

THE IMPACT OF EMOTIONS ON JUDGING

Written by Dan Lawton



One million dollars a year we spend on stories we never even film. Why not? I'll tell you. They don't make me cry. What makes me cry? Emotion.—Louis B. Mayer (as written by Jack Fincher in “Mank” (Netflix 2020))

At a recent Inn of Court meeting in San Diego, an audience of lawyers and judges, divided into teams seated at tables, answered a series of questions aimed at probing how their minds solved problems. The first question was this: “A bat and a ball cost \$1.10 in total. The bat costs \$1.00 more than the ball. How much does the ball cost?”

Within two seconds, several judge-hands shot up. “Duh,” said one of the hand-raisers, to chuckles and murmured approvals. “Ten cents!”

The correct answer was *five cents*. The bat cost \$1.05. The judge reddened slightly amid some more chuckles from the audience. Then the presenters got on with the program.

The exercise demonstrated the difference between System 1 thinking and System 2 thinking, two types of human thought processes explored by an academic psychologist, Daniel Kahneman, and his colleagues in a Nobel Prize-winning paper published in 2002. Kahneman was out to study errors people make by not engaging in sound rational thinking in making financial decisions. He described a sort of dual mental life, in which we use

System 1 thinking (fast, easy, intuitive), and System 2 thinking (slow, effortful, analytical). Later, Kahneman published a best-selling book, *Thinking: Fast and Slow* (Farrar et al. 2013), in which he expanded on how we can better tap into the benefits of System 2 thinking.

In his own book, *Advanced Topics in Appellate Practice: The Path to Mastery* (Full Court Press 2022), the late appellate lawyer Charlie Bird offered real-world examples of each type of thinking Kahneman described. A baseball player's practice of shagging fly balls in the outfield enables his brain to decide the trajectories of baseballs accurately, without wasting time and effort, so he can field the balls well. He's using System 1 thinking, jumping to conclusions and acting automatically and quickly, as he must if he wants to record a putout and help his team win. He is using cognitive bias, putting disproportionate weight on impressions without reason—using a *heuristic*, a mental shortcut or rule of thumb that we use to solve problems fast. Using the heuristic lets him silently and quickly intercept a batted ball on the fly, while reducing the mental effort needed to do it to a degree low enough to allow a needed and fast solution. At the Inn of Court program, the judge who proudly told us the ball cost 10 cents leaned on a heuristic, sparing himself a calculation that might have slowed him down in solving a problem that seemed easy.

Now think of a different problem. While taking an exercise walk in your neighborhood, sans phone, you suddenly realize you have a Zoom call in 15 minutes and are over a mile from home. You do the math in your head, then boost your speed to over four miles an hour, so you can make it in time. You are doing a form of deep work that the outfielder hasn't bothered with, because he doesn't need to. Your mental work is System 2 thinking. It's *systematic*, involving effort, concentration, and execution of learned rules. In the bat-and-ball problem, realizing that subtracting 10 cents from \$1 yields 90 cents instead of \$1 requires taking the time to think and calculate. And so it's understandable why, during a public exercise in which the desire of hypercompetitive people in a public setting to show off their mental prowess to peers may affect willingness to do the small mental work needed to reach the right answer, the judge would have used System 1 instead of System 2 thinking at the Inn of Court program.

Jurists, Charlie wrote, believe they're using System 2 thinking all the time when making rulings. They claim to retain open minds while reading briefs and hearing arguments. They deny that pathos or ethos affects them. Lawyers know this is baloney, of course—and data bears out the importance of intuition, gestalt, and emotion in judicial decision-making. The truth is that System 1 is always at work in judges' minds, yielding a never-ending stream of impressions and opinions. However earnestly the jurist may believe her self-evaluation of open-mindedness and objectivity, she can't push System 1 thinking from her mind. And System 1 thinking is where cognitive bias and heuristics live in the form of anchoring, framing, recency bias, the "halo effect," and confirmation bias, among others.

Any trial or appellate lawyer, if being candid, can recount instances of System 1 thinking on the bench—close cases in which judicial emotion, bias, failure to listen, or giving undue credence to an assertion made by an esteemed opponent based on the "benefit of the doubt" supposedly warranted by the opponent's lofty reputation came into play. Former federal public defender Karen Snell told me of the frosty reception she received in San Francisco at the Ninth Circuit, where Judge Mary Schroeder took the bench to evaluate the government's challenge to the district court's ruling that spared Snell's client, Irish refugee Jimmy Smyth, from extradition to Great Britain in 1996. During our interview, Snell didn't say, "System 1 thinking." But she might as well have.

At the hearing, Schroeder's facial expression scared Snell. "It was just the look on her face, the look of someone who thought my client was in the Irish Republican Army," Snell told me in 2018. From the moment she walked onto the bench, Schroeder had telegraphed undisguised hostility with her body language. Her questioning made clear she was in charge of the panel's decision and viewed the decision of the district judge, the late Barbara Caulfield, as wrong. She was curtly dismissive of Snell's arguments. So was her colleague, Joseph Sneed, a law-and-order conservative. It came as little surprise to Snell, three-and-a-half months later, when Schroeder reversed Caulfield and ordered Smyth extradited.

Possibly, Schroeder, for all her vaunted scholarly depth, had allowed heuristics to affect her decision-making. Among colleagues on the bench, Schroeder was known to be hard on criminal defendants. She viewed Smyth as an outlaw and a terrorist, and decided his case that way, while carefully draping her opinion in the incantations of the pertinent clauses of the U.S.-U.K. supplementary extradition treaty of 1986.

In 1985, the Ninth Circuit reviewed the criminal convictions of two Taiwanese immigrants, the Chens, who had made payments totaling the low four figures to U.S. immigration agents, to spare themselves from immigration raids at the restaurant they owned in Tucson, Arizona and gain a green card for their cook. The Chens, whose command of English was not the best, claimed the agents had entrapped them. But a three-judge panel consisting of Richard Beezer, Thomas Tang, and William Canby rejected the arguments and affirmed the convictions. In a thoughtful and melancholy concurrence, Judge Tang wrote this:

"It is with sadness that I join this decision. [¶] In concur because the government has technically proven its case. The jury has found no entrapment; nevertheless, although not technically induced by the government, these offenses were certainly governmentally encouraged. [¶] ... [¶] [T]he government mindlessly donned its blinders and pursued the Chens with a zeal and commitment of resources more befitting an undercover investigation aimed at breaking up an elaborate smuggling operation. At what cost was this done? Were the Chens such a threat to the integrity of our law enforcement establishment? ... [¶] The government has won a victory, but it rings hollow. Technically the Chens were not entrapped but these violations could have been easily prevented with

a simple ‘No.’ Does the price of their misguidance demand five years’ incarceration and then deportation? Isn’t there a sufficiency of criminal offenses without the government contributing to their manufacture? This total exercise leads any critical observer to be skeptical and to ponder whether justice has been served.” (*United States v. Chen* (9th Cir. 1985) 754 F.2d 817, 825 (conc. opn. of Tang, J.).)

Judge Tang didn’t let emotion force him to dissent or try to sway his two colleagues, Beezer and Canby, to a reversal. He was *sad*, because he thought what the government had done was *stupid* and *unjust*—as it surely was—and thought the cost, in the form of two ruined human lives and a loss of public esteem for the legal system, exceeded any corresponding benefit. What jurist, if being honest, would deny having experienced some of the same emotions in denying a posttrial motion, imposing a sentence, or affirming a judgment?

Nominees to the U.S. Supreme Court are fond of telling public audiences that they are umpires in robes, calling “balls and strikes,” as Chief Justice John Roberts famously told the nation at his televised Senate confirmation hearing in 2005. “Judges can’t rely on what’s in their heart [I]t’s not the heart that compels conclusions in cases. It’s the law,” said Justice Sonia Sotomayor at her own confirmation hearing in 2010.

Today, few below the age of 65 remember the late Justice William Brennan. He had something to say on this subject. Unlike most of his peers, Brennan publicly questioned the casting aside of emotion in judging. “Sensitivity to one’s intuitive and passionate responses ... is ... not only an inevitable but a desirable part of the judicial process,” Brennan wrote in a law review article published in 1988. (*Reason, Passion, and “The Progress of the Law”* (1988) 10 Cardozo L.Rev. 3.) Years earlier, Brennan’s colleague Robert Jackson described “dispassionate judges” as mythical creatures, like Santa Claus or Easter bunnies. (*United States v. Ballard* (1944) 322 U.S. 78, 94 (dis. opn. of Jackson, J.).)

As best I can tell, since Jackson and Brennan’s time, none of their successors has dared say amen. Especially at confirmation-hearing time, all we hear is that the jurist, like some kind of berobed android, carefully cabins his or her emotions in a compartment insulated from the black box that houses the hardware which performs the cold, precise review and application of law to fact. Invariably, the nominee delivers this supposed first principle solemnly, if a bit

condescendingly, with perfect eye contact with the questioner, with the hoped-for impact on the audience of senators and punditocracy firmly in mind.

For decades, there was no way to question this pious, self-serving nonsense empirically.

But, in 2015, a group of authors set out to study the results of controlled experiments conducted at CLE programs with jurist-audiences during the period spanning 2008 and 2013. The judges were asked to respond to written questionnaires which described various hypothetical civil and criminal cases. By statistically significant margins, the authors found that emotion played a strong role in the judges’ hypothetical decision-making. For example, in a case involving a medical marijuana statute, judges were highly likely to grant a defense motion to dismiss a charge for illicit possession of marijuana when they learned that the defendant was a 55-year-old accountant and a married father of three with a terminal case of bone cancer and no prior criminal record. Where the defendant was posited as an unemployed 19-year-old male with a mild seizure disorder and on probation for beating his girlfriend and dealing drugs, the judges overwhelmingly voted to deny the motion to dismiss. Under the law, none of those facts had any relevance. But they touched the judges’ emotions, affecting the results. (See Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?* (2015) 93 Tex. L.Rev. 855.)

In San Diego, our Inn of Court exercise yielded similar results based on a real case involving a decedent whose sons contested his will in Probate Court. The dead man had been a loving husband and father. He had lived near the beach in San Diego and often taken sons surfing in the early mornings. His will specified that his widow would inherit his house and all furniture and objects of art inside it. His sons, said the will, would inherit his surfboards. The parties’ disagreement centered on a particular surfboard, which was mounted on a living room wall, where it hung, centered above a sofa. The widow viewed the surfboard as an object of art; the sons, as what it was, a *surfboard*. For purposes of the will, what was it, really?

We split the audience into groups, then fed each group a slightly different fact pattern which recited a fact that we thought had some emotional impact. (One was the rosy glow the surfer-dad exhibited when returning home in the early mornings, exhilarated, from a surf

outing with his boys.) Our judge-groups reached wildly-varying outcomes depending on this or that fact, suggesting that their emotions affected their decision-making, however coldly logical their explanations for the rulings they delivered.

Wistrich et al. describe a world in which judges create one set of rules for the sympathetic and a different set for the unsympathetic, or what they called a “war between judicial heart and judicial head,” in which the “judicial heart wins many skirmishes.” As unsavory as that is, they aren’t out to embarrass judges or clutch pearls. Neither was Bird. Both sets of authors wanted to *make good use of the empirical reality for lawyers and their clients*.

Wistrich et al. offer some concrete recommendations. Trying to select clients who are likeable, sympathetic, or otherwise appealing, and thinking twice before accepting cases from the other kind of client. Making motions, arguments, and trial presentations emotionally, as well as logically, appealing. Humanizing clients during direct examination. Concentrating energy on the crafting of a compelling story. For judges, Wistrich et al. suggest judges engage with their reactions to emotional stimuli rather than try to repress them.

From judges, there seems little to learn about these topics. Charlie Bird writes of his years of reading and attending programs convened by bar associations, commercial providers, the American and California Academies of Appellate Lawyers, and others, at which he developed a skepticism about appellate judges as “trail guides to appellate excellence.” Charlie observes that these judges, as authors and program panelists, are capable of doing three things well: discussing substantive topics, explaining what they do, and declaring what they dislike. “Most fare worse,” Charlie writes, “when the mission is to discuss what they like, in the sense of what is persuasive. And most are at their worst when they try to tell ... lawyers how to practice, above basic levels.” It is too bad.

The point of this essay isn’t, “What a shame our jurists can’t admit what we all know—that emotions affect their decisions, as they affect our own.” It’s to recognize the fact—so that we lawyers can do something good about it for our clients and ourselves. Bird delivers practical and specific advice on best practices for appellate lawyers. A lot of that advice has equal application in the trial courts. Reading his book repays the cost and effort many times over.

Lawyers, of course, can’t honestly deny their own heuristics and biases or the role emotion plays in their work. There was a time, since past (I think), when I found myself unable to give a closing argument at the end of a trial without choking up and fighting back tears at some unpredictable moment. I wasn’t doing it on purpose or for effect. It just happened. But to pretend it didn’t happen, or that it didn’t affect my work while trying to apply law to fact, would be just that — pretending.

Wistrich et al. and Charlie Bird have urged judges, as well as lawyers, to stop pretending, and to do something about the thing Justices Brennan and Jackson were unafraid to say out loud: emotions affect judicial decision-making, even though they don’t, and shouldn’t, always carry the day.

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