

Student Paper

Sensitive Judges How to Resolve the Tangle of Legal Decision-Making and Emotion?

Jurriën Hamer*

1. Introduction

Should a judge base his decisions on his emotions? The usual reply is: ‘No, he should not’. A judge must possess what is called ‘judicial temperament’,¹ which means that while in office, a judge acts and thinks dispassionately, exhibiting a rational focus on the law and never straying in the emotional battlefield a courtroom can often be. Because judges decide in the name of the law and the state, which represents the common good, he or she² cannot be influenced by the touching stories of the particular case. And yet, at the same time, aren’t we proud of judges who do exhibit emotion? Do we not applaud the judge who vigorously defends the rights of minorities, or feels righteous outrage at the terrible crimes a suspect is deemed guilty of?

There seems to be a tension between on the one hand the firm demand that judges be impartial and distanced, and therefore *not* emotionally engaged, and the ideal of a judge who is influenced by a passion for law, a passion for justice.³ A striking illustration of this tension is the way the opinions of Supreme Court Justice Blackmun, during his life and after his death, have been appraised by his peers. Characteristic of Justice Blackmun was his engaged style of making judgments and the emotional appeal his writing had. Consider the following excerpt:

‘Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents [the US Government] who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, “dutifully recorded these incidents in files”’.⁴

Through writings such as these, in the eyes of many, Justice Blackmun became a magnificent example of a personal and humane judge, and he was praised for his engagement and concern.⁵ Yet equally so,

* This paper is an adapted version of the research project by Jurriën Hamer, entitled ‘Sensitive Judges. How to Resolve the Tangle of Legal Decision-Making and Emotion?’, which was completed at the Utrecht University School of Law department of Legal Theory, Utrecht (the Netherlands) on 29 November 2011, under the supervision of Prof. Dr. A.M. Hol. E-mail: J.M.Hamer@students.uu.nl.

1 S.H. Pillsbury, ‘Harlan, Holmes, and the Passions of Justice’, in S. Bandes (ed.), *The Passions of Law*, 1999, p. 330. See also R.A. Posner, ‘Emotion versus Emotionalism in Law’, in S. Bandes (ed.), *The Passions of Law*, 1999, p. 324.

2 From this point onwards I will refer to a judge as a ‘he’.

3 See Pillsbury, *supra* note 1, p. 330.

4 *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

5 M.C. Dorf, ‘In praise for justice blackmun: (corrected) typos and all’, 1999 *Columbia Law Review* 99, p. 1397.

the traces of emotion in Justice Blackmun's legal opinions provoked criticism.⁶ Blackmun had been too personal, too involved. Indeed, it has been suggested that his decisions were all too often not motivated by reference to statute or case law, but by his own personal convictions.⁷ The show of emotions was interpreted as a political stance, ill-befitting the standing of a judge.

The professional life of Justice Blackmun illustrates the advantages of relying on your humanity, but at the same time illustrates the risk of sincere emotional involvement being linked to biased decisions. A question is therefore how we should respond to the challenge the appearance of emotions presents us with. Should judges be trained to suppress all emotions, or should they be encouraged to rely on their feelings? Do we differentiate between emotions, allowing some and rejecting others? Is it possible to differentiate? In order to answer these questions we need to delve deeper into the nature of emotions, to find what value emotions may have in legal decision-making and, conversely, which aspects of emotions make them unfit for such deliberations.

Traditionally, the tangle of emotion and judgment has always been resolved by drawing a line between reason and emotion. Through the course of history, prominent philosophers have judged emotions to be rationally suspect, while at the same time regarding reason to be the leading instrument with which to make fair judgments. See for example Plato, who divided the human soul into three parts: reason, appetite and spirit.⁸ According to Plato, the first part of the soul was supposed to guide the other two parts.⁹ And many centuries later, Kant argued that reason, not emotion, should form the good will, from which all normative judgments were derived.¹⁰

This means that there is a strong historical doctrine that suggests that Lady Justice weighs *rationaly*, and should be blind to emotions. Yet, there can be some doubt as to whether this classical train of thought is right. In this paper, I will argue that simply stating the primacy of reason over emotional experiences or judgments is not a satisfactory way of coming to grips with the challenges those emotions pose in the legal decision-making process. A closer examination of emotions will show that they are not so distinct from reason as one might think. It will be argued that emotions carry cognitive and propositional content, and are in that way as much connected with *thought* as with a bodily sensation.

Still, it is not the sole aim of this paper to refute the classical divide between reason and emotions. Its aim is to propose an intelligent way for judges to deal with their emotions in making judgments. With no pretence whatsoever of giving a final answer to that particular question, I will attempt to make a fruitful contribution to untying the knot of emotions and legal deliberation. Note that this analysis explicitly investigates the role that emotions play in legal decision-making. Dealing with emotions is also relevant for the way a judge behaves during a trial, and in the manner in which he expresses his judgments. Although the discussion about the behaviour of a judge partly overlaps with the debate on emotions in decision-making, for considerations of space and clarity, I will restrict myself to the latter.

2. Rejecting emotions

To understand the renewing nature of the cognitive theories of emotion that will be discussed here, it is important to reiterate as powerfully as possible the arguments against the influence of emotions in making legal judgments. To do this, it is both necessary and rewarding to draw from the rich discourse on emotions and judgments, which centres mostly on *moral* judgments. The applicability of these arguments from outside the legal arena to the question at hand will first be illustrated. The underlying assumption of counter-arguments is that emotions are bodily occurrences which interrupt and mislead rational deliberation. I will argue that emotions are *part* of such rational deliberation, but provide knowledge of a special kind.

6 Posner, *supra* note 1, p. 324.

7 G.C. Sisk, 'The Willful judging of Harry Blackmun', 2006 *Missouri Law Review* 70, p. 1050.

8 Plato, *The republic*, translated by H.D.P. Lee, 1955, Book Four, para. 2.

9 Plato, *ibid.*, para. 2.

10 I. Kant, *Fundering van de metafysica van de zeden*, 1997, pp. 37-40.

The first reason for denying emotions access to the process of making moral judgments is that they are partial – an emotional person is a biased person.¹¹ One of the core principles of moral decision-making is that, at least at the outset, every person should be considered of equal importance.¹² But the emotional importance you attach to your friend's mother, or a woman passing you in the street, is much smaller than the emotional value and significance your own mother has to you. This is logical: in your own life your own mother is one of the most important women alive. An emotion thus has a tendency to focus on a specific bit of someone's reality, blinding him to other potentially morally relevant things.

The link with judges is easily established: a judge is supposed to consider each legal subject as equal – a value enshrined in both international treaties and national constitutions.¹³ Being touched by the agonies of a claimant or the compelling plea of a defendant narrows the judge's neutral 'line of sight'. Adam Smith acknowledged this point when he stated that compassion as a social drive would always have inconsistent results.¹⁴ Referring to the phenomenon that people tend to feel less and less compassion, the more distanced they are from the people who deserve their consideration, he even argued that the average person is more disturbed by the prospect of losing his own little finger, than the prospect of thousands of people dying far away.¹⁵ Later on we will come back to this point.

The second argument against emotional influence is that emotions are unreliable.¹⁶ The occurrence of an emotion seems dependent on contingent factors.¹⁷ Pizarro mentions the example of walking past a bum who is normally dressed and experiencing pity, and walking past a bum who is strangely dressed and not experiencing pity.¹⁸ In such a case having pity seems to depend on circumstances which have no logical relation with the moral judgment about bums in general. Due to this contingent dependency, emotions seem to defy mathematical, law-like explanations, and this makes them ill-suited for the practice of moral judgments, because one cannot rely on the (right) emotion to be there when you need it to inform you. The consequence of this is inconsistency, and this is relevant to judges: they must judge similar cases in similar ways, and expect their sources of information to be readily available. Being emotional in one case and distanced in another may have a discriminatory effect, and thus might generally conflict with basic legal values.

The third complaint about emotions is that they are experienced passively – we do not choose our emotions, we just *have* them.¹⁹ This makes the passions morally highly suspect, because the whole point of moral deliberation is that we must make the best possible moral judgment, *because we are responsible for those judgments*. As Ben Ze'ev puts it:

'Any discussion concerning the role of emotions in morality should address the issue of whether we can attribute responsibility to emotional behavior. Without such responsibility, the role of emotions in the moral domain cannot be significant.'²⁰

If we lose all responsibility for our decisions, constructive thinking about how to make those decisions will appear redundant. Considering judicial decision-making, this point also seems significant. A judge is held responsible for his decisions, and often has an obligation to provide reasons for his decisions.²¹ In our thinking about judges, we assume they consciously make choices so that they can be held accountable for those choices. A trial is based on such commonly shared convictions. Attorneys supply the judge with arguments in order to convince him to share their views and other participants do the same. This

11 Nussbaum deals with this aspect in her discussion of compassion. See M. Nussbaum, *Oplevingen van het denken*, translated by P. Adelaar, 2004, p. 308. See also A. Ben-Ze'ev, *The Subtlety of Emotions*, 2000, p. 256, and D. Pizarro, 'Nothing More than Feelings? The Role of Emotions in Moral Judgment', 2000 *Journal for the Theory of Social Behaviour* 30, no. 4, p. 356.

12 Nussbaum, *supra* note 11, p. 308. See also Pizarro, *supra* note 11, p. 356.

13 See for example the Universal Declaration of Human Rights, Arts. 1 & 7, or the US Constitution, 14th amendment.

14 A. Smith, *The theory of moral sentiments*, 1980, p. 136. See also Nussbaum, *supra* note 11, p. 309.

15 Smith, *supra* note 14, p. 321. See also R.H. Coase, 'Adam Smith's view of man', 1976 *Journal of Law and Economics* 19, no. 3, pp. 538-542.

16 Pizarro, *supra* note 11, p. 357.

17 *Ibid.*

18 *Ibid.*

19 Ben-Ze'ev, *supra* note 11, p. 244. See also Pizarro, *supra* note 11, p. 358.

20 Ben-Ze'ev, *supra* note 11, p. 243.

21 For example, in most countries such an obligation exists in criminal law cases, see for instance Section 174 of the British Criminal Justice Act 2003, or Art. 359 of the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*).

whole practice seems rather pointless if the judge were to decide emotionally and for instance punish one rapist more severely than another, just because he empathizes more with the first's victim than with the latter's. A judge uses reason and draws on the law and does not arbitrarily rely on how he simply 'happens' to feel.

Examining the objections to emotions in moral judgments and considering how those arguments relate to legal practice, it might seem obvious that emotions should not take part in legal decision-making. However, it will be illustrated that the above-mentioned arguments suffer from wrong preconceptions about what an emotion actually is, at the risk of overlooking the advantages of emotions in decision-making.

3. A new perspective on emotions

What is an emotion? This has been and still is the leading question of widespread debate. There are numerous positions regarding the question what an emotion *exactly* is, yet in essence they seem to revolve around two views: the cognitivist and the physicalist approach.

One of the most influential papers ever written on this subject is 'What is an emotion?' by William James.²² Drawing on the British empiricist tradition of Berkely, Hume and Mill,²³ James attacked the traditional understanding of an emotion, which was that people have a certain thought or occupy a certain mental state, and then experience an emotion. James writes: 'Common sense says, we lose our fortune, are sorry, and weep; we meet a bear, are frightened and run; we are insulted by a rival, are angry and strike.'²⁴ Thought thus precedes feeling a certain emotion. James argues for a reversal of this understanding: the bodily sensation occurs first, and our thoughts follow: 'the more rational statement is that we feel sorry because we cry, angry because we strike, afraid because we tremble (...)'.²⁵ This view is empiricist because it relies on that which is visible, and can be measured. To James, the cause of an emotion was physiological, not mental.

Of course, in modern neuroscience this distinction is no longer made – a mental state is also a considered a physical state and vice versa. James' specific theory has therefore long since been abandoned by scholars.²⁶ Yet, mentioning it still has value, for it clearly exemplifies a train of thought that is influential today: an emotion is a bodily sensation, and not a certain mental thought.²⁷ All the arguments against emotions in moral judgments are based on this point of view. Firstly, an emotion just happens to you, because it is a bodily sensation that simply occurs, it is not something we choose. Secondly, the appearance of an emotion is contingent, because it is a bodily sensation we do not yet fully understand. And finally: emotions are partial because they are not the products of rational thought (which is able to think 'in general'), but are physical reactions to our environment.

In contrast, the cognitivist approach argues that emotions *are* composed of thoughts. It differs from the aforementioned physicalist approach because cognitivists state that an emotion is a complex consisting of bodily sensations *and* thoughts. This is illustrated in Richard Solomon's car-stealing example:

'Emotions are intentional; that is, emotions are "about" something. For instance, "I am angry at John for stealing my car." (...) It is true that I am angry. And it is also true that John stole my car. Thus we are tempted to distinguish two components of my being angry; my feeling of anger and what I am angry about. But this is doubly a mistake. It requires that a feeling be directed at something. But feelings are occurrences and cannot have a "direction"'.²⁸

Solomon argues that the occurrence of an emotion cannot be explained by solely looking at the specific physical sensation that someone experiences. For instance, a strange feeling in your stomach cannot *explain* the anger you have, it is merely a sensation that accompanies the anger. As said in the example,

22 W. James, 'What is an Emotion?', 1884 *Mind* 9.

23 C.L. Golyghtly, 'The James-Lange Theory: a Logical Post-Mortem', 1953 *Philosophy of Science* 20, no. 4, p. 287.

24 James, *supra* note 22, p. 190.

25 *Ibid.*, p. 190.

26 Golyghtly, *supra* note 23, p. 287.

27 Nussbaum, *supra* note 11, p. 35.

28 R.C. Solomon, 'Emotions and choice', 1973 *Review of Metaphysics* 27, no. 1, p. 21.

anger is *about* something, and thus a definition of that anger should account for that aspect.²⁹ Solomon concludes that emotions, because they are about things, must instead be defined in cognitive terms – terms that describe what a certain emotion is about.³⁰ Thus, one's anger at John the car thief is not solely the experience of your heart thumping in your chest but also contains the *thought* that John stole your car. This explains why, when you discover that instead of John Felix stole your car, you probably become angry at Felix. The cognition, or thought, that caused the direction of your anger (pointing towards John or Felix) changed, and so the emotion's target (John, Felix) changed. Believing A or B to be the case is thus vital to the emotions someone experiences. If your mother is suddenly struck by a heart attack, you feel afraid, but if she is successfully revived, you are relieved. Explaining emotions by focusing on bodily senses occludes this connection between the emotion and the person or object at which it is directed.

In order to clearly define what an emotion is, the cognitivist must still find out by what exact terms emotions should be described. They contain thoughts, but what kind of thoughts? Nussbaum proposes to describe emotions as evaluative judgments.³¹ Following the Stoic tradition, which ironically itself eventually refuses to grant emotions value in moral judgments,³² Nussbaum deciphers other characteristics of an emotion. Firstly, she splits the fact that emotions are 'about something' into emotions being aimed at something *and* emotions involving an interpretation of an object.³³ Your anger at John contains an interpretation of John taking your car. This interpretation is visible in the use of the word 'stealing', which reflects a way in which one perceives John's act.

Connected to this point, Nussbaum states that the interpretation of an object is not neutral. Instead, it is an expression of a value-laden or evaluative judgment. Again, the car example illustrates this. You interpret John's stealing as something offensive to you, because you think stealing property is wrong and slights you. This seems to make sense. You wouldn't be angry if John took your car for good reason, for example because he borrowed it from you. The stealing violated something you believe in, something that was important to you, and this thought leads to the anger you feel. This brings us to the third characteristic Nussbaum mentions: the '*eudaimonistic*' element.

That John stole your car did not matter in general – it mattered to you. Emotions are personal, they concern the values you hold dear and define the objects you perceive in terms of your own life. Nussbaum captures this personal element by recalling the ancient Greek concept of *eudaimonia*.³⁴ *Eudaimonia* means happiness for oneself or succeeding as a person and is connected to being virtuous, in the sense of excelling in everything you do. This does not need to imply egoism; *eudaimonia* is about relating to one's environment, and thus could amount to a relationship of *servicing* that environment. The essential point is that *eudaimonia* is about how the world relates to you *in particular*, being a unique person.

Nussbaum's description of emotions as being *eudaimonistic* provides useful insights, for instance on the question why one feels deeply for his or her own mother, but is not, generally speaking, in the slightest bothered emotionally by a news broadcast concerning a woman dying during an earthquake on the other side of the world. Objectively, your own mother is not worth more than someone else, however far away. Still, from a *eudaimonistic* perspective, it is perfectly logical why your own mother matters more to you than some other woman: it's *your own* mother!

4. Evaluation of the new perspective

Summing up, the cognitivist approach suggests an addition to the physicalist analysis of an emotion, namely that emotions do contain and are defined by thoughts. Furthermore, these are not thoughts in general, but, following Nussbaum, contain evaluative judgments, which express the values that are important to your life. This shift in thinking relates emotions directly to who we are and how we think

29 There are also emotions, such as moods, which do not seem to have an object. Those will not be discussed in this paper. Suffice it to say that many emotions do have an object, and that this object has to be included in any satisfactory definition of those emotions.

30 Solomon, *supra* note 28, p. 22.

31 Nussbaum, *supra* note 11, p. 34, 39.

32 R.C. Solomon, 'The Philosophy of Emotions', in M. Lewis et al. (eds.), *Handbook of Emotions*, 2008, p. 5.

33 Nussbaum, *supra* note 11, p. 37.

34 *Ibid.*, p. 40.

about the world around us.³⁵ It thus constitutes a subjective approach to emotions, and this means that the truth of such a theory can only be determined by reference to our own experiences. Is this a viable approach to emotions? A neurologist would probably disagree, and would instead insist on a theory based on empirically falsifiable evidence. Approaches such as Nussbaum's do not rely on such evidence, but are normative and consequently of a more speculative nature. Is this a problem?

I do not think so. The strength of a subjective approach is that it easily connects with folk psychology,³⁶ a term that I use to refer to the way people think and talk about emotions in everyday life. In the end, a theory of emotions which is geared towards guiding people in dealing with their emotions must mean something to the people experiencing those emotions. More specifically, in order to answer the question posed in this paper, we have to search for a theory of emotions that connects to the way a judge has to face his or her emotions. The danger of scientific approaches is that because they reduce all knowledge to the third-person perspective of the distanced researcher, people become disconnected from their own emotional experiences. In addition to referring to an objective phenomenon, emotions refer to a *subjective experience*, which only the experiencing subject can grasp.³⁷ A theory which enables people to work with their emotions has to acknowledge this subjective quality. I conclude that the ultimate test for the credibility of a theory of emotions, meant to guide people in working with their emotions, is the extent to which it can give meaning to our own experiences.

To my mind a lot of emotional experiences are covered by the cognitivist approach, ranging from the deep sadness due to the loss of a loved one,³⁸ to wanting vengeance because one has been slighted.³⁹ However, not all emotional experiences fit perfectly into the cognitivist scheme. As Nussbaum admits, having a certain 'mood', be it dark or bright, is not necessarily connected to evaluative judgments – sometimes someone *just* feels a certain way, has a bad or a good day.⁴⁰ For the purposes of this paper, this means that the cognitivist approach cannot help a judge understand his emotions fully. Yet, this does not mean that it is not worthwhile to investigate the insights a cognitivist theory *can* give to a judge.

5. The cognitivist response

Now that we can accept the cognitivist theory as a meaningful instrument to study the relationship between emotions and the act of judging, it is time to examine if the arguments in favour of rejecting the role of emotions in making legal judgments still hold true. As I will draw from arguments that refute claims against the role of emotions in *moral* reasoning, I will first discuss these points in their own context, and then consider whether the allegations can be equally refuted in the domain of *legal* reasoning.

The first complaint against emotions was that they were partial. The cognitivist approach does not refute the statement that emotions are partial.⁴¹ Instead it explains this by pointing out that emotions are judgments about what someone or something means *to you*, and thereby underlines the importance of partiality itself.⁴² Consider the following case. Two people apply for a job and you must decide whom is to be hired. One of them is your friend, with whom you have had many conversations about the line of work you are in, and whom you trust. Furthermore, you care for him and in that sense want him to get the job, because of what it will mean to him: fulfilling his ambitions, financial stability for his family and so on. What is wrong about experiencing warm emotions for your friend at such a time? The point would obviously be that if you base your decision solely upon the merits of your friend, without regard to the pros and cons of hiring the other person, you would act unfairly. Yet does this necessarily follow from the facts of the case? It might as well be true that you sympathize with your friend, but force yourself to consider the other man's case just as thoroughly.

35 R.C. Solomon, *True to our Feelings*, 2007, p. 119.

36 *Ibid.*, p. 120.

37 See T. Nagel, 'What's it like to be a bat?', 1974 *The Philosophical Review* 83, no. 4, and T. Nagel, *Mortal Questions*, 2003, p. 196.

38 See the discussion by Nussbaum of her own grieving process in Nussbaum, *supra* note 11, pp. 37-42.

39 Solomon, *supra* note 35, p. 101.

40 Nussbaum, *supra* note 11, p. 35.

41 A. Ben-Ze'ev, 'Emotions and morality', 1997 *The Journal of Value Inquiry* 31, p. 195.

42 *Ibid.*, p. 201.

The point here is that sympathizing with your friend *as such* is not wrong, it just should not lead to biased attitudes and one-sided decisions. On the contrary, specific emotions provide important information, because they entail evaluative judgments about what we think is important and unimportant, wrong and right.⁴³ For example, through the concern that you experience for your friend, you realize how important it is that his application is handled with care and professional scrutiny. Through understanding his perspective, you note the moral salience of the decision you have to make.⁴⁴ Following Ben Ze'ev, emotions, because they draw attention to the particular, make us realize the importance of that which is around us. They add meaning and colour to the connections we have with the outside world.⁴⁵ This in turn allows us to understand the richness of another person's life. Through having a specific friend, you begin to understand what friendship means, and through loving a certain forest, you begin to understand the importance of nature in general. Still, such emotions need guidance, they need to be *balanced* with other, more distanced, ways of thinking. One might of course wonder whether this is possible – it might be true that emotions fully dominate our decision-making, and blot out all other considerations. This brings us to the second problem.

The second problem with emotions and moral reasoning was that emotions just happen to us, that we experience them passively. To a cognitivist, this is both true and untrue. The allegation is true in the sense that emotions express our own vulnerability. The objects of emotions are things we cannot ultimately control, such as our own health, the appreciation of a friend, or the praise of our colleagues.⁴⁶ Therefore when we experience emotions, we feel like our environment is doing something to us. Indeed, a friend can make you sad or happy, and becoming ill makes you afraid. Emotions make us realize our own vulnerability to our environment, and in that sense our dependency and passiveness.

Yet there is another sense, in which we can choose our emotions and treat them 'actively'. Because thoughts underlie our emotional experience, changing those thoughts can indeed change our emotions.⁴⁷ There is a link between emotions and choice. If we used to value our car deeply, but become convinced it is actually a wreck on wheels, we will still be angry at John if he steals our wreck, but the sadness of him stealing it will be less.

Of course correcting your emotions is not always easy. We learned from Aristotle that making fundamental changes to one's character requires an intense long-term investment, and can sometimes come too late.⁴⁸ The examples of emotionally dysfunctional people who had problematic upbringings, and thus bad emotional training, are abundant.⁴⁹ But the connection between emotions and judgments does show that it is not impossible to change, and therefore that we are to some extent responsible for our emotions where we choose not to alter them.⁵⁰

The final problem with emotions was that they were unreliable. What would an emotional cognitivist say to that? Nussbaum argues that emotions are reliable as such, due to their connection with evaluative judgments. The problem concerning unreliability is rather that we presume to possess a complete knowledge of ourselves, and think that thus we cannot be surprised by our own thoughts and convictions.⁵¹ But this is clearly not the case. We have many deep convictions, assumptions and ideas *in the back of our minds* that can at times completely take us by surprise.⁵² This is simply because no one can consciously know and consider all his evaluative judgments. Many are hidden in the background of our personality, and only enter into our consciousness when prompted by our surroundings. Consider the following example. Richard thinks he does not love Emily anymore and breaks up his relationship with her. When Emily is gone from his life, he suddenly feels immense remorse and profound love for Emily. Why did he not experience this love before? Is it because love is unpredictable? A cognitivist could argue that Emily's

43 Pizarro, *supra* note 11, p. 360. See also Ben-Ze'ev, *supra* note 41, p. 203, and Ben-Ze'ev, *supra* note 11, p. 256.

44 *Ibid.*, p. 361.

45 Ben-Ze'ev, *supra* note 41, p. 203.

46 Nussbaum, *supra* note 11, p. 77.

47 Solomon, *supra* note 28, p. 32.

48 Aristoteles, *Ethica Nicomachea*, translated by Christine Pannier & Jan Verhaeghe, 1999, para. 1103 a 15.

49 Nussbaum, *supra* note 11, p. 177-180.

50 Solomon, *supra* note 28, p. 32.

51 Nussbaum, *supra* note 11, p. 72. Nussbaum talks about background judgments, which continuously influence our behaviour in an unconscious manner.

52 *Ibid.*, p. 72.

departure reminded Richard of the role Emily played in his life, and reminded him of the judgments he had about Emily that were central to his love. Or maybe his decision was indeed well-founded, but that living in her absence was even worse than living with Emily. The point is clear. Emotions are not unreliable per se – we just do not always understand our own deeper convictions, and sometimes make judgments that turn out to be flawed.

To sum up, from a cognitivist perspective, the problems noted about involving emotions in our moral reasoning can be solved. The partial nature of emotions indicates an inherent danger of emotions, but, as argued above, the only consequence of this danger is that judgments must not rely *solely* on emotions. In itself, the particularistic information that emotions convey is of vital importance to the moral reasoning process. Furthermore, emotions are not passive in the sense that we cannot do anything about them – we can! They are passive in the sense that they illustrate our dependency on our environment, but this is no obstacle to involving them in our decision-making process. Finally, the unreliability of emotions is due to an unreliability of knowing your own mind, which tells us something about thought and reason, not specifically about emotions.

6. A legal objection to emotion

Having examined emotions in the field of moral judgments, we can now return to the legal domain. How can we consider the arguments put forward by cognitivists from a legal perspective? Does the separation of legal reasoning and emotional knowledge still hold? Does the legal domain and the role the judge fulfils therein demand better solutions for the passivity, partiality and unreliability of emotions? The arguments that show that we can be held responsible for our emotions, because they can be controlled and corrected by other forms of knowledge, seem to solve potential problems for judges satisfactorily. We can imagine judges correcting their emotions – it is something we already expect of them.⁵³ The second argument about the unreliability of emotions also suffices, because it points out that when judges possess a high level of self-knowledge or self-awareness, which seem good qualities for a judge, their emotions becomes less random and more intelligible, and thus less unreliable. Note that the unreliability and passiveness of emotions still pose problems to judges. My point is that these are problems good judges are able to overcome. This leaves the problem of partiality. To my mind, the partiality of emotions is the core of the problematic image of judges who do not suppress their emotions. This is because, at least *prima facie*, it goes against a long-held ideal of adjudication in civil-law countries: ‘*La jurisprudence ce n’est autre chose que la loi*’.⁵⁴

At the height of the Enlightenment period, when the first large-scale codification practices took place, the idea behind the judge was that he should enforce the will of parliament, as stated in the law.⁵⁵ The notion that the judge himself could alter or meddle with statute was inconceivable – his person was of no concern to society. One can only imagine how absurd it would seem from this perspective to evaluate whether a judge’s *emotions* should matter in the legal equation. Hence the thought that a judge should use an objectively verifiable, abstract thinking process to discover the meaning of the law in a specific case was the only leading view.

Of course, the notion that a judge must strictly apply the law has proven to be unrealistic. Statutes are often unclear and according to some, inherently unclear,⁵⁶ because of the ever-changing society it applies to, but also due to the simple fact that some statutes are clearly intended to give the judge leeway to work out solutions when applying it to the facts of a specific case.⁵⁷ Yet the claim that in those uncertain situations judges should still only and strictly avail themselves of objective tools of deliberation remains

53 Pillsbury, *supra* note 1, p. 330.

54 Robespierre, reference from G.J. Wiarda, ‘Drie typen van rechtsvinding’, 1999, p. 16. One may wonder, of course, whether the same attitude goes for common-law countries. Though traditionally more likely to allow some discretionary autonomy to judges, biased attitudes are of course still disapproved in common-law legal orders, where emotions are also seen as a cause for taking a partial stance. See Pillsbury, *supra* note 1, p. 330.

55 P. Scholten, ‘De methode van het privaatrecht’, in C. Asser et al., *Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Algemeen Deel*, 2008, p. 2.

56 Scholten, *supra* note 55, p. 3.

57 See the use of ‘open norms’ like ‘equitable solution’ or ‘reasonable person’.

standing. Is it not true that only where judges suppress their emotions when applying the law to the facts of the case equitable justice can be achieved?

I think such a conclusion cannot be maintained. As argued, a judge must be able to *correct* his emotions, when their partiality endangers taking an objective view. Evidently, when a judge faces factual questions, for instance about ‘what has happened’, which can only be answered through presenting empirical evidence, he has to decide as objectively as possible, and correct emotional drives to either assume or dismiss possibilities. Yet even then emotions can prove valuable, for instance because they focus his direction on types of evidence which he from experience knows to be legally suspect.⁵⁸

Moreover, concerning the *interpretation* and *practical application* of laws, many statutes contain provisions that are ultimately not grounded in distanced rational calculation, but in emotions.⁵⁹ Posner gives as examples: ‘This is true whether the rule is against urinating or masturbating in public, against public nudity, against pederasty, against polygamy, against infanticide, for or against abortion, against involuntary euthanasia, (...)’.⁶⁰ Explaining such laws, which are based upon our revulsion against certain acts, on purely rational grounds would prove both difficult and inauthentic. Therefore, to better understand the rule, a judge can involve his own emotions, and in that way connect to the moral notions underlying the legal provision. Here too, the proposition is not that a judge should solely rely on emotional knowledge to interpret the law – thinking logically and objectively remains important. The point is that felt emotions cannot be dismissed, but must be considered as relevant knowledge.

I stated earlier that one of the values of emotions is that emotions note moral salience. Emotions call our attention to the morally relevant particulars of a certain case. Hence, it follows that when the law is an expression of moral concerns, emotions can play a useful role in appreciating those concerns. Again, this does not necessarily mean that a judge is thus immediately partial. He needs to be trained in using the clues of moral salience that he perceives. Interestingly, this guiding process is not only distanced rationality correcting engaged thinking, but also emotion correcting emotion. When dealing with the problem of partiality, the judge can try to empathize with the parties that are absent, and try to include them in his emotional perspective.⁶¹ Rationality in such a model is not the standard to which emotions should be modulated, but the faculty mediating and considering a host of different emotional experiences.

7. The use of emotion

So far this paper has tried to refute arguments against using emotions in legal judgments. It is now time for a more positive approach: what use are emotions to a judge in legal decision-making? The point of moral salience has already been made, so I will limit myself to briefly discussing the value of emotions as a source of intuitive knowledge,⁶² emotions as a critical challenge, and the knowledge a judge gains through empathy.⁶³

With each case a judge works on, his experience grows. In handling future cases, the old ones, and the lessons they taught him, are remembered. Such experience is in some sense subconscious – composed of an enormous volume of memories, tendencies and beliefs that he is not continuously aware of, but that are sparked by new events. This sort of memory can be of an emotional nature. A judge can have a ‘gut feeling’ something is not right in a certain situation, or that some interpretation of statute law is lacking... something. In an early stage of deliberation, it might well be that he does not precisely realize what is lacking, but that he only experiences a feeling of unease with his current opinion or solution. Such emotions are important, because they can guide judges in looking for the arguments that *do* seem right and appropriate. This is perhaps the best example of distanced reasoning and involved emotions operating hand in hand in the decision-making process. The emotions guide the search for arguments in

58 M. IJzermans, *De overtuigingskracht van emoties bij het rechterlijk oordeel*, 2011, pp.182-184.

59 Posner, *supra* note 1, p. 322.

60 *Ibid.*

61 Posner, *supra* note 1, p. 323.

62 IJzermans, *supra* note 58, p. 183.

63 *Ibid.*, pp. 181-184.

such a way that the part of deliberation which is emotional, and the part that is distantly logical, can no longer be separated.

This brings us to the second value of emotions: emotions make us critical. Pizarro noted that emotions do not always overlap with the evaluative judgments that we think we have.⁶⁴ Consider again walking past a bum. You think that you do not care about the bum and do not feel sorry for him, because he is probably a drug addict and his misery is thus self-inflicted. Yet, when you walk by, you do feel sorry and want to help him. This newly experienced emotion clearly *questions* your earlier opinion about being a bum and deserving the help of others. What usually happens is that a person makes a choice: either he allows the emotion to influence his belief system, thus making his judgments fit this new experience, or he suppresses his emotional experience in order to safeguard his belief system (the approach people usually choose in the bum situation).⁶⁵ It is not my goal here to argue which corrective approach is best, but such conflicts do illustrate the critical quality of an emotion.

Consider a judge when reading through his verdict. While reading, he might experience all kinds of emotions, for example unease because he might be judging too softly or too harshly, or sadness when he considers the consequences of his verdict to an involved party. In whatever way, he will choose to handle such emotions. Hence, they are important because they make him critical about his decision. Emotion provides a motivational factor that drives the judge to do the best he can.

Finally, emotions have a value in the legal decision-making process, because of the knowledge a judge can accumulate by empathizing with participants in legal proceedings. To obtain all relevant knowledge of what happened factually, but also of how certain events were *experienced* by the participants, judges can sympathize with them, imagining themselves to be in their position. Take the case of someone responding in anger and fear to being robbed, and shooting the robber with a gun. If a plea of self-defence is made, a judge may have to ascertain if a 'reasonable person' would have reacted in the same way. To be able to do that, it might help the judge to try to experience the situation from the perspective of the robbed person, paying attention to all the circumstances he was in.

Whether or not the judge then decides to approve of the plea of self-defence, it seems convincing that empathizing with the participant will supply him with information that could not be gained by solely logically analyzing his account. Another point is relevant here. Trying to empathize with stakeholders in a trial that are *not* immediately represented, might actually help judges in taking a more objective view of the situation.⁶⁶ The law affects society as a whole, and imagining what a verdict means for all different kinds of people, how they would all *experience* the effects of a certain decision, is a good way of interpreting that 'general interest'.

8. Concluding remarks

Can emotions play a role in legal decision-making? The biggest change in thinking about emotions, produced by accepting a cognitive account of emotional experience, is that the judge should not consider his emotions as an external influence that he should suppress, but as a valuable source of knowledge that he can use. Emotions consist of evaluative judgments, not simply bodily sensations. Thus, the accusations of passivity, unreliability and partiality do not provide the arguments to decisively exclude emotions from legal decision-making. Instead, emotional knowledge can be corrected, and emotional experience need not dominate rational deliberation. If we reflect on our emotions, we can *work* with them, and enrich our thinking. Distanced, logical reasoning and a more committed, more involved way of thinking can go hand in hand in tackling tough legal challenges, and should do so for several reasons.

Firstly, emotions can play an important role in judicial deliberation, because they give a judge an idea of what is morally salient in a certain case, and so connect him with intuitions that are relevant to understanding and thus applying the law. This does not mean that a judge can solely rely on his emotions, or rely on his emotions in the first place. Law always takes precedence and draws the lines within which

64 Pizarro, *supra* note 11, p. 367.

65 Pizarro, *supra* note 11, p. 368.

66 Posner, *supra* note 1, p. 323.

a judge has to do his job. However, the evaluative judgments that underlie emotions should take a place in legal deliberation.

Secondly, being a good judge requires listening to your intuition. A feeling of unease, agitation or enthusiasm can point towards a new direction of investigation, and guide a more logical, conscious way of thinking. Emotions can focus the attention of judges at crucial moments, and inspire them to make better decisions.

Thirdly, being empathic, both with the immediate participants of a trial and with all others affected by it, gives a judge new information which helps him consider notions such as general interest, and gives meaning to the facts at hand. Finally, and perhaps most importantly, through the above-mentioned functions, emotions make a judge critical of his own way of thinking, challenging old habits and providing a sense of importance, that can keep a judge alert in seemingly simple or dull cases.

In the end, a judge should not deliberate as emotionally as the participants of a trial do. Nussbaum illustrates this by comparing the emotional judge with the emotional observer.⁶⁷ Someone who watches over the proceedings, and in the end takes the decisions, but who, as an observer, always remains distanced from what is happening. A judge is never among the parties, he remains above them. Keeping this distance and at the same time allowing emotions to inform their own decisions, is the difficulty judges must overcome.

67 M. Nussbaum, 'Emotion in the language of judging', 1996 *St. John's Law Review* 70, pp. 26-30.