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EMOTION IN THE LANGUAGE OF JUDGING

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I am going to talk about emotion in the language of judging. I begin with two quotations. One is a statement made by Justice Steven G. Breyer during his confirmation hearings:

I read something that moved me a lot not very long ago. I was reading something by Chesterton, and he was talking about one of the Brontës He said ... you go and you look out at the City, he said - I think he was looking at London - and he said, you know, you see all those houses now, even at the end of the 19th century, and they look as if they are the same. And you think all those people are out there, going to work, and they are all the same. But, he says, what Brontë tells you is they are not the same. Each one of those persons and each one of those houses and each one of those families is different, and they each have a story to tell. Each of those stories involves something about human passion. Each of those stories involves a man, a woman, children, families, work, lives. And you get that sense out of the book. So sometimes, I have found literature very helpful as a way out of the tower.¹

The other quotation is from an article in *The New Republic* on the occasion of the retirement of Justice Blackmun. It is called "Sentimental Journey," and it was written by Jeffrey Rosen.² Rosen stated:

But feeling deeply is no substitute for arguing rigorously; and the qualities that made Blackman an admirable man ultimately condemned him to be an ineffective Justice. By reducing so many cases to their human dimensions and refusing to justify

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¹ Nomination of Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States: Hearings before the Comm. on the Judiciary, 103rd Cong., 2d Sess. 232-33 (1994) [hereinafter Confirmation Hearings] (statement of Stephen G. Breyer, Supreme Court Nominee).

² Jeffrey Rosen, *Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun: Criticism of Retiring United States Supreme Court Justice*, THE NEW REPUBLIC, May 2, 1994, at 13.

his impulses with principled legal arguments, Blackmun showed the dangers of the jurisprudence of sentiment.³

The larger thesis for which I should like to argue if I had time here is that the language of judging should be in some respects, which we would have to specify very carefully, like the language of the lover of literature.⁴ By that, I mean not necessarily fine words and high style, but a language that is expressive of the kind of imagination that's capable of perceiving the individual humanity of the people involved and their circumstances; recognizing that each has a complicated story with factors that make it not the same as anyone else's.

But, as both of my quotes recognize, that kind of imagining is rich in emotion. The world of the Brontës is a world of human passion. And if we think of the judge as a literary artist or a reader of literature, we are led to wonder how far should that language be rich in emotion. That is my focus here today.

I want to begin with a question. What is Jeffrey Rosen really worried about when he talks about the jurisprudence of sentiment? I think there are two quite distinct things he is worried about. One is an entirely false worry, the other more interesting. The one that's ultimately less interesting, and you can see this throughout his article, is that Rosen appears to believe, as I think quite a lot of people do before they start thinking much about the structure of emotions, that emotions are something quite unthinking, opposed to reasoning in some very strong and primitive way, and that they are mindless surges of affect.⁵ Simply stated, they believe that emotions do not contain or rest upon any kind of thought.⁶

This seems to be a very weak position when one starts to reflect about what emotions like anger, sympathy, grief and so on really are. It just cannot stand up. One can quickly recognize

³ *Id.*

⁴ See Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1388 (1986) (arguing that literature is vital to judge's awareness of perspectives beyond those of author and is therefore essential to sound decision making).

⁵ See Rosen, *supra* note 2 at 13 (comparing Blackmun to Frank Murphy, "the warmhearted New Dealer," who tended to "let his heart get the better of his head" and describing Blackmun's "sentimental homilies" as nothing more than "impulsive sympathy").

⁶ See *id.* at 14 (describing Blackmun as an "indecisive, unsophisticated craftsman, unconcerned about dressing up his humane impulses in legal reasoning").

that emotions like that are really not at all like gusts of wind or surges of the blood. They rest upon a certain kind of view of an object, and they often embody very complicated beliefs about the object. In this respect, I think what Aristotle said in the *Rhetoric*⁷ about emotions, has not been very much surpassed. He argued that to have anger, you have to have certain beliefs about what has happened, about the seriousness of what has happened, about the deliberateness with which that damage was inflicted, and a host of other beliefs.⁸

To have sympathy or compassion for someone's plight, again, you have to believe something about the seriousness of what that person has suffered. You have to believe that it did not come upon them entirely through their own fault. Moreover, you have to believe that that is a general human possibility; that you yourself have similar possibilities. Or at least that is what has been argued by most of the people who have written about compassion in Western philosophical traditions. So, emotions are not just mindless; they embody thoughts. Therefore, we cannot dismiss them from judicial reasoning and writing just by opposing them in an unreflective way to reasoning and thought.

But then the more interesting and serious worry arises, that even if we grant that emotions have many cognitive features, and embody forms of thought, we still have to ask which ones are appropriate, which ones should be guides, and which ones are good guides in public reasoning. We might start to worry, and I think that this is Rosen's more interesting worry, that a judge who is guided by emotion will simply let sympathy gush all over the place in an inappropriate way, that it will lead to a disregard of the evidence, a disregard of legal reasoning, and just a kind of inappropriate gushy way of proceeding.⁹ In my conclusion, I will comment on this as a view of Justice Blackman. I think Rosen is very unfair in many respects. But, in any case, I think that is the really interesting worry.

Now, in pursuing that worry, I think a very good place to turn is to Adam Smith's *Theory Of Moral Sentiments*,¹⁰ which in

⁷ ARISTOTELIS, *ARS RHETORICA* (W.D. Ross ed., 1959).

⁸ See *id.* at ch. II. 1-2.

⁹ See Rosen, *supra* note 2 at 14, 18 (lambasting Blackmun for personalizing cases while ignoring or misinterpreting underlying constitutional issues and criticizing notion that warmhearted impulses are more important than legal reasoning).

¹⁰ ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (D.D. Raphael & A.L. Macfie, eds., Oxford University Press 1976).

turn will bring me back to the role of the picture of the judge as a reader and lover of literature. Now, Smith in *Moral Sentiments* describes a norm of public rationality.¹¹ And the way he describes it is by imagining a certain kind of character whom he calls the judicious or impartial spectator, who is imagined as someone whose artificially constructed situation will be a model of the point of view of public rationality.¹² That is, this person whom we construct will have all and only those thoughts, sentiments, and fantasies that are part of a publicly rational outlook on the world.¹³

Smith focuses on a central question: Which emotions will such a figure have? And he insists that this figure will not have all emotions, but most of the major emotions will appear somewhere in this person's reflection—only, however, in a certain way.¹⁴ Now, we have to then step back and say, "How is this construction imagined?"

The impartial spectator, first of all, is a spectator. He or she is someone not personally involved in the events that are being witnessed, although this person cares about the participants as a concerned friend and onlooker. So, he is not going to have such thoughts and emotions as relate to his own personal safety and happiness or to anything about the way in which his own personal stake in the outcome has an impact on the situation. So, in that sense, he is without bias, and he surveys the scene before him with a certain kind of detachment.

On the other hand, the judicious spectator is not for that reason lacking in feeling. Among his most important moral faculties is the power of imagining vividly what it is like to be each of the persons whose situation he imagines.¹⁵ Smith writes:

¹¹ See *id.* at 9-13 (maintaining that solely by imagination can one form conceptions regarding another's emotional state).

¹² See *id.*

¹³ See *id.* at 12 (characterizing compassion of spectator as his own feeling if similarly situated, requiring spectator to utilize both reason and judgment).

¹⁴ *Id.* at 11, 21. Smith describes how the "furious behaviour of an angry man" is likely to prejudice the spectator against the angry man, and perhaps favor his enemies. SMITH, *supra* note 10, at 11. Smith further emphasizes that the emotions of the spectator will always fall short of the emotions of the direct experience. *Id.* at 21.

¹⁵ See SMITH, *supra* note 10, at 12 (noting that when we place ourselves in another's situation, "passion arises in our breast from the imagination"); see also Benjamin Zipursky, *Deshaney and Jurisprudence of Compassion*, 65 N.Y.U. L. REV. 1101, 1129 (1990) ("Compassion is not a simple feeling-state but a complex emo-

[T]he spectator must, first of all, endeavour, as much as he can, to put himself in the situation of the other, and to bring home to himself every little circumstance of distress which can possibly occur to the sufferer. He must adopt the whole case of his companion with all its minutest incidents; and strive to render as perfect as possible, that imaginary change of situation upon which his sympathy is founded.¹⁶

Smith goes on to say that empathy is one stage, but it's not sufficient for public rationality because often the misfortunes that befall people damage their ability to assess their situation correctly and to see it the right way.¹⁷ At the most extreme, we can imagine a case of someone who has lost rationality through some accident. This person may have a very painless life and empathy might show us the pleasure of a contented child, but Smith observes that the judicious spectator will view the calamity as a very dreadful one for precisely that reason.¹⁸

What that shows us is that both empathetic identification accompanied with a kind of critical external assessment are crucial in determining the degree of emotion that it is rational for the participants in the case to have. Smith continues: "The compassion of the spectator must arise altogether from the consideration of what he himself would feel if he was reduced to the same unhappy situation, and, what is perhaps impossible, was at the same time able to regard it with his present reason and judgment."¹⁹

Smith then goes on to say that since, as he has argued previously, the major emotions such as compassion, anger and so on are based on belief and reasoning, the spectator will be rich in those emotions.²⁰ However, there is a crucial qualification—not all emotions are good guides.²¹ To be a good guide, the emotion,

tional attitude toward another, characteristically involving imaginative dwellings on the condition of the other person ... ") (citing LAWRENCE BLUM, *COMPASSION, IN EXPLAINING EMOTIONS* 507, 509 (A. Rorty ed. 1980)).

¹⁶ SMITH, *supra* note 10, at 21.

¹⁷ *See id.* at 12 (acknowledging that reason may be lost when calamities occur and that those in such situations become "insensible" to their own misery).

¹⁸ *See id.* at 12 (recognizing that anguish felt by humanity for one who is not cognizant of their own misery and concluding that anguish cannot reflect sufferer's sentiment).

¹⁹ *Id.* at 12.

²⁰ *See id.* at 10. Smith observes that "whatever is the passion which arises from any object in the person principally concerned, an analogous emotion springs up at the thought of this situation, in the breast of every attentive spectator."

²¹ *See* SMITH, *supra* note 10, at 16-19. (explaining process by which spectator

first of all, has to be informed by a true view of what is going on, of the facts of the case, of their significance for all the actors in the situation, and of any dimensions of their real significance that may elude or be distorted in the consciousness of the actors.²²

Second, the emotion has to be the emotion of a spectator, not a participant.²³ That means not only that we have to perform this reflective assessment of the situation to figure out whether the participants have understood it correctly; it also means that we have to omit that portion of the emotion that derives from a personal interest in our own goals and projects.²⁴ The device of the judicious spectator is aimed above all at filtering out that portion of anger, fear, and even compassion that focuses on the self in its cherished projects.²⁵

If, for example, my friend suffers an injustice, I'll become angry on his behalf, but according to Smith, that anger lacks the special vindictive intensity of anger at wrongs done to oneself.²⁶ Again, if my friend is grieving at a loss, I'll share the grief, but not its disabling and blinding excess. For Smith, thinking of this distinction helps us to think of what public actors should be like.²⁷ They should be passionate for the well being of others, but they should not insert themselves and their own goals into the picture that they responsively contemplate.

Throughout the discussion, Smith uses literary readership as well as spectatorship at dramas to illustrate the stance and the emotions of this judicious spectator.²⁸ Smith, thus, attaches considerable import to literature as a source of moral guidance.²⁹

determines whether passions of person principally concerned are unjust, improper, or unsuitable to original situation).

²² See *id.* at 21 (requiring spectator to completely put himself in situation of sufferer).

²³ See *id.* at 21-22. Since the spectators think of their own safety and are not real sufferers, this hinders them from reaching that degree of passion which naturally animates the participant. *Id.*

²⁴ See *id.* at 22 (affirming importance of spectator to view situation in his more "candid and impartial light").

²⁵ See *supra* notes 23-24 and accompanying text.

²⁶ See *supra* notes 23-24 and accompanying text.

²⁷ See, e.g., SMITH, *supra* note 10 at 17-18 (discussing conflicting range of emotions felt by spectator upon witnessing stranger's grief for loss of his father).

²⁸ See *id.* at 32 (observing that characters in tragedies and romances receive sympathy, affection, and indignation from readers).

²⁹ In his work, Smith analyzes the empathy felt for classical literary figures. See *id.* at 32-33.

Furthermore, it seems that Smith derives the importance of literary readership from the fact that readership is in effect an artificial construction of judicious spectatorship that is perhaps more familiar to us than this artificial construct. So, it leads us in a pleasing and natural way into understanding the attitude that befits a good citizen and judge.

As we read, we are immersed and intensely concerned for the participants; and we see the participants, as Breyer points out, as individuals with their own stories to tell.³⁰ But we do not know where we are in the situation before us. We care about the individual characters and to some extent, we identify with them. But we lack the special and often confused intensity of emotion that would derive from thinking that it's really our own life that's at issue.

Now, what I think Smith suggests, and I find this a very promising suggestion that would have to be developed much further than I can here, is that this really is a good way of thinking about how emotion can enter into judicial thought and judicial writing; that we want emotion that is tethered to the evidence, that has been carefully filtered for bias, that's informed by legal reasoning of the best sort. But that if we do get that, there is absolutely no reason why emotion shouldn't be an important part of judicial thought and writing.³¹ Indeed, it is difficult to imagine that the public imagination could be complete without that.

I do think that there might be at least an argument for saying that some of the ways in which Justice Blackman wrote emotionally, for example, the famous exclamation "poor Joshua"³²

³⁰ See Confirmation Hearing, *supra* note 1, at 232-33 (describing Bronte's awareness of diversity among seemingly homogenous population of London).

³¹ See Zipursky, *supra* note 15, at 1135 (contending that compassionate stance is better suited to thorough legal interpretation than dispassionate one); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 655-56 (1989) ("This insistence upon the injustice of all emotion stems from a misconception of emotion and its influence upon criminal punishment.").

³² *Deshaney v. Winnebago City Social Serv. Dep't.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting). In *Deshaney*, the Supreme Court rejected a claim that Wisconsin's social service department violated the plaintiff's due process right to liberty by failing to intervene and prevent severe child abuse. *Id.* at 203. Blackmun responded:

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor

and so on,³³ might give rise to the reading—maybe it would be misreading, but certainly could give rise to the reading that this was an untethered kind of personal explosion of sentiment. And I think if one were to find fault with him along those lines, that would be the way to argue.

Sympathetic emotion that is tethered to the evidence and free from reference to one's own personal goals and situation is not only acceptable, but actually essential to public judgment. But it is that sort of emotion that literary works construct in their readers. And that, I think, means that literary readership is what Smith thinks it is: an artificial construction of some crucial elements in the norm of public rationality and also of judicial language.

about "liberty and justice for all"—that this child, Joshua Deshaney, now is assigned to live out the remainder of his life profoundly retarded.

Id. at 213.

³³ See, e.g., Penda D. Hair, *Justice Blackmun and Racial Justice*, 104A YALE L. J. 7, 9-12 (1994) (explaining Blackmun's recurring sensitivity to reality, victims of discrimination, and impact Court's opinions have on employers). Justice Blackmun wrote: "[M]y record and the opinions that I have written ... will show, particularly ... in the treatment of little people, what I hope is a sensitivity to their problems." *Id.* at 25.