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When is lack of emotion a problem for justice? Four views on legal decision makers' emotive life

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ABSTRACT

Reason and emotion are often cast as opposites. Yet emotion comes in a wide array of manifestations and has a variety of relations with its supposed opposite. Understanding emotion better is key to grasping how jurisprudence casts the relation between psychology and judicial decision making. Jurisprudents disagree on whether and when (lack of) emotion is a problem for decision makers in the justice system. The aim of this paper is to shed light on unarticulated assumptions in mainstream legal theory concerning this disagreement. The paper plots the different positions jurisprudents hold concerning the role of emotion in judicial decision making, regardless of where they stand on matters such the nature of law. The paper substantiates the claim that legal theorists often take an irrationalist approach to emotion but occasionally develop an alternative account that is closer to a cognitivist approach, the prime example of which is the claim that equity requires practical reasoning. Emotions are then cast as skills to be appreciated. The paper concludes that jurisprudence adopts a simplistic view of emotion. The study of the role of emotion has been hampered by the tendency to view emotions reductively. My classificatory effort warrants the conclusion that lack of emotion – understood as a skill in cognitivist terms – constitutes a problem for justice.

KEYWORDS Justice; empathy; emotion; practical reasoning; law; legal theory

Introduction

Reason and emotion are often conceived of as a constraining pair of descriptors, like day and night. Yet emotion comes in a wide array of manifestations and has a variety of relations to its supposed opposite. Understanding emotion is key to grasping how jurisprudence casts the relation between psychology and judicial decision making. Yet law has had little to say on emotions, and only recently did the topic come into the limelight with the work of scholars conversant with the law-and-emotion movement (for example, Abramst & Kerentt, 2010; Maroney, 2006). A question on this topic that has not received the attention one might expect is what conception, or conceptions, of emotions are at play in the way legal decision making is understood.

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This paper aims to answer this question by investigating connections between how decision making is viewed and assumptions about the human psyche, foremost those about emotion. It plots the different positions jurisprudents hold concerning the role of emotion in judicial decision making, regardless of where they stand in relation to more common criteria of allocation such as positivism and natural law. Mainstream legal theory includes sets of descriptive and normative ideas on the role of emotion in decision making. On the descriptive side, we find those who think judicial decision making is emotionless and those who deny this. On the normative side, we find those who believe judicial decision making might not be emotionless but should aspire to be so and those who believe it should not. Jurisprudence thus encompasses four ideal-typical views of how legal decision makers react to emotions. These are sketched in section 2. In section 3, we explore the theories of emotion behind these views. Lawyers often rely on an irrationalist theory of emotion, although occasionally an alternative, cognitivist theory is held, according to which justice should not be blind to passions. The prime example of the latter is that equity requires practical reasoning. The paper concludes that jurisprudence adopts a simplistic view of emotion. Thus the philosophical debate on emotion proves instructive for legal scholars.

Four ideal-typical views

In the jurisprudential literature, there are four recurrent ways of depicting the legal decision maker's relation to emotions. To show these, I sketch four portraits of judges: Jean-Jacques, the dispassionate lawgiver; Mr. Steiguer, the biased judge; the selfless Pallas Athena; and Solomon, the empathic equity magistrate. We can group them according to whether their disagreement is over the descriptive question of what constitutes legal decision making or the normative question of which form of legal decision making is preferable. Let us start with the disagreement over whether emotive detachment is constitutive of legal decision making.

The dispassionate lawgiver

For our first character, law is essentially a question of logic and deduction. Let us call him Jean-Jacques, in honour of Rousseau, whose *législateur* in the second book of *Du contrat social* typically is emotively detached: 'a superior intelligence beholding all the passions of men without experiencing any of them'. He shares the anthropological attributes of Spock, the pointy-eared vulcan from *Star Trek*, whose decisions result from reason alone. Yet Jean-Jacques is not like an affectively mind-blind computer applying algorithms. He is dispassionate – both emotionless and impartial, qualities seen as

necessarily linked. It does not matter whether he is involved in legislation or in applying the law; the cognitive abilities remain the same. In the first case, he deduces from his understanding of the anthropology and situation of his subjects which constitution suits them best; in the second case, he deduces from the law which decision should be applied to the case at hand.

This is why lawgivers of his kind may live apart from the community – like Lycurgus, who left Sparta after giving it its constitution. And such lawgivers need not be living in our time; in book 2 of *Du contrat social*, Rousseau explains that the lawgiver is 'working in one century, to be able to enjoy in the next'. Exclusion from the community is the ultimate sign of the irrelevance of compassion: there is no need for the dispassionate lawgiver to feel with his subjects, as merely knowing his guinea pigs is sufficient. The legal reasoning of such a lawgiver is deprived of the affective elements that might lead to partiality, and it builds on the idea that various parties' interests can be established objectively.

Jean-Jacques is the legal version of the philosophical notion that moral reasoning is the process of discovering and applying a system of universal laws. This 'uncreative' view of rule application is usually associated in Continental Europe with Montesquieu's *bouche de la loi* in the *De l'esprit des lois*. Lurking behind this image is the omniscient judge and the law conceived of as a closed system with predetermined answers. Such an image shares little with psychological realism. It assumes that disencumbered deliberation is possible, at least for certain creatures. The assumption is warranted because decision making here is not about reasoning but reason giving. Hunches, of which emotion may be an example, might play a role in the context of discovery (reasoning), but they are irrelevant in the context of justification (reason giving). The question of how judges reach their decisions is thus distinct from that of how these decisions are supported; decisions need not be supported by reference to emotion.

On this view, emotion is a mindless surge of affect, similar to a distraction, with no place in the judge's justification. This script has retained power because 'it is anchored to an entrenched view of emotion. This traditional view holds that emotion is by its nature irrational, undisciplined, and idiosyncratic' (Maroney, 2006, p. 119).

The biased judge

The second ideal-typical view is embodied by the biased judge. Contrary to those who defend the first ideal-type, in which law (or rather legal justification) is emotionless, those who are inclined towards the second ideal-type believe the judge cannot but be affected by biases.

This view does not concern ordeals or case-by-case decision making: the 'substantively irrational law' of what Max Weber called 'the justice of the

Khadi' is not contemplated as a serious form of legal reasoning. The view according to which law suffers from indeterminacy and judges from bias is not embodied by the Khadi, but by Mr. Steiguer. In his work *L'homme machine* from 1747, the French Enlightenment philosophe de La Mettrie tells the story of Mr. Steiguer from Wittighofen in Switzerland: 'a bailiff' who was 'the most upright and even indulgent of judges when fasting but capable of hanging the innocent as well as the guilty when he had feasted' (de la Mettrie, 1986, p. 7). Steiguer symbolises the theory known as digestive realism that holds that judicial decisions depend on what judges had for breakfast.

Digestive realism does not affirm that it is good (or bad) to decide upon a good (or bad) breakfast; it simply holds that judges are led to some decisions because of what they had for breakfast. On this view, nonlegal factors typically determine judicial decisions. While it is unclear how this determination impacts the outcome of the case (does it favour the defendant or the prosecutor?), it is clear that these factors include the judge's mood (Tuzet, 2015, p. 2). Moods are 'background states that raise or lower our susceptibility to emotional stimuli' (Evans, 2001, p. 47). Moods last longer than emotions – from several minutes to several hours. Unlike emotions, moods are pre-intentional, 'non-conceptual bodily feelings' that provide 'spaces of significant possibility' (Ratcliffe, 2010, p. 348). This explains why the causal connection between the mood and the judicial outcome, in favour of defendant or prosecutor, is underdetermined. Yet verdicts might not be the kind of object that moods operate on. Frijda (2009, p. 259) insists that feelings must lack objects to be classified as moods: a person may be in an irritable or anxious mood for no identifiable reason, but to be angry there must be an object for the anger. In Steiguer's case, if the breakfast causes the state, that state might not be a mood after all, but rather a placeholder for a person's worldview.

Notice that a bias is a distortion of or deviation from a norm of rationality in judgement and that emotions are, on this view, likened to such distortive elements, not to cognitive elements. It is not necessary that this view preclude that emotions can be feelings without object that elicit bias, since what this view focuses on is what the emotion does rather than offering an ontological take on emotion as such. Its mark is to view emotion functionally in legal decision making as if it could be likened to an unwarranted assumption of which the decision maker is largely unaware, and it suggests that this is due to how the law works: the multiplicity of legal sources renders the formalist pretence of doctrinal determinacy an insidious falsity.

The judge's worldview (like that of any other) surely includes unarticulated, often uncritically assumed ideas. Pretending that human beings can be disembodied, their opinions neutral, their character traits changed, their moods erased when they engage in decision making is so far-fetched that it needs no comment. In the debate between the dispassionate lawgiver and

the biased judge, the latter wins when it comes to psychological realism, but it misses the target. All criticism of the first view that centres on the unconvincing psychology fails.

A better reason to favour the second over the first view is the indeterminacy of law. The idea that law is affected by a strong form of indeterminacy constitutes the core difference between realism and positivism (Mindus, 2015). On such a view, not only rules, or the open texture of legal language as expressed in rules, are indeterminate, as in Hart, but so are the sources of law and the very finding of legal material as relevant for a given case. The claim is that the multiplicity of legal sources renders the formalist pretence of doctrinal determinacy an insidious falsity (Dagan, 2013; Guastini, 2013).

On the second view, there are no easy cases; choosing the facts to be investigated is already normatively laden. If 'the authoritative tradition speaks with a forked tongue' (Llewellyn, 1962, p. 70), the choice among rules competing to control the case is the major source of indeterminacy. As Llewellyn (1933) explains in distinguishing between *ratio decidendi* and *obiter dictum*, judges can rely either on the rule stated by the previous court or on the legally relevant facts (or both). On this view, emotions are not unimportant but belong to an undifferentiated nonlegal realm; the judge may be an emotional creature, but these emotions only materialise as unfounded beliefs (Maroney, 2011, p. 666).

The biased judge also runs into problems. Law might be seriously indeterminate and psychology prone to introduce nonlegal elements into legal decision making, yet these elements are not all identical. It still needs to be proven that reference to emotion qualifies as nonlegal. Could, for example, epistemic emotions – such as curiosity, wonder, or surprise – play a beneficial role in legal decision making? An unarticulated assumption in much work on emotions and the law is that the emotive judge invariably tends towards sloppiness, bias, and irrationality. But must we throw the baby out with the bathwater? The emotions that a judge may need to divest must not include curiosity, astonishment, and intellectual courage.

The first ideal-type better adjusts to epistemic emotions – that is, affective phenomena that can be essential or incidentally helpful for epistemic activity yet generally relevant to our quest for knowledge (Morton, 2010; Scarantino & de Sousa, 2018). The dispassionate lawgiver is aware that she needs to have a full understanding of the psychological workings of the recipients of the decisions, including their emotions. However, emotion is elusive here because it is useful only for cognitive purposes: 'Cognitive empathy functions as a tool for understanding others; it seems to have no particular emotional valence. Empathy of this sort can be used for any purpose at all, including purposes detrimental to the person to whom it is directed' (Bandes, 2011, p. 110).

It is uncontested that cognitive empathy counts in law. In social psychology, emotive or emotional empathy is the ability to *feel* the same emotion as another person – to suffer distress in response to perceiving another's plight and to feel compassion for another – whereas cognitive empathy (empathic accuracy) refers to how well an individual *perceives and understands* the emotions of another (Maibom, 2019; Spaulding, 2019). The debate on the role of empathy in law was never about whether the cognitive abilities of judges ought to be strengthened. What is contested is the role of emotive empathy in feeling with others (Bandes, 2009; Henderson, 1987; West, 2013). In jurisprudence, empathy is not regarded as just another variable that may or may not be appropriate grounds for a decision. Legal theory has, for a long time, accommodated debates about the appropriate decisional role of morality or of scientific knowledge. Empathy is treated differently and regarded as 'a wild, untamed, destabilizing force that cannot coexist with the rule of law' (Bandes, 2011, p. 105). The cognitive conception of empathy is overly restrictive: emotion is either irrelevant or a sort of belief; in the second ideal-type, it is framed as an unfounded belief, a bias, a prejudice. But whatever emotion is, it does not seem to be a mental mode reducible to belief. Perhaps it is messier: 'Emotions are probably the most complex mental phenomena as it involves all types of mental entities that belong to various ontological levels' (Ben-Ze'ev, 2010, p. 41). Neither the first nor the second view of the decision maker's emotive life can appreciate this.

Legal theory nonetheless offers yet another set of distinct views on the role of emotion. On the one hand, some believe that the rule of law is best promoted by decision making stripped of emotion. Judges should strive towards impartiality; they should put aside emotions that obscure judgement. This is the third ideal-typical view: Justice ought to be blind to passions, lest it turn into its opposite. Emotions are cast as a problem for justice, lack thereof as the cure for injustice.

On the other hand, detractors argue that being emotionally blind makes the judge a bad decision maker. Good judging nurtures what has been called 'judicial emotion' – that is, a judge's experience of a discrete, identifiable emotional state (such as fear, anger, surprise, or disgust) while performing her professional role. Typically, this position is circumscribed to hard cases, politically salient cases, or – more traditionally – equity (a kind of judging that specifically requires practical wisdom).

The disagreement between these two views is normative. Both positions in this debate over the best form of decision making share the understanding that emotions do have import on a normative level. They disagree on its value. Here we find our next portraits: Pallas Athena and Solomon.

The selfless umpire

Conventional wisdom has it that judges should leave their personal predilections and emotional commitments behind as they ascend the bench. This view of emotion in legal decision making is well captured by US Supreme Court chief justice John Roberts's well-known umpire metaphor, in which judges leave their emotions behind in finding the best solution in a case. Hobbes is a historical precedent of this view; in chapter XXVI of *Leviathan*, the ideal judge is divested 'of all fear, anger, hatred, love, and compassion'. The selfless Pallas Athena embodies this third ideal-type. Unlike jurors or children, judges discipline themselves to respond to the problems before them with careful rationality. Richard Posner (1999), for one, embraces this view. Pallas Athena may be gifted with human psychology, but she is able to lift herself above certain parts of it: She does not get tired or fall prey to whims. Although she might sympathise with one party, she does not let this influence her reasoning. Judges do feel emotion, but they should, in their professional lives, deprive themselves of their personal inclinations. In this sense, Pallas Athena is selfless. Emotions have normative significance, and the significance is negative: they should be disregarded in seeking the right answer to a legal problem. Emotion is conceived of as an add-on that should not be introduced into the rational process of justification. Lack of emotion is the cure, not the illness.

Pallas Athena's emotions are subjective and fanciful; they *should not* matter. She divests herself of emotion without losing herself. Like taste or flavours, emotions are impervious to argument or reason. It is a question of preferences that may require some ranking of alternatives but of which no rationality is given; its main tonality in this literature is attitudinal, not cognitive, and it is distinguished from feeling as a bodily modification by being something, unlike our bodies, that we may set aside.

The empathic equity magistrate

A different take is offered by the fourth ideal-typical view, embodied by the empathic equity magistrate Solomon, who serves 'to know wisdom and instruction; to perceive the words of understanding; to receive the instruction of wisdom, justice, and judgement, and equity; to give subtlety to the simple, to the young man knowledge and discretion' (Proverbs 1, 2–6). He has 'an understanding heart' (Kings 3, 4–9). Solomon rules against 'unreasonable' laws set by the lawmaker and opposes the tyrant, who is such in virtue of his stubborn inability to see the 'reasons' of others.

The great judge uses *equitas* and *pietas* rather than *ius strictum*: when applying the law strictly would deviate from justice, the intention behind the law, or other substantial principles, Solomon derogates. The mistake in the

law is that of the legislator who either failed to notice a particular set of circumstances or deliberately overlooked them. Consequently, when the law is silent or inappropriate, Solomon reads the law according to how he would have legislated. Two circumstances define the scope of the claim that justice *should not* be blind to passions: Solomon works on equity, and he is guided by his empathy.

Straddling the permeable line between carving out exceptions and creating rules, equity is rooted in the Latin principle of *aequitas*, which 'equalises' the disparities between *ius scriptum* and *ius aequum* (*Digesto* 1.1.7.1). It negotiates between the universality of the law and the randomness of particular circumstances. This is why equity, in order to mitigate the rigour of the law, requires *phronesis*: 'It is practical, and practice is concerned with particulars. This is why some who do not know, and especially those who have experience, are more practical than others who know' (Aristotle, *Nic. Ethics*, 1141b). Solomon is gifted with empathic skills.

Solomon does not merely *understand* other people's motivations. He also *feels* for them. This is the meaning of sympathy or compassion (Zipursky, 2013, p. 309; Breyer, 2020). Advocates of the Solomonic approach hold that 'our intuition, emotion and conscience are appropriate factors in the jurisprudential calculus' (Kaufman, 1984, p. 16). For them, the myth of dispassion 'rests on two fictions: (1) that emotion necessarily leads to injustice, and (2) that a just decision-maker is necessarily a dispassionate one' (Pillsbury, 1989, p. 655). Empathy here contributes to the justifiability of a decision. This is why moral imagination is 'part of the solution to the problem of unaccountable judges interpreting indeterminate law, rather than part of the problem' (Bandes, 2011, p. 101). Empathy is a prerequisite for the phronetic abilities characterising the nuanced judging that equity deals with.

Emotionally impaired decision makers are bad because judging requires what Goleman (1995) calls emotive intelligence. Those, like Jean-Jacques or Pallas Athena, who 'know' how humans behave but stay emotionally detached are 'less practical'. Pallas Athena would not have resolved the case of the two mothers with such a resolutely illegal method – namely, suggesting the division of the child. Solomon's ability to sense the true mother's desperation at the mere prospect of a dead child is what guides his decision making. His empathy enables him to choose sides in the dispute, whereas Pallas Athena or Jean-Jacques would have been left, intellectually speaking, in the place of Buridan's ass. Solomon is also unable to deprive himself of his empathy. Stripped of his phronetic skills, he would not be Solomon. Emotion cannot be left behind as one ascends the bench. It is identity-defining, but not a mere predilection. Solomon's empathy is not a subjective idiosyncrasy like Pallas Athena's emotional preferences. It is not a distraction either. It is not sneaked into the otherwise-linear process of reason giving. It is what makes his judgement wise.

Note that the fourth ideal-typical view often speaks of emotion as synonymous with 'intuition' or 'hunch' – a paraconscious cognitive skill that flows from the wisdom of experienced people (Hutcheson, 1929, p. 277; Fiss, 1991, p. 801). Here emotion is synonymous with a full appreciation of social reality. Bandes (2011) notes that judges make assumptions for which experience counts: 'They make assumptions about how pregnant women feel towards their unborn babies, how cops react to sanctions, how it feels for a 13-year old girl to be strip searched in the school principal's office, how it feels to be sent to the "coloured only car" on the train' (p. 113).

Experience is necessary in order to even have intuitions about how other people feel in these situations. These intuitions may be unarticulated, and possibly wrong, but they share little with the irrationalist or subconscious view of emotion in the first and second views of the decision maker's emotive life.

Different conceptions of emotion

In jurisprudence there are basically four ways of thinking about how emotion connects to decision making. Lack of emotion constitutes a problem for justice only in one of these ways. First, emotion can be thought to be superfluous for understanding decision making: justice is about formal rationality, and judging is essentially reason giving; emotion, conversely, is conceived of as an irrational feeling, a distraction. Second, emotion may be conceived of as an extraneous factor impacting legal decision making because law suffers from indeterminacy. This opens the floodgates to all kinds of drives, urges, and desires that affect decision makers. Emotion is here conceived of as a false presupposition. It works like an implicit bias. Third, emotion may be conceived of as belonging to the personal predilections that judges should leave behind as they ascend the bench. This is so because justice ought to be predictable and judges should strive towards impartiality, while passions obscure judgement and instigate lopsidedness. In order to live up to the rule of law, judges should not let their subjective idiosyncrasies influence their decision making. Emotional detachment is a requirement of impartiality. Emotion is here conceived of as a preference. It is like a taste. Fourth, emotion may be conceived of as essential to the practical wisdom required for good judging because (a certain kind of) judging requires practical reasoning, not merely formal deduction. This is paradigmatically the case for equity. Here empathy has an important role to play in mitigating the rigour of the law. Emotion is conceived of as a cognitive ability and as similar to a skill.

The ideal-typical views of how the judge react to emotions adopt different understandings of emotion: (1) feeling; (2) bias; (3) preference; (4) skill. Next, I show how these different conceptions of emotion rely on two broad theories of emotion.

Theories of emotion

Irrationalism

For the irrationalist, the modalities of the human psyche are dichotomous. Reason is like the charioteer in Plato's *Phaedrus* (246a–254e), who must guide the soul to truth by ruling over appetites. It is our sole access to deliberative knowledge, and it is the ruler of our unruly emotive life, which makes us subjects of the whims of concupiscence and unconsciousness. The passions are like foes to be defeated, feelings untameable. The advocate of the irrationalist theory of emotion might say of emotion what Kant (1964) claimed about inclinations (*Neigung*): 'It must … be the universal wish of every rational being to be wholly free from them' (pp. 95–96). Both Kantian and utilitarian ethics adopt versions of this dichotomised account; it can be traced to a rich tradition in ethics: Stoicism. Irrationalism is found today in those who, like Peter Singer (2005), see emotions as part of our evolutionary heritage, as something we would be better off without when deciding what to do. This is not all there is to say about irrationalism (for example, we have not explored *akrasia* and self-deception), but this characterisation gestures at the irrationalism found in much legal philosophy, which reflects a commonsensical theory of emotion decreasingly supported by philosophy of emotions.

There are, however, different ways in which emotion can distort. It may distort because it diverts attention from formal deduction, like an itch that keeps one from attending to a task. This is a view that equates emotion to feeling, a bodily modification that distracts one's higher cognitive abilities. Or it may distort because it prevents the open-mindedness associated with considering all sides of an issue, like a preconception that keeps one anchored to tradition or false beliefs that one is unable to shake. This view understands emotion as a bias surreptitiously introduced into deliberation; emotion is an unconscious impulse, an irresistible compulsion (Frank, 1963, pp. 270–77). Or it may distort because it tends to promote lopsidedness; it favours partiality, taking sides, and getting impassioned about something. This view understands emotion as a personal preference or taste.

These different ways correspond to the first three aforementioned ideal-typical views. For the first view, embodied by the dispassionate lawgiver, emotion is a distraction from formal deduction. No matter how reasonably, emotion here is understood as aligning with the view of emotion as a consequence of a bodily modification. This theory traces back to the work of James (1950, p. 449), who argued that the emotions are bodily feelings or perceptions of bodily feelings; they are affective states pursuant to bodily changes. James accepted the empiricist view of emotion as a feeling; on this account, different bodily movements give rise to different emotions. A creature having another body would be emotionally equipped in

a different fashion. Emotions are thus epiphenomenal; they are products of bodily changes and they do not themselves cause action.

This is the case of the dispassionate lawgiver. Like emotions for James, passions for Jean-Jacques are irrelevant in explaining the springs of action in decision making. Emotions lack motivational force (Dewey, 1894). This explains why he need not even have the same body as his legal subjects. He must understand them, but he may obtain this information by knowing about their bodily changes and emotive reactions (empathic in an epistemic sense); he does not need to share in these emotions (sympathetic).

A problem with this view is that it suggests there are no unconscious emotions (Deonna & Teroni, 2012). While we might unconsciously *emote* certain passions (for example, love or envy), it makes no sense to speak of unconscious *feelings*. A feeling expresses its own state. It is not directed towards any other object. Since it is a mode of consciousness, one cannot be unconscious of it.

Another conception of emotion is at play in the second ideal-type, in which emotion is understood to be a kind of bias that creeps into deliberative practices. The biased judge is unmindful of how his breakfast impacts his victims in court. In philosophical terms, this is Freud's (1981) conception of emotion. Emotion can be an unconscious impulse, an irresistible compulsion or urge. Freud took emotions to be states of mind we are conscious of through the feelings that manifest them. Emotions are not feelings; they are merely expressed by feelings. He was looking to explain feelings that have no obvious cause, and he found the explanation in repressed emotions, where we are unconscious of an emotion that only shows itself through a feeling that seems inappropriate to its object. Emotions are understood as intentional states of mind, not epiphenomena. They maintain motivational force even if we are unaware of them. These 'imperceptible emotions', as Hume (2000, 2.1.1.3) called them, have great impact on our will since we are unaware of them, like Steiguer's bias.

The selfless Pallas Athena adopts a third conception of emotion. For her, emotion is an ineffable, unintelligible, eminently subjective experience; it is an unarticulated predilection. The strength of this position is that it makes sense of cultural and individual variation in the emotional climate, which cognitivist and generally objectivist theories sometimes struggle with. Also, this view may explain why appealing to feelings offers a way to make people change their mind without having to provide good arguments. But, on a closer look, it is a rather shallow notion.

A problem is that emotions are intrinsically *social* phenomena. Although preferences differ from person to person, the fundamental causes behind the adoption of a preference, such as those causing joy or distress, may be common to us all. This is the very point of learning from other people's experiences. Evolutionary psychology and anthropology have long ago

proven that basic emotions constitute a language that is pan-cultural amongst humans and shared with nonhuman animals (Ekman & Davidson, 1994). A basic emotion (for example, joy, anger, fear, or disgust) is of rapid onset and lasts a few seconds or a few minutes. Emotional expressions, associated with these basic emotions, are more similar to breathing than to, say, phonetic articulation, which varies from language to language. That humans share a basic emotional repertoire does not mean that different cultures do not produce people with different emotional settings. Every culture has its own rules about socially acceptable forms of emotional expression. But this just stresses the point that assuming emotion to be an individual predilection is far off the mark. Also, on this view, emotion is an add-on, something removeable at will. Yet emotion forms a general mode of the mental system, one we cannot undo ourselves (Ben-Ze'ev, 2010). Lastly, many other factors make the social dimension increasingly relevant; consider that much of today's decision making is done by groups, not by single lawmakers. If emotions are reduced to individual idiosyncrasies, we foreclose inquiry into the impact of emotions in social settings and the feedback effect of institutional arrangements on emotive displays (von Scheve & Salmela, 2014).

A problem for irrationalism, besides the conception of emotion it embodies, is the idea of rationality behind it. The dichotomy between reason and emotion in the first three ideal-types fails to explain how emotion may be strategically valuable, important in legal decision making (Morton, 2010; Silvia, 2006).

Regardless of whether one thinks of emotion as a bodily feeling, an unconscious drive, or a subjective inclination, these conceptions of emotion rely on an irrationalist theory of emotion. It may be unconvincing for several reasons, but for those committed to it, lack of emotion is no hindrance to justice.

Cognitivism

Another possibility is to avoid casting the human psyche in dichotomous terms and instead present the modalities of the mind so as to render emotion a form of knowledge, that is an instrument of information. This is key in the cognitivist theory of emotion at play in the last ideal-typical view. It is subtler but not unproblematic (Nussbaum, 2001).

Here the poles of reason and feeling form a continuum in which emotions are not ushered away as irrational outbursts but analysed in a psychological etiology of sentiments. This outlook challenges the assumption that the passions play no beneficial role in deliberation and emphasises persuasion as a potentially informative practice. From this perspective, emotions, like other cognitive states, belong to intelligent thought and action and carry information about the objects they are directed towards. Consider a person who deliberately acts wrongly. Her

feelings of guilt carry informative content about her actions. Emotions are on par with beliefs, judgements, decisions, and resolutions. They are often seen to have propositional content and are warranted or not according to the fittingness of the evaluative judgement in which the emotion consists. Cognitivism is modelled on a specific class of emotions: higher cognitive emotions – typified by love, guilt, shame, embarrassment, jealousy, or pride – that are fundamentally *social* in a way that basic emotions are not (Scheffler, 1991). While some cognitivists (for example, Scheler, 2014) uncover an intentional object even in basic emotions, higher cognitive emotions are recognised to be longer lasting and culturally more diverse than the emotions one finds on the opposite side of the spectrum of emotional complexity, where emotions are closer connected to sensations (for example, horror). Emotions that have import for law are, we are told, of a 'higher standing'; there are specifically justice-related passions (for example, the sense of justice) and emotions discussed by lawyers are *reason-sensitive attitudes*, unlike, say, startles and phobias. From a cognitivist perspective, emotions are endowed with intentionality. This is what distinguishes sentiments from sensations, emotions from bodily feelings. Sensations (say, shortness of breath) are deprived of intentionality if unconnected to emotion (say, fear). Emotions necessarily concern something, which constitutes the evaluative judgement that they contain. Cognitivism is associated with the Stoics, but it has had a recent upswing with (neo)sentimentalism, a theory about the role of emotion in normative decision making according to which moral judgements are said to be about whether feelings are apt. What is attractive in the theory is the idea, prevailing among philosophers of emotion today, that emotions are world-directed intentional states (Prinz, 2004, p. 11). Many think that emotions help us question our reasons (During, 2009); wise agency emerges as we improve our reasons for action over time (Nussbaum, 2016).

Conceiving of emotion as cognitively valuable for improving our casuistic database fits well with Solomon's idea that fine-tuning his emotive intelligence is useful for him. For the cognitivist, lack of emotion constitutes a problem for justice.

Although more sophisticated than irrationalism, cognitivism is also vulnerable to criticism. While some embrace a less cumbersome perceptual reading (Tappolet, 2016), many think that emotions have propositional content besides intentionality. This requires the emoting subject to be able to grasp propositions or concepts. Language may be a prerequisite. This could exclude infants and nonhuman animals from the range of deliberating subjects, although we do observe emotional reactions in creatures with hardly any intellectual capacities and although the law attributes relevance to their emotions, and sometimes also voice to them.

Conclusion

The emotive life of the legal decision maker has been oversimplified. Mainstream jurisprudence fails to distinguish between different sorts of emotions. This is reflected in the comparatively small amount of work done on the reciprocal interaction between emotion and institutional design. How emotions impact social structures and how these institutions shape the display of emotions should interest legal scholars more. Whether emotions can lead to actions that promote agents' aims also calls for attention. It requires jurisprudents to get a better grasp on emotion. This paper takes a step in this direction by illustrating four ideal-typical views of the legal decision maker's emotions. Each view was found to embrace a different view of emotion, likened to feeling, bias, preference, or skill. These views were also found to rely on two theories of emotion: irrationalism and cognitivism. This classificatory effort allows us to conclude that lack of emotion constitutes a problem for justice when emotion is understood as a skill and cast in cognitivist terms. The theories of emotion are vulnerable to objections, some of which were highlighted. Were the philosophical critique of the cognitivist theory of emotion to be found convincing, it could impact how we answer the question of what intensity and kind of emotion one should expect in the emotive lives of legal decision makers.

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