of contemptuous and

⁷⁶ *Id.*

⁷⁷ Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207, 1250 (2012).

⁷⁸ See Solum, *supra* note 72, at 1372–74 (identifying excessive anger as the crux of poor judicial temperament, and asserting that all judges—trial and appellate—need to possess the appropriate anger that characterizes “good temper”).

⁷⁹ See GARWIN ET AL., *supra* note 62, at 206–14 (collecting examples of judges sanctioned for “inappropriate expressions of anger,” including physical confrontations and yelling); Sharyn Roach Anleu et al., *The Emotional Dimension of Judging: Issues, Evidence, and Insights*, 52 CT. REV. 60, 70 (2016) (analyzing examples of state disciplinary proceedings sparked by anger displays).

⁸⁰ See generally *Dodds v. Comm’n on Judicial Performance*, 906 P.2d 1260, 1270 (Cal. 1995) (explaining that the judge “repeatedly interrupt[ed] a litigant and yell[ed] angrily and without adequate provocation”); *In re Sloop*, 946 So. 2d 1046, 1049 (Fla. 2006) (removing a judge for repeated displays of misconduct, including brandishing a firearm in the courtroom); *In re Holien*, 612 N.W.2d 789 (Iowa 2000) (“The depth and breadth of [the judge’s] hostilities must have touched every aspect of her judicial services She has been like the proverbial bull in a china shop.”).

⁸¹ *Disciplinary Action Against Judge on Ground of Abusive or Intemperate Language or Conduct Toward Attorneys, Court Personnel, or Parties to or Witnesses in Actions, and the Like*, 89 A.L.R. 4th 278 § 40 (1991).

⁸² GREENSTEIN, *supra* note 43, at 93 (quoting the Utah Application for Judicial Office).

⁸³ Norman L. Greene, *A Perspective on “Temper in the Court: A Forum on Judicial Civility,”* 23 FORDHAM URB. L.J. 709, 712, 716–17 (1996) (pointing out that “blatant rudeness, nastiness, and arrogance . . . are well known to people who are frequently in the courts”).

insulting language.⁸⁴ Anger alone does not explain such attitudes and behaviors.⁸⁵ Although anger is an important element of both the virtue of temperament and the vice of its opposite, it is not the only element.⁸⁶

That being said, Solum's account is welcome in that it correctly identifies differential propensities toward anger and its expression as an element of judicial temperament. He also nicely distinguishes between episodic anger and underlying dispositions. Rather than criticize or praise the handling of any given conflict on the *Starship Enterprise*, Solum invites us to focus on the characters' enduring qualities as a means to predict how they will handle conflict. As Part II.B. explains, this distinction is critical.⁸⁷ Even the U.S. Supreme Court has opined that good judges can fly off the handle at times, and that although such instances are unfortunate, they do not necessarily reveal a general lack of fitness.⁸⁸ Similarly, even though disciplinary actions sometimes are triggered by one extreme incident, they far more frequently involve a pattern of conduct.⁸⁹ Judges who routinely explode, engage in outsized power displays, demean others, and appear resistant to change seem so obviously "intemperate" that all can agree that, whatever judicial temperament is, they don't have it.⁹⁰ Identifying the foil, these examples show, is one way—if an imperfect one—to move closer to a shared concept of judicial temperament.

A second approach to clarifying temperament's arguably elusive nature is to identify qualities orthogonal, not oppositional, to it. For example, Solum explicitly positions temperament as just one of a number of judicial virtues.⁹¹ The conceptual work of separation requires boundary delineation. Indeed, no account imagines temperament as the only ingredient in judicial fitness. The ABA Standing Committee, for example, draws a sharp line between temperament and two other categories of fitness: integrity, which it defines as "character," "reputation," "industry and diligence," and professional competence, or "intellectual capacity, judgment, writing and analytic abilities, [legal] knowledge

⁸⁴ *Confirmation Hearings I*, *supra* note 1, at 667 (statement of Sen. Biden cautioning federal nominees not to be "arrogant," "officious," or "discourteous"); Roach Anleu et al., *supra* note 79, at 66–69.

⁸⁵ See *infra* notes 164–273 and accompanying text.

⁸⁶ See *infra* notes 174–215 and accompanying text.

⁸⁷ See *infra* notes 128–163 and accompanying text.

⁸⁸ Maroney, *supra* note 77, at 1236 (quoting *Liteky v. United States*, 510 U.S. 540, 555–56 (1994)) (describing such lapses as within the "bounds of what imperfect men and women . . . display").

⁸⁹ See GARWIN ET AL., *supra* note 62, at 74, 84–85 (noting that sanctions for failures of temperament, including rude or hostile behavior, generally follow a pattern of similar conduct).

⁹⁰ Email from Alexander Boni-Saenz, *supra* note 14.

⁹¹ See *supra* note 71 and accompanying text.

... and ... professional experience.”⁹² A good judge, in the ABA account, needs all three. Under the psycho-legal theory, too, such desirable judicial qualities also are properly considered non-temperamental.⁹³

The ABA Standing Committee also disclaims any consideration of a “nominee’s philosophy, political affiliation or ideology.”⁹⁴ That disclaimer reflects a belief—or at least the need to espouse a belief—that a judge with integrity, professional competence, and a proper temperament can be a good judge, no matter her politics, declarative beliefs, or approach to judging. This is not a perspective uniformly espoused.⁹⁵ The plausibility of such a separation, though, may be seen by contrasting the late Justice Scalia with his successor, Justice Gorsuch. The two are similar with regard to judicial philosophy and ideology, but although many over the years have agreed with Scalia’s disparaging view of his own temperament,⁹⁶ Gorsuch drew widespread praise on that count during his confirmation proceedings.⁹⁷ Indeed, one commentator dubbed him “Scalia without the scowl,” and quipped that “Trump’s nominee has the ideology without the temper.”⁹⁸ To be sure, this praise of Gorsuch’s temperament suffered from the vice of vagueness, and more specific assess-

⁹² HOW IT WORKS, *supra* note 11, at 3. *See generally* FED. JUDICIAL CTR., *supra* note 31 (dividing competencies into knowledge, skills, and attributes, with temperament noted as one such attribute).

⁹³ *See infra* notes 274–311 and accompanying text.

⁹⁴ HOW IT WORKS, *supra* note 11, at 9.

⁹⁵ *See* Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U.C. DAVIS L. REV. 619, 629 (2003) (“The former argument, that a person’s ideology is unlikely to affect performance in office, is impossible to sustain.”); Charles E. Schumer, Opinion, *Judging by Ideology*, N.Y. TIMES (June 26, 2001), <https://www.nytimes.com/2001/06/26/opinion/judging-by-ideology.html> [<https://perma.cc/6LNR-76HE>] (calling for a pragmatic approach to judicial selection that considers ideology); *infra* notes 278–285 and accompanying text.

⁹⁶ *See* Maroney, *supra* note 77, at 1245–46 (describing accounts of the late Justice’s temperament).

⁹⁷ The hearing transcripts from Justice Gorsuch’s confirmation to the Tenth Circuit show few references to temperament, and those that do appear are typically conclusory. *See Confirmation Hearings II*, *supra* note 29, at 2 (statement of Sen. Allard) (stating that Gorsuch “possesses the temperament befitting an appellate judge”).

⁹⁸ Andrew Cohen, *Neil Gorsuch: Scalia Without the Scowl*, MARSHALL PROJECT (Jan. 31, 2017), <https://www.themarshallproject.org/2017/01/31/neil-gorsuch-scalia-without-the-scowl> [<https://perma.cc/CUZZ-UY35>]; *see* Neal K. Katyal, Opinion, *Why Liberals Should Back Neil Gorsuch*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/opinion/why-liberals-should-back-neil-gorsuch.html> [<https://perma.cc/4NTM-VB89>] (attributing to Justice Gorsuch “a temperament that suits the nation’s highest court”); David Lawler, *Neil Gorsuch: Who Is Donald Trump’s US Supreme Court Nominee?*, THE TELEGRAPH (Feb. 1, 2017), <https://www.telegraph.co.uk/news/0/who-is-supreme-court-nominee-neil-gorsuch/> [<https://perma.cc/GH9J-8X8H>] (“He is well respected by his colleagues in the judiciary and does not share Scalia’s fiery temperament.”); David G. Savage, *Scalia’s Views Mixed with Kennedy’s Style: Meet Neil Gorsuch, Trump’s Pick for the Supreme Court*, L.A. TIMES (Jan. 31, 2017), <https://www.latimes.com/politics/la-na-pol-gorsuch-supreme-court-20170131-story.html> [<https://perma.cc/837P-AXEP>] (referencing his “superb” temperament).

ments generally focused only on his calm and pleasant demeanor—just one relevant factor.⁹⁹ The example nonetheless supports an important foundational idea, also supported by the psycho-legal theory: temperament is not everything we look for in a judge, and it operates independently from other qualities, both those we seek (like adequate legal training) and those we may commit to disregard (such as politics). The psycho-legal theory of judicial temperament, however, parts ways with the ABA example in one particular way, namely, by identifying commitment to equality as a non-temperamental, ideological aspect of judicial fitness.¹⁰⁰

C. We (Sort of) Speak the Same Language When We Talk About Judicial Temperament

As this distillation reveals, it is possible to excavate at least some common core in how we talk about judicial temperament. Consensus, however, should not be overstated. Even when taking a relatively focused view of high-value traits and behaviors (like compassion and displays of patience) and low-value traits and behaviors (like anger and aggression), extant accounts are unclear as to whether judicial temperament serves only to promote procedural justice values, collegiality, and the like, or whether, and to what degree, it also implicates substantive decision making.¹⁰¹ A highly elastic construct also leaves much room for conceptual slippage, subterfuge, and bromides, and thereby invites criticisms that are hard to counter except by resort to counter-assertions equally devoid of content.¹⁰² Moreover, not all agree that the sort of

⁹⁹ See Cohen, *supra* note 98 (referring to Justice Gorsuch as “affable” and “measured”); Savage, *supra* note 98 (citing his “polite, congenial manner”); see also Katyal, *supra* note 98 (praising Justice Gorsuch’s temperament with no elaboration or detail).

¹⁰⁰ See *infra* notes 274–311 and accompanying text.

¹⁰¹ See, e.g., ROSEN, *supra* note 2, at 6–7 (claiming temperament affects every aspect of judging, but including in the construct virtually every factor that could have such an effect, including jurisprudential philosophy); Jeffrey Rosen, *The Supreme Court: Judicial Temperament and the Democratic Ideal*, 47 WASHBURN L.J. 1, 10–11 (2007) (exploring the interaction of judicial temperament and “success,” specifically emphasizing judicial humility); Yackle, *supra* note 7, at 309 (stating that temperament might refer to “prudence” or “Solomonic justice”); Byron Holz, Note, *Chaos Worth Having: Irreducible Complexity and Pragmatic Jurisprudence*, 8 MINN. J.L. SCI. & TECH. 303, 304 (2006) (using temperament as a synonym for positivist, pragmatic, and nominalist judging styles).

¹⁰² Gerhardt, *supra* note 45, at 1206 (explaining how such accusations are hard to answer because “[e]mpirically demonstrating excellent judicial temperament or collegiality is not easy”). Take the 1999 nomination of Ted Stewart to the District of Utah. Political opponents claimed that he had “little or no judicial temperament.” *Confirmation Hearings on Federal Appointments Before the S. Comm. on the Judiciary*, 106th Cong. 195 (1999), <https://hdl.handle.net/2027/ien.35556032003824> [<https://perma.cc/YVF7-DDNX>]. Stewart’s defenders fought back with verbiage simultaneously vociferous and conclusory, branding the allegation “utterly false and nonsense.” *Id.* at 197. Letters submitted on his behalf characterized his temperament as excellent, outstanding, good, abundant, mild, or—most commonly—as simply existing, as in he seems to “possess a judicial temperament.” *Id.* at 206. Stew-

temperament captured by the above distillation is necessary for one to be a good judge, or even a great one. During the debates over Kavanaugh's nomination, one commenter wrote that many of the most highly regarded U.S. Supreme Court Justices "had disastrously bad, highly unjudicial temperaments," as they were "nasty, vindictive, backbiting, ambitious and partisan" in addition to nurturing animosities and taking every conflict personally.¹⁰³ The argued point is not that bad temperament is a good thing, but rather that a judge with a concededly bad temperament could still be great if he or she brings sufficient other value to the bench.¹⁰⁴

We thus still are left with a version of the question once asked of Justice Scalia: is there such a thing as an ideal judicial temperament, and if so, what is it, what does it do, and why do we care? As to each aspect of this question, we now have a stronger sense of where core instincts lie—an important analytic step forward. But these core instincts are not doing the work we expect of them. They have not gelled into a common understanding, based on sound theory, capable of being operationalized. As the following Part demonstrates, folding these core instincts into a construct grounded in psychology both buttresses and complicates—and, ultimately, clarifies—what we should talk about when we talk about judicial temperament.¹⁰⁵

II. THE PSYCHO-LEGAL THEORY OF JUDICIAL TEMPERAMENT

Psychological theory and research provide a disciplined lens through which to understand humans' *interpersonal differences*—the major psychological qualities that distinguish one person from another—and *intrapersonal functioning*—the ways in which those qualities combine within any given person.¹⁰⁶ These are the core concerns of judicial temperament: how to discern a given judge's relevant traits, and how to separate those with desirable traits from those without them. Proceeding from the baseline truth that judges are

art's nomination was successful and he still sits on the bench. The exchanges around his hearing, however, shed precisely no light on his temperament.

¹⁰³ Noah Feldman, Opinion, *Bad Temperament Alone Shouldn't Sink Kavanaugh*, CHI. TRIB. (Oct. 4, 2018), <https://www.chicagotribune.com/opinion/commentary/ct-perspec-kavanaugh-temperament-supreme-court-1005-20181004-story.html> [<https://perma.cc/47PU-HZYP>].

¹⁰⁴ Part II.B.3 takes up this idea in proposing that we can (and should) tolerate a range of temperaments given a range of judicial roles that will have differential fit with a judge's combination of traits and other qualities. The psycho-legal theory does propose that some judges' temperament is so exceedingly poor as to render it unlikely that any combination of other virtues would justify judicial office, but I render no opinion as to whether that was true as to the Justices on which Professor Feldman focuses.

¹⁰⁵ See *infra* notes 106–273 and accompanying text.

¹⁰⁶ See Nicole B. Barenbaum & David G. Winter, *History of Modern Personality Theory and Research*, in HANDBOOK OF PERSONALITY 3, 7 (Oliver P. John et al. eds., 3d ed. 2008) (outlining the different approaches to personality research).

human, this Part synchronizes fundamental psychological findings about human temperament with fundamental features of judging. The resulting psycho-legal theory of judicial temperament represents an attempt to elucidate the extent to which judges' personal traits are likely to influence their work-related behaviors, and how; the specific traits that are most and least likely to promote desired behaviors, and why; and how we collectively can create environments that help judges achieve the best possible level of performance in light of their temperamental baselines.

Section A of this Part encapsulates psychological research into temperament, which lays the groundwork for the psycho-legal theory.¹⁰⁷ Section B sets forth that theory's structural aspect—namely, the ways in which temperament constrains the possible self, significantly drives behavior, and interacts with the judge's environment.¹⁰⁸ Section C sets forth the theory's substantive formulation, showing how particular trait-level patterns of emotional experience and self-regulation would be predicted to serve or disserve desired judicial behaviors.¹⁰⁹

A. The Psychology of Temperament: Foundational Principles

The psycho-legal theory rests on several foundational principles of developmental and personality psychology, principles synopsized here.

Though each person is unique, interpersonal differences and intrapersonal functioning are not an endless series of one-offs. These aspects of our personhood sort into categories. For example, it is common in modern U.S. culture to refer to one person as an *introvert* and another as an *extrovert*, and to understand that these rough categories—first—explain something about each person's consistent way of relating to the world, and—second—demarcate an important distinction that tends to manifest in particular behaviors in similar situations.¹¹⁰ This notion that humans can be sorted into such types has a long history in philosophy and medicine. The most familiar and enduring model of temperament, articulated by Hippocrates and expanded by Galen, divides all of humanity into four types—melancholic, choleric, sanguine, and phlegmatic—according to purported admixtures of bodily fluids, or “humors.”¹¹¹ The ele-

¹⁰⁷ See *infra* notes 110–127 and accompanying text.

¹⁰⁸ See *infra* notes 128–163 and accompanying text.

¹⁰⁹ See *infra* notes 164–273 and accompanying text.

¹¹⁰ See Barenbaum & Winter, *supra* note 106, at 12–13 (exploring how personality psychologists break down personality traits to predict behavior).

¹¹¹ See JEROME KAGAN, *GALEN'S PROPHECY: TEMPERAMENT IN HUMAN NATURE* 2–5 (2018) (expanding on Hippocrates' bodily fluids approach); Rothbart, *supra* note 32, at 5–6 (describing Hippocrates' approach). Galen's types remain surprisingly familiar: according to his typology, an excess of black bile makes the *melancholic* person moody and prone to fear and sorrow; excess yellow bile makes the *choleric* person easily aroused and aggressive; excess blood makes the *sanguine* person

gant simplicity of that model has continued to enjoy enormous cultural purchase, and has found particularly strong expression in the arts.¹¹²

With the advent of psychology as an independent discipline over the last century, and with its enormous flourishing in the last decades, however, our understanding of temperamental traits has become far less rigid.¹¹³ We now think in terms of *dimensions*—that is, the idea that every person sits somewhere on a continuum for every known trait—rather than about fixed types of persons.¹¹⁴ Rather than describe any given person as “an introvert,” for example, we would instead characterize that person as having greater or lesser degrees of introversion.¹¹⁵ The combination of many trait dimensions within a given person creates a relatively stable, distinct behavioral-affective profile—a kind of “temperament constellation.”¹¹⁶ Certain constellations occur with above-average frequency, and thus yield qualitatively meaningful categories of persons that are more numerous and nuanced than the four Galenic types but less varied than snowflakes.¹¹⁷ These trait constellations interact with situations to produce behavior.¹¹⁸ Some situations are relatively impervious to temperamental influence—virtually all humans will try to escape a bear attack—

personable, warm, and easygoing; and excess of phlegm makes the *phlegmatic* person calm and even-keeled. KAGAN, *supra*, at 2–5.

¹¹² See KAGAN, *supra* note 111, at 8 (noting Galenic temperament’s expression in statuary, novels, music, and dance); see also Fred Kirshnit, *Carl Nielsen, Symphony No. 2, “De Fire Temperamenter” (The Four Temperaments)*, AM. SYMPHONY ORCHESTRA (Nov. 18, 2007), <https://americansymphony.org/symphony-no-2-de-fire-temperamenter-the-four-temperaments-op-16-1901-02/> [<https://perma.cc/98F3-N4N8>] (praising a music piece about humors and temperament); Anna Winter, *Thérèse Raquin by Emile Zola*, THE GUARDIAN (July 31, 2010), <https://www.theguardian.com/books/2010/aug/01/therese-raquin-emile-zola-review> [<https://perma.cc/B8UH-82HP>] (reviewing a book that incorporates humors); *Durer’s Symbolism: Adam & Eve*, THE CLARK (Nov. 14, 2010), <https://www.clarkart.edu/exhibitions/durer/content/symbolism-adam-eve.cfm> [<https://perma.cc/C2ZS-A5KT>] (finding representations of the four humors in a painting); *The Four Temperaments*, THE GEORGE BALANCHINE TR., <http://balanchine.com/the-four-temperaments/> [<https://perma.cc/MV29-TKB9>] (last visited Apr. 8, 2020) (describing a ballet commissioned to represent the humors).

¹¹³ See Oliver P. John et al., *Paradigm Shift to the Integrative Big Five Trait Taxonomy: History, Measurement, and Conceptual Issues*, in HANDBOOK OF PERSONALITY, *supra* note 106, at 114, 116, 119 (showing the conceptual shift surrounding personality traits).

¹¹⁴ See CARVER & SCHEIER, *supra* note 22, at 14 (defining a type as a “distinct and discontinuous categor[y]” of person whereas a trait is an individual characteristic—say, extraversion—within a person).

¹¹⁵ DIANA JOYCE, ESSENTIALS OF TEMPERAMENT ASSESSMENT 72–77 (Alan S. Kaufman & Nadeen L. Kaufman eds., 2010); KAGAN, *supra* note 111, at xvii; Rothbart, *supra* note 32, at 6; see *infra* note 127 (explaining differences between personality domains, such as introversion and extraversion, and temperamental dimensions).

¹¹⁶ Zentner & Shiner, *supra* note 32, at 680, 682–84 (describing developments in psychology that have shown trait constellations originate in genes and the brain, not the “humors”).

¹¹⁷ KAGAN, *supra* note 111, at 70–75.

¹¹⁸ *Id.*

although most situations—say, a cocktail party—allow for trait-driven behavioral variation.¹¹⁹

The core temperamental traits—which, as the following Sections will explain,¹²⁰ have been identified as emotional reactivity and self-regulation—emerge early in life, evidencing their heritability and biological basis.¹²¹ One’s environment, however, also plays a vital role. Temperament provides the “building blocks that underlie development of individual differences in personality,” but constant interactions and life experiences result in an eventual adult expression of that personality that is more complex and varied.¹²² Temperament and personality thus are closely intertwined, the former forming a particularly deep stratum of the latter.¹²³ Finally, adults display other distinguishing qualities generally understood to reside outside the orbit of temperament and personality. These include intelligence, learned skills, “acquired knowledge, opinions, beliefs,” and “tolerance toward others,” or what we might together call abilities and beliefs.¹²⁴

Thus, even in its more sophisticated modern iteration, science validates humans’ persistent drive to categorize. It is, in fact, true that we all “have fairly stable qualities (traits) that are displayed across many settings but are deeply embedded in the person.”¹²⁵ Thus we go through our lives with “relatively enduring individual differences in the tendency to behave, think, and feel in certain ways.”¹²⁶

Each aspect of a person—temperament, personality, abilities, and beliefs—is implicated in the kind of judge he or she will be. Not all, however, are equally implicated in the construct of judicial temperament.¹²⁷ Those in-

¹¹⁹ CARVER & SCHEIER, *supra* note 22, at 31–34 & 32 fig.4, 37.

¹²⁰ See *infra* notes 164–273 and accompanying text.

¹²¹ KAGAN, *supra* note 111, at xiv, 40–42 (“Although folk theory is often at odds with evidence from psychological research, in this case the community belief that [certain] traits emerge early and are stable over time matches the scientific record.”); JEROME KAGAN & NANCY SNIDMAN, *THE LONG SHADOW OF TEMPERAMENT* 5 (2004) (studying reactivity as a polarized trait).

¹²² See Rothbart, *supra* note 32, at 3, 12–14 (surveying the contextual aspects that shape peoples’ personality).

¹²³ CARVER & SCHEIER, *supra* note 22, at 21–28; William Revelle & Klaus R. Scherer, *Personality and Emotion*, in *OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES*, *supra* note 57, at 304, 304–05 (noting that emotional predisposition has significant effects on one’s day-to-day emotional experiences); Zentner & Shiner, *supra* note 32, at 675. Precise demarcation of the boundary between temperament and personality remains contested. See Marvin Zuckerman, *Models of Adult Temperament*, in *HANDBOOK OF TEMPERAMENT*, *supra* note 32, at 41, 55–60 (mapping the various approaches of using personality factors to conceptualize temperament).

¹²⁴ KAGAN, *supra* note 111, at 77.

¹²⁵ CARVER & SCHEIER, *supra* note 22, at 8.

¹²⁶ Denissen, *supra* note 32, at 77.

¹²⁷ It is not the ambition of this Article to present a full account of how *personality* shapes judges and their behavior, nor could it be. To give a concrete example, it does not take on the important ques-

trapersonal aspects regarded by psychologists as temperamental are the key to understanding both the structure and the substance of the legal construct of judicial temperament.

B. Structural Elements of Judicial Temperament

With these fundamentals in mind, this Section dives deeper into what psychology teaches us about the structural elements of human temperament and weaves those insights into the context of judges and judging.¹²⁸ In short, psychology strongly validates the implicit structural assumption that a judge with temperament *x* will, in environment *y*, tend to display certain behaviors but not others. Psychological research both provides the imperative to make that assumption explicit and reveals ways in which it should be refined.

1. Temperament Constrains the Possible Self

You all know you have a book on every judge in your district. You lawyers sit down and you talk about so-and-so being a horse's tail, so-and-so being fair, so-and-so being a good person, a bad person, courteous, discourteous, arrogant, humble . . . [M]y plea to you all is . . . [that] when the day is done and they talk about you, people say, you know, he or she was a courteous, decent, kind judge.¹²⁹

Senator Biden's plea, made to a group of judges awaiting confirmation, assumed that lawyers develop a highly particularized read on the judges before whom they appear. That "book" will capture a judge's core personal qualities in a way that is both predictive of professional behaviors and unlikely to vary.

The temperament literature evokes the same idea, but with a different metaphor: not a book but an *envelope*. An envelope, like a book, contains diverse content, but ultimately constrains. As Jerome Kagan and Nancy Snidman explain, "each temperament creates an envelope of possible outcomes, with

tion regarding the level of narcissism that might render a judge unfit for any or some judicial positions. Nor does it take on personality traits, such as conscientiousness, that likely promote independent fitness domains, such as professional competence. By carving out the realm of judicial temperament and identifying the traits that most clearly underlie or frustrate its manifestation, this Article helps clarify the boundaries of other relevant traits and tees up further exploration of their influence. *See infra* Part III.A. *See generally* MATTHEW E.K. HALL, WHAT JUSTICES WANT: GOALS AND PERSONALITY ON THE U.S. SUPREME COURT (2018) (providing one example of what a disciplined inquiry into broader personality domains might look like). It is possible that, over time and with further research, the psycho-legal theory of judicial temperament may expand beyond the building-blocks elements of reactivity and regulation to encompass certain other adult personality traits that are closely tied to those building blocks, worthy of separate attention, and yet still separable from other fitness domains.

¹²⁸ *See infra* notes 128–163 and accompanying text.

¹²⁹ *Confirmation Hearings I, supra* note 1, at 667 (statement of Sen. Biden).

some more likely than others.”¹³⁰ They were speaking specifically to the constraining properties of early-emerging traits measurable in infants and small children—for example, a tendency to react calmly to unexpected stimuli (a “low-reactive” profile). There is no straight line from such traits to their adult manifestations; initial temperamental profiles shape and are shaped by environment over time. Thus, “different life histories create different personalities in children born with the same temperament.”¹³¹ The range of possibility, however, is bounded by the starting point. In Kagan’s words:

[O]ne’s temperament imposes a restraint on the possible outcomes. A low-reactive infant might become a trial lawyer, investment banker, navy pilot, or criminal, but it is unlikely that he will become a frightened recluse. Condensed water vapor can, depending on local conditions, form a white billowy cloud, a mackerel sky, or a dense ground fog, but it cannot become an asteroid.¹³²

Temperament thus “eliminates many more possibilities than it determines.”¹³³ Although people grow and change within their envelope of possibility, it is highly unlikely that they will exit that envelope entirely. Further, some forms of emotional and behavioral change—even if possible—will be far more difficult for persons with a given temperamental envelope than they would be for others, as they will require greater motivation, environmental support, and effort.¹³⁴

Temperament’s constraining properties are particularly relevant to adults. An adult’s temperamental profile will reflect some continuity from earlier stages in the life course. Not being able to predict at the front end which traits will endure does not mean that none will.¹³⁵ Indeed, certain early-appearing tendencies, such as positive emotionality, empathy, anger, irritability, and skill with self-control, are particularly durable.¹³⁶ Such durability signals a temperamental constraint that may be particularly tough to shake. Further, an adult’s envelope of possibility is smaller, and its contents more fixed, than it was in childhood. Personality continues to develop throughout the entire life course, even into old age, as do abilities and beliefs. Variability, however, tightens and

¹³⁰ KAGAN & SNIDMAN, *supra* note 121, at 3.

¹³¹ *Id.*; see KAGAN, *supra* note 111, at xx–xxi, 36.

¹³² KAGAN & SNIDMAN, *supra* note 121, at 3.

¹³³ *Id.* at 23, 197 (“The power of each infant temperamental bias lay in its ability to prevent the development of a contrasting profile.”).

¹³⁴ *Id.* at 29; see Zentner & Shiner, *supra* note 32, at 688 (noting that there “is a certain inertia to temperament,” and while people can develop in many ways “some ways are more likely than others”).

¹³⁵ See Zentner & Shiner, *supra* note 32, at 675 (“Adult outcomes of early childhood temperament include adult personality traits, psychopathology, and school achievement.”).

¹³⁶ *Id.* at 677, tbl.32.1; see KAGAN & SNIDMAN, *supra* note 121, at 26.

growth curves tend to flatten. By the middle stage of life, the age at which judges generally assume the bench, traits will be at their peak stability.¹³⁷

Psychology thus confirms a core instinct that judges present with robust, perceptible interpersonal differences, and that many of these differences are likely to be both deep and stubborn. It refines that instinct by explaining that we can anticipate some growth and change, particularly if that judge is highly motivated to comply with professional norms that push against his or her dispositions, is willing to exert effort to make such compliance habitual, works within an environment that makes compliance easier than its alternatives, and receives consistent support and feedback to ease that path. It is not, however, reasonable to expect the assumption of office itself to effect meaningful change, let alone to turn a judge into his or her temperamental opposite. By the time a judge takes office, what we see is, roughly speaking, what we get.

2. Temperament Is a Significant Determinant of Behavior

The point can be sharpened yet further. Not only is assuming judicial office highly unlikely to dislodge temperament-consistent patterns of behavior but it may very well entrench them. Temperament may be particularly predictive of behavior under stress.¹³⁸ Core traits predispose us to particular modes of perception and understanding of, and response to, our environment. When time is short, stakes are high, or a situation is ambiguous, humans tend to follow well-worn paths. Although patterned responses can be reflected upon and overridden, doing so is a luxury, as it consumes mental resources and time.¹³⁹ Temperament thus acts as a “determinant of behavior under stress,” with its role being “especially evident in difficult situations.”¹⁴⁰

¹³⁷ See Denissen, *supra* note 32, at 83–84 (showing that personality becomes more mature and stable as people age, and the least mean-level change is after age forty); Jennifer Lodi-Smith et al., *Personality Trait Development Across the Life Span*, in HANDBOOK OF LIFE-SPAN DEVELOPMENT 513, 520–21 (Karen L. Fingerman et al. eds., 2011) (discussing a similar observation as Denissen).

¹³⁸ See Jan Strelau, *The Role of Temperament as a Moderator of Stress*, in TEMPERAMENT IN CONTEXT 153, 161–62 (Theodore D. Wachs & Gedolph A. Kohnstamm eds., 2001) (explaining the connection between temperament, stress, and reactivity).

¹³⁹ Shane Frederick, *Heuristics*, in OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES, *supra* note 57, at 205, 205–06. The influence of heuristic processes (including the affect heuristic) on judicial decision making has been most consistently shown by Rachlinski, Wistrich, and Guthrie. See, e.g., Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 863–67 (2015) (describing “affect heuristic” as a fast, intuitive process that judges can choose to examine and override through effortful and slow deliberative processes).

¹⁴⁰ JAN STRELAU, TEMPERAMENT AS A REGULATOR OF BEHAVIOR: AFTER FIFTY YEARS OF RESEARCH 119 (2008); Strelau, *supra* note 138, at 154, 157 fig.8.1.

Any amplifying impact of stress is significant, because stress is a defining characteristic of judging environments.¹⁴¹ Indeed, in 2019, two major national surveys—one in Australia and one in the United States—showed the extent to which this is so.¹⁴² Australian researchers found “a judicial system not in mental health crisis, but under considerable stress.”¹⁴³ They further noted that symptoms of burnout and trauma are prominent features of the judicial stress experience.¹⁴⁴ U.S. researchers found that judges’ occupational stressors—ranging from the weight of decision making to unprepared lawyers—had a correlation with effects such as fatigue, sleep disturbance, attentional challenge, and rumination.¹⁴⁵ Stressors are not confined to the trial bench, as some

¹⁴¹ Jared Chamberlain & James T. Richardson, *Judicial Stress: A Topic in Need of Research*, in STRESS, TRAUMA, AND WELLBEING IN THE LEGAL SYSTEM 269, 269–70 (Monica K. Miller & Brian H. Bornstein eds., 2013); Tracy D. Eells & C. Robert Showalter, *Work-Related Stress in American Trial Judges*, 22 BULL. AM. ACAD. PSYCHIATRY & L. 71, 71 (1994); C. Robert Showalter & Daniel A. Martell, *Personality, Stress and Health in American Judges*, 69 JUDICATURE 82, 85 (1985); Celeste F. Bremer, *Impact of a Mentoring Program on Occupational Stress, Personal Strain, and Coping Resources of Newly Appointed U.S. Magistrate Judges 15–16* (Dec. 2002) (unpublished Ph.D. dissertation, Drake University), <https://escholarshare.drake.edu/handle/2092/457> [<https://perma.cc/W6H4-MUFU>].

I have completed the preliminary phase of a qualitative, interview-based study of Article III federal judges that includes exploration of stress and its impacts. TERRY A. MARONEY, WHAT JUDGES FEEL: HOW EMOTIONS PERMEATE THE WORK OF JUDGING (forthcoming). The judicial subjects all report multiple stresses of the sorts mentioned here, with perceived impacts on their well-being and job performance.

¹⁴² See Carly Schrever et al., *The Psychological Impact of Judicial Work: Australia’s First Empirical Research Measuring Judicial Stress and Wellbeing*, 28 J. JUD. ADMIN. 141, 141 (2019) (examining stress and well-being in Australian judges); Coal. of Lawyer Assistance Programs (CoLAP), *Presentation at the 2019 National Conference for Lawyer Assistance Programs, CoLAP’s 2019 National Judicial Stress and Resilience Survey: The Results Are In!* (Sept. 25, 2019) [hereinafter CoLAP] (on file with author) (PowerPoint presentation exploring the same in United States judges).

¹⁴³ Scherer et al., *supra* note 142, at 167.

¹⁴⁴ *Id.*

¹⁴⁵ CoLAP, *supra* note 142, at 14–17. Stress seems to “go with the territory,” given judging’s “inescapably lonely features,” public pressure and scrutiny, lack of feedback, background (and sometimes foreground) threats of violence, and workload pressures. See Timothy J. Corrigan, *Who Appointed Me God? Reflections of a Judge on Criminal Sentencing*, JUDICATURE, Autumn 2016, at 25, 26 (recounting assassination attempt); Michael Kirby, *Judicial Stress—An Update*, 71 AUSTL. L.J. 774, 780 (1997) (describing how lonely the profession is); Monica K. Miller et al., *Using Constructivist Self-Development Theory to Understand Judges’ Reactions to a Courthouse Shooting: An Exploratory Study*, 17 PSYCHIATRY PSYCHOL. & L. 121, 123, 135–37 (2010) (presenting research indicating that stress from the threat of violence can affect judges’ personal well-being and professional performance). Particular tasks, such as criminal sentencing, carry unique stressors. Del Quentin Wilber, *Judge Who Had “No Passion for Punishment” Retires After 31 Years*, WASH. POST (June 1, 2011), https://www.washingtonpost.com/local/crime/judge-calls-it-quits-after-31-years-sentencing-too-much-to-bear/2012/06/01/gJQA1u3F8U_story.html [<https://perma.cc/E9A3-KYG3>]. Some judges face dirty, uncomfortable, even unsafe working conditions. Monica Silvia Ciocoiu et al., *Implications of Levels of Stress Factors in Magistrate’s Activity*, 15 ROM. BIOTECHNOLOGICAL LETTERS 126, 129–30 (2010) (reporting data on Romanian judges’ stress stemming from factors such as poor lighting, inad-

might suppose,¹⁴⁶ particularly as appellate judges face the unique challenges of being dependent on one another.¹⁴⁷ Of course, judging is (or ought to be) more than a traumatic daily grind. If it were not, we would ask why anyone would choose to do it at all.¹⁴⁸ Indeed, the recent surveys indicate that many judges find their work less stressful than their prior legal practice had been, and signs of extreme distress appear less prevalent in judicial populations as compared to practicing lawyers.¹⁴⁹ Judging's many rewards include the pride of civic service, the pleasure of intellectual challenge, prestige, and the ability to make a difference.¹⁵⁰ Judging's rewards, however, come within a package of challenges. Temperament is a particularly important influence on a judge's behavior when those predictable challenges cause predictable stresses.

In addition to being amplified by stress, the behavioral purchase of temperament will be strongest when environmental constraints are weakest.¹⁵¹ If a judge is predisposed to act in a particular way but would face certain and immediate sanction for doing so—sanction here conceptualized as any outcome the judge wishes to avoid, from negative peer evaluation to removal from of-

equate work areas, noise, and temperature); Bremer, *supra* note 141, at 15–16 (laying out common stressors in the judicial field).

¹⁴⁶ ROBERTS, *supra* note 44, at 6 (explaining how U.S. District Court judges face “far more severe time and resource constraints than their appellate brethren,” while being deprived of “the benefit of collegial decision making or the comfort of shared consensus”).

¹⁴⁷ See Kirby, *supra* note 145, at 779 (noting the judge's stress had not lessened after elevation to the Australian High Court because “the kinds of persons appointed to the court are prone to exert stress on themselves and on each other”); see also Gerhardt, *supra* note 45, at 1205–06 (stating that appellate judges must coexist “in relatively close quarters [and] successfully maintain respect and civility over long periods of time,” which is not easy). U.S. Supreme Court Justice Whittaker cited exhaustion and “continuous stresses” as his reasons for stepping down after only five years. *Whittaker Is Leaving U.S. Supreme Court*, PITT. POST-GAZETTE, Mar. 30, 1962, at 3.

¹⁴⁸ See ROBERTS, *supra* cite 44, at 8 (“[J]udges make a difference every day, and leave a lasting legacy, by making our society more fair and just.”); cf. REASON AND IMAGINATION: THE SELECTED CORRESPONDENCE OF LEARNED HAND 51 (Constance Jordan ed., 2013) (reproducing a letter by Hand) (“I now see why people in former times went to such extravagances in telling judges what great men they were. If they had not baited the hook in some such way, the poor suckers would never have bitten.”).

¹⁴⁹ Schrever et al., *supra* note 142, at 168; CoLAP, *supra* note 142, at 14–17. My own qualitative research with federal judges so far bears out these points. MARONEY, *supra* note 141. Many judges report that their stress is lessened by greater control over their schedules, relative to practice. Other judges, however, report that their work-related stress changed but did not lessen. Yet others report that they now have greater stress. Early analysis suggests these differentials depend on what sort of practice the judge had before taking the bench.

¹⁵⁰ SHARYN ROACH ANLEU & KATHY MACK, PERFORMING JUDICIAL AUTHORITY IN THE LOWER COURTS 71–74 (2017); ROBERTS, *supra* note 44, at 8; Michael D. Kirby, *Judicial Stress*, 13 AUSTL. B. REV. 101, 115 (1995) (“[I]n the life of a judicial officer there is excitement, intellectual stimulation, personal satisfaction, still much public esteem, a general sense of social utility and worthwhileness . . .”).

¹⁵¹ CARVER & SCHEIER, *supra* note 22, at 33 (explaining how one's environment can affect their personality).

fice—she is more likely to exert effort to express a different behavior. Conversely, if a judge stands to be rewarded in a currency about which she cares (such as peer approval or promotion) for behavior toward which she is less habitually disposed, the odds of that behavior increase. The less certain, immediate, and meaningful the sanctions and rewards, the more behavioral impact temperament will have.¹⁵²

Much of the judging universe is characterized by weak external constraints. Judges sometimes declare themselves “God in [their] courtroom,”¹⁵³ an assertion that, although literally untrue, does reflect the wide leeway we typically cede them. After all, norms of courtroom conduct require high levels of deference to the judge, even when her requirements seem odd or unreasonable.¹⁵⁴ Judicial discipline is rare; reversal is unusual (and sometimes impossible); rewards for norm-compliant behavior are few.¹⁵⁵ Oversight is limited by the reality that the public seldom is in a position to observe what happens in most courtrooms, let alone what happens in chambers or conference. The enormous power of the judge means that whatever her trait constellation, it will have a relatively open space within which to operate.

Given the ubiquity and multiplicity of judicial stressors, then, and the frequently loose environmental constraints on judicial behavior, we are right to “worry most”—or at least to worry a lot—about temperament.¹⁵⁶ We need to predict not how judges will act when putting their best foot forward, but how they will act under predictable pressures and with predictably minimal oversight. Some judges cope fairly well within these parameters, some thrive, and some struggle mightily.¹⁵⁷ Temperament is an important determinant of into which camp any particular judge is likely to fall.

¹⁵² Sanctions and rewards act as environmental constraints on expression of characteristics such as temperament, so in their absence a judge’s trait temperament will be uninhibited. *See id.*

¹⁵³ Maroney, *supra* note 77, at 1268 (quoting *Gottlieb v. Sec. & Exch. Comm’n*, 310 F. App’x 424, 425 (2d Cir. 2009)).

¹⁵⁴ By way of example, see Stephan Futeral, *Practical Tips on How to Deal with a Difficult Judge*, FUTERAL & NELSON, LLC (Oct. 26, 2014), <https://www.charlestonlaw.net/deal-difficult-judge/> [<https://perma.cc/Q8U2-5UNU>] (providing tools to practice before difficult judges); *6 Ways to Handle Difficult Judges*, L. TRULY: L. BLOG (Feb. 12, 2020), <https://lawtruly.com/6-ways-to-handle-difficult-judges/> [<https://perma.cc/QNU5-JR62>] (explaining how lawyers cope with difficult judges).

¹⁵⁵ INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., RECOMMENDATIONS FOR JUDICIAL DISCIPLINE SYSTEMS 2–3 (2018).

¹⁵⁶ *Confirmation Hearings I*, *supra* note 1, at 667 (statement of Sen. Biden); *cf.* Gerhardt, *supra* note 45, at 1205 (judicial nominees “need to be able to handle the intense pressures” of the job).

¹⁵⁷ *See infra* notes 158–163 and accompanying text.

3. Temperamental Fitness Is Determined by Goodness of Fit

The prior two Subsections explained that a judge's core traits both (a) constrain his or her habitual range of attitudes and behaviors and (b) drive particular behavioral patterns within that range, particularly in conditions of stress and loose external control. A third structural point invites attention to person-environment interactions.

In popular parlance, temperament "is often referred to as a unidimensional quality that people have more or less of, not unlike intelligence or self-esteem."¹⁵⁸ Similarly, we talk about judicial temperament as if it is something people simply have or do not have. This is a mistake.

Judging is not a standardized profession—far from it. Judges might work in the federal, state, or municipal systems, be elected or appointed, enjoy life tenure or work under renewable contracts, earn relatively high or low salaries, hear trials or appeals, sit in urban or rural settings, enjoy shabby or well-appointed surroundings, have a general or specific jurisdiction, wield greater or lesser docket control, and so on. As the parameters of any given situation are as important in determining how people will behave as are the traits they bring to that situation, we cannot focus only on the latter. Rather, we ought to think about *goodness of fit* between a judge's temperamental profile and his or her specific work environment.¹⁵⁹ The typical parameters of that environment—its cultural norms, repetitive tasks, recurrent stressors, mechanisms of oversight, decisional constraints, incentives, and daily rhythms—will interact with the judge's temperamental constellation with varying levels of harmony or discord.

Examining goodness of fit in the judicial context is clearly more complicated than treating temperament as a unitary quality. It is the difference between an algorithm and an on/off switch. Accuracy, however, often requires complexity. Fortunately, as with all temperamental inquiries, looking to goodness of fit does not portend an infinite series of one-offs. As the following Section demonstrates,¹⁶⁰ relative strength or weakness in certain temperamental domains is closely associated with the attitudes and behaviors that should be

¹⁵⁸ Zentner & Shiner, *supra* note 32, at 676.

¹⁵⁹ As explained by Thomas and Chess, seminal figures in the psychology of temperament: "Goodness of fit results when the properties of the environment and its expectations and demands are in accord with the organism's own capacities, characteristics, and style of behaving." ALEXANDER THOMAS & STELLA CHESS, *TEMPERAMENT & DEVELOPMENT* 11 (1977). When there is a good fit the individual is able to adapt and function effectively in his or her environment; under conditions of poor fit ("discrepancies and dissonances between environmental opportunities and demands and the capacities and characteristics of the organism") maladaptive functioning is more likely. *See id.* at 11–12; Theodore D. Wachs & Gedolph A. Kohnstamm, *Introduction*, in *TEMPERAMENT IN CONTEXT*, *supra* note 138, at vii, viii (expanding on the importance of goodness of fit in temperament literature).

¹⁶⁰ *See infra* notes 164–273 and accompanying text.

understood to typify a generally good or poor judicial temperament. Judicial assignments, too, can be sliced at a moderate level of abstraction—for example, trial versus appellate, civil versus criminal, elected versus appointed—and still be of taxonomical utility. Some judges will be temperamentally suited to many sorts of judicial work, some suited only to particular sorts, and others ill-suited to most or all sorts. Assessing those two factors interactionally determines goodness of fit.

An analogy that has proved helpful in psychology is the distinction between dandelions and orchids. Some temperamental constellations are particularly susceptible to environmental influences, others less so. A dandelion-like individual will thrive in just about any setting. Orchids' survival, let alone thriving, depends on highly specific conditions.¹⁶¹ Dandelions are not necessarily "better," as their capacity for being spectacular is more limited.¹⁶² Above a baseline of temperamental suitability for any judicial role, some judges will be dandelions and others orchids. We would do well to identify where on the spectrum between a dandelion and an orchid a judge sits, so as to sort her into a setting in which she can thrive. This sorting is particularly important for the fussiest of orchids, judges who would be spectacular in only one setting.

Goodness of fit firmly grounds one of the shared intuitions described in the context of President Trump's candidacy: some trait constellations make individuals more or less suited to particular positions of authority. Professional success in one domain may not, and often does not, translate into success in a different one, not just because of the different abilities and beliefs upon which each may call but also because of the harmony or dissonance between one's temperament and the parameters of that new domain.¹⁶³ In the judicial context, this insight reminds us that being well-suited to legal practice may not translate into being well-suited for a judicial role, nor will a good fit in one judicial position necessarily bode well for fit in a different one.

* * * *

This Subpart has posited the following. Judges can mold or improve on aspects of their temperamental traits but cannot be expected to fundamentally

¹⁶¹ See Zentner & Shiner, *supra* note 32, at 688–89 (encapsulating the “differential susceptibility thesis,” whereby certain temperaments are more or less influenced by environment).

¹⁶² See *id.* (describing how those with dandelion temperaments “will be protected from adverse environments but may in turn benefit less from enriching ones,” whereas those with orchid temperaments may exhibit “particularly negative development in response to bad environments, but also exceptionally positive development in response to good environments”).

¹⁶³ See Hagop S. Akiskal & Karen K. Akiskal, *In Search of Aristotle: Temperament, Human Nature, Melancholia, Creativity and Eminence*, 100 *J. AFFECTIVE DISORDERS* 1, 4 (2007) (“[C]reativity and eminence and leadership in different professional domains are related to distinct optimal mixes of temperamental and cognitive profiles.”).

reorient or transcend them. Those traits will be an important determinant of the judge's behavior, their relative importance varying from relatively weak where environmental constraints are high and stress low, to very strong when constraints are weak and stress high. Rather than think of someone having or not having a judicial temperament, we should ask which, if any, specific judicial environments are a good enough fit with his or her temperamental constellation. The lesser the distance between a judge's dispositions and a specific judicial position's demands for specific behaviors, the more likely he or she is to satisfy those demands with greater consistency and less effort.

C. Substantive Elements of Temperament

With these structural concepts firmly in place, we are ready to turn to substance. This Section identifies the traits that would be predicted to underlie the most widely-desired judicial behaviors—expressions of compassion, patience, humility, respect, and open-mindedness—in the greatest variety of judicial work settings.¹⁶⁴

The substantive component of human temperament may be conceptually reduced to two basic factors: habitual patterns of emotional attitudes and experiences (often called “reactivity”), and habitual patterns of managing emotions and behavior, including capacity for impulse control (often called “self-regulation”).¹⁶⁵ Judicial temperament is, at its heart, about precisely those same things.

It is important to note at the outset that emotional experiences are inherently neither problematic nor beneficial, including for judges.¹⁶⁶ Emotion is an evolved capacity that enables us to navigate our world competently, a mechanism through which we process environmental information, evaluate its personal

¹⁶⁴ See *infra* notes 164–273 and accompanying text. As goodness-of-fit analysis shows, there is no standard *good* or *bad* judicial temperament divorced from work context. For example, we may be able to tolerate higher levels of disadvantageous traits, and lower levels of advantageous ones, if the parameters of the specific judicial assignment buffer against the most damaging impacts of trait-consistent behaviors. For example, a judge with relatively low self-regulation skill may be able to act well during infrequent, highly structured public appearances (such as oral argument) but be unable to do so on a trial docket. See *infra* pp. 2136–38 (explicating the most and least advantageous traits given the shared, baseline requirements of all judicial positions, and proposing how traits falling along a continuum between the two may interact with the demands and attributes of specific judicial positions).

¹⁶⁵ See M. Rosario Rueda, *Effortful Control*, in HANDBOOK OF TEMPERAMENT, *supra* note 32, at 145, 145–46 (discussing self-regulation and reactivity in children); Rothbart, *supra* note 32, at 9, 13 (breaking down reactivity further into affect, activity, and attention, and self-regulation as the ability to control one's reactivity); Zentner & Shiner, *supra* note 32, at 677–89, tbl.32.1 (describing traits associated with reactivity and self-regulation).

¹⁶⁶ For an extended defense of this proposition and others in this paragraph, see generally Maroney, *supra* note 18, providing extended, empirically-based support for these positions.

significance, and mobilize action.¹⁶⁷ Though law traditionally has cast emotion as the enemy of reason, that narrative is, simply put, untrue.¹⁶⁸ Emotion is deeply intertwined with reason, as it both reflects our beliefs and values about the world and shapes how we feel, think, and act in that world.¹⁶⁹ Like any evolved capacity that is adaptive most of the time, however, emotion is maladaptive some of the time. It can reflect false beliefs or bad values (for example, that persons of a particular race are uniquely dangerous), clash with social expectations (for instance, feeling pleased about a death that others are mourning), or motivate a decisional style (such as quick judgment) or course of action (such as freezing) that is poorly suited to a particular situation.¹⁷⁰ The relationship between emotion and its suboptimal iterations is like that between cognition and its associated heuristics and biases.¹⁷¹ Both are processes that work well most of the time and poorly some of the time, the latter not diminishing the overall value of the former but, rather, requiring us to notice, question, and potentially override what feel like “natural” responses. These propositions are as true for judges as for all humans. When we talk about the substantive aspects of temperament, we therefore are talking not about the virtue or vice of any given emotional experience and how a judge regulates it, but rather about her deep, relatively durable patterns of emotion and its regulation.

1. Habitual Patterns of Emotional Experience

We all are predisposed to process our surroundings with a particular emotional style. Such habitual or trait emotionality consists of both the speed and intensity with which one reacts to stimuli—for example, something novel or frightening—and the content of those reactions—for instance, feelings of anger, sadness, fear, or joy.¹⁷² Given the same stimulus, such as learning of a death, one person may be quick to react with outward expressions of anger, whereas another might process the information more slowly and privately, and tend toward sorrow. Reactivity patterns bear the hallmarks of temperament.

¹⁶⁷ See John Tooby & Leda Cosmides, *The Evolutionary Psychology of the Emotions and Their Relationship to Internal Regulatory Variables*, in HANDBOOK OF EMOTIONS 114, 127–28 (Michael Lewis et al. eds., 3d ed. 2008) (describing the evolutionary function and advantage of emotions). See generally THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS (Andrew S. Fox et al. eds., 2d ed. 2018) (exploring fundamental questions of emotion through the voices of leading researchers).

¹⁶⁸ Maroney, *supra* note 18, at 642–51.

¹⁶⁹ See *id.* (synthesizing psychological, philosophical, and neurological scholarship to offer extensive support for these propositions).

¹⁷⁰ *Id.* at 649–51.

¹⁷¹ *Id.* at 650 & n.111; cf. Wistrich, Rachlinski & Guthrie, *supra* note 139, at 863–65.

¹⁷² Richard J. Davidson, *Approach/Withdrawal*, in OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES, *supra* note 57, at 49, 49–50; Revelle & Scherer, *supra* note 123, at 305; Rothbart, *supra* note 32, at 9.

These patterns are at least somewhat heritable, are observable in both young children and adults, and are relatively stable (particularly in their adult manifestations).¹⁷³ Such patterns cannot be globally assessed as good or bad. They are simply different, and become good or bad only in relation to what is appropriate for one's environment and goals.

Judging is the relevant environment for our inquiry, and producing the desired set of behaviors the relevant goal. Certain patterns of habitual emotionality are particularly likely to promote those desired judicial behaviors, with others particularly likely to do the opposite.

a. Dispositional Negativity

Dispositional negativity would be expected to have an undesirable effect on judicial behaviors.¹⁷⁴ This temperamental profile admits of two rather different iterations: a stable tendency toward anger (and its close cousins, irritation, frustration, and contempt) or a stable tendency toward fear (and its close cousin, anxiety). In either iteration, dispositional negativity creates a propensity for overreaction to stressors, aversive challenges, and threats; manifests itself in negative feelings even when such stressors, aversive challenges, and threats are remote or absent; and predisposes a person to act in ways that evoke stressors, aversive challenges, and threats to which they then react.¹⁷⁵ Dispositional negativity also is likely to bias a person toward "indiscriminate" negative feelings and behaviors.¹⁷⁶ Each of these impacts is negative in the judging context.

i. Anger, Irritation, Frustration, and Contempt

The anger-heavy iteration of dispositional negativity is particularly likely to promote the behaviors generally considered the markers of a poor judicial temperament. It is worth reiterating that anger itself is not the problem. As I have argued at length elsewhere, and as Solum would concur, judges not only

¹⁷³ See *supra* notes 110–163 and accompanying text.

¹⁷⁴ See Alexander J. Shackman et al., *The Psychological and Neurobiological Bases of Dispositional Negativity*, in *THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS*, *supra* note 167, at 67, 67 (correlating dispositional negativity with reactivity to stressors).

¹⁷⁵ *Id.* One general difference between these iterations is that the former set of emotions tends to motivate one to approach the offending person or situation, and the latter to motivate withdrawal. Nico H. Frijda, *Action Tendencies*, in *OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES*, *supra* note 57, at 1, 1–2; see Davidson, *supra* note 172, at 49–50 (explaining the relationship between withdrawal and fear). But see Kevin S. LaBar, *Fear and Anxiety*, in *HANDBOOK OF EMOTIONS* 751, 751–52 (Lisa Feldman Barrett et al. eds., 4th ed. 2016) (noting that specific fear episodes can also call up a "fight" response rather than a "flight" one).

¹⁷⁶ Shackman et al., *supra* note 174, at 71.

regularly get angry, but sometimes they should.¹⁷⁷ As one eminent philosopher put it, “Can one have a sense of justice without the capacity and willingness to be personally outraged?”¹⁷⁸ Even misplaced or slightly excessive displays of anger are normal, given the welter of offensive behavior to which judges regularly are exposed, and often can be tolerated when they are infrequent and their concrete impacts contained.¹⁷⁹ If our concern is with judicial *temperament*, our focus properly is on frequent, reflexive, inadequately justified, vehemently expressed anger, as such a pattern is likely to be rooted in an underlying trait.¹⁸⁰

Dispositional anger consists of a stable tendency “to attribute hostile intent in others’ actions, to perceive frustration in a variety of situations, and to engage in continuous conscious pondering and rumination over one’s own anger, as well as the perceived provocations of others.”¹⁸¹ Persons high in trait anger demonstrate heightened frequency and intensity of mood changes, and increased reactivity to stress.¹⁸² This disposition also tends to manifest in conflictual behaviors. Temperamentally “hostile and argumentative” persons “tend to be vigilant for potential provocation from others, to initiate and sustain arguments when provocation is perceived, and to react angrily when others’ behaviors are viewed as hostile or rejecting.”¹⁸³ Dispositional anger also tends to entail frequent experiences of the closely-related emotions of frustration and irritation.¹⁸⁴ Frustration is an uncomfortable feeling attending the perception that one’s goals are being blocked or desires thwarted.¹⁸⁵ Irritation, too, is un-

¹⁷⁷ Righteous judicial anger is, in Aristotelean terms, virtuous—felt “at the right times, with reference to the right objects, towards the right people, with the right motive, and in the right way” ARISTOTLE, *supra* note 28, bk. II, at 27; Maroney, *supra* note 77, at 1206 (explaining how a righteously angry judge accurately assesses that someone has committed an unwarranted act, is motivated to impose a proportional consequence, and gives voice to shared moral values; her anger expression is, even if forceful, purposeful and dignified); *see also* Solum, *supra* note 72, at 1374 (explaining the need for proportionate judicial anger).

¹⁷⁸ ROBERT C. SOLOMON, *A PASSION FOR JUSTICE: EMOTIONS AND THE ORIGINS OF THE SOCIAL CONTRACT* 42 (1990).

¹⁷⁹ Maroney, *supra* note 77, at 1284–85.

¹⁸⁰ Dispositional anger is both “moderately to substantially heritable” and observable in both young children and adults. Kirby Deater-Deckard & Zhe Wang, *Anger and Irritability*, in *HANDBOOK OF TEMPERAMENT*, *supra* note 32, at 124, 124–32; Rothbart, *supra* note 32, at 6. I have noted that “certain judges seem prone to anger states that are relatively frequent and extreme,” suggested that such a characteristic might lie at the heart of what we call poor judicial temperament, and promised to research the question further. Maroney, *supra* note 77, at 1213 & n.31. My instinct was largely correct but incomplete, as trait anger is not (as I suggested, and as Solum asserts) the sole measure of a poor temperament.

¹⁸¹ Deater-Deckard & Wang, *supra* note 180, at 126.

¹⁸² Richard A. Depue & Yu Fu, *Neurobiology and Neurochemistry of Temperament in Adults*, in *HANDBOOK OF TEMPERAMENT*, *supra* note 32, at 368, 369–70; *see* Rothbart, *supra* note 32, at 7–8.

¹⁸³ Deater-Deckard & Wang, *supra* note 180, at 126.

¹⁸⁴ *Id.* at 124–25 tbl.7.1.

¹⁸⁵ *Id.*

comfortable, though less intense than anger and without as strong an element of moral judgment.¹⁸⁶ Both emotional states can be entirely warranted, but when habitual—what we colloquially might call irascibility or grouchiness—they are just as worrisome as anger, particularly because they are similarly linked to verbal and physical aggression.¹⁸⁷ Further, a habitually angry person may regularly feel and display another closely-related emotion: contempt.¹⁸⁸ Contempt combines aspects of anger and disgust. Like anger, it reflects a perception of wrongdoing, and like disgust, it reflects a judgment that the offender is repulsive.¹⁸⁹ Contempt is especially dangerous for judges. Contempt marks the difference between legitimate expressions of authority and illegitimate expressions of superiority. Contemptuous treatment is a familiar element of judicial disciplinary proceedings, generally involving insults, ridicule, and ritual humiliation.¹⁹⁰

The anger-frustration-irritation triptych, even without a contempt element, thus embodies an underlying disposition not only for a specific sort of internal experience—such as “thinking angry thoughts” and having “angry feelings”—but also for aggressive speech and behaviors reflecting those thoughts and feelings.¹⁹¹ In fact, by expressing less warmth, escalating, and engaging in “toxic interpersonal behaviors” like use of “contempt and sarcasm,” persons with this temperamental profile actually may create conflictual situations, to which they will then have characteristically exaggerated responses.¹⁹²

Particularly with a contempt element, this trait cluster poses a real danger of regular manifestation of the hostile, dismissive, sarcastic, callous, and rude behaviors that are a relative-consensus hallmark of poor judicial temperament.¹⁹³ This trait cluster also can lead to decisional errors. Left unchecked, anger and its close cousins can curtail deliberation and increase punitive behavior, regardless of whether those feelings are relevant or justified—a particular danger for judges who tend to feel these emotions with greater frequency

¹⁸⁶ *Id.*; Peter Kuppens, *Irritation*, in OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES, *supra* note 57, at 226, 226–27.

¹⁸⁷ Leonard Berkowitz, *Frustration*, in OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES, *supra* note 57, at 188, 188; Deater-Deckard & Wang, *supra* note 180, at 124; Kuppens, *supra* note 186, at 227.

¹⁸⁸ Ursula Hess, *Contempt*, in OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES, *supra* note 57, at 99, 99–100 (explaining the “contempt-anger-disgust” triad); Shackman et al., *supra* note 174, at 68.

¹⁸⁹ Hess, *supra* note 188, at 99–100; Maroney, *supra* note 77, at 1259.

¹⁹⁰ See Roach Anleu et al., *supra* note 79, at 66–68 (providing examples of such behavior).

¹⁹¹ Deater-Deckard & Wang, *supra* note 180, at 124.

¹⁹² Shackman et al., *supra* note 174, at 68.

¹⁹³ GREENSTEIN, *supra* note 43, at 73 (“A jurist with appropriate judicial temperament uses authority gracefully.”); Maroney, *supra* note 77, at 1259.

and less justification.¹⁹⁴ Moreover, this pattern of emotional experience contributes to poor health outcomes, including cardiovascular pathophysiology and substance abuse, both of which can affect judges' professional performance and longevity.¹⁹⁵

Further, the general rule that "what we see in an adult judge is what we are likely to get" has particular purchase for this iteration of dispositional negativity. Although many judges share the same environmental challenges and stressors, only some display this behavioral profile. Though the parameters of dispositional anger may vary over time, the "magnitude of change over adulthood is modest," if it happens at all.¹⁹⁶ Change is likely to be even more constricted the more extreme the trait profile and the weaker any meaningful environmental pushback. A judge that presents with strong indicators of this sort of dispositional negativity therefore is a very risky bet. Such a judge is likely to continue to manifest a short fuse, antisocial attitudes, and aggressive behaviors, absent an intervention that effectively addresses the trait, the environmental constraints that allow the trait to be expressed, or both.¹⁹⁷

ii. Fear and Anxiety

The second iteration of dispositional negativity, a tendency toward fear and anxiety, also poses a challenge to judicial temperament, if a less visible one.¹⁹⁸

A fearful disposition implicates judicial temperament by hindering development of courage. Courage is an underappreciated aspect of judicial fitness. Although tributes to great judges often laud their courage,¹⁹⁹ it is not generally

¹⁹⁴ Maroney, *supra* note 77, at 1265–69 (citing to, inter alia, Jennifer S. Lerner & Larissa Z. Tiedens, *Portrait of the Angry Decision Maker: How Appraisal Tendencies Shape Anger's Influence on Cognition*, 19 J. BEHAV. DECISION MAKING 115 (2006); and Paul M. Litvak et al., *Fuel in the Fire: How Anger Impacts Judgment and Decision-Making*, in INTERNATIONAL HANDBOOK OF ANGER: CONSTITUENT AND CONCOMITANT BIOLOGICAL, PSYCHOLOGICAL, AND SOCIAL PROCESSES (Michael Potegal et al. eds., 2010)).

¹⁹⁵ Nathan S. Consedine, *Health-Promoting and Health-Damaging Effects of Emotions*, in HANDBOOK OF EMOTIONS, *supra* note 167, at 676, 683 tbl.42.1; Deater-Deckard & Wang, *supra* note 180, at 135.

¹⁹⁶ Deater-Deckard & Wang, *supra* note 180, at 133 (noting, though, that average levels of anger gradually decrease over the human life span).

¹⁹⁷ See *id.* at 136 (noting the potential efficacy of anger management interventions with adults).

¹⁹⁸ See Rothbart, *supra* note 32, at 7 (including in negative emotionality habitual anxiety, "submissiveness, fear, sorrow, tenderness, and disgust"; these are closely related "repressive or inhibitive" emotions); Zentner & Shiner, *supra* note 32, at 678; see also Maroney, *supra* note 77, at 1229 (noting the relative ease with which characteristic anger behaviors may be observed).

¹⁹⁹ See, e.g., Guido Calabresi, *What Makes a Judge Great: To A. Leon Higginbotham, Jr.*, 142 U. PA. L. REV. 513, 513 (1993) (stating that "above all" a judge needs "courage, that fire which compels one to do what is right though the heavens—and one's own career—may fall"); Joe L. Webster, *A Giant Among Judges and Men*, JUDICATURE, Summer 2018, at 6, 7 (paying tribute to the "unsurpassed courage" of North Carolina Judge Sammie Chess, Jr.).

included in law's temperamental taxonomies (nor, for that matter, is it folded into the independent constructs of integrity and competence).²⁰⁰ Judicial independence, however, requires courage, and courage is temperamental. The hard reality of actual and threatened violence against judges and their families, for example, could push judges to rule so as to avoid making enemies.²⁰¹ Nevertheless, we require that they resist that push. Similarly, the threat of angering or alienating professional and social peers, powerful constituencies, and fellow government actors in the other branches could pull judges away from difficult but necessary actions. We likewise require that they resist that pull.²⁰²

The building blocks of courage—differential propensities toward submissiveness, timidity, and fear—are basic iterations of habitual emotionality, observable in both children and in adults. They have a genetic basis, show relative stability (particularly in adults), and express in behavior.²⁰³ To be clear, episodic fear is critical to normal human functioning, including in a judge.²⁰⁴ Indeed, courage is not the absence of fear but the ability to act consistent with one's goals and values despite reasonable fears.²⁰⁵ Chronic fearfulness, however, can overwhelm that capacity, instead motivating avoidance and withdrawal.²⁰⁶ As Chief Justice Roberts has observed, judging is no job for “timid . . . souls.”²⁰⁷ High levels of trait fearfulness threaten something desired, just as surely as high levels of trait anger promise something undesired.

²⁰⁰ Both Solum and the Federal Judicial Center recognize courage to be a critical judicial quality, though they do not categorize it as temperamental. Solum, *supra* note 72, at 1371 (“The disposition to feel too much fear makes us cowardly; the disposition to insufficient fear makes us rash. Courage represents a mean between cowardice and rashness.”); accord FED. JUDICIAL CTR., *supra* note 31, at 26 (categorizing courage as a “judicial competency”).

²⁰¹ See Corrigan, *supra* note 145, at 26 (a judge recalling when his life was threatened).

²⁰² FED. JUDICIAL CTR., *supra* note 31, at 26 (stating that judges need “the wherewithal to exercise courage in the face of difficult and unpopular decisions”); Solum, *supra* note 72, at 1371 (“A civically courageous judge understands that the good opinion of others is worth having if it flows from having done justice and that social approval for injustice is an impermissible motive for judicial action.”).

²⁰³ Depue & Fu, *supra* note 182, at 370; Kevin B. MacDonald, *Temperament and Evolution*, in HANDBOOK OF TEMPERAMENT, *supra* note 32, at 273, 279–80; Rothbart, *supra* note 32, at 6, 9; Zentner & Shiner, *supra* note 32, at 677–78 tbl.32.1; Zuckerman, *supra* note 123, at 42.

²⁰⁴ Fear alerts us to dangers and motivates us to take protective action—for example, arranging for increased security, or planning to leave on a remote vacation immediately after issuing a blockbuster ruling. LaBar, *supra* note 175, at 752 (explaining how fear “serves to mobilize bodily resources” and “facilitates action planning” to protect endangered interests).

²⁰⁵ *Courage*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/courage> [<https://perma.cc/8XQM-P77G>].

²⁰⁶ Arne Öhman, *Fear*, in OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES, *supra* note 57, at 182, 182–83 (noting that fear-driven avoidance interferes with normal adjustment to life challenges); Shackman et al., *supra* note 174, at 70–71.

²⁰⁷ ROBERTS, *supra* note 44, at 6.

Closely related to trait fearfulness is trait anxiety.²⁰⁸ Though these phenomena may (and often do) co-occur, they are not the same thing. Fear is linked to an identifiable trigger, whereas anxiety is more global, characterized by an unpleasant feeling that one's environment is uncertain and potentially threatening.²⁰⁹ Like fear, anxiety has functional utility. Humans need to be able to imagine future threats and negative consequences so that we can avert or plan for them.²¹⁰ Indeed, a deficit of anxiety would be highly troublesome in a judge, perhaps signifying undue confidence in the "right" answer, underestimation of the dangers of mistake, and a lack of concern with stakes. Research has even shown that anxiety can promote high levels of work performance, if we appraise anxiety-producing events as challenges as opposed to hazards.²¹¹ Persons with elevated trait anxiety, however, are likely, if exposed to stressors, to experience more frequent (and likely more intense) episodes of anxiety with less justification, and will be biased toward interpreting even ambiguous events as threatening.²¹² In addition to dampening the potential for moments of courage, as fearfulness would, persistently elevated anxiety (in addition to being subjectively distressing) would theoretically make a judge less decisive.²¹³

Trait fearfulness and anxiety therefore should be acknowledged as core concerns of judicial temperament. A judge who sits at their upper extremes would have a difficult time withstanding the demands of the position.²¹⁴ The habitually fearful or anxious judge whose traits present in a pronounced but less extreme manner may well be able to withstand such pressures, but will need to

²⁰⁸ See Depue & Fu, *supra* note 182, at 369–70 (explaining why many researchers over the years researched fear and anxiety as one and the same); LaBar, *supra* note 175, at 751 (describing how anxiety can present as either a discrete state or as dispositional characteristic).

²⁰⁹ LaBar, *supra* note 175, at 751–52; Richard J. McNally, *Anxiety*, in OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES, *supra* note 57, at 42, 42–44.

²¹⁰ Depue & Fu, *supra* note 182, at 370; McNally, *supra* note 209, at 43–44.

²¹¹ Juliane Strack et al., *Must We Suffer to Succeed?: When Anxiety Boosts Motivation and Performance*, 38 J. INDIVIDUAL DIFFERENCES 113, 113 (2017).

²¹² McNally, *supra* note 209, at 42 (“[A] high-trait anxious person may infrequently experience elevations of anxiety if he or she happens to live a relatively stressor-free life. Analogously, a glass vase remains characterized by the disposition of fragility even if it is never shattered by a force.”); Shackman et al., *supra* note 174, at 67–70.

²¹³ Jerome Kagan, *The Biography of Behavioral Inhibition*, in HANDBOOK OF TEMPERAMENT, *supra* note 32, at 69, 74 (“Everyone experiences uncertainty . . . but only some individuals experience salient, uncomfortable feelings and a response paralysis.”); McNally, *supra* note 209, at 42; cf. FED. JUDICIAL CTR., *supra* note 31, at 27 (postulating that judges that act with “decisiveness” “rarely second-guess their own decisions, which reduces personal stress”).

²¹⁴ Such a judge might develop a diagnosable anxiety disorder, which may respond well to treatment. Shackman et al., *supra* note 174, at 67. Such treatment might move the judge into acceptable territory, particularly with ongoing support and attention to minimizing unnecessary stressors in his or her workplace. See *supra* note 32.

both find a judicial role that is least endangered by these traits and invest in building the regulatory skills that will enable her to mitigate their impacts.²¹⁵

b. Positive Emotionality

Desired judicial behaviors are more likely not only when the above-described traits are absent or relatively low, but also when other traits are relatively high. One such trait dimension is “positive emotionality,” another broad construct that embraces two distinct patterns.²¹⁶ The first is a propensity for calm satisfaction, including with lower-intensity stimuli, and frequent feelings and expressions of pleasantness. The second tends toward exuberance, excitement, joy, and sensation-seeking.²¹⁷ Both forms of positive emotionality bring significant benefits. They buffer against depression, promote resilience and longevity, and generate both enhanced social competence and “sustained engagement and expectations of success.”²¹⁸ Dispositionally positive persons also tend to be more open-minded. They have a broadened perspective on their own thoughts and actions, as well as the thoughts and actions of others, in contrast to the “narrowed mindsets sparked by negative emotions.”²¹⁹ The dispositionally positive judge will not, of course, feel happy or content at all times, nor should she, as that would be a highly abnormal reaction to often distressing circumstances. She is, however, more likely than those with opposing dispositions to be resilient, engage productively with others, and maintain an open mind with less effort.

Though both forms of positive emotionality generally are a boon, they are not necessarily equally good fits with the opportunities and challenges that typify many forms of judging. The low-arousal iteration of dispositional positivity will most consistently promote expressions of calm and patience—listening without interrupting, giving matters the time they need, and speaking in a measured tone. That disposition generally is inconsistent with feelings of impatience and frustration.²²⁰ Although judges can (and do) learn to adopt a calm demeanor despite a contrary internal state, including an aroused one,²²¹

²¹⁵ See *infra* notes 243–262 and accompanying text.

²¹⁶ Samuel P. Putnam, *Positive Emotionality*, in HANDBOOK OF TEMPERAMENT, *supra* note 32, at 105, 109 (discussing the types of positive emotionality).

²¹⁷ *Id.* at 114–17.

²¹⁸ Davidson, *supra* note 172, at 49–50; Putnam, *supra* note 216, at 115–17.

²¹⁹ See Barbara L. Fredrickson, *Positive Emotions*, in OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES, *supra* note 57, at 310, 310 (outlining the “broaden-and-build” theory of positive emotion); see also *infra* note 282 and accompanying text (discussing the relevance of open-mindedness).

²²⁰ Putnam, *supra* note 216, at 114.

²²¹ See *infra* notes 243–262 and accompanying text.

one who generally defaults to feeling calm will find it far easier to consistently display calm behaviors.²²²

Relative to their calmer counterparts, judges with the high-arousal, exuberant iteration of positivity are less likely to consistently display these desired low-arousal behaviors. Such persons desire rewards and pursue goals with particular fervor, and react with heightened elation when successful but with heightened frustration when unsuccessful.²²³ For better or worse, judges seldom enjoy high-adrenalin rewards. Their victories tend to be of the muted, perspectival sort—for example, knowing that one has done a good job in difficult circumstances, articulating a difficult concept in a way that will further the progress of law, enjoying the camaraderie of clerks and colleagues, or appreciating one's contribution to the democratic project.²²⁴ Simultaneously, high-adrenalin goal blockages abound—for example, attorneys whose marginally-competent verbosity is holding up a proceeding, or appellate colleagues who refuse to endorse or even debate a passionately held position. Given the lopsided reward/blockage ratio judges tend to face, a high-exuberant temperament profile would be predicted more frequently to manifest in impatience and even aggression.²²⁵ Thus, trait exuberance can cause some of the negative behaviors primarily linked to dispositional anger, as both are associated with high arousal. Further, the high-exuberant judge may be more at risk of boredom during routine and tedious moments, which most forms of judging serve up regularly.²²⁶ She may, however, find difficult tasks appealing, as they are highly stimulating; be particularly sustained by bigger victories; and seek leadership positions, thereby propelling institutional innovation.

In general, the dispositionally positive judge of either sort is likely to be a good temperamental bet. Within that category, the judge characterized by a propensity toward calm satisfaction is least likely to exhibit aggressive, impa-

²²² Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CAL. L. REV. 1485, 1537–43 (2011) (explaining how it is easier to externally express a genuine internal state than it is to adopt a display that contrasts with an internal state).

²²³ Putnam, *supra* note 216, at 110–11.

²²⁴ See ROACH ANLEU & MACK, *supra* note 150, at 71–74, 167 (presenting evidence of Australian judges' high levels of satisfaction with intrinsic aspects of their work, like intellectual challenge and value to society); ROBERTS, *supra* note 44, at 8 (describing the overarching sense of civic duty with which judges are rewarded); Stina Bergman Blix & Åsa Wettergren, *A Sociological Perspective on Emotions in the Judiciary*, 8 EMOTION REV. 32, 35 (2016) (quoting a judge who was proud to have been seen as fair in her overseeing of a case). To a person, the participant judges in this author's study cite to these sorts of feelings as the most common positivity they experience on the job. As one said when trying to capture what his workplace happiness feels like: "It's not a high-five kind of thing," but rather a "sublime satisfaction." Interview with Judge #22 (Mar. 2017).

²²⁵ Putnam, *supra* note 216, at 114–15.

²²⁶ REASON AND IMAGINATION, *supra* note 148, at 98–99 (reproducing a letter from Learned Hand to Oliver Wendell Holmes describing his struggles with frustration and boredom); Putnam, *supra* note 216, at 111 (explaining how positive emotionality increases the risk of boredom).

tient behaviors, because she is least likely to feel the emotions that spur such behaviors, and she is most likely to find pleasure in the small, quiet, often private victories of judging. The exuberant judge, though facing relatively greater challenge on those fronts, is still likely to fare better than her dispositionally negative counterpart. More, she will bring significant energy to the bench.

c. Kindness

Also highly relevant to judicial temperament is a relatively new member of psychologists' temperamental taxonomies: dispositional kindness. This concept speaks not to individual acts of kindness, which may or may not be appropriate in any given situation, but rather to a deep-seated "constellation of positive attitudes, feelings, and behaviors toward others," including "empathy, prosocial behavior, generosity, and altruism."²²⁷ Whereas dispositional positivity is directed to the self, dispositional kindness is directed toward others. People differ significantly in these emotional capacities, experiences, and the behaviors they motivate.²²⁸ Further, those differences are observable in both children and adults, are amenable to measurement, appear to have distinct neural and genetic correlates, and show substantial longitudinal stability across the life course.²²⁹

Dispositional kindness is, like trait fearfulness, an underappreciated determinant of judicial fitness that should be recognized as temperamental. Empathy, or the propensity to understand and care about others' emotional states, is at the center of trait kindness; prosocial behaviors, or voluntary acts intended to benefit others, are its prototypical behavioral manifestation; and feelings of compassion link the two.²³⁰ As we have seen, compassion is one of the most consistently cited elements of judicial temperament in extant accounts, though such accounts seldom explain why.²³¹ It is, further, a bit of an oddity, the only high-consensus

²²⁷ Ariel Knafo & Salomon Israel, *Empathy, Prosocial Behavior, and Other Aspects of Kindness*, in HANDBOOK OF TEMPERAMENT, *supra* note 32, at 168, 168.

²²⁸ *Id.* at 170–73.

²²⁹ *Id.*

²³⁰ See Batson, *supra* note 57, at 91 (describing compassion as an "other-oriented emotion elicited by and congruent with the perceived welfare of another person," reliant on "(1) perceiving the other as in need (distress) and (2) valuing the other's welfare"); Knafo & Israel, *supra* note 227, at 173, 175 (discussing the dimensions of kindness); see also Terry A. Maroney & Philip Ackerman-Lieberman, "As a Father Shows Compassion for His Children": *Ancient and Contemporary Perspectives on Judicial Empathy*, 3 J.L. RELIGION & ST. 240, 243–46 (2014) (explicating the "empathic arc" of empathy to compassion to behavior).

²³¹ See *supra* notes 42–105 and accompanying text. Even Chief Justice Roberts, an ardent supporter of the neutral-umpire vision of judging, thinks good judging requires compassion. ROBERTS, *supra* note 44, at 4. Chief Justice Roberts' position is seconded by a critical mass of highly-regarded state-court judges. See NAT'L CTR. FOR STATE COURTS, ELEMENTS OF JUDICIAL EXCELLENCE: A FRAMEWORK TO SUPPORT THE PROFESSIONAL DEVELOPMENT OF STATE TRIAL COURT JUDGES 26

element that is transparently emotional. In a cultural environment that generally eschews judicial emotion and that periodically erupts with “radioactive” clashes over judicial empathy,²³² compassion appears as a rare designated emotional outpost.²³³ The psycho-legal theory solves this apparent puzzle. We evaluate traits by reference to the functions they are thought to serve in the daily work of judging, and compassion promotes desired behaviors. Moderate to high trait kindness inclines people to have and to demonstrate respect for their fellow humans: to be willing to listen to them, to understand them, to care about them, and to be willing to work hard to serve them well.²³⁴ Low dispositional kindness, at the opposite pole, expresses in trait callousness and misanthropy. That trait would be expected to manifest in the displays of arrogance, rudeness, and disregard that fray social bonds among judges and between the judiciary and the public. We have lacked the vocabulary with which to explain why compassion feels both important and temperamental. Fortunately, this theory provides it.

Judging is a particularly demanding and important form of public service, so it makes sense that we would value persons who naturally are inclined to care about that public. Gainsaying that proposition appears as difficult as overcoming the law’s general aversion to judicial emotion. Indeed, tributes to “great judges” typically praise them not just for their intellect and courage but also for their benevolence.²³⁵ One much-beloved judge has written that “[i]f we judges could possess but one attribute, it should be a kind and understanding heart. The bench is no place for cruel or callous people regardless of their other qualities and abilities.”²³⁶ In the words of another, “[A] judge is more likely to reach a just answer if he or she cares.”²³⁷

Moderate to high levels of trait kindness therefore should be understood as critical determinants of a good judicial temperament. In addition to promot-

(2017), <https://www.ncsc.org/~media/Images/Topics/Judicial%20Administration/Elements-of-Judicial-Excellence-final-report-Publicv15Dec2017.ashx> [<https://perma.cc/VDQ7-YLE5>] (presenting data showing that well-regarded state-court judges regard compassion as a core trait underlying judicial excellence).

²³² See Maroney, *supra* note 18, at 631 (quoting Baker, *supra* note 18).

²³³ See Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 L. & HUM. BEHAV. 119, 121 (2006) (pointing out the rarity of such “permissibly emotional outposts in an otherwise ‘rational’ legal universe”).

²³⁴ C. Daniel Batson, *Altruism (Psychological Perspectives)*, in OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES, *supra* note 57, at 26, 26–27 (defining altruism as “a motivational state with the ultimate goal of increasing another’s welfare” that, according to the empathy-altruism hypothesis, is spurred by “an other-oriented emotional reaction”).

²³⁵ See Calabresi, *supra* note 199, at 513 (“[A] judge needs . . . generosity of spirit, that compassion which causes one to know what it is like to be in trouble and in pain, and to desire instinctively to reach out and help.”); *A Tribute to Judge James R. Browning*, 73 MONT. L. REV. 1, 10 (2012) (describing Judge Browning as kind and compassionate).

²³⁶ Devitt, *supra* note 6, at 574.

²³⁷ Denny Chin, *Sentencing: A Role for Empathy*, 160 U. PA. L. REV. 1561, 1580 (2012).

ing displays of respect and caring, these levels would be expected to buffer against judicial cynicism and despair, attitudes that feed destructive behaviors toward both the public and the self. The work of judging often shows humanity at its worst. To perform that work well over time requires a fundamental disposition to believe in humanity's essential decency.²³⁸

Extremely high levels of trait kindness, however, present specific dangers. A judge who is too closely attuned to the emotions and needs of others may, given the spectrum of human suffering with which most judges regularly are in contact, experience emotional exhaustion, compassion fatigue, and burnout, all of which can damage well-being and job performance.²³⁹ Such a judge may also be at risk of "pathological altruism."²⁴⁰

At non-pathological levels, though, the high-kindness individual will take more available opportunities to act prosocially, and will incur greater costs to do so, than will persons with lesser levels of this trait. They remain, however, sensitive to opportunity and cost, and will not extend helping behaviors if doing so would violate their own sense of priorities and ethics.²⁴¹ We therefore would expect the dispositionally kind judge, if ethical and competent, to obey the rule of law, acting as prosocially as the law permits but no more.²⁴² A judge at the highest extremes of this trait, in contrast, would be expected to find staying in his lane unusually challenging if doing so were to require him to withhold helping behaviors. Short of that extreme, however, trait kindness is a core aspect of a good judicial temperament.

* * * *

This subsection has proposed the following. At the substantive level, to possess a generally good judicial temperament means to have a relatively low propensity to experience emotional states likely to express in undesirable behaviors, and a relatively high propensity to experience emotional states likely to express in desirable ones. Judges high in trait anger are particularly likely to experience anger, irritation, frustration, and contempt, to perceive situations as

²³⁸ A widely beloved judge with whom this author works frequently, and who is possessed of a great love of humanity, recounts how even he once came home from a difficult day on the bench and said to his wife, "You know, people suck."

²³⁹ Monica K. Miller et al., *Judicial Stress: The Roles of Gender and Social Support*, 25 PSYCHIATRY PSYCHOL. & L. 602, 602–04, fig.1 (2018).

²⁴⁰ Knafo & Israel, *supra* note 227, at 169 (explaining how polar opposites on this trait dimension are the extremely low levels of empathy found in psychopathy and autism, and uncontrolled, emotionally exhausting empathy).

²⁴¹ *Id.* at 175 (describing how one might feel empathy with and compassion for earthquake victims, but be unwilling or unable to overcome barriers to helping, such as lack of money or time to volunteer).

²⁴² *Cf.* FED. JUDICIAL CTR., *supra* note 31, at 29 (stating that a competent judge "[e]xpresses empathy for others in appropriate ways").

personally arousing and offensive, and to display aggressive and disrespectful behaviors. A less dramatic but still meaningful temperamental vulnerability is posed by those high in trait fearfulness, as they are less likely to maintain the courage necessary to make difficult decisions. Judges prone to very high levels of anxiety may be indecisive and lack sufficient resilience to handle the position's demands. In contrast, judges high in trait positivity are likely to exhibit resilience, competence in interpersonal relationships, and open-mindedness. Judges whose trait positivity tends toward satisfaction and contentment are particularly likely to both feel and project calm, and to derive pleasure from ordinary accomplishments. Judges whose positivity tends toward exuberance and joy may have to work harder to project calm and to cope with boredom, but are likely to take on difficult tasks with enthusiasm and to relish achievements. Finally, temperamentally kind judges would be expected to resist cynicism, to regularly treat others with understanding and compassion, and, when the law allows, to extend permissible forms of relief to those in distress, whether at the individual or systemic level.

2. Habitual Patterns of Self-Regulation

The speed, intensity, and content of emotional responses is one pillar of psychological temperament. Self-regulation, the second pillar, is just as deep-seated and influential. It is equally as critical to judicial temperament.

Rather than being at the mercy of our emotions, humans regularly exert effort to influence what emotions we have, when we have them, and how those emotions are experienced and expressed—for example, so as to conform to social expectations and professional norms.²⁴³ We do so with a wide variety of strategies, such as adopting a “poker face,” biting our tongue, thinking about something else, or avoiding certain people and situations.²⁴⁴ Also referred to as “effortful control,” this dimension is driven by an individual's intrinsically motivated ability to control their emotions.²⁴⁵ In adults, this dimension captures

²⁴³ See James J. Gross, *Antecedent- and Response-Focused Emotion Regulation: Divergent Consequences for Experience, Expression, and Physiology*, 74 J. PERSONALITY & SOC. PSYCHOL. 224, 226 (1998) (exploring regulatory strategies designed to change the emotion-eliciting situation, or interpretation of and/or response to that situation); see also Iris B. Mauss et al., *Culture and Automatic Emotion Regulation*, in REGULATING EMOTIONS: CULTURE, SOCIAL NECESSITY, AND BIOLOGICAL INHERITANCE 39, 40 (Marie Vandekerckhove et al. eds., 2008) (“[D]eliberate or automatic changes in any aspect of the emotional response, including the eliciting situation, attention, appraisals, subjective experience, behavior, or physiology.”).

²⁴⁴ Gross, *supra* note 243, at 224–26; Maroney, *supra* note 222, at 1505–08; Maroney & Gross, *supra* note 49, at 144–46.

²⁴⁵ Rueda, *supra* note 165, at 145; see Mary K. Rothbart & Brad E. Sheese, *Temperament and Emotion Regulation*, in HANDBOOK OF EMOTION REGULATION 331, 336 (James J. Gross ed., 2007) (defining “effortful control” as “the ability to inhibit a dominant response in order to perform a sub-

variation in ability to shape emotional experiences, the thoughts underlying them, and the actions they motivate, by focusing, moving, and sustaining attention; overriding initial or dominant responses in favor of secondary or subdominant ones; and activating a behavior despite a desire to avoid it.²⁴⁶ A common analogy is that emotional reactivity is the accelerator and self-regulation the brake. Less simplistically, self-regulation encompasses the entire range of actions one might take to determine a car's accelerated movements, including steering, downshifting, speeding up, and braking.²⁴⁷

Self-regulatory tendencies—true to type for a core temperamental element—emerge early, tend to persist, hold cross-culturally, have genetic and neural correlates, tie into core features of a mature personality, and admit of significant individual differences.²⁴⁸ Persons high in self-regulation are able to display a variety of responses to a range of situations, allowing greater decisional leeway to—for example—approach situations they fear and inhibit actions they desire, when necessary to meet their short and long-term goals.²⁴⁹ Such ability is considered a hallmark of emotional intelligence.²⁵⁰ Persons low on this trait dimension tend to rely unreflectively on a narrow set of responses and frequently deploy less-advantageous avoidant coping mechanisms.²⁵¹ These differential regulatory patterns have predictably differential impacts on

dominant response, to plan, and to detect errors”). The closely related concept of executive attention concerns itself with flexible control of cognition, while temperament concerns itself with regulation of emotion. As emotion is connected to both thoughts and behavior, a focus on the former includes attention to the latter. Rueda, *supra* note 165, at 147; see Rothbart, *supra* note 32, at 9, 13.

²⁴⁶ Rueda, *supra* note 165, at 145–47.

²⁴⁷ In the psychological literature, regulatory dimensions of temperament sometimes are labeled “effortful control” and “constraint.” Depue & Fu, *supra* note 182, at 388; Rueda, *supra* note 165, at 145; see also Zentner & Shiner, *supra* note 32, at 677 tbl.32.1 (finding effortful control to be among the most enduring trait dimensions).

²⁴⁸ See Lengua & Wachs, *supra* note 32, at 524–25 (describing how the regulatory domain predisposes people to “utilize specific appraisal, coping, or emotional regulation strategies to deal with stress” and “demands”); Kimberly J. Saudino & Manjie Wang, *Quantitative and Molecular Genetic Studies of Temperament*, in HANDBOOK OF TEMPERAMENT, *supra* note 32, at 315, 317 (explaining the genetic components of emotional regulation).

²⁴⁹ Rueda, *supra* note 165, at 145–47; see Lauren K. White et al., *Neurobiology and Neurochemistry of Temperament in Children*, in HANDBOOK OF TEMPERAMENT, *supra* note 32, at 347, 352–59 (finding that effective regulation calls on both automatic and “higher-order executive processes” to ascertain the nature of a challenge and deploy situationally appropriate attentional and behavioral responses).

²⁵⁰ Nicola S. Schutte et al., *Antecedent-Focused Emotion Regulation, Response Modulation and Well-Being*, 28 CURRENT PSYCHOL. 21, 23 (2009) (citing John D. Mayer et al., *Emotional Intelligence: Theory, Findings, and Implications*, 15 PSYCHOL. INQUIRY 197, 197–215 (2004)).

²⁵¹ Rueda, *supra* note 165, at 147; see Depue & Fu, *supra* note 182, at 389 fig.18.6 (showing the interaction between emotionality and constraint); Nancy Eisenberg et al., *Effortful Control and Its Socioemotional Consequences*, in HANDBOOK OF EMOTION REGULATION, *supra* note 245, at 287, 295 (finding that persons who are neither “overcontrolled nor undercontrolled” are “well adjusted, socially competent, and resilient”).

situational success, well-being, and overall adjustment to life demands, including work demands.²⁵²

Strength in flexible, active self-regulation is another element of human temperament that should be recognized as an essential part of a good judicial temperament.²⁵³ This trait directly promotes several high-consensus desirable behaviors, specifically displays of patience, calm, and a dignified demeanor, even in challenging circumstances, and even when such displays are unexpected due to a contrasting internal state. As the prior subsection proposed,²⁵⁴ one way to maximize chances that a judge consistently will display such behaviors is to select those with relatively high levels of positive emotionality, particularly of the low-arousal sort. A second, complimentary way to do so is to preference judges high in self-regulation.²⁵⁵

Even dispositionally well-regulated judges, however, will have their regulatory skills tested by the recurrent challenges of judging. Those challenges do not require uniform down-regulation of emotion, but rather nimble shaping and switching. It is important for a judge to refrain from showing emotion on her face in some situations (for example, to prevent a jury from seeing that she thinks a witness is stretching the truth) but to show it in others (for instance, to express enthusiasm for a defendant's progress in reentry court).²⁵⁶ A patient, slow, even-toned response is not appropriate when an immediate danger presents itself, such as a lawyer starting to reference inadmissible material. A judge may want to adopt a caring, soothing tone with a frightened child witness, but a clinical, cold one with an expert witness who refuses to stay on task.²⁵⁷ A difficult telephone call with a colleague may de-escalate a conflict, whereas the sharply-worded email that was satisfying to draft and easy to send may do the opposite. Further, regulatory strategies differentially consume cog-

²⁵² See Lengua & Wachs, *supra* note 32, at 524–25 (referencing regulatory variance in children); Rothbart & Sheese, *supra* note 245, at 331–33 (outlining the relationship between temperament and emotion regulation across the life span).

²⁵³ Cf. FED. JUDICIAL CTR., *supra* note 31, at 29 (deeming “[e]motional [i]ntelligence,” defined as “[t]he capacity to perceive and manage one’s own emotions and the emotions of others,” a necessary judicial attribute).

²⁵⁴ See *supra* notes 172–242 and accompanying text.

²⁵⁵ A third way, discussed briefly at the end of this Part, is to train judges explicitly to develop their emotion-regulation skills in the unique contexts of their work settings and demands. See NAT’L CTR. FOR STATE COURTS, *supra* note 231, at 19–20 (reflecting judicial leaders’ view that their peers vary greatly on such emotional management skills—indeed, that emotion regulation is among the sites of greatest variance—and need training). Although training would not be expected to change an underlying trait, it would maximize potential for growth within the envelope of possibility, the parameters of which may be larger than assumed. This author has been offering such trainings for some time, and is working toward an experimental model to see if regulatory growth can be quantified.

²⁵⁶ Maroney, *supra* note 222, at 1552–54.

²⁵⁷ ANLEU & MACK, *supra* note 150, at 120–22 (identifying five distinct styles of demeanor, ranging from welcoming to rude, that judges may use in different situations).

nitive resources, and therefore call for differential deployment according to whether such resources are abundant or constrained.²⁵⁸ Moreover, although judging presents constant regulatory demands, regulatory burdens are not equitably distributed. For example, female judges may find their authority eroded by even well-justified and dignified anger displays, even as male judges may find their authority cemented.²⁵⁹ Such disparities add to the already significant load of self-regulation.²⁶⁰ Self-regulation is a sophisticated improvisational dance, not one performed by stepping in numbered outlines on the floor. Every judge needs a moderate to high level of regulatory skill to pull off this dance.²⁶¹

As with other trait dimensions, regulatory skill exists along a continuum. That is to say, it does not have an on-off switch. Those with other substantive traits most neatly aligned with core aspects of a good judicial temperament—positivity, particularly the low-arousal kind, and kindness—would be predicted to need slightly lower levels of regulatory skill than their opposing counterparts. As less inherently advantageous trait dimensions—the anger/irritation/frustration/contempt cluster, fear and anxiety, and extraordinarily high levels of high-arousal positivity—more regularly tend toward problematic behaviors, high regulatory skill will be at a commensurately higher premium. That skill would be predicted to make the difference between reacting to a sudden stressor with either an explosive outburst or a deep breath, as well as the difference between burnout and a long, distinguished career.²⁶²

Judges who come to the bench with strength in the dimension of self-regulation are therefore relatively good temperamental bets. Those who come with less regulatory strength will need considerably more attention. The greater the distance between regulatory propensities and behavioral expectations, the greater the danger that the judge's regulatory needs will outpace regulatory capacity. Those at the lowest levels of self-regulation may be unsuited for any or most judicial assignments.

²⁵⁸ See Maroney, *supra* note 222, at 1545 (explaining that inhibiting facial and bodily signs of emotion, for example, imposes cognitive load and memory impairment, whereas changing one's thoughts about a situation in order to change its emotional significance does not).

²⁵⁹ Jessica M. Salerno & Liana C. Peter-Hagene, *One Angry Woman: Anger Expression Increases Influence for Men, but Decreases Influence for Women, During Group Deliberation*, 39 L. & HUM. BEHAV. 581, 581 (2015).

²⁶⁰ See generally Amy S. Wharton, *The Sociology of Emotional Labor*, 35 ANN. REV. SOC. 147 (2009) (analyzing scholarship on emotional labor—that is, the work of managing emotions in service of workplace norms and demands—and pointing to factors such as gender that affect such labor).

²⁶¹ See Maroney & Gross, *supra* note 49 (presenting a detailed theoretical model of the emotionally well-regulated judge); Wharton, *supra* note 260 (highlighting the complexity of emotional labor).

²⁶² See FED. JUDICIAL CTR., *supra* note 31, at 29 (asserting that well-regulated judges perceive situations more fully, “which leads to a fair and accurate process and sound and fair decisions”; “work well under pressure”; “more easily mature and improve in the judicial function”; and make fewer mistakes).

3. Emotion/Regulation Wheelhouses

Thus far, this Section has addressed trait-level emotional experience and self-regulation as separate. In reality, they are intertwined. Although theoretically any trait combination is possible, some combinations are more likely than others.²⁶³ Correlations between patterns of reactivity and regulation create individual temperamental wheelhouses, and certain wheelhouses are particularly common.²⁶⁴

Those with lesser dispositional regulatory skill tend also to have particularly disadvantageous sorts of trait emotionality. Studies show, for example, that adults “who have the highest levels of anger also have the lowest levels of cognitive self-regulation.”²⁶⁵ High-trait-anger persons appear particularly likely to have lower skill with effortful control processes that would allow them to down-regulate hostile feelings and override impulses toward their behavioral expression.²⁶⁶ Strength in the kindness dimension, in contrast, is linked to strength in effortful control, including the ability to delay gratification, as well as in development of conscience and the associated ability to act on principle.²⁶⁷

Psychological data, therefore, suggest that some judges will sort into diametrically opposing positions when we look to their wheelhouses. Judges with worrisome levels of trait anger, irritation, frustration, and contempt are particularly likely also to engage the least flexible, most harmful forms of emotion regulation. Judges with high levels of positive emotionality and kindness are particularly likely to engage the most flexible and beneficial forms of regulation. The fact that temperamental dimensions tend to cluster in this way is, in

²⁶³ Zentner & Shiner, *supra* note 32, at 680.

²⁶⁴ Depue & Fu, *supra* note 182, at 389. Though this relationship is complex, Depue and Fu provide a useful matrix in which “emotional trait” occupies the vertical axis and “constraint” the horizontal, each on a continuum from low to high. *Id.* at 389 fig.18.6. The two tendencies form a diagonal of behavioral stability extending from labile (high emotionality and low constraint) to rigid (low emotionality and high constraint). *Id.* A similar relationship exists between reactivity and any regulatory characteristic. See CARVER & SCHEIER, *supra* note 22, at 35 (observing how “most people do things that reflect the entire range of a trait dimension,” but “the things they do most often reflect a narrower portion of that dimension”).

²⁶⁵ See Deater-Deckard & Wang, *supra* note 180, at 129 (noting, further, that most people experience a gradual improvement in “the capacity to regulate negative emotions” throughout adulthood, including into “middle age and beyond”).

²⁶⁶ Benjamin M. Wilkowski & Michael D. Robinson, *The Anatomy of Anger: An Integrative Cognitive Model of Trait Anger and Reactive Aggression*, 78 J. PERSONALITY 9, 20–24 (2010). The consequences of reduced regulatory skill are broad-reaching. A recent meta-analysis makes clear that constrained regulatory flexibility and range, as well as use of strategies such as suppression and denial, are associated with poor physical and mental health outcomes, while the opposite is true of flexible use of active coping strategies. Bruce E. Compas et al., *Coping, Emotion Regulation, and Psychopathology in Childhood and Adolescence: A Meta-Analysis and Narrative Review*, 143 PSYCHOL. BULL. 939, 965–66 (2017).

²⁶⁷ Rueda, *supra* note 165, at 157.

some practical sense, helpful. Slam-dunks and air balls, it appears, will make themselves known if we look through the proper lens. Where we see them, we should pay heed: the odds of an air ball becoming a slam-dunk are just as low as the inverse.

Understanding the most common wheelhouses might also alert us to dangers where (as often is the case) information is incomplete. When a judge presents with a documented history of frequent anger displays across different situational contexts, including off the bench, we rightly may worry about the weak regulatory skill with which the trait underlying such behaviors often is packaged. When we see a long history of skillful, context-sensitive emotion regulation, we might be more comfortable in assuming that temperamental kindness is likely to come along with it. Such assumptions should not be taken too far: wheelhouses are typical zones, not automatic ones. Good evidence about experiential traits can raise presumptions about self-regulatory ones (and vice versa), but the presumption should be tested.

* * * *

As this Part has explained, the traits about which we should talk when we talk about judicial temperament sound in emotional experience and regulation. Psychology supplies a deep explanatory mechanism for why certain substantive qualities—like compassion—are common features on temperament wish-lists, and why others—like arrogance—occupy the opposite pole. It also validates our collective instinct that patience, the ability to keep a level head, and maintenance of a courteous demeanor are deeply rooted—rooted, as we now can see, in self-regulatory dispositions. By ignoring psychological insights about a fundamentally psychological construct, we have remained unable to theorize why these qualities and behaviors properly are clustered together, and to identify where they come from. Perhaps this lacuna arose because understanding the construct requires us to traffic outside traditional concepts of legal reason and to speak the language of emotion. Law is deeply uncomfortable in that space. That is, however, the space we must enter if we aspire for a workable concept of judicial temperament.

This Part has revealed, too, that extant accounts have missed certain traits. Courage is an important aspect of a good judicial temperament; high trait fearfulness and anxiety pull against it. It also has revealed a few surprises. Compassion is a critical aspect of judicial temperament not despite its emotional nature but because of it. Capacity for flexible emotion regulation is not just a helpful skill for judges to cultivate, but a deeply rooted job requirement on which judges are likely to vary widely.²⁶⁸

²⁶⁸ See NAT'L CTR. FOR STATE COURTS, *supra* note 231, at 4 (noting emotion management as a skill critical to judicial excellence but one on which judges vary).

Moreover, the insights corralled in this Part can help us feel more sanguine about the prospect of principled sorting of judges into temperamental categories. As particularly advantageous experiential traits tend to come clustered with advantageous self-regulatory ones—and as the opposite also is true—we can identify one temperamental prototype that is generally likely to be ill-suited to any sort of judging and another that is likely to be well-suited to most. Between these poles, we should examine unique combinations of temperamental dimensions within any given judge and hold them up against the unique attributes of distinct judicial environments. For example, a judge with strong high-arousal positivity may be more suited to an active trial-court assignment than a cloistered appellate one. That judge, however, will also need particularly strong regulatory skill to nimbly navigate constant interaction with lawyers, litigants, juries, and the public without being sidelined by irritation and frustration. Such goodness of fit analysis will help us discern the best and worst bets for exhibiting preferred judicial behaviors in the predictable parameters of that environment.

The insights undergirding the psycho-legal theory of judicial temperament also have implications for efforts to support judges' optimal growth within their envelope of possibility. Regulatory capacity is perhaps the best target for such efforts. Sufficient skill in emotion management can mitigate the negative behavioral expressions of even entrenched reactivity patterns, and the latter may be harder to dislodge. Regulatory capacity often continues to grow over the life span. Though by adulthood growth trajectories are nowhere near as malleable as they were in childhood, they never are completely fixed.²⁶⁹ Interventions in teaching regulatory skill have shown great promise in other professional populations, particularly medical professionals, though they have not yet been tested with judges.²⁷⁰ To be sure, the weaker the dispositional regulatory skill and the more emotionally provocative the judge's typical work environment, the less likely it is that any such change will be dramatic.²⁷¹ We therefore would do well to invest primarily in judges high in trait self-

²⁶⁹ See White et al., *supra* note 249, at 352–53 (showing that cognitive regulation is strongly associated with age, but changes the most in early childhood).

²⁷⁰ Maroney, *supra* note 222, at 1521 (citing to, inter alia, Daisy Grewal & Heather A. Davidson, *Emotional Intelligence and Graduate Medical Education*, 300 J. AM. MED. ASS'N 1200 (2008)). See generally Rachel A. Cameron et al., *In Search of Compassion: A New Taxonomy of Compassionate Physician Behaviors*, 18 HEALTH EXPECTATIONS 1672 (2015) (observing effective interventions in the medical field); Leeat Granek et al., *Nature and Impact of Grief Over Patient Loss on Oncologists' Personal and Professional Lives*, 172 ARCHIVES INTERNAL MED. 964 (2012) (presenting novel evidence of grief among oncologists, with impacts on both them and their work, and articulating need for education for doctors “on how to manage difficult emotions”).

²⁷¹ See Rueda, *supra* note 165, at 147 (stating that regulatory efficiency depends in part on the strength of the emotional processes against which effort is exerted).

regulation.²⁷² We should not presume, however, to know the limits of any given judge's envelope of regulatory possibility, which may surprise. Further, because many judges already on the bench will display relative regulatory weakness—given that we have not systematically selected them with this trait in mind—and because the demands of judging require even those with regulatory strength to become stronger, programs to increase regulatory skill always will add value.²⁷³

Of course, judges with the least advantageous temperamental wheelhouse are already on the bench. Accordingly, we should be realistic about the level of intervention that may be needed to have a chance of moving them into acceptable territory—and the fact that they may never get there even with intervention. Moreover, our lack of a solid theoretical foundation has prevented us from knowing what effective interventions might even look like. The more we are able to develop such interventions for a diverse array of judges and judging environments, the more we can be confident in concluding that any given judge, having failed to improve even with intervention, is irreparably unfit.

The psycho-legal theory thus buttresses, sharpens, and expands upon our core instincts about judicial temperament. The temperamental slice of desired judicial attitudes and behaviors does indeed have deep roots in the person. Temperaments can be trained and shaped, but are not infinitely malleable. Even when our only data source is evidence of these traits in different domains, such as in private life or non-judicial work, those data should be taken seriously as predictors of judicial behavior, if those domains share relevant features with the judging environment. If used as the starting point for a robust research program, the theory promises to materially improve our use of judicial temperament as a guide for selecting, sorting, and supporting judges.

III. WHAT WE OUGHT NOT TALK ABOUT WHEN WE TALK ABOUT JUDICIAL TEMPERAMENT

The research supporting the psycho-legal theory of judicial temperament exposes the unduly narrow scope of accounts like Solum's, which singles out just one relevant emotional trait.²⁷⁴ It similarly reveals the overbreadth of accounts like Rosen's,²⁷⁵ which folds in every aspect of a judge's personal life and judicial philosophy. Providing a principled basis for distinguishing tem-

²⁷² Maroney, *supra* note 222, at 1555 & n.395 (suggesting that “extraordinary” judges who regulate emotion well, doing “naturally what we tell them not to do” and achieving “privately what we discourage publicly,” “perhaps” are the ones “we think of as having a good judicial ‘temperament,’ an oft-invoked but profoundly underspecified quality”).

²⁷³ *Id.*

²⁷⁴ See *supra* notes 71–78 and accompanying text.

²⁷⁵ See *supra* note 10 and accompanying text.

peramental factors from everything else a judge brings to the bench forces us into more specific and disciplined discourse. It prevents us from using temperament as either a smoke screen or conceptual dumping ground.

As this Part explains, the psycho-legal theory helps us see what desirable judicial traits are *not* temperamental.²⁷⁶ This Part further warns against falling into common fallacies that have plagued former discourse on human temperament.²⁷⁷ Moreover, specifying the complexity of judicial temperament cautions us against adopting simplistic formulae for assessing it.

A. Not All Desirable Judicial Traits Are Temperamental

As we have seen, one important aspect of delineating what judicial temperament *is* is to clarify what it *is not*—not just by reference to that which is oppositional, but also to that which is orthogonal. Psychological research strongly supports accounts like that of the ABA Standing Committee guidelines, which distinguish temperament from the judicial qualities of integrity and professional competence.²⁷⁸ Surely this is correct. Even the most temperamentally ideal person would be a terrible judge if she had no ethical barometer or deeply subpar legal training and skills. The psycho-legal theory of judicial temperament, however, also reveals a particularly important way in which even the best-supported accounts have gotten it wrong. The ABA Standing Committee guidelines, like a number of others, include in their temperamental construct “freedom from bias” and “commitment to equal justice under the law.”²⁷⁹ Declarative commitments to equality are not temperamental, but rather land squarely in the domain of *abilities and beliefs*—important, but lacking all the temperamental hallmarks such as heritability and durability.²⁸⁰ Commitment to equality—for example, along lines of race, sex and gender, sexual orientation, disability, and nationality—is a high order, culturally specific set of thoughts, beliefs, and values. So too is the belief that the good society is one in which such multiple forms of human existence are to be encouraged even when they are not one’s own—indeed, even when we do not fully understand or endorse them. Such thoughts, beliefs, and values are an

²⁷⁶ See *infra* notes 278–285 and accompanying text.

²⁷⁷ See *infra* notes 286–311 and accompanying text.

²⁷⁸ HOW IT WORKS, *supra* note 11, at 3. See generally FED. JUDICIAL CTR., *supra* note 31 (separating the concept of judicial temperament from other qualifications); NAT’L CTR. FOR STATE COURTS, *supra* note 231 (delineating a wide variety of desirable judicial attributes and skills, most delineated as non-temperamental).

²⁷⁹ HOW IT WORKS, *supra* note 11, at 3.

²⁸⁰ See *supra* note 124 and accompanying text.

important aspect of personal identity on which people vary, but they are not rooted in temperament.²⁸¹

The one sense in which commitments to equality and diversity *are* temperamental is that they would be predicted to occur somewhat more frequently in those who are dispositionally open-minded—a quality that, as we have seen, is promoted by trait positive emotionality.²⁸² Open-mindedness creates a space within which such commitments might find a home; the commitments fill that space with a specific set of ideas. Put differently, it would be difficult for a person to arrive at declarative commitments to equality and diversity without a certain quantum of open-mindedness. It is, however, entirely possible not to hold such commitments, despite open-mindedness. For example, a person who is naturally open to new experiences and learning, but who is never exposed to information about people different from her—or who is exposed only to negative information and judgments about such people—is unlikely to develop such commitments.

A similar point can be made about trait kindness. Naturally high levels of empathy, compassion, and prosocial behavior would be expected to make a person more likely to understand and care about the experiences of those unlike her. Trait kindness, however, in no way guarantees its extension across salient societal dividing lines. Ample research shows that we often dole out empathy, compassion, and prosocial behaviors more frequently to people whom we regard as “like us.”²⁸³ What sorts of persons one regards as within that zone—whether explicitly or implicitly—depends on one’s thoughts and beliefs about dissimilar persons. A committed racist may exhibit enormous empathy and care for those within his racial group and their exact opposite outside of it. A white person who has developed a heartfelt commitment to anti-racist ideals might remain firmly opposed to all forms of equal treatment for lesbian and gay persons. A judge might act on an instinctive empathy for a defendant who reminds him of himself twenty years prior, but feel no such connection to a defendant of a different gen-

²⁸¹ KAGAN, *supra* note 111, at 77 (explaining that many differences among people have little or nothing to do with temperament, such as “acquired knowledge, opinions, beliefs,” learned skills, prejudices and “tolerance toward others”); Rothbart, *supra* note 32, at 13 (placing these among the many important, culturally-driven aspects of self that “clearly go beyond traits”).

²⁸² See *supra* note 219 and accompanying text.

²⁸³ See Stefan Stürmer et al., *Empathy-Motivated Helping: The Moderating Role of Group Membership*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 943, 955 (2006) (“[E]ven in benign intergroup encounters . . . the role of empathy in helping is contingent on perceived group-level (dis)similarities.”); see also John F. Dovidio et al., *Extending the Benefits of Recategorization: Evaluations, Self-Disclosure, and Helping*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 401, 420 (1997) (exploring how recategorization affects the in-group out-group model); Bernd Simon et al. *Helping Individuals or Group Members? The Role of Individual and Collective Identification in AIDS Volunteerism*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 497, 506 (2000) (finding people more willing to volunteer for people they identified as their own group).

der, race, or class—or even one who went to a different college. Emotional dispositions do not create declarative beliefs or override implicit biases. Rather, they are channeled and bounded by them.

Accordingly, declarative commitments to equality and diversity should be understood as an aspect not of temperament but of ideology. Packing such commitments within the domain of judicial temperament is a particularly consequential example of the conceptual slippage that bedevils extant accounts. Consider that the ABA Standing Committee declares philosophy and ideology off-limits in its evaluation of judicial nominees.²⁸⁴ Doing so allows it to preserve its image of political impartiality. Nevertheless, declarative commitments to equality and diversity are an important qualification for judicial office in a diverse democracy. Because it would be intolerable in the contemporary United States for a committed, overt white supremacist (for example) to be considered qualified, the ABA has to package commitments to equality and diversity somewhere—and temperament is the floppy construct into which these homeless concepts can be shoved.

Pulling these commitments out of where they never belonged is important. Doing so requires us to admit that some aspects of a judge's ideology actually do matter as a condition of entry.²⁸⁵ Explicitly positioning commitments to equality and diversity within ideology, and accepting that at least this aspect of ideology is non-negotiable, requires us to articulate explicitly what specific set of beliefs and values are unacceptable in a judge, and why; what we can and should do actively to inculcate them; and when we collectively can conclude that a given person's antidemocratic values are too ossified to change.

B. Avoiding Caricature and Clumsiness

The psycho-legal theory of judicial temperament carries implications for selecting judges, sifting them into the environments to which they are temperamentally best suited, supporting the improvement of temperamental baselines through

²⁸⁴ HOW IT WORKS, *supra* note 11, at 3.

²⁸⁵ Chemerinsky, *supra* note 95, at 631. Further, as this requirement is not rooted in temperament, it is likely to be more highly malleable than those that are. Claims of dramatic change in belief structures (for example, by a prospective judge who disclaims biased views held as a young person) are at least somewhat more likely to be credible than are claims of dramatic change in temperament. Institutional efforts to move belief structures in desired directions also would be expected to be—on average—at least somewhat less challenging. It is important, however, not to be overly sanguine about the promise of moving judicial beliefs and values through the sorts of stand-alone “diversity training” initiatives on which organizations typically rely. Changing beliefs and values may be easier than budging temperamental traits, but both are hard, and some models are more successful than others. See Katerina Bezrukova et al., *A Meta-Analytical Integration of Over 40 Years of Research on Diversity Training Evaluation*, 142 PSYCHOL. BULL. 1227, 1227 (2016).

judicial evaluation, counseling, and education, and—finally—establishing bases and mechanisms for judicial removal. Every new theory presents new pitfalls, however, and this one is no different. Its primary dangers are overdeterminism and oversimplification in the move from theory to practice.

First, any claim about stable categories into which humans reliably can be sorted invites reduction to a parlor-game exercise. As Kagan explains:

Every age has a preferred explanation of the obvious differences among people that always are a focus of curiosity and a topic for gossip. The most persuasive accounts attribute most of the human variation to one causal mechanism, for the mind likes single-process explanations over those that involve multiple forces; the latter are difficult to grasp and therefore less pleasing.²⁸⁶

Indeed, Galen's four-part typology owes no small part of its two-millennia cultural run to its simplicity. The contemporary United States, no longer quite in Galen's sway (and arguably less obsessed with Zodiac signs than we were several decades ago), has enthusiastically embraced our own four-part temperamental typology. The four Harry Potter houses—"brave Gryffindor, gentle Hufflepuff, smart Ravenclaw or ambitious Slytherin"—have become a popular way to capture perceived types.²⁸⁷ Sorting Hat aficionados are making important life decisions, such as marriage, based on this magic mechanism that ostensibly reveals one's essential, unwavering core. Startlingly, they also are seeking to alter their behaviors and habits so they will continue to fit within the house in which they are emotionally invested.²⁸⁸ We would do well to be wary of the tidy faddishness that so often attends typology.

Reductionist typology can be not just faddish but dangerous. Those dangers are perhaps most obvious when typology explicitly incorporates bodily attributes. As the pioneering theorists Sheldon and Stevens put it more than half a century ago:

Tradition has it that fat men are jolly and generous, that lean men are dour, that short men are aggressive, and that strong men are silent and confident. But tradition is sometimes wise and sometimes stupid, for seldom does it distinguish between the accumulated wisdom of the ages and the superstitions of ignorance. Especially as regards physique and temperament have the conclusions of careful

²⁸⁶ KAGAN, *supra* note 111, at 1.

²⁸⁷ Shankar Vendantam, *The Sorting Hat*, NPR: HIDDEN BRAIN (Dec. 4, 2017), <https://www.npr.org/templates/transcript/transcript.php?storyId=568418089> [<https://perma.cc/M6YN-GTPW>].

²⁸⁸ *Id.*

students been contaminated by the stereotypes of the street and by the dogmatism of the side-show phrenologist.²⁸⁹

The references to stereotype and phrenology drive home the point that not all temperamental typologies are whimsical or potentially benign. Consider the work of Lorenzo and Lydia Fowler, well-known late-nineteenth-century phrenologists who were equally evangelistic about temperament.²⁹⁰ The Fowlers' work was stunningly specific in purporting to link nationality and physical attributes—particularly those associated with racial and gender difference—to stable mental and emotional traits, which they then mapped onto suitability for particular sorts of work.²⁹¹ The end result were assessments like this one: Africans have lower brain volume than Europeans; boast “more memory and power of observation than originality of thought”; and show little development of the “moral brain” while having a large “social brain,” coupled with low “self-esteem,” qualities that together render them more easily enslaved.²⁹² The Fowlers fed to rapt audiences similar evaluations of the inherent traits and optimal work roles of, among others, Jews, Native Americans, white women, Scots, Poles, and the French. Although their work is an extreme example of how distorted ideas can shape temperamental classification and the nefarious ends to which such classification can be put, the Fowlers were not alone. Even Sheldon and Stevens, while decrying such tendencies, made generalizations about the temperamental attributes of Jews and “Negroes.”²⁹³

We have a responsibility in our own time to ensure that taking temperament seriously does not provide cover for reductionism. This would be an easier task if adult temperament—the trait dimensions themselves, the specific ways in which they express in observable behaviors, and the ways in which we assess them—were cleanly separable from social and cultural influences. This is not the case. First, as we have seen, environment and life experience shape temperament's development within the envelope of possibility.²⁹⁴ Socially salient categorizations such as race, class, and gender, as well as exposure to particular stressors such as poverty and war, are aspects of environment and life

²⁸⁹ WILLIAM H. SHELDON & S.S. STEVENS, *THE VARIETIES OF TEMPERAMENT: A PSYCHOLOGY OF CONSTITUTIONAL DIFFERENCES* 1 (1970).

²⁹⁰ *Noted Phrenologist Dead*, N.Y. TIMES, Sept. 4, 1896, at 10.

²⁹¹ Lydia N. Fowler, *Temperaments: Their Classification and Importance, A Lecture*, in *LECTURES ON MAN: A SERIES OF DISCOURSES ON PHRENOLOGY AND PHYSIOLOGY* 53, 53–68 (New York, S. R. Wells & Co. 1880) (setting forth an astonishing array of racialized and gendered temperamental typologies).

²⁹² Lydia N. Fowler, *Formation of Character*, in *LECTURES ON MAN: A SERIES OF DISCOURSES ON PHRENOLOGY AND PHYSIOLOGY*, *supra* note 291, at 267, 278.

²⁹³ SHELDON & STEVENS, *supra* note 289, at 1, 211 (critiquing the crude typologies of the past while simultaneously opining on the characteristic temperaments of “Negro and Jewish” persons).

²⁹⁴ *See supra* notes 138–157 and accompanying text.

experience.²⁹⁵ This reality underscores the importance of being open to temperamental diversity above baselines. We would not, for example, want to treat dispositional fearfulness at any level as disqualifying. Not only would such a practice violate the theory's requirement that we evaluate traits in their full context, it would disadvantage judges in whom that trait reflects childhood adversity and advantage judges who have been privileged enough to escape such adversity. The greater degree to which we embrace temperamental diversity, the greater degree to which we embrace human diversity.

Second, culture shapes emotion expression and regulation in ways not attributable to temperament.²⁹⁶ Swedish judges, for example, operate within a national culture that highly values subdued emotional displays. When they wish to convey anger or irritation toward a long-winded lawyer, they do so by quietly putting down their pens.²⁹⁷ That signal would be utterly lost in a different cultural context. More importantly, it is not indicative of any particular temperamental trait but, rather, of the judges' internalization of cultural norms for how these emotions properly are displayed. Similarly, women generally experience anger about as much as men do, but tend to express it differently—for example, engaging in fewer overt displays of aggression—because of gendered acculturation to distinct behavioral expectations.²⁹⁸ Outside observers thus may mistake differential display patterns for reliable signs of a person's underlying temperament constellation. Furthermore, they may do so in a biased fashion, reflecting implicit assumptions about what behaviors are normal or abnormal for a given type of person.²⁹⁹

Some have made this case with regard to Senator Lindsey Graham's differential temperamental assessments of Justices Sotomayor and Kavanaugh. At Sotomayor's confirmation hearing, he quoted anonymous lawyers who de-

²⁹⁵ Jerome Kagan, *The Bases for Preservation of Emotional Biases*, in *THE NATURE OF EMOTION*, *supra* note 167, at 64, 65–66; see Xinyin Chen et al., *Culture and Temperament*, in *HANDBOOK OF TEMPERAMENT*, *supra* note 32, at 462, 462–74 (exploring evidence of cultural differences in reactivity and regulation, and possible explanations, including exposure to daily stresses); Nicole M. Else-Quest, *Gender Differences in Temperament*, in *HANDBOOK OF TEMPERAMENT*, *supra* note 32, at 479, 479–92 (finding that gender impacts temperamental development and expression, though mechanisms are unclear, and that “males and females are similar on most but not all psychological behaviors, traits, and abilities”).

²⁹⁶ Batja Mesquita & Dustin Albert, *The Cultural Regulation of Emotions*, in *HANDBOOK OF EMOTION REGULATION*, *supra* note 245, at 486, 496–503; Fraser Watts, *Emotion Regulation and Religion*, in *HANDBOOK OF EMOTION REGULATION*, *supra* note 245, at 504, 504–20.

²⁹⁷ Bergman Blix & Wettergren, *supra* note 224, at 35.

²⁹⁸ See Deater-Deckard & Wang, *supra* note 180, at 133 (observing few if any sex differences or cross-cultural variations in anger traits, though culture and gender norms influence whether and how dispositional anger is displayed); Else-Quest, *supra* note 295, at 488–89 (noting impact of gender socialization and stereotyping).

²⁹⁹ See Else-Quest, *supra* note 295, at 485–86 (identifying the risk that those perceiving behaviors will interpret and respond to them differently based on gender).

scribed her as “excitable,” “angry,” “aggressive,” and “nasty,” and suggested that she examine her temperament problem.³⁰⁰ Following Kavanaugh’s dramatic display of anger at his confirmation hearing, in contrast, Graham raised no such concerns and rallied behind that display.³⁰¹ This distinction revived objections of a race- and gender-based double standard.³⁰² The specifics of that contrast can be (and surely will continue to be) debated. It is true, however, that in evaluating judges’ temperament we run the risk of invoking taken-for-granted standards that could lionize affective styles associated with particular social, experiential, and cultural backgrounds, while demonizing others.³⁰³ In Kagan’s words, a society that seeks to enshrine differences in order to exert hierarchical control will find it expedient to freeze human qualities into categories that serve that goal.³⁰⁴

The proper response to deeply bad science that has been put to deeply bad uses, and to the human biases that influence how even good science is used, is not to stop investigating the scientific target and making use of what we learn.³⁰⁵ Indeed, taking the science of temperament seriously is our best bet for avoiding the dangers of reductionism. The unguided “common sense” of any given group of decisionmakers—the kind of folk wisdom that has driven temperamental assessment to date—is appealing in its simplicity, but it necessarily reflects a situated set of often-unwarranted assumptions and blind spots.³⁰⁶ The

³⁰⁰ See *Sen. Graham Questions Judge Sotomayor About Her Temperament*, C-SPAN (July 14, 2009), <https://www.c-span.org/video/?c4752632/sen-graham-questions-judge-sotomayor-temperament> [<https://perma.cc/7ZQ2-N6NF>].

³⁰¹ See *Kavanaugh Hearing: Transcript*, WASH. POST. (Sept. 27, 2018), https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/?utm_term=.db4b708438d4 [<https://perma.cc/Q9HV-KXMW>].

³⁰² See James Oliphant, *Sotomayor Hearings: Is Judge a Temperamental Bully?*, L.A. TIMES (July 14, 2009), <https://latimesblogs.latimes.com/washington/2009/07/sotomayor-hearings-is-judge-temperamental-bully.html> [<https://perma.cc/QL87-XGE5>] (noting that Sen. Lindsey Graham was repeating allegations also surfaced by Jeffrey Rosen, and that “Sotomayor’s defenders suggested she was being portrayed as an irrational, overly emotional Latina in a way that a man in her position would not be”).

³⁰³ Green & Roiphe, *supra* note 62, at 498–99, 522 (arguing that efforts to regulate “judicial discourtesy” by reference to ideals of dispassion have operated as means to deter “the development of diverse judicial styles,” particularly the “more colorful style of judging associated with ethnic minorities,” and to solidify the power of elites). It also would be wrong to assume that a judge who consistently speaks in a loud voice is evidencing poor regulation or discourtesy, as she might be well-regulated, empathic, and acculturated to a particular vocal style.

³⁰⁴ KAGAN, *supra* note 111, at xiv–xv, 10–11. Indeed, given the ways in which essentialized notions of human difference were used to justify the Holocaust, Kagan found himself not being “completely happy” with what his research revealed about temperament; he would have preferred to find that human traits are dependent completely on environment. *Id.* at xxi–xxii; see *id.* at 11, 35.

³⁰⁵ *Id.* at xxiii (asserting that, with adequate scientific grounding, society will “recognize[] that temperamental variation does not pose a threat to democratic and egalitarian ideals”).

³⁰⁶ Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851, 856 (2009).

psycho-legal theory of judicial temperament provides grounded tools for understanding a complex reality. It orients us away from potentially biased surface evaluation and toward deep sources. The evil specter, though, and even the silly one, does require us to proceed with great care.

Finally, going beyond that which is silly or evil, making a good theory operational can be clunky. An instructive example comes from corporate personality testing. It has become common for U.S. corporations to make hiring, firing, work assignment, and promotional decisions based on personality measurement tools, many of which use the well-validated Big Five criteria.³⁰⁷ Indeed, a large industry supports this practice, the big idea of which is essentially the same as that behind the pen-and-paper vocational aptitude tests given to generations of junior high school students. That big idea is, basically, goodness-of-fit thinking. Just like those seventh-grade tests that said you would be a great firefighter or entertainer, however, the practice is highly imperfect. Even where tools accurately measure the personality factors of interest, the impact of those factors on work performance varies—for example, by the specific sort of work, levels of worker autonomy, how work teams operate, reward structures, and degrees of work stress.³⁰⁸ Personality testing has also raised concerns about distortion of diversity goals, perhaps because of biases built into the tools themselves.³⁰⁹

No matter how the psycho-legal theory of judicial temperament is operationalized, simple reliance on a single assessment tool is highly unlikely to be appropriate. Single-shot assessment of supposedly fixed qualities of people so as to slot them into predetermined work roles oversimplifies a complex human reality. It also can draw attention away from a wider universe of options—such as seeking to enhance growth in needed qualities, and altering work environ-

³⁰⁷ Richard D. Goffin et al., *Forced-Choice and Conventional Personality Assessment: Each May Have Unique Value in Pre-Employment Testing*, 51 *PERSONALITY & INDIVIDUAL DIFFERENCES* 840, 840 (2011); Neal Schmitt, *Personality and Cognitive Ability as Predictors of Effective Performance at Work*, 1 *ANN. REV. ORGANIZATIONAL PSYCHOL. & ORGANIZATIONAL BEHAV.* 45, 46 (2014); see CARVER & SCHEIER, *supra* note 22, at 28 (“[T]he five-factor model seems to offer the best promise of a consensus about the dimensions of personality that trait psychology has ever seen.”); John et al., *supra* note 113, at 114–19 (listing the Big Five domains as *extraversion, agreeableness, conscientiousness, neuroticism, and openness to experience*). Certain of the Big Five personality domains enjoy significant overlap with temperamental ones, though the degree to which this is so actively remains under scientific debate. See Rebecca L. Shiner, *Personality as Lasting Individual Differences in Emotions*, in *THE NATURE OF EMOTION*, *supra* note 167, at 61, 61–64 (describing “personality traits as ‘temperament grown up’”). Attention to this debate will be important should any effort to apply the psycho-legal theory rely on Big Five measurement tools.

³⁰⁸ Frederick P. Morgeson et al., *Reconsidering the Use of Personality Tests in Personnel Selection Contexts*, 60 *PERSONNEL PSYCHOL.* 683, 710 (2007); Deniz S. Ones et al., *In Support of Personality Assessment in Organizational Settings*, 60 *PERSONNEL PSYCHOL.* 995, 1011–16 (2007); Schmitt, *supra* note 307, at 54.

³⁰⁹ Schmitt, *supra* note 307, at 52–53.

ments so as to incentivize and facilitate desired behaviors. Indeed, the corporate world is now broadening its assessment norms with these concerns in mind, both seeking multiple perspectives on employees' attributes and examining those perspectives in light of fit with individualized work expectations.³¹⁰

This trend mirrors a similar one in actuarial assessments of legally-relevant behavior, such as recidivism risk. Increasingly, such tools are being conceptualized as risk-and-needs assessments, capturing relevant indicators in a way that—first—outperforms individual human judgment, and—second—can guide human judgment, with the objective of matching any given person with the level and kind of supervision and services that will minimize her risk and maximize her chances of thriving.³¹¹ A successful operationalization of the psycho-legal theory likely will reflect the spirit of this turn. Temperamental assessment tools could be designed to identify any given judge's areas of strength, obstacles to judicial success, and supports needed to improve professional outcomes.

This Part has thus far flagged danger zones as we consider how the psycho-legal theory of judicial temperament may be leveraged to catalyze practical advances. It has not tried to solve these issues, as it would be ill-advised to jump quickly from theoretical framing to operational utility. What is called for is a careful empirical research program to test, refine, and potentially alter the theory itself, and then consider, with rigor, how to systematically transform processes of judicial selection, training, support, evaluation, discipline, and removal to take better account of what the theory reveals about judicial temperament.

IV. REIMAGINING 2018 IN LIGHT OF THE PSYCHO-LEGAL THEORY: A THOUGHT EXPERIMENT

The 2018 debate over Justice Kavanaugh's temperament, with which this Article began, represents a dramatically squandered opportunity to engage in a principled public conversation about judicial temperament.³¹² One initial measure of the psycho-legal theory's value, then, is the extent to which it could have informed that debate. If its conceptual framework could have sharpened collective understanding of the aspect of the controversy that was actually

³¹⁰ David W. Bracken & Allen H. Church, *The "New" Performance Management Paradigm: Capitalizing on the Unrealized Potential of 360 Degree Feedback*, PEOPLE & STRATEGY, June 2013, at 34, 39.

³¹¹ See, e.g., MARK W. LIPSEY ET AL., CTR. FOR JUVENILE JUSTICE REFORM, IMPROVING THE EFFECTIVENESS OF JUVENILE JUSTICE PROGRAMS: A NEW PERSPECTIVE ON EVIDENCE-BASED PRACTICE 22–27 (2010); PEW CTR. ON THE STATES, RISK/NEEDS ASSESSMENT 101: SCIENCE REVEALS NEW TOOLS TO MANAGE OFFENDERS 1 (2011), https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2011/pewriskassessmentbriefpdf.pdf [<https://perma.cc/LP8P-J42G>].

³¹² Indeed, the theory has already been cited as a useful intellectual framework for organizing that debate. Robert Barnes, *Questions Linger About Nominee's Judicial Temperament*, WASH. POST, Oct. 6, 2018, at A5.

about temperament, and if it could have facilitated reasoned dialogue about that aspect in a shared, empirically-grounded language that avoided reductionism, then this important moment in U.S. judicial history might have thrown off more light than heat.

This is a tall order, given the complicated and potent mix of other considerations simultaneously at play in the Kavanaugh nomination. The most obvious such consideration was the truth or falsity of sexual assault and harassment allegations, on which it is not useful here to opine. Their truth or falsity was relevant, but in a unidirectional way. If they were true and known to Kavanaugh to be true, then no portion of his behavior at the hearing was defensible, whether as a matter of temperament or of integrity. If they were not true, or if they were not known by Kavanaugh to be true (or if he was unaware of a significant risk that they might be true and that he might be unable to recall the events), however, the temperamental debate is legitimate, but complicated. Without offering an opinion on the ultimate answer to that debate—which would be speculative—the psycho-legal theory does clarify the terms with which we should have had it.

Take as a starting proposition that then-Judge Kavanaugh's emotional displays at the hearing, which included clear expressions of anger, frustration, and contempt, were highly unusual and counter-normative for that formal, public, and consequential setting. On this, there is wide consensus.³¹³ From there opinion forked in two general directions. Detractors saw the extreme display of negative emotion as indicative of destructive traits that Kavanaugh generally is able to keep under wraps, but that had been revealed by the extreme pressures of the situation.³¹⁴ Defenders cast that display as an appropriate episodic response to an extraordinary situation that was unlikely to recur, certainly not in a work setting, and thus as diagnostic only of the depth of his legitimate self-regard and care for his family.³¹⁵

The psycho-legal theory contemplates that either narrative could be true—for example, because behavior under stress can be revealing of temperament, but can also be aberrational. The behavior itself is not a conclusive in-

³¹³ See *The Senate Should Not Confirm Kavanaugh: Signed, 2,400+ Law Professors*, *supra* note 3.

³¹⁴ See Feldman, *supra* note 103.

³¹⁵ *The Senate Should Not Confirm Kavanaugh: Signed, 2,400+ Law Professors*, *supra* note 3; see Barnes, *supra* note 312 (collecting arguments pro and con, including by quoting UCLA Law Professor Eugene Volokh as saying “I can’t imagine how I would keep my composure in such a situation, even if I (like Judge Kavanaugh) were a judge who had a decade-long reputation of calm and politeness during the ordinary work (including the controversial work) of a court”); Richard North Patterson, Opinion, *The Telling Role of Character in the Ford-Kavanaugh Controversy*, BOS. GLOBE (Sept. 30, 2018), <https://www.bostonglobe.com/opinion/2018/09/30/the-telling-role-character-ford-kavanaugh-controversy/zqAFTKwLaZxmF5lRftr9SJ/story.html> [<https://perma.cc/YV7P-5XRN>] (stating that the judge “revealed his reflexive belligerence”).

indicator of the source from which it springs. In determining which view was more likely to be accurate, the psycho-legal theory would have counseled examination of, among other things: past, documented incidents of similar behavior in similarly stressful, or less stressful, situations; the lack of such behavior in similarly stressful, or more stressful, situations; and the extent to which environmental factors may have facilitated or constrained our access to direct evidence of such behaviors (for example, in the generally cloistered world of appellate chambers). As the primary concern was with Kavanaugh's displays of negative emotion, we might also have looked for reliable, consistent signs of positive emotionality and kindness, including in trying circumstances, with which trait negative emotionality tends not to be clustered. If such evidence was muted or absent, a move from negative behaviors to negative trait might be more supportable, and if it was present (particularly at high levels and across meaningfully varied situations), that move would be less so.

The psycho-legal theory of judicial temperament would have also directed separate consideration of available evidence of then-Judge Kavanaugh's relative skill with self-regulation. In making that assessment, it would be relevant to determine whether Kavanaugh deliberately chose to express his negative emotions as he did. Such a choice would raise concerns not about his regulatory capacity but, rather, the normative status of the reasons for making that choice.³¹⁶ If, instead, his actions reflected dysregulation—that is, inability to conform to his valued norms—then our concern would be not only the normative content of the ideas he expressed but also the extent to which the episode could be indicative of deep-seated regulatory deficits. Evidence about his typical regulatory skill and default emotion-regulation strategies then would have become highly relevant.³¹⁷ One also ought to have asked whether the predictable demands of serving on the Supreme Court of the United States would create new situations that, although about profoundly different things, might cause regulatory demands to exceed Kavanaugh's regulatory capacity. If that was likely to be true, one would have wanted to ask whether the Court's culture,

³¹⁶ Peter Baker & Nicholas Fandos, *Show How You Feel, Kavanaugh Was Told, and a Nomination Was Saved*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/kavanaugh-vote-confirmation-process.html> [<https://perma.cc/T2UT-W32R>]; cf. Barnes, *supra* note 312 (quoting Harvard Law Professor Richard Lazarus as saying he did not know if Kavanaugh's expressions of partisanship arose from "uncontrolled fury" or "political calculation").

³¹⁷ For example, suppression of emotional experience and expression, which might appear to an outside observer as calm neutrality, is consistent with periodic, extreme anger outbursts. See Maroney, *supra* note 222, at 1549–50 (“[R]eactive attempts to suppress subjective experience stand an equally poor chance of neutralizing emotion, but they add to those costs the danger of emotional rebound.”). But even a dispositionally calm, patient person with good emotional regulation skills can have such an outburst. Pattern evidence, therefore, is the most generally informational in seeking to determine the degree to which an individual outburst is indicative of traits.

norms, and constraints would sufficiently cabin the impact—on the Justice, on his colleagues, on cases, and on the public image of the Court—of instances of self-regulatory failure.

Some of these factors were indeed in play during the confirmation debates. For example, Kavanaugh’s supporters pointed to his lengthy tenure in judicial service without temperamental complaint.³¹⁸ Detractors called attention to other alleged episodes of dysregulated anger and aggressive behavior.³¹⁹ Even these relevant points were unable to be fully developed, however, given how quickly they became intertwined with positions on truth or falsity of the assault and harassment allegations.³²⁰ Legitimate temperamental arguments quickly were cast as positions taken by warring camps, not as sensitive, complicated matters calling for thorough and sensitive public dialogue.³²¹

Further, the ways in which people largely talked past one another on the issue of temperament muddled an independently important conversation about ideology.³²² It was not just then-Judge Kavanaugh’s emotional expressions that were extraordinary.³²³ So too was his overt invocation of political partisanship. Some of his words and actions reasonably could have been interpreted not just as a (potentially justified) complaint that he was being victimized by such partisanship, but also as a declaration that he personally identified in an explicitly partisan manner and would continue to do so on the Court.³²⁴ Like commit-

³¹⁸ Hatch, *supra* note 4 (stating that the judge’s “critics seem to be aghast that he is a human being who is unwilling to take slander lying down,” and that “this whole ‘temperament’ argument is a non sequitur” given that the ABA report showed that “[l]awyers and judges overwhelmingly praised Judge Kavanaugh’s judicial temperament”); Ventresca, *supra* note 4. Some commentators also made at least rudimentary goodness-of-fit arguments. See Michael Barone, Opinion, *It’s OK for Judges to Be Angry*, WASH. EXAMINER (Sept. 28, 2018), <https://www.washingtonexaminer.com/opinion/michael-barone-its-okay-for-judges-to-be-angry> [<https://perma.cc/9CJ2-TCJQ>] (stating the importance of judicial temperament for trial judges, but asserting that “[a]ppeals courts can function tolerably well even with very nasty judges”); Ruben Navarrette, Jr., Opinion, *Kavanaugh’s Emotions Showed He’s Human. That’s a Good Thing in a Supreme Court Justice.*, USA TODAY (Oct. 18, 2018), <https://www.usatoday.com/story/opinion/2018/10/18/brett-kavanaugh-fit-supreme-court-emotional-testimony-shows-human-column/1662723002/> [<https://perma.cc/8XPA-WN6Q>] (asserting that the “left” is trying to “‘get’ Kavanaugh” on temperament, but that he likes a judge “with an emotional streak” and comparing Kavanaugh to the state-court judge who sentenced Larry Nasser).

³¹⁹ Judi Hershman, *I’ll Never Forget Brett Kavanaugh’s Anger*, SLATE (Nov. 5, 2018), <https://slate.com/news-and-politics/2018/11/brett-kavanaugh-ken-starr-heidi-heitkamp-republican-campaign-democrat.html> [<https://perma.cc/5ZC5-7PD2>].

³²⁰ *Id.*

³²¹ See *supra* notes 318–319 and accompanying text.

³²² See *supra* notes 318–319 and accompanying text.

³²³ See *The Senate Should Not Confirm Kavanaugh: Signed, 2,400+ Law Professors*, *supra* note 3.

³²⁴ Barnes, *supra* note 312 (quoting retired Supreme Court Justice John Paul Stevens, who was sufficiently concerned about the partisan elements of Kavanaugh’s behavior as to counsel senators to “really pay attention to it”). Another relevant discussion about beliefs and values might have revolved around whether evidence of the nominee’s kindness reliably revealed that kindness to be selective. Cf. Lisa Blatt, *I’m a Liberal Feminist Lawyer. Here’s Why Democrats Should Support Judge Kavanaugh.*

ments to equality and diversity, strength of identification with a political party is a set of beliefs and values that is both orthogonal to temperament and highly relevant to judicial fitness, particularly the duty of impartiality. An extraordinarily important debate began to unfold over whether such a display of apparent partisanship revealed beliefs so strong and operational as to signal unfitness—not because of temperament, but because of ideology. That important debate, however, was partly drowned out by the temperamental morass into which it was pitched.³²⁵ A less toxic, more grounded set of theoretical ground rules might have allowed us to separate these independently critical aspects of fitness, and to examine the mainstream position that no aspect of ideology is relevant at the judicial selection phase.

This discussion of the Kavanaugh nomination will not harmonize passionately held positions, nor is it meant to. It does demonstrate that a psychologically grounded dialogue about temperament would have maximized potential to talk with one another and not past one another. The lack of a shared theory and vocabulary made it difficult to have a conversation that did anything but sharpen division, and conceptual slippage made it difficult to untangle temperament from the other considerations at play. Unfortunately, public debate over U.S. Supreme Court nominations in highly polarized political times may prove impervious to even the most compelling theory. One hopes that this is not the case. But even if this is so, the dialogue-disciplining potential of the psycho-legal theory presumably will be greater in the much larger, less public, and less politicized determinations of temperamental fitness happening every day across the country.

CONCLUSION

This Article has offered a psycho-legal theory of judicial temperament to replace the ill-defined ones of our past and present. That theory proposes that,

POLITICO (Aug. 2, 2018), <https://www.politico.com/magazine/story/2018/08/02/im-a-liberal-feminist-heres-why-i-support-judge-kavanaugh-219081> [<https://perma.cc/SH7H-62HL>] (“Kavanaugh is a great listener, and one of the warmest, friendliest and kindest individuals I know.”); Stephanie Kirchgaessner & Jessica Glenza, ‘No Accident’ Brett Kavanaugh’s Female Law Clerks ‘Looked Like Models,’ *Yale Professor Told Students*, THE GUARDIAN (Sept. 20, 2018), <https://www.theguardian.com/us-news/2018/sep/20/brett-kavanaugh-supreme-court-yale-amy-chua> [<https://perma.cc/768Z-GGEL>].

³²⁵ Editorial, *Even if Kavanaugh Is Innocent, His Confirmation Could Damage the Supreme Court*, DES MOINES REG. (Sept. 28, 2018), <https://eu.desmoinesregister.com/story/opinion/editorials/2018/09/28/brett-kavanaugh-confirmation-damage-supreme-court-credibility-christine-blasey-ford-chuck-grassley/1443593002/> [<https://perma.cc/9R24-PXWX>] (calling attention to alleged partisanship but mixing it into discussion of judicial temperament); Editorial, *The Irish Times View on the US Supreme Court Nomination: America’s Disgrace*, IRISH TIMES (Sept. 28, 2018) (same), <https://www.irishtimes.com/opinion/editorial/the-irish-times-view-on-the-us-supreme-court-nomination-america-s-disgrace-1.3645055> [<https://perma.cc/3C9Z-MVSC>].

far from being either a mystical quality or one that can be captured with a back-of-the-envelope inventory, judicial temperament is a complex but coherent construct, one deeply harmonious with psychological concepts of human development. How well or poorly a particular judge lives up to the temperamental expectations of judicial office depends to no small degree on his or her tendencies toward particular patterns of emotional experience and regulation. These tendencies are deep. They are, by adulthood, only imperfectly malleable. They drive behavior, particularly in the stressful situations that typify most forms of judging. The behaviors we most want from our judges are rooted in a tendency to feel positive emotions such as satisfaction and joy; a strong disposition for empathy, compassion, and prosocial action; and facility with shaping emotions and their expression in service of the proximate and distal goals of judging. The behaviors we least want from our judges are rooted in a tendency to feel negative emotions such as anger and fear; low dispositional kindness; and a rigid, constrained regulatory repertoire. Judges will present with a range of temperamental constellations, only some of which will be at the extremes of ideal or disqualifying. A judge's temperamental wheelhouse—that is, the aspects of their trait constellation that most habitually find expression in behavior—is an important determinant of the kinds of judicial assignments to which she will be best or worst suited. It also is an important determinant of the kinds of training and support that will both minimize any risk she poses to the reality and perception of justice, and maximize her chances of personal and professional flourishing. The psycho-legal theory also urges that courage be recognized as an aspect of judicial temperament, and that commitments to equality and diversity instead be recognized as an aspect of ideology. Finally, it cautions care in further theoretical development and in moving from theory to implementation.

This new theory of judicial temperament stands up well as a theory. A theory should, first, explain. This one explains why we have persisted in our belief in the existence and importance of something called judicial temperament, despite our equally persistent inability to get our arms around it. The belief persists because it reflects a deep truth about human beings. Our inability to get our arms around judicial temperament has, until now, persisted because we have failed to plumb available insights from our sister discipline of psychology. That inability also reflects our reluctance to face judicial temperament's emotional core.

A theory should also predict, a function “more subtle and more difficult.”³²⁶ This one predicts that specific traits will manifest in desirable judicial behaviors (or their opposite) in interaction with specific features of diverse

³²⁶ Carver & Scheier, *supra* note 22, at 6.

judicial environments. These interactions, it asserts, can be empirically captured, though to date they have not been. The theory further proposes that we can, and ought to, develop sound methods for assessing presence or absence of the traits that underlie any given judge's temperamental fitness, both as a general matter—that is, whether they clear baselines—and as a specific one—that is, to what judicial assignment their temperament is best suited. It further predicts that we can improve many (perhaps most) judges' emotional regulation skills with adequate investment. Whether these predictions hold true will be shown over time, as this new theory is probed, argued with, and tested. The iterative process this Article hopes to spur will meaningfully enhance our collective understanding of this critical aspect of judicial fitness—and, ultimately, our ability to operationalize that understanding through valid, reliable processes.

This effort is worth it. The quality of justice depends heavily on the quality of those who dispense it, and that depends heavily on temperament.

