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Emotions and Precedent

EMILY KIDD WHITE¹

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ABSTRACT

The philosophy of emotion raises complications for theories of precedent. This chapter argues that it is productive to think of the effect of some precedents as facets of legal reasoning that are related to the use and understanding of legal concepts as thick concepts. In legal reasoning, precedents are routinely invoked to explicate, and/or clarify the content of legal concepts that are at issue in a case. This chapter develops an argument by Bernard Williams, i.e., that one must avoid the risk of over-generalizing the relationship of emotions to thick concepts, by placing it in the context of legal reasoning. It argues that the several distinctive ways that emotions might interact with thick legal concepts pose challenges for any general theoretical account of precedent in legal reasoning. A focus on these different roles that emotions can play in judicial uses of precedent illuminates some of the more subtle ways in which these uses reveal held values, ways of seeing, and political commitments. The chapter finds that in at least some cases where a precedent is invoked to thicken the understanding of a legal concept at issue in a case, variations in the emotional architecture associated with that invocation will come in direct tension with the legal concept under examination, or with other legal values and principles that pertain to equality, and equal treatment under law.

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1. INTRODUCTION

The philosophy of emotion raises complications for theories of precedent. Philosophers of emotion have drawn multifaceted maps of the various ways that emotions interact with evaluative judgements,² or more generally, with thick concepts.³ I will argue that it is productive to think of the effect of some precedents as facets of legal reasoning that are related to the use and understanding of legal concepts as thick concepts.⁴ In legal reasoning, precedents are routinely invoked to explicate, and/or clarify the content of legal concepts that are at issue in a case.⁵ Some invocations of precedent aim to provide a more robust, detailed – or thicker – understanding of a legal concept by detailing its prior, and at times paradigmatic, applications. The multiplicity of ways that emotions interact with thick concepts pose challenges for any general theoretical account of precedent in legal reasoning and bringing these distinctions to light illuminates the difficulty of deciphering the subsurface work of emotions in public-facing legal reasons. In at least some cases where a precedent is invoked to thicken the understanding of a legal concept at issue in a case, variations in the emotional architecture associated with that invocation will come in direct tension with the legal concept under examination, or with other legal values and principles that pertain to equality, and equal treatment under law.

² Robert C Solomon, *Not Passion's Slave: Emotions and Choice* (Oxford University Press 2003); Ronald De Sousa, *The Rationality of Emotion* (MIT Press 1997); Martha Craven Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge Univ Press 2008); Stephen R Leighton, 'A New View of Emotion' (1985) 22 *American Philosophical Quarterly* 133.

³ Bernard Williams (ed), 'Morality and the Emotions', *Problems of the Self: Philosophical Papers 1956–1972* (Cambridge University Press 1973); Peter Goldie, 'Thick Concepts and Emotion' in Daniel Callcut (ed), *Reading Bernard Williams* (Routledge 2009).

⁴ See e.g., Emily Kidd White, 'Replaying the Past: Roles for Emotion in Judicial Invocations of Legislative History, and Precedent' (2019) 9 *Oñati Socio-legal Series* 577.

⁵ The question of whether and how precedents might constrain judicial reasoning is here purposefully left open. The narrow claim is only that in at least some instances, judges have discretion about the applicability, meaning, reach, and force of past precedents. See, e.g. Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Hart 2020).

2. EMOTIONS AND THICK CONCEPTS

In 1972, Bernard Williams published ‘Morality and the Emotions’ in a small volume of philosophical papers.⁶ Williams’ explicit aim in the paper, delivered as his inaugural lecture at Bedford College, London, was to steal from the ruins of emotivism to say something about the relationship between emotions and normative judgment.⁷ On William’s view, emotivism’s mistake was evaluating the relationship at too general a level. Emotivism for Williams ‘offered a connexion between moral language and the emotions as straightforward and as general as could be conceived in the form of the thesis that the function and nature of moral judgment was to express the emotions of the speaker and to arouse similar emotions in his hearers.’⁸ Stated as such, the significance of emotions to normative judgement was either easily disproven (and frequently lacking explanatory power when faced with counter-examples), or – more important to Williams – impossible to grip at such a high level of generality.

Williams argued that it would be more useful either to analyze the ways that at least some sentences semantically incorporate expressions of emotion⁹ or, more central to the present paper’s claim, to consider the ways that ‘a speaker’s expressing emotions should be regarded as a necessary condition of his utterance’s counting as the making of a moral judgement’.¹⁰ This latter path draws from the speech-act view of emotivism, which, as Williams writes, leads to questions of when it might not be possible to disentangle emotions from an evaluative judgement,¹¹ for the reason that at least some evaluative judgements rely on ideas about sincerity (including of belief, and, subject to some qualifications, commitment) which, for Williams, implicate emotions. As Williams argues, it is not always possible to disentangle the emotional aspects of an evaluative judgement without a loss of meaning, or texture.¹² Thick concepts are those in which emotions,

⁶ Williams (n 3).

⁷ *ibid* 208–209.

⁸ *ibid* 208.

⁹ *ibid* 212.

¹⁰ *ibid* 214.

¹¹ *ibid*.

¹² See, e.g. Emily Kidd White, *Emotions in Legal Reasoning* (Oxford University Press forthcoming).

evaluations, and thick descriptions are irrevocably bound up with one another.¹³ The position is that in at least some cases, the emotional aspects of the evaluative judgement at hand are neither secondary, nor severable, and one consequence of this view is that evaluative judgements are distinguishable based on the emotional aspects they possess.

William's arguments in 'Morality and the Emotions' were given careful attention, and extension by his former student Peter Goldie in 2009 in a paper entitled 'Thick Concepts and Emotions',¹⁴ which sought to bring its insights to bear on neo-sentimentalist theories, which generally claim the position that it is appropriate to feel certain emotions when particular forms of evaluation are called for.¹⁵ Goldie revises this position by placing emphasis on the work of emotional dispositions in order to make sense of examples where the characteristic emotion that is thought to be intrinsic to the judgement is not present in an individual instance, though it tends to be embedded in the actor's ways of seeing, being and valuing. On this view, for example, you might know that it is right to feel outrage at certain political facts and yet fail, for reasons good or bad, to experience that emotion. We can think, for example, of teaching about a past atrocity and having the work of choosing words carefully come to obscure or quiet the anger that one might otherwise find appropriate, or of the way that grief can stay the feeling of joy that might otherwise surface upon the hearing of good news. Emotional dispositions are important for Goldie because emotions relate to each other, reasons, and values in complex and often protean ways.¹⁶ Political and ethical outlooks are revealed in the tendency to feel emotions with respect to certain others and situations, not in their presence or absence at a particular moment in time.

¹³ Williams (n 3).

¹⁴ Goldie, 'Thick Concepts and Emotion' (n 3).

¹⁵ Goldie cites a formulation from Justin D'Arms and Dan Jacobson, which is that 'to think X has some evaluative property Φ is to think it appropriate to feel F in responses to X'. *ibid* 99.

¹⁶ Some philosophers of emotion describe being in the grip of a strong emotion as being in an emotional state (of grief, fear, or rage, for example). For discussions on this, on relations between emotions and reasons, and the ways that different emotions interact with, or even potentially preclude one another, see Leighton (n 2); William Lyons, 'On Emotions as Judgments' in Stephen Leighton (ed), *Philosophy and the Emotions: A Reader* (Broadview Press); Jenefer Robinson, *Deeper than Reason: Emotion and Its Role in Literature, Music, and Art* (Clarendon Press; Oxford University Press 2005).

Thick concepts for Williams and Goldie are ones that have more, rather than less descriptive content (distinguishing them from thin concepts, including thin evaluative concepts such as good or right). Thin concepts operate at a higher level of abstraction than thick ones. For example, the concept of betrayal is thicker and includes more detail than the concept of wrongness. In addition to this descriptive content, thick concepts possess evaluative content that presents as ‘keyed in to approval (or disapproval),’¹⁷ of the descriptive content giving us a thick-textured ‘idea of the character of the person, object, or action, so characterized.’¹⁸ By contrast, ‘thin concepts although clearly evaluative, are thought not to have much or any descriptive conceptual content: we get little if any sense of what the object is like beyond the fact that the user likes (or dislikes) it, and thinks others should do the same, and so on.’¹⁹ Examples of thin evaluative concepts are *good*, *bad* and *right*. Such concepts are ‘very abstract vehicles of commendation or disparagement that can be attached to an almost unlimited range of actions or states of affairs.’²⁰ Thick concepts are specific and evaluative. *Gentleness*, *cruelty*, and *patience* are examples. Applications of a thick concept will vary across contexts. Gentleness with respect to one’s newborn child differs from the gentleness that one might show a teenager, with differing approaches, modes, and aims operating in each instance of the application of the thick concept. As Goldie explains, finding an activity to be cruel attributes a certain wrongness to that activity, such that the finding of cruelty ‘cannot be disentangled from its evaluative content.’²¹ To apply a thick concept like *discriminatory*, for example, to an action is to evaluate that action and condemn that action. As with all thick concepts, the application relies on a judgement about certain facts, which if they turn out to be false or ill-founded, undermine the application of that concept.²²

A final characteristic of a thick concept as described by Williams in *Ethics and the Limits of Philosophy*²³ is that they are both *world-guided* and *action-guiding*. *World-guided* concepts are ones that ‘might be rightly or wrongly applied’ and *action-guiding* concepts are ones that tend to be related

¹⁷ Simon Kirchin, *Thick Concepts* (2013), 1-2.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press of Harvard University Press 2011) 181.

²¹ Goldie, ‘Thick Concepts and Emotion’ (n 3) 95.

²² AW Moore, ‘Maxims and Thick Ethical Concepts’ (2006) 19 *Ratio* 129, 135.

²³ Bernard Williams, *Ethics and the Limits of Philosophy* (Harvard University Press 1985).

to reasons for action, which is not to say they cannot be defeated by other reasons, including value-based and/or pragmatic reasons for action.²⁴ *Action-guiding* concepts for Goldie and Williams are sometimes wielded unconsciously or spontaneously, and at other times after considered thought. Significantly, and of central importance to the argument below, these two features can come apart in the application of thick concepts. *World-guiding* concepts can be applied by ‘insightful observers’ who don’t share the values or ways of seeing implied by the concept.²⁵ Those observers might well predict, for example, how someone who holds the concept as an *action-guiding* concept, might think, or act. They might apply the thick concept to deliberations and activities in ways that they discern others expect, or they might publicly exclaim and showcase their *world-guided* (but not *action-guiding*) application of the thick concept for other reasons. These *world-guided* applications, however, remain distinguishable from an *action-guiding* application of a thick concept, and it is questions about sincerity and emotion, for Goldie, which work best to explicate this distinction.

As Williams writes, ‘a man’s emotions has significance for our understanding of his moral sincerity, not as a substitute for, or just in addition to, the considerations drawn from how he acts, but as, on occasion underlying our understanding of how he acts.’²⁶ Williams continues, ‘what is relevant to our understanding of his moral dispositions is not whether there are (in our view) grounds or reasons for action of that sort, but whether he sees the situation in a certain light. And there is no reason to suppose that we can necessarily understand him as seeing it in that light without reference to the emotional structure of his thought and action.’²⁷

3. ROLES FOR EMOTION IN *FULLY ENGAGED* APPLICATIONS OF THICK CONCEPTS

Within the field of the philosophy of emotion, it is a long-abandoned view that emotions are beyond judgement, or political evaluation, though this is often the stated rationale for the call to disentangle

²⁴ Goldie, ‘Thick Concepts and Emotion’ (n 3) 96.

²⁵ Williams (n 23) 141–142. Cited also in Goldie, ‘Thick Concepts and Emotion’ (n 3) 96.

²⁶ Williams (n 3) 222.

²⁷ *ibid.*

legal reasoning from emotion.²⁸ Emotions have affective and cognitive aspects that relate closely to one another.²⁹ Emotions involve a judgment or evaluation about an object or an event, and an affective or physiological aspect (that can be broadly characterized as a pain or a pleasure), which works to establish their characteristic constituent desires for action,³⁰ and, ultimately, differentiates them from other modes of thought or experience.³¹ Shame, for example, has a negative painful orientation, and its constituent desire is to make oneself small or disappear.³² Williams rejects the Kantian view, which sees emotions as ‘capricious,’ ‘passive,’ and, as the ‘product of natural causation,’ ‘fortuitously distributed.’³³ Such a view, for Williams, ‘suggest[s] a crude view of emotions themselves’ and implies ‘that there is no way of adjusting one’s emotional response in the light of other considerations, of applying some sense of proportion, without abandoning emotional motivation altogether.’³⁴

Individual emotions relate to facts and beliefs that can be subject to scrutiny, standards of evidence, and rational judgment. Subject to some qualification, emotions are answerable to reasons.³⁵ They are evaluative in the sense that they reveal to some extent what an individual finds

²⁸ A burgeoning field of law and emotion literature begins from this premise. See, e.g., Susan A Bandes and others (eds), *Research Handbook on Law and Emotion* (Edward Elgar Publishing 2021); Terry A Maroney, ‘A Field Evolves: Introduction to the Special Section on Law and Emotion’ (2016) 8 *Emotion Review* 3; Amalia Amaya and Maksymilian Del Mar (eds), *Virtue, Emotion and Imagination in Law and Legal Reasoning* (Hart Publishing 2020).

²⁹ Leighton (n 2); Solomon (n 2); Robert C Solomon, *The Passions: Emotions and the Meaning of Life* (Hackett Pub Co 1993); Nussbaum (n 2).

³⁰ John Gardner, ‘The Logic of Excuses and the Rationality of Emotions’ (2009) 43 *Journal of Value Inquiry* 315.

³¹ Within the philosophy of emotion, there are wide-ranging views on how best to describe the relationship between the physiological and cognitive aspects of an emotion. Questions about sequence and rank abound. For cognitivists, like Martha Nussbaum, certain emotions tend to follow from the holding of particular evaluative judgments. Others, like William James, find that physiological responses precede and assist in forming the cognitive aspects of an emotion. See e.g., Nussbaum (n 2); William James, ‘What Is an Emotion?’ (1884) 9 *Mind* 188. Others find a strong distinction between these two aspects superficial, with some drawing on contemporary research in neuroscience to put pressure on both sorts of causal accounts. See e.g., Robinson (n 16); Maria Gendron, ‘The Evolving Neuroscience of Emotion: Challenges and Opportunities for Integration with the Law’ in Susan Bandes and others, *Research Handbook on Law and Emotion* (Edward Elgar Publishing 2021).

³² Solomon (n 29). See, ‘The Emotional Register’.

³³ Robinson (n 27).

³⁴ Williams (n 3) 224.

³⁵ Gardner (n 30); Williams (n 3).

important,³⁶ and it is for this reason that Robert Solomon describes them as ‘eudemonistic’, and as ‘engagements with the world’³⁷ for their tendency to reveal deep and personal understandings of value (for good or ill), and, at times even, a (well-placed or not) sense of justice. Given that emotions are evaluative in this sense, it is possible to press both upon the facts or beliefs underlying an emotion and upon the judgment motivating an emotion.³⁸ As emotions are object-directed, new information about an object can work to revise an emotional state³⁹ (though not always for some emotions can prove resistant, or irrational).⁴⁰ Further, as emotions reflect evaluative judgements, they are open to probing questions about the status of the value underlying one’s emotional concerns.

To move deeper into the distinction outlined above concerning the *world-guided* and *action-guiding* aspects of thick concepts, Goldie draws on a paper by Adrian Moore on the difference between *understanding* a concept and being *fully engaged* with a concept. As Moore wrote,

Thick ethical concepts can be grasped in two ways, an engaged way and a disengaged way. To grasp a thick ethical concept in the disengaged way is to be able to recognize when the concept would (correctly) be applied, to be able to understand others when they apply it, and so forth. To grasp a thick ethical concept in the engaged way is not only to be able to do these things, but also to feel sufficiently at home with the concept to be prepared to apply it oneself, where being prepared to apply it oneself means being prepared to apply it not only just in overt acts of communication but also in how one thinks about the world and in how one conducts one’s affairs.⁴¹

Emotions play a role with respect to both *understanding* and being *fully engaged* with a thick concept. In terms of the former, understanding a thick concept often means understanding something about its emotional architecture, including features of the emotions that it engages (including their cognitive and physiological aspects, dominant metaphors, and

³⁶ Nussbaum (n 2).

³⁷ Solomon (n 2); Solomon (n 29).

³⁸ Nussbaum (n 29).

³⁹ Nussbaum, *Upheavals of Thought*; Solomon, *The Passions*.

⁴⁰ Williams (n 3) 224.

⁴¹ Goldie, ‘Thick Concepts and Emotion’ (n 3) 96. Citing Moore (n 22) 137.

constituent desires for action)⁴² that characteristically apply with respect to them. In terms of the latter, however, emotions and emotional dispositions play a significant and non-severable role in the *full engagement* of a concept. They do so in complex, typically potent, fluid, and sometimes elliptical ways. In many cases, what makes the *living by* the thick concept in question sincere is an emotional disposition, which entails the tendency to emotionally engage with circumstances involving its relevant applications.

Thick concepts don't exist in a vacuum. They have as Goldie puts it, a *focus* and a *stance*. The focus is the object of concern, and the stance is the 'emotional "attitude" held towards the focus'.⁴³ Sincerity, for Williams and Goldie, becomes an important facet of the application of a thick concept because the expression of a judgment will only constitute *fully embracing* or *living by* a concept where the person in question 'shares (subject to the above qualifications) the feelings and emotions that give application of the concept its point.'⁴⁴ These sincere views stemming from *living by* and *fully embracing* a thick concept tend then, subject to some qualifications, to motivate action, ways of seeing, and patterns of reasoning.⁴⁵ This, for Goldie, is the deep connection between thick concepts and emotion, i.e., that a sincere full engagement with a concept implicates character and emotional dispositions.

4. PROBLEMS FOR PRECEDENT WITH THICK LEGAL CONCEPTS AND EMOTION

Invocations of precedent can contribute additional layers of meaning and detail to legal concepts, a process which, drawing from the field of ethical theory, reflects the notion of *thickening*.⁴⁶ This is a backward-looking process that engages prior uses of a legal concept, across differing contexts, to build a better grip on its meaning and implications for the case at bar.

⁴² Solomon (n 29).

⁴³ Goldie, 'Thick Concepts and Emotion' (n 3) 105. The contents of this emotional attitude can shift depending on the circumstances. When we value someone, we can feel angry when they are disrespected, concerned when they are sick, happy when they are happy etc.

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ Williams (n 24); Samuel Scheffler, 'Morality Through Thick and Thin a Critical Notice of Ethics and the Limits of Philosophy' (1987) 96 *The Philosophical Review* 411.

Often the process flags paradigmatic examples or circumstances which engage the concept.⁴⁷ Similar to the view held here, Maksymilian Del Mar argues that it is useful to think of precedents as ‘thick resources’, the ‘dynamic content’ of which is to some extent constrained by stabilising practices (e.g. textbooks, re-statements of the law), but nevertheless never so constrained as to be incapable of being construed as relevant in a novel way.⁴⁸ References to precedent in the explication and use of legal concepts are a constitutive aspect of the practice of common law legal reasoning, which is not to say that anything about the use of particular precedents or a more general theory on the level of constraint they supply is uncontested.⁴⁹ The work of finding and using precedents in legal reasoning has never lacked a politics.⁵⁰

Judges can invoke precedents as applications of thick concepts in *world-guided* and/or *action-guiding* ways. Whether and how judges use precedents to *fully engage* with an application of a legal concept can have an impact on legal reasoning. A *fully engaged* application of a thick legal concept requires the use of precedent that reflects an emotionally inflected stance towards a focus (i.e., an object of concern) that depends upon a particularized and sincere form of valuing, or way of seeing, which concerns that focus. The possibility of a *fully engaged* application of a thick legal concept immediately raises skeptical questions about what precisely at the level of theory is required by judges in their applications of thick legal concepts, and so too, about the self-awareness of judges, and the ability of judges (or anyone) to either fully understand and/or manage their own emotionally imbued set of value-commitments and ways of seeing.⁵¹

Leaving aside questions concerning the scope of the discretion permitted to a judge in the use of precedent, the claim here is that legal concepts can exude a certain thinness that references to precedent can work to supplement.⁵² Precedents can be used to *fully engage* with an application

⁴⁷ White, ‘Replaying the Past’ (n 4).

⁴⁸ Maksymilian Del Mar, ‘What Does History Matter to Legal Epistemology?’ (2011) 5 *Journal of the philosophy of history* 383, 386.

⁴⁹ Emily Kidd White, ‘Notes on a Supreme (Legal) Fiction’ 47 *Journal of Legal Philosophy*.

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² For an argument on the interpretation of thin legal concepts, see C McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 *European Journal of International Law* 655.

of a legal concept, they can be used to give the appearance of this full engagement, they can be applied by a judge acting in the manner of an ‘insightful observer’, or by a judge wishing to present themselves as an ‘insightful observer’ applying the concept. Given the existence of these distinct possibilities, even where the discretion of the judge to use precedent to *thicken* the legal concept at issue seems limited, the challenges outlined below pose deep problems for theories of precedent that profess the normative value of public reason, or other substantive rule of law values, such as the commitment to equal treatment under the law. Depending on the theory of legal interpretation at play, casting light on these distinctive possibilities seems to require either that judges always (under an account where moral or evaluative reasoning is part of legal reasoning) or never (under an account where moral or evaluative reasoning is excluded from legal reasoning) – without exception – show a sincere full (that is, *action-guiding*) engagement with a legal concept in the application of a precedent.⁵³

a) *The difficulty of distinguishing between world-guided and action-guiding applications of a legal concept*

The practices associated with the use of precedents in common law judicial reasoning make it difficult to discern instances where legal concepts are being applied in *world-guided* but not *action-guiding* ways. It is difficult to discern on the face of a written judgement when a judge is *using* a legal concept but not *embracing* or *fully engaging* with that concept. In several instances, this might not matter to the case outcome, and it may or may not be decipherable on the face of the judgement’s reasoning. And yet, the roles that emotions play with respect to *world-guided* and *action-guiding* applications of a thick concept are quite distinct. This is significant because it is not clear that a legal concept will be applied as vigorously or searchingly where it is not *action-guiding*. And so too, because the implications of this focus on emotion for accounts of legal reasoning are stark and demanding. In what follows, I raise two distinct issues which suggest that, in at least some instances, the role emotions play with respect to some thick legal concepts impact judicial reasoning.

⁵³ I thank Felipe Jimenez for pushing me to clarify this implication of my argument.

i) Emotions as Aids to Understanding

In the pages of a 1979 *New Yorker*,⁵⁴ Grace Paley's short story 'Love' ends with the protagonist blowing through the aisles of a grocery store before running into an old friend with whom she'd had a terrible argument years before. They had long since stopped speaking. Seeing her friend's lovely face, a face that she had previously delighted in, she finds her own hand advancing to this woman's hand, taking it up and giving it a kiss. Her friend smiles at the gesture, rearranging the past, and settling into place a new range of possibilities.

Paley here gives us an inroad into a discussion on the epistemic benefits of emotions in judicial reasoning. Crucially, the use of the term 'epistemic' here pertains to the cognitive process of understanding⁵⁵ in relation to the construction of legal arguments and findings, not to ascertainment of anything like an objective moral fact.⁵⁶ As in Paley's story, emotions move and motivate us; they can rearrange our understandings of pertinent facts and highlight certain features of a situation that are important to us.⁵⁷ Emotions have epistemic functions even where they do not ground our evaluative judgments. They can startle and 'capture and consume our attention, [thereby] facilitating a reassessment or reappraisal of the evaluative information that emotions themselves provide.'⁵⁸

Emotions can serve epistemic functions, allowing us to focus on features of the world that we consider important or, conversely, to identify threats to those persons, things, or values that we hold dear.⁵⁹ When we value something, certain features of the object of our value (a landscape, an event, even an idea) can stand out to us.⁶⁰ Emotions can play positive (or

⁵⁴ Grace Paley, 'Love', *The New Yorker* (October 8, 1979).

⁵⁵ See e.g. Catherine Z Elgin, 'Emotion and Understanding' in Georg Brun Doguoglu, Ulvi and Dominique Kuenzle (eds), *Epistemology and emotions* (Routledge 2016).

⁵⁶ See e.g. Thomas Nagel, 'Types of Intuition' (2021) 43 *London Review of Books*.

⁵⁷ Catherine Z Elgin, 'Impartiality and Legal Reasoning' in Amalia Amaya and Maksymilian Del Mar (eds), *Virtue, Emotion and Imagination in Law and Legal Reasoning* (Hart Publishing 2020).

⁵⁸ Michael S Brady, *Emotional Insight: The Epistemic Role of Emotional Experience* (Oxford University Press 2013).

⁵⁹ See e.g. Lawrence Blum, 'Iris Murdoch' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2022, Metaphysics Research Lab, Stanford University).

⁶⁰ Emily Kidd White, 'Till Human Voices Wake Us: The Role of Emotions in the Adjudication of Dignity Claims' (2014) 3 *Journal of Law, Religion and State* 201.

negative) epistemic roles in judicial reasoning by gripping and focusing the attention⁶¹ of the presiding judge or judicial panel, thereby prompting a re-evaluation of the impugned law, the legal dispute, or of the transactions and relations involved in the case.

For good or ill, emotions at work in the application of a legal concept ‘can motivate the search for reasons that bear on the accuracy of their own initial assessment of some object or event, and thus motivate the rational reappraisal or reassessment of that object or event.’⁶² It is significant to note here that the attention-directing features of emotions are far from apolitical, and raise a series of questions about whose emotions are legible to those in power, whose emotions are perceived to be legitimate, compound, deeply-felt, or authentic,⁶³ and which harms, wrongs, or interferences warrant emotional concern.⁶⁴

Emotions can work to focus critical attention on the object of emotion, or on a line of reasoning that engages that object, inviting a process of cognitive reflection⁶⁵ that can work to diffuse, intensify, or change the emotion (we can think of fear moving to indignation, or to laughter upon further reflection, for example)⁶⁶ or, more broadly, one’s understanding of the matter at hand. Jenefer Robinson’s understanding of emotions-as-process underscores the ways emotions might contribute to motivation and understanding:

When human beings have an emotional response to something in the (internal or external) environment, they make an affective appraisal that picks that thing out as significant to me (given my wants, goals, and interests) and requiring attention. This affective appraisal causes physiological changes, action tendencies, and expressive gestures, including characteristic facial and vocal

⁶¹ Brady (n 58) 13.

⁶² Ibid.

⁶³ Bandes, ‘Remorse and Criminal Justice.’

⁶⁴ Emily Kidd White, ‘On Emotions and the Politics of Attention in Judicial Reasoning’ in Amalia Amaya and Maksymilian Del Mar (eds), *Virtue, Emotion and Imagination in Legal Reasoning* (Hart Publishing 2020).

⁶⁵ See e.g. Robinson (2005).

⁶⁶ Peter Goldie, ‘Narrative Thinking, Emotion, and Planning’ (2009) 67 *The Journal of Aesthetics and Art Criticism* 97, 10.

expressions, that may be subjectively experienced as feelings, and the whole process is then modified by cognitive monitoring.⁶⁷

As Robinson emphasizes, these various elements are ‘interconnected’: ‘physiological responses reinforce attention’; ‘action tendencies and behavior may change the environment so that the emotional situation changes or dissipates’; and ‘(c)ognitive monitoring may confirm or disconfirm affective appraisals.’⁶⁸ Emotions direct our attention to various features and attributes that resonate with us. Emotions motivate the finding of evidence and analogies that appear relevant to the legal question before the court, and, so too, for good or ill contribute to the smoothing out of various disanalogies and/or evidentiary hurdles that might otherwise present. Emotions have attention-capturing shortcutting functions (fear is the usual example as it inspires a response often before a full cognitive appraisal has had time to form).⁶⁹ Emotions often work as shorthand in this regard; they can be fast-working, motivating processes (we can even think of the names of certain precedents themselves carrying tone-filled, emotional weight, which is not to say well-known precedents won’t conjure up even radically different associations across groups).

For Williams, it is possible to understand correct applications of a thick concept without embracing that concept. In support of this argument, Goldie raises Moore’s example of the concept of the *Sabbath* suggesting that ‘this is a concept whose correct application is readily grasped by those who do not embrace the concept in an engaged way.’⁷⁰ I am not sure this always holds. Even with respect to the example at hand, the *Sabbath*, it is not clear that there isn’t some lack, or difference, of understanding that might translate into a different emphasis, a difference in tone, weight, or considered detail (including the ability to grip some of the concept’s more ineffable aspects) that might lead to an inapt application in particular circumstances. Emotions signal that something is important to an agent and in a particular way. Emotions are important to value-directed practices not only for reasons of authenticity and sincerity but also for understanding.

⁶⁷ Robinson (n 27) at 113.

⁶⁸ Ibid.

⁶⁹ Leighton (n 2).

⁷⁰ Goldie, ‘Thick Concepts and Emotion’ (n 3) 96.

As stated above, ‘insightful observers’ will often be able to perform, or give heed to any expected emotional aspects that would be involved in *fully embracing* a legal concept (a particular conception of liberty, for example), for this is precisely what it means to apply a thick concept in a *world-guided* way. If, however, I am correct that there remains some difference, in at least some cases, in the understanding and application of thick legal concepts through precedent when judges apply them in a *world-guided* but not in an *action-guided* way (with the difference having to do with an emotional engagement that is either live in the particular instance or present at a dispositional level), then this poses a challenge to existing theories of legal reasoning. As Moore writes, ‘to ‘embrace’ a concept is to grasp it in the engaged way. It is to enter into the spirit of the concept, to have whatever outlook gives the concept its point, to *live by* the concept.’⁷¹ There is a difference between chronicling emotions and experiencing emotions.⁷² There is a difference between using emotion words because they appear appropriate to the task, like empathy and compassion, and experiencing either of these things.⁷³

I have written in the past of the concern that judges might employ disordered or false versions of empathy in their legal reasoning practices, drawing on the language of the claimant, without real efforts to understand their station or point of view.⁷⁴ The concern here is how judges might employ precedents to signal a *fully engaged* application of a thick legal concept whilst only drawing on precedents in a *world-guided* manner to serve their own political outlooks and intuitions (or more perniciously, their own stereotypes, and prejudices) about the claimant and the case, thereby failing to give the legal concept full weight,⁷⁵ and, so too, offering a false public account of their own reasoning process (ie., an insincere performance of full engagement). This is not an argument in favour of sincere, *fully engaged* applications of thick legal concepts, which can obviously be objectionable at the level of substantive politics (we know all too well the problem of sincerely held bad politics).⁷⁶ It is the clarification that given the

⁷¹ Moore (n 22) 157.

⁷² White, ‘On Emotions and the Politics of Attention in Judicial Reasoning’ (n 64).

⁷³ White, *Emotions in Legal Reasoning* (n 12).

⁷⁴ White (n 53).

⁷⁵ White (n 51).

⁷⁶ Much will depend here on the theory of legal interpretation at play and whether there are thought to be resources within that theory to correct for injustice.

motivating and epistemic features of emotions, there is reason to believe that the use of precedent will differ across *world-guided*, and *action-guiding* applications of the thick legal concept at issue in a case. The above concern could, notably, also run in the opposite direction, with a judge purporting to use precedent to apply a thick legal concept in a *world-guided* way (aiming, perhaps, for the cloak of authority associated with a cool emotionally disengaged application) when in fact they are using precedent to apply a thick legal concept in a *fully embraced* and sincere *action-guiding* way (whether they are self-aware to know this or not).

ii) *In at least some cases, the law seems to require that a thick legal concept be applied in an action-guiding manner, drawing on certain emotions (whilst resisting others)*

The idea of sincerity that is so important to Williams takes on additional complex dimensions when we enter the terrain of legal reasoning. Sincerity might operate, or fail to operate, at multiple levels with respect to the practice of legal reasoning. Insincerity might signal a chasm between the private normative and/or political views of the judge, and their pronouncement on the status of a particular precedent as binding. Or, as set out above, the difference between a legal concept that is applied via precedent in a *world-guided* but not an *action-guiding* manner.

One response to the foregoing might be to say that the expectation is that while judges must draw on precedents to provide thicker understandings of past applications of a legal concept, they are never required to *fully engage* with the legal concepts that they then apply to the case at bar. Judges in common law legal systems must look to precedents to thicken their understanding of the *world-guided* aspects of the legal concept under examination before applying it in ways that might be defended as correct. There are no expectations of sincerity, or with respect to emotional engagement, at play when considering the demands of the judicial role. Judges are meant to take on the role of the ‘insightful observer’, charged with the task of understanding the legal concepts that are relevant to the present case and applying them regardless of their own political commitments or sense of justice etc.

This is one description of the role that seems right to defend though somewhat incomplete, and, at times, incongruent with some expectations concerning substantive rule-of-law norms, and with respect to the judicial role itself (on the view outlined above, might sincerity not be required with respect to one's adherence to the judicial role, for example?).⁷⁷ There is much variety and variance in the writing styles of common law judges.⁷⁸ Common law judges sometimes write judgements as if there is space between their own political views and what they take the law to require, but not always.⁷⁹ And yet, with respect to at least some legal concepts and values, something seems awry in requiring too strict a separation between the legal concepts and values that require application through the strictures of legal reasoning and those that might be privately held by the judge or judicial panel.⁸⁰ It is not altogether clear that judges aren't meant to feel the weight of some thick legal concepts, like dignity for example.⁸¹

A cold distance is, as John Gardner wonderfully put it, not an unemotional stance, it is just another emotional disposition, and one that itself reveals value commitments or the lack of value commitments.⁸² In at least some cases, something at the level of value commitment and at the level of legal interpretation appears awry where a judge experiences no emotions with respect to the use, description, or interpretation of precedents (or when visiting certain facts within them),⁸³ or where they display the wrong emotions when using precedent to thicken a legal concept. At times, a cold distance is the inapt or wrong emotional response. As John Gardner memorably wrote, 'there is no general or default answer to the question of whether a sober appreciation of reasons for action is more reasonable than an emotionally-charged appreciation of those same reasons for action. Being cool, calm, and collected is just another place on the

⁷⁷ Terry A Maroney, 'The Persistent Cultural Script of Judicial Dispassion' (2011) 99 California Law Review 629.

⁷⁸ Del Mar (n 5).

⁷⁹ *ibid*; Maroney, 'The Persistent Cultural Script of Judicial Dispassion' (n 84); White, *Emotions in Legal Reasoning* (n 12).

⁸⁰ White, 'Replaying the Past' (n 4).

⁸¹ White, 'Till Human Voices Wake Us: The Role of Emotions in the Adjudication of Dignity Claims' (n 60).

⁸² Gardner (n 30).

⁸³ See e.g., Benjamin Zipursky, 'DeShaney and the Jurisprudence of Compassion (Case Note)' (1990) 65 New York University Law Review 1147.

emotional map, with no special claim to rational efficiency.⁸⁴ He continues, 'Neither the passionate nor dispassionate among us has any a priori claim to be generally more effective in acting in conformity with reasons about value.... Sometimes, surely, a cold calculation is just the opposite of what is called for.'⁸⁵ Emotions are, in Gardner's terms, precisely those that are called for in the practice of a value. As Michael Stocker and Elizabeth Hegemon write:

Emotions may show valuing rather than value: how a person values something, not the value something has or the value the person takes it to have. Sometimes people have emotions that contain and reveal valuing, not values; and sometimes people have emotions that reveal a lack of valuing, even in the face of acknowledged value... I may not value, or may barely value, what I know has great value. For example, I may not value or may barely value a given school of music, even though I know – and know directly, for myself, not just by being told by those I know do know – that it is of the very highest value.⁸⁶

In at least some cases, applications of a legal value will appear inapt where a judge appears not to have the requisite emotions when drawing on various precedents, or interpretation of precedents, or, in the alternative, where they display the wrong emotions.⁸⁷ Martha Nussbaum, for example, argues that disgust has no place in law because no other emotion paints its object in such a negative and contemptuous light.⁸⁸

b) The concern over inconsistent or unequal applications of action-guiding concepts

The final critique of the neo-sentimentalist position in Goldie's paper also stems from a concern about generality in the theoretical construction of the relationship between emotions and thick concepts. Here Goldie addresses Moore's revision to the neo-sentimentalist's position,

⁸⁴ Gardner, 'The Logic of Excuses and the Rationality of Emotions', at 349.

⁸⁵ *Ibid.*

⁸⁶ Michael Stocker and Elizabeth Hegeman, *Valuing Emotions* (Cambridge University Press 1996) 158.

⁸⁷ White, 'Till Human Voices Wake Us: The Role of Emotions in the Adjudication of Dignity Claims' (n 60).

⁸⁸ Nussbaum (n 29).

critiquing that it does not account ‘for a limited domain of a fully engaged application of a thick concept.’⁹¹ Here Goldie draws upon an example from R.M. Hare of an aggressive and demeaning initiation ceremony for recruits at a military academy taking place under the authority of an official who knows perfectly well how to *fully engage* with the concept of *cruelty* when it comes to his own children. Goldie notes how the official might withhold the use of the thick concept of *cruelty* in judgments about what had been done to the recruits,⁹² or, more subtly, use the term knowing how it applies in the usual case while recasting some of its implications (‘the ceremony was *cruel* but entertaining’). In the second case, we could say that this official was not *fully engaged* with the concept in this context though they are in other parts of their life. As Goldie writes, ‘(s)uch a person is by no means inconceivable nor unimaginable.’⁹³ Summarizing the argument, he writes, ‘for any particular person, full engagement with a thick concept, and correlatively its action-guidedness in application by that person, need not apply across all domains. One can be fully engaged in a concept here but not there.’⁹⁴

In the field of legal reasoning, this insight translates into a concern that judges use precedent to *fully engage* in the application of a legal value when certain issues are at stake, or more perniciously, when the rights, or interests of certain groups are at stake, but not always, and not across all of the applicable domains.⁹⁵ Like the official above, they also might not see how they have carved out a space where they simply won’t recognize the application of the thick concept as apt, or they will readily (and not always self-knowingly) craft narratives as to why certain suspensions, revisions, qualifications, or provisos to the concept’s application are appropriate. The philosophy of emotion here elicits this deep criticism of judicial reasoning that is otherwise difficult to pinpoint because on the face of the legal reasoning in question, the applicable legal concepts will either be seen as non-applicable, or they will be referenced but only in a superficial or lifeless manner. Susan Bandes has, for example, written of how the emotion of remorse implicates something of a future gaze, and a promise of better behaviour. She finds, devastatingly, that judges are often less apt at reading a

⁹¹ Peter Goldie, *The Mess Inside: Narrative, Emotion, and the Mind* (Oxford University Press 2012) 100.

⁹² Goldie, ‘Thick Concepts and Emotion’ (n 3) 100–101.

⁹³ *ibid* 101.

⁹⁴ *ibid*.

⁹⁵ White, ‘On Emotions and the Politics of Attention in Judicial Reasoning’ (n 64).

concrete future (full of family, success, education, etc.) for poor and/or racialized defendants, and hence are less likely to attribute to them the emotion of remorse, a factor which has concrete consequences in terms of sentencing.⁹⁶ Cast in more general terms, the concern is with a legal test applied in seeking and searching ways for some claimants but not others, or with respect to some legal rights and not others, with precedents marshalled to give apparent warrant to such disparate results, obscuring the structured inequality at play.⁹⁷

This is a powerful challenge for theories of judicial reasoning that encompass the use of precedent. Masked by the *world-guided* applications of legal concepts (which might even evince the appearance of the right and requisite emotional stances – outrage at cruelty, anger at discrimination etc.), the legal reasoning might look defensible on its face, but it will lack the *fully engaged* application of the concept. A masked, bloodless application.

We know all too well in our political life about half-hearted attributions of rights, for example, to refugees and migrants.⁹⁸ Some legal concepts get applied in highly motivated ways and others not, and with respect to some interests and not others. These uneven *fully engaged* applications can at times undermine the legal value in question (a value like human dignity that is meant to be attributed equally to all human beings), and so too the principles and norms of application concerning equality and equal treatment before the law.

⁹⁶ Susan A. Bandes, 'Remorse and Demeanor in the Courtroom: Cognitive Science and the Evaluation of Contrition,' in *About the Integrity of Criminal Process: From Theory into Practice* (Hart Publishing, 2016).

⁹⁷ On the indeterminacy of legal language serving the interest of some while giving legal warrant for dispossession and violence against others, see, e.g., White, 'Notes on a Supreme (Legal) Fiction' (n 52); Robert Knox, 'Haiti at the League of Nations: Racialisation, Accumulation and Representation' (2020) 21 *Melbourne Journal of International Law* 1; Ntina Tzouvala, *Capitalism As Civilisation: A History of International Law* (Cambridge University Press 2020).

⁹⁸ See e.g., Itamar Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (Cambridge University Press 2016).

5. CONCLUSION: DEEPER THAN LEGAL REASON

She felt a warning tremor as she spoke, as though some instinct deeper than reason surged up in defense of its treasure. But Darrow's face was unstirred save by the flit of his half-amused smile.

Edith Wharton, *The Reef*⁹⁹

Embedded in the context of legal reasoning, the core insight in the above-referenced papers by Williams and Goldie – that one must avoid the risk of over-simplifying or over-generalizing the relationship of emotions to thick evaluative concepts – seems as fruitful as ever. A focus on emotion illuminates some of the more subtle ways in which judicial uses of precedent reveal held values, ways of seeing, and political commitments, and so too, some of the stark demands placed on the judicial role by various theories of judicial reasoning and precedent.

A focus on emotions in the use of precedent in the application of legal concepts reveals a distinction between full engagement and something less than full engagement, that might otherwise be difficult to ascertain. This distinction can work to derogate from commitments to both substantive and procedural commitments to equality and equal treatment under the law. Nothing in this paper constitutes an argument in favour of all legal concepts being applied in a *fully engaged* manner. This is a separate question of ethics, and politics. The question, however, of whether this is what the law calls for remains a pressing, critical and uncomfortable one. Questions about judicial sincerity and self-knowledge seem overly intimate and yet highly relevant.

Gerry Simpson writes that one motivation for his recent book that details some of the sentimental aspects of international law is ‘the hunch that most of what is interesting in life occurs off-screen...’¹⁰⁰ This hunch is here shared and taken as a warning that much of the work of emotions in legal reasoning is subsurface, impacting our understanding of legal questions in myriad ways. Legal concepts will be *fully embraced* at the service of some goals, and persons, and ways of life but not others. The deeper-than-reason

⁹⁹ Cited as epigraph in Robinson (n 16).

¹⁰⁰ Gerry Simpson, *The Sentimental Life of International Law: Literature, Language, and Longing in World Politics* (Oxford University Press 2021).

political outlooks of judges shape reasoning efforts and case outcomes in ways that are, at times, hard to ascertain and hold to account. This isn't necessarily a fatalistic conclusion. Rather, it is a call for subsurface emotional dispositions, and the politics they reveal, to be drawn out and subjected to critique. Or, more broadly, a call to question whether present processes of adjudication are constructed to deliver on the norms and commitments they profess.