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Abstract

Legal reasoning in the common law tradition requires judges to draw on concepts, and examples that are meant to resonate with a particular emotional import and operate in judicial reasoning as though they do. Judicial applications of constitutional rights are regularly interpreted by reference to past violations (either through precedent, contextual framings, and/or legislative history), which in turn elicit a series of emotions which work to deepen and intensify judicial understandings of a right guarantee (freedom of association, freedom of expression, equality, security of the person, etc.). This paper examines the way in which invocations of past political histories, and rights abuses (however ill or well-defined), work to conjure up a set of *service emotions* (emotions which work to establish a particular frame of mind), which guide judicial applications of doctrine in cases concerning an alleged violation of a constitutional right.

Key words

Emotions; law and emotions; judging; legal reasoning; constitutional rights

Resumen

El razonamiento jurídico en la tradición de derecho consuetudinario exige que los jueces partan de conceptos y de ejemplos que se supone se hacen eco de un significado emocional concreto y que, en el razonamiento judicial, operan como si de hecho así fuera. La aplicación judicial de derechos constitucionales se interpreta generalmente por medio de referencias a delitos anteriores (a través de encuadres contextuales precedentes o bien a través de la historia legislativa), lo que, a su vez, invoca una serie de emociones que profundizan e intensifican la interpretación judicial de una garantía jurídica (libertad de asociación, libertad de expresión, igualdad,

This chapter was presented at the *Judging, Emotion and Emotion Work* workshop convened by Kathy Mack, Sharyn Roach Anleu, Stina Bergman Blix, and Terry Maroney in May of 2018 at the International Institute for the Sociology of Law in Oñati, Spain. The author was grateful for the invitation and also to the participants and conveners for their rich and constructive feedback on the paper. The chapter benefited from early feedback from Jeremy Waldron, Moshe Halbertal, Christopher McCrudden, and Peggy Cooper Davis. The author would like to thank her anonymous reviewers for their extremely useful comments and questions, and, so too, Leire Kortabarria for her fine copy-editing, and expert organization of this volume. Finally, the author would like to extend her particular thanks to Terry Maroney for her support and guidance with this piece.

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seguridad de la persona, etc.). Este artículo analiza la forma en que las invocaciones a la historia política o a abusos de derechos (por mal o bien definidos que estén) sirven para formar un conjunto de emociones de servicio (que sirven para establecer un estado de ánimo concreto), que guían la aplicación judicial de la doctrina en casos de presuntas violaciones de derechos constitucionales.

Palabras clave

Emociones; derecho y emociones; juzgar; razonamiento jurídico; derechos constitucionales

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1. Introduction

While the ideal of the dispassionate judge reflects an important set of normative commitments that track widely across differing approaches to the study of law, it ultimately rests upon an account of law and the judicial role that remains only surface-level true. Judges have distinct role-related reasons for conscientiously drawing on certain emotions, or even cultivating certain affective dispositions which flow both from the governing legal doctrine (Bandes 1996, 1999, Gardner 2008, White 2014), and more generally, from the serious and solemn task of judicial reasoning, and judicial decision-making.

Political histories and past right abuses are regularly invoked in common law legal reasoning, through precedent and/or legislative history, to establish the purposes and purview of an impugned constitutional right. This paper analyzes the work of emotions in judicial invocations of historical rights violations and, in so doing, it puts pressure on the assumption that judges must altogether exclude, extirpate, or quiet emotions to reason through a case. The paper concludes that while governing law requires judges to expel certain extraneous emotions (inappropriate, pernicious, or distracting ones, for example), it also regularly requires them to draw on (often highly particularized) emotionally-laden examples that work to set the course of the legal reasoning required by the case at bar (see Del Mar 2013). Though the paper draws on the methods of analytical philosophy, its focus places the work in useful conversation with those sociologists, psychologists, and socio-legal scholars who work on questions concerning emotional regulation (see Gross 2014, Roach Anleu and Mack 2017, Bergman Blix and Wettergren 2018). These methods and perspectives focus on the relationships between social roles and expectations, emotion and motivation, emotion work, and emotional performance. This paper supports these inquiries by drawing on philosophical methods to analyze how legal doctrine (see Maroney 2006) requires judges to use (or in other terms, "regulate") emotions and emotional states in the course of legal reasoning. Whether or not we have the ability to test the authenticity – whatever that might mean – of judicial emotions – it is clear that governing doctrine and practices of legal reasoning within a legal system can themselves demand a great deal of emotional thinking from judges (see Maroney 2006). While emotions can support legal reasoning by playing pragmatic and motivational roles, they can also play constitutive roles forming part of the intended understanding and use of a legal concept. In the context of constitutional reasoning, the absence of certain emotions might signify a failed application of the governing law, or, for example, a failed understanding of the purposes, significance, and/or reach of a constitutional rights guarantee.

As this inquiry aims to work from doctrine, it finds itself embedded within a series of long-running jurisprudential debates on the scope, practice, grounds, and hermeneutics of legal interpretation. As such, a few preliminary distinctions clear ground for the analytical work that the paper is pursuing. First, what ethics, and good politics requires can be radically distinct from the established or authorized forms of legal reasoning within a political community. Evaluative legal concepts require judges to adopt affectively rich understandings of certain legal objects, subjects, actions, and events in their reasoning efforts (White, forthcoming). Governing law requires judges to confront these legal objects, subjects, actions, and events in a particular tone, and/or emotional register. Emotions contain evaluative judgements, and we can weigh them ethically, and politically (see Bedford 1956, Solomon 1977b, 2003, Nussbaum 2001, Deigh 2008). While some have contemplated a category of moral emotions (like compassion; see Haidt 2003) that maintain their moral features across context, the view here is that emotions are never in themselves moral or morally beneficial, but that they have the potential to play constitutive roles with respect to ethical action when they are felt aptly, and in the appropriate circumstances (see Gardner 2008, White forthcoming). The emotions required by legal reasoning might at times overlap, make good on (law might make certain emotions, or more broadly, certain ethical activity possible), or echo real normative commitments, but this

question of convergence is always separate and distinct. As it will be argued, it is especially important to keep the question alive, given that the service emotions that play constitutive roles in legal reasoning claim the status and authority of moral emotions (and reasons; see Raz 1979) as they work to establish emotionally-laden ways of seeing and reasoning about legal objects, subjects, actions, and events. There is a political economy to this, and it will be a question of justice, or fairness, or political recognition whether or not governing law does this well or poorly (we might condemn, for example, from the perspective of justice a legal system which imbued little emotional weight or import to the legal category of the non-citizen or the refugee). At times, the evaluative legal concepts (such as equality, security, liberty) that feature regularly in constitutional legal orders invite expansive, and principle-based purposive reasoning into judicial determinations of the purview of a right, for example. While evaluative legal concepts offer foothold for weaving (a more explicit category of) normative considerations into legal reasoning, the practice nevertheless retains a distinctive form (see MacCormick 1978) even in the face of practical disagreement. Put another way, while there is some potential for the emotions that form part of the application of certain evaluative legal concepts to push towards more just or inclusive judicial interpretations of existing doctrine, this is not an inevitable feature. Emotions in judicial reasoning, even when they are required by legal doctrine, can work counter many of our political and normative commitments, including those which overlap with fundamental legal values, to equality before the law, for example (see Bandes 2016).

Second, the paper draws on the tools of analytical philosophy to work out the emotional elements of certain practices of legal reasoning, and, as such, is distinct from an inquiry into our ability to access the sincere-or-not mental states of judges, and so too, sociological research on the expressive or performative aspects of judicial behavior (see Roach Anleu and Mack 2017, Bergman Blix and Wettergren 2018). Third, and last, it should be recognized that judicial references to past rights abuses through legislative history and precedent can be deeply problematic from an ethical or political standpoint. They can be maliciously false, tragically under-inclusive, superficial, one-sided, etc. The law has long failed to recognize, or recognize in any substantive way, countless histories and structural forms of political violence. There is a political economy to what doctrine requires from the emotions of judges.

2. Drawing on Emotions; Emotions in the Service Role

I memorized the tricks to set the river on fire –

Robert Lowell, *Reading Myself,* 1973

Emotions have affective and cognitive states that relate closely to one another (Solomon 1977b, 2003, Leighton 1985, 2003, Nussbaum 2001). Emotions involve a judgment or evaluation of importance 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 constituent desire for action (Gardner 2008), and, ultimately, differentiates them from other modes of thought or experience (Robinson 2005). While there are several ways in which emotions interact with law (see Bandes 1999, Sanger 2001, Maroney 2006, 2011, Abrams and Keren 2010) the focus here is on the various roles that emotions play in legal reasoning. A standard assumption is that emotions always present in the form of a reaction – that is, a person responds with an emotion to persons, or events occurring in the world. In terms of judicial reasoning, the dominant frame is to think of a judge responding with emotion to the testimony, or evidence in a case, to the figure of the claimant, or even to legal processes themselves (frustration over a delay, for example, White 2014). This is, however, but one way in which emotions play a role in judicial reasoning (White forthcoming). This paper looks past this dominant view to explore one instance where actors, in this case – judges, draw on emotions to put themselves into a particular emotional frame for the purposes of reasoning in line with the governing doctrine. It

distinguishes between two distinct sets of reasons why judges might draw on emotions. Judges might draw on emotions for reasons of appropriateness, having considered that certain emotions, and emotional states are part of the right understanding and application of certain legal concepts. Conversely, judges might draw on particular emotions because they understand them to be productive and/or useful in some way. An emotion might be, for example, especially motivating (revenge, honour) or, it might play positive epistemic roles by gripping and focusing the attention (Brady 2013) of the presiding judge or judicial panel, thereby prompting reevaluations of the purview of the impugned right, for example.

In our daily lives, we regularly draw on emotions to help us generate the appropriate quality of mind to act or reason in accordance with a held value (or one prescribed to us via a role, practice, or a relationship). Elsewhere, I have termed this a *service role* that some emotions sometimes fulfill (White 2014). This role or function is named after the service beliefs that help constitute the emotion in question. In contrast with tracking beliefs, service beliefs "do not relate world to mind at all. They are reasons to adapt (or preserve) the way things are (including aspects of ourselves) in the service of value" (Gardner 2008). Emotions fulfill service functions when their constituent beliefs aim to serve a value (others have drawn on the terminology of practical reasons) (Gardner 2008). It is often the case that we try to exclude or temper certain emotions to act in accordance with a value. In a similar vein, we may also try to put ourselves in a position to experience an emotion because we understand it to be called for or appropriate. Forms and practices of emotional regulation have been studied in the psychological literature (see Gross 2014). In the philosophy of emotion, it has been recognized since at least Aristotle's time that emotional states of mind can be scrutinized, displaced, or fine-tuned, and, they can, at times, also be conjured up, which is our focus here.

Underscoring the epistemic benefits of emotions in the service role effectively undermines the Kantian view of emotions, which, as summarized by Bernard Williams, sees emotions as "capricious", "passive", and, as the "product of natural causation", "fortuitously distributed" (Williams 1973). This Kantian view 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." (Williams 1973). The Kantian view requires revision, especially when we consider our emotional reactions as occurring over time. While it may be difficult to draw on emotions to alter our experience of the world, it is also possible, and, at times, ethically, politically, or practically required (Solomon 2003).[1] We regularly revise our emotional responses by focusing on the object of concern and pressing ourselves to see whether our response was appropriate, for "as the phenomenologists have constantly stressed, to feel a certain emotion towards a given object is to see it in a certain light; it may be wrong, incorrect, inappropriate to see it in that light, and I may become convinced of this" (Williams 1973). This is not to say, however, that such processing always operates to mute or quiet an emotion. Appropriate emotions are not always moderate or tepid ones (Aristotle 1984)[2] and revision can, at times, have an intensifying effect. We do this sort of work by putting pressure on our judgments, setting up habits of mind or body (everyone feels better after a swim), calling up competing emotions, or using our imagination. As Bernard Williams writes,

[1] Solomon's core theses: 1) that we are responsible to some extent for our emotions, and 2) that emotions themselves are cognitive judgments and not simply feelings (although they will, of course, relate closely to feelings and physiological reactions).

[2] Strong emotions are sometimes precisely what are called for under certain circumstances. We also needn't rely too heavily on the notion of control. We might think of some human losses as so jarring, for example, that debilitating grief rightly follows. See, for example, Francine Prose's examination of self-forgiveness in her review of the 2017 film *Manchester By the Sea* (Prose 2016). We might think of a host of examples where emotions overwhelm us without ever exceeding the bounds of appropriateness.

> Of course, it may be that no thoughts about the object shift the emotion; because they fail to convince (which, notoriously enough, may be a function of the emotion itself) or because, although they in a way convince, the emotional structure persists. The phenomenology, psychology and indeed the logic, of such situations is highly complex and various. But the important point now is this: that when considerations which show the emotion to be inappropriate fail to displace it, this is not because it is an emotion, but because it is an irrational emotion. (Williams 1973)

Similarly, it is possible to generate an emotional reaction, as part of a desired state of mind, by calling up events and images, real or imagined.[3] Think, for example, of setting out on a visit to see a friend who has been unwell. It is a visit during a busy work week filled with some minor but unexpected letdowns and sleepless nights with a teething toddler. Think of how you might take a moment before that visit to hold your friend in your thoughts, call up certain memories, and consider the difficulties that she is facing to put yourself in a good position to be genuinely loving and attentive during your time together. This is an example of emotions fulfilling a service function, and, so too, the conscientious and imaginative, and image-laden work that is required to call up the appropriate emotional state for the task at hand. Though this example is set within the confines of a friendship, the dynamic works similarly in the context of impersonal relations, a category more relevant to the task of judging.[4] At times this work is ritualized (the donning of robes, the double knotting of cleats, or the act of kneeling in prayer), with the aim of generating the right emotional frame for a practice.

The interest here is in the conscientious work required to establish an emotional state that is motivated by the actor's desire to act or reason well, and where certain emotions are understood to be constitutive of the appropriate action or understanding. This definition sets asides those instances where an actor draws on an emotion for purely pragmatic reasons (making my toddler laugh in the grocery store to stave off a tantrum). In short, the focus here is not on the general utility of an emotion with respect to action but rather on the emotions that form part of the application of a value.[5] This is not to say, however, that we don't find these functions interwoven. Martha Nussbaum, for example, relies on a combination of pragmatic and normative reasons when she argues that the pervasiveness of hate, bigotry, and prejudice demands a conscious application of social emotions in political life (Nussbaum 2015).

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. It is often through an emotion that we learn about the best means by which to act in accordance with a value. It is for this reason, then, that we sometimes draw on emotions in the service role. Peter Goldie offers an illuminating example of an agent using the emotion of regret for planning purposes (Goldie 2009). As Goldie sketches it out, Sally wishes to catch a train to attend a lecture. Sally wants to have a shower but really doesn't, for certain, have time to have one and arrive at the station in time. Imagining how terrible it would feel to miss the lecture by arriving too late for the train (the emotion of regret) helps Sally prioritize these desires, dropping the shower to get to the train on time. In this case, Sally consciously draws on the emotion of regret to test and clarify her priorities, and then act upon them. She puts the emotion of regret to use in her reasoning processes

[3] In the *Gorgias*, Plato argues that *logoi* (discourse, speech acts) have the power to "stop fear and take away grief and engender joy and increase fellow feeling," cited also in Nussbaum 1996.

[4] There is a parallel here with some of the sociological research on "emotion work", which has focused on those, usually gendered, fields of employment (airline stewardess, nurses etc.) which requires workers to manage the emotions of clients. (Hochschild 1983).

[5] The argument here is that emotions are epiphenomenal to the structure of the legal value of human dignity. Their appropriateness derives from the nature and structure of the legal value (which is not to say that there is agreement on the nature and structure of this value). The characterization of emotions as derivative of a wrong (or a value) in this sense does not diminish their role. He writes: "A derivative role in the relevant sense might well be a major role, even the dominant role" (Gardner 2016).

to act in accordance with her values. The point here is the aim of the paper - we, at times, consciously use examples, historical or imagined, because we know that they evoke emotions which facilitate our ability to act or reason well (in accordance with a role, or value).

Emotions fulfill a service role when we draw on them to generate the right quality of mind to act well – that is, when we consciously place ourselves in a position to experience an emotion because we understand it to be in line with a value-directed practice (Williams 1973, Scheffler 1991). When we draw on a particular emotion in the service of a value, there might be corollary epistemic or pragmatic benefits. While these are at times termed, "service emotions" in the paper, they are really emotions that are fulfilling a service role (a necessary specification as individual emotions can function in various roles (see White 2014).

3. Judicial Emotions and Rights Violations

Judges determine the ambit of a constitutional right in the context of an alleged violation. This work requires the right affective understanding of both a rights guarantee, and the harm or wrong of its violation, which are both distinct from the emotional reactions of judges to the evidence in the case at hand. Generating and maintaining the right affective understanding of the idea of a rights violation requires a series of mental efforts that are aided by emotions operating in the service role. Set within the scaffolding of legal doctrine and precedent, this is a backwards-looking, example-driven exercise that aims to generate and maintain a somber and negative emotional dimension to the conceptual category of a rights violation. The adjudication of constitutional rights requires judges to consciously draw on a series of affectively charged examples drawn from precedent or legislative history, which cultivate a series of solemn emotions like lament, rue, and indignation. These are steadying, reflective emotions that are called up by judges through a familiar set of legal reasoning techniques in order to infuse an inquiry into an alleged rights violation with the requisite weight and solemnity. This section proceeds in two parts. First, it describes the role of service emotions in judicial understandings of a rights violation. Second, it examines the epistemic value of painful emotions in legal reasoning about a potential rights violation.

3.1. Constructing the Legal Category of a Rights Violation

Emotions can be appropriate to a role or task. Emotions fulfilling service roles enable judges to generate and maintain the affective understanding of a rights violation required by the governing legal values and doctrine of a constitutional order. A rights violation must be understood as a harm or wrong, and this understanding would be incomplete without emotions. For judges, negative emotions should arise when confronted with the idea of a constitutional rights violation, and they should grow more acute, specific, and painful even, in the face of particular examples (should cynicism or burnout dull these emotions, then we might charge that judges are not applying the doctrine as they are required to do, i.e., they are not giving full protection to the constitutional guarantee in question). The source of the obligation to build this negative emotional sense into the category of a rights violation stems from a governing legal scheme (and a constitutional rights violation always represents a threat to political authority where this is premised on governmental powers being limited by constitutional rights). Whether the lament, somberness, and/or painful recognition that a judge is required to experience when reasoning through a constitutional case tracks a freestanding or all-things-considered ethical or political obligation is a powerful question that should be posed vis-à-vis any legal system, though it is left here unaddressed.[6]

[6] Whether the affective dimensions of the category of a rights violation are seen as constitutive or epiphenomenal might depend on your theory of judicial interpretation.

Not all legal wrongs require judges to experience emotions and we can imagine several examples where judges have to do very little emotional work to properly understand the legal concepts that must be applied in the case at hand (certain legal categories, like sexual assault, or false imprisonment, would appear to have a strong negative emotional imports, while others, like a noise violation, or a contract breach appear less clearly to possess the same). This is not the case with respect to an alleged violation of a constitutional right. A judge conceiving of a rights violation neutrally, without any trace of lament, painful affect, or solemnity, would appear not to be grasping the positive sense of the rights guarantee (though the intensity of the expected emotional response might depend somewhat on how broadly the ambit of the right has been drawn, and whether or not the rights violation is ultimately subject to proportionality or justificatory reasoning), and the specific harm or wrong of an interference with those rights. Judges are called upon to apply general values, concepts, and categories to particular cases (Dworkin 1977, MacCormick 1978). Emotions play a role in crafting judicial understandings of the general category of a constitutional rights violation. This emotional layering can be distinguished from the claimant's own subjective experience of an allegedly rights-violating law or government act.[7] It is also likely to be particular to the right in question, whether it be one that provides a guarantee of equality under the law, or a protection against certain kinds of deprivations of life, liberty, and security of the person.

While this is an analytical argument about what legal reasoning requires of emotion, we can nevertheless detect traces of this mechanism at work in the text of judgements where constitutional rights protections are introduced via evocative descriptions of precedent and legislative history (see McCrudden 2015). Such references work to guide judicial understandings of the nature and purposes of the constitutional right in question, and emotions play a role in layering and deepening that understanding. To analyze a potential rights violation in common law reasoning, judges consider past precedent where the constitutional right in question had been violated in purposes or effect. At times, judgements will refer back to the social ills or political wrongs that occurred prior to the recognition of the constitutional right in question.[8] Aharon Barak, former President of the Supreme Court of Israel, has written that judges interpret constitutional rights taking into account both the constitutional or human rights architecture of a specific political community as well a political community's specific historical and social background that led to the recognition of certain constitutional rights within that legal–political order. Understanding how a history of political violence bears on the idea of a constitutional guarantee is far from a neutral task. Insofar that the legal concept of dignity is frequently used to interpret constitutional rights (McCrudden 2008, 2013, Waldron 2012a), judges often turn to historical examples of dignity violations as part of their rights analysis. Writing on the uses of the past to interpret the legal concept of human dignity, Peggy Cooper Davis writes,

> Since World War II, as international rights codifications have proliferated, use of the term human rights has become more common in legal discourse and is now commonly associated with the concept of human dignity. In this same post World War II period, the concept of human dignity has come to carry new associations: those who drafted new constitutions in response to acts and political arrangements that were widely regarded as atrocities identified respect for human dignity as the principle those atrocities had violated. Most notably, Germany after the Holocaust and South Africa after apartheid built new constitutions with cornerstones of respect for human dignity. This, I argue, was a key development toward understanding human dignity through protest against its denial. (Davis 2016)

[7] There are a number of reasons that individual claimants might not experience a rights violation under law as painful or not wish to frame a rights claim before the court in such a manner. At times, we wish to stand on our rights. (See Williams 1992, Waldron 2013).

[8] See, for example, the early decision of the South African Constitutional Court in *State v Makwanyane and Another* [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), [1996] 2 CHRLD 164, 1995 (2) SACR 1 (CC).

Jeremy Waldron, in a similar vein, highlights the connection between judicial interpretations of human dignity and a series of historical periods where the laws within a particular political community did not recognize the equal humanity of persons. He writes, "every country has to cope with the burden of its own history, with vestiges of its commitment to an ideology of differential dignity. Think of the United States, for example, burdened by a history of slavery and institutionalized racism" (Waldron 2012a). Reacting to these histories of dignity violations without an emotional response would signify something like an incomplete understanding (see Solomon 1977b, de Sousa 1987, 2011) of the rights secured by the constitution. When the law requires a judge to reason in accordance with a value, they must be sensitive and responsive to value threats. It is a feature of holding a value that we respond with emotion to real or imagined examples of that value being undermined or impeded (Stocker 1996).

Certain emotions appear constitutive, or epiphenomenal perhaps, to the idea of injustice (particular candidates here might include: lament, rue, pity, concern, anguish, solemnity, outrage and/or indignation). Conversely, concepts of injustice might themselves bear a unique and distinctive (however unnamed) emotional aspect (see White forthcoming). The relevant emotions concerning injustice are called up by judges using a familiar set of common-law reasoning techniques (see Del Mar 2013, 2018) which include references to precedent and legislative history. Often powerful phrases are repeated time and again through judgments, nearly as recantations, with the aim of establishing a more robust and tone-filled understanding of the constitutional right in question. Referring to past rights violations via precedent or legislative history bring front-of-mind a series of affectively-charged images and examples which work to both establish and hold the meaning of the constitutional right in question, and to set the right frame of mind for reasoning through the case at hand. These are familiar legal reasoning techniques used by judges of all levels of court. Judges regularly look to past uses to establish the meaning and veracity of a legal concept prior to its application to the case at hand. As mentioned, this generally consists of references to precedent and legislative history, but it can extend more broadly to include historical examples of violence and/or widescale, paradigmatic violations of rights (or the emblematic, seared-into-the-memory-of-a-group particularized instance of a broader political injustice, Michael Brown in Ferguson, for example (see Jackson 2016, Blum 2017) as we see with references to apartheid in the South African jurisprudence, for example, and with references to National Fascism and the Holocaust in the German constitutional jurisprudence (Habermas 2010, Scott 2013, Tasioulas 2013). As Aharon Barak has argued, judicial interpretations of constitutional rights draw upon both the constitutional architecture of a particular jurisdiction and broader historical and sociological understandings of the sorts of wrongs and harms that constitutional guarantees aim to prevent (Barak 2015).

Through these reasoning techniques, the emotions that relate to injustice are raised, offering form, grip, and salience to the idea of a rights violation. These emotions work to lend seriousness and gravity to the inquiry at hand. They also potentially offer an important sense of humility to judicial reasoning efforts, as they invariably highlight the past failures of judges to overturn laws that perpetuated indignity, and/or violated constitutional rights.

One way of clearly demarcating the service role for emotions in legal reasoning is to point to the section of the legal judgment where we might expect the emotions to function in this role. Common-law judgments[9] generally share the same elements and basic structure: a statement of facts, lower court findings (where applicable), the governing law, the position of the parties, the application of the law to the legal issues presented, the decision, and the remedy. The relevant section of the judgment is, then, the governing law section. Here we are concerned with the ways in which

[9] Civil law judgments contain similar elements (Waldron 2012b).

emotions work to set up thinking about the general category of a constitutional rights violation, and the role that emotions play in the legal reasoning techniques that concretize the constitutional right in question. Affectively laden examples play a role in establishing judicial understandings of the purposes and purview of the right in question, and so too in the stakes of its violation.

Service emotions here contribute an additional layer of meaning to the concept by lending structure, and often a sense of importance and clarity, to judicial understandings of rights protections. This function reflects the notion of "thickening", which draws upon the thin/thick distinction in ethical theory (Dworkin 1972, Williams 1985, Scheffler 1987, Waldron 2010b). 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. According to this distinction, thick concepts "are said to have both evaluative conceptual content, for they seem to be keyed in to approval (or disapproval), and descriptive content, for they help to give us a specific idea of the character of the person, object, or action, so characterized" (Kirchin 2013). 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, thinks others should do the same, and so on" (*ibid*.). 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" (Kirchin 2013). Thick concepts are specific, as opposed to general, evaluative ones. "Gentleness", "cruelty", and "patience" are examples.

Emotions, such as those that respond to an injustice, can also be thick – that is, they contain evaluative judgements, and tend to be rich in detail and tone (see King 2007). Similar to thick concepts, thick emotions bind together judgments, affect, dominant metaphors, scripts, and desires (Solomon 1977a). Reactions of pain and horror to the ill treatment of others can strike us, and hold us, and provoke in us a recognition and understanding of the rights-violating form of a law or practice. Here, however, the task is to build in an emotional understanding of a particular constitutional rights guarantee by referencing a history of violation within the political community (or, more broadly, across political communities). Peggy Cooper Davis puts the argument powerfully here:

> The concept of respect for human dignity has, I think, been best understood in the process of contemplating its lack. Certain constraints on people and certain ways of relating to people strike us as deeply inconsistent or dissonant with the respect they are due. We then reason back to discover what causes our sense of dissonance. When we contemplate physical abuse or the taking of human life, our sense of dissonance may reflect identification and faith that our own kind is precious. And identification may encompass a communal feeling such that the pain or death of one is felt as a direct loss to all. (Davis 2009)

Take, for further example, the *Obergefell v Hodges*, _ 576 US (2015), case before the United States Supreme Court that found that the right to marriage for same-sex couples was protected under the Due Process Clause and the 14th Amendment's Equal Protection Clause. Dignity plays a unique role in American constitutional law and historically has referred to institutional or corporate, not human, dignity (Daly 2012). In *Obergefell*, however, it is the legal value of *human* dignity that plays an important role. The value is constructed through references to its erasure under American law, and it is through a reference to this history that the Court builds a powerful emotive sense of the category of a dignity violation. The Court uses the usual dictates of legal reasoning to build meaning into the concept.[10] The Court emphasizes, in the passages included below, how the commitment to equal dignity between persons had been systematically violated through law, using the examples

[10] For a lovely related piece on exemplarity and narrativity in legal reasoning, see Del Mar 2013.

of the doctrine of coverture, the legal ban on interracial marriage, and the criminalization of same-sex relations.

> Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. See 1 W. Blackstone, Commentaries on the Laws of England 430 (1765). As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned (…).
>
> Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions (…).
>
> Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970's and 1980's. Notwithstanding the gradual erosion of the doctrine of coverture…invidious sex-based classifications in marriage remained common through the mid-20th century. See App. to Brief for Appellant in *Reed v Reed*, O. T. 1971, No. 70–4, pp. 69–88 (an extensive reference to laws extant as of 1971 treating women as unequal to men in marriage). These classifications denied the equal dignity of men and women. One State's law, for example, provided in 1971 that "the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit" Ga. Code Ann. §53–501 (1935)…
>
> They ask for equal dignity in the eyes of the law. [*Obergefell et al. v Hodges, Director, Ohio Department of Health, et al*. _ 576 US (2015)]

In short, precedents build up a sense of the stakes of the category of a rights violation. As *Obergefell* shows, the Equal Protection Clause is given history, density, and meaning through the invocation of precedent. Part of this process is building a powerful and painful emotional resonance into the category of violation of the Equal Protection Clause. The right is understood through emotionally laden references to its historical denial.

3.2. Drawing on the Epistemic Advantages of Painful Emotions

> Imagination, love, intellect – and pain.
>
> Yes, you've got to know pain.
>
> John Berryman[11], 2016

To recall an earlier definition, emotions have either a positive or negative orientation (Gardner 2008). As we saw above, the relevant emotional sense of a constitutional rights violation possesses a negative orientation – a painful orientation. At times, painful emotions serve epistemic functions, aiding our understanding of the situation we are confronting (Elgin 2007, Brady 2013). Pain can, in this way, be clarifying, just as anger can be a form of right-seeing (Srinivasan 2017). Functioning in a service role, painful emotions can flag threats to a constitutional right that might not have been otherwise recognized. All emotions have a built-in desire, and painful emotions have a built-in desire to locate the source of the pain (Solomon 1977b). Pain facilitates interest and attention. As the negative painful sense is concerned with the unjust treatment of others, it is bound up with solemnity, vigilance, and concern. We might also think that it breeds a healthy skepticism of law based on an awareness of past violations, even widespread systemic violations, of constitutional rights. The

[11] John Berryman answering the question of what makes a poet in Cole 2016.

feeling of pain has a capacity to motivate. This supports the interpretive role assigned to the legal value of human dignity places in constitutional regimes committed to the purposive interpretation of constitutional rights.[12] This has the potential to place the judge in a state of agitation motivating a careful exploration of the evidence of an alleged rights infringement. Pain denotes concern and underscores a value commitment (emotions are in this way eudemonistic). The emotions of injustice are sensibility training emotions,[13] they focus their holder's attention on an event that bears a particular sort of significance. In this way, they motivate the search for unrecognized instances of a rights violation.

The emotions of injustice functioning in the service role can work to place an additional cognitive emphasis on the efforts to recognize certain kinds of wrong or harm, breeding a serious and solemn sort of attention to the evidence of an alleged rights violation in the case at hand. The emotions of injustice work to establish the stakes of the constitutional question before the court. This is an important rebuttal to the charge that a recognition of the role of emotions in judicial reasoning somehow sets up a high bar for plaintiffs to generate spectacle in their presentation of their case to the court.[14] It is also an important guard against complacency, cynicism, or worse. Nussbaum instructs that, given the pervasiveness of hate, stereotype, and prejudice, we consciously must draw on social emotions to counter their effects (Nussbaum 2015). Judicial commitments to neutrality cannot encompass a neutral understanding of past rights violations. A judge that felt nothing with respect to them would not simply be failing an ethical or political test (should the particulars demand this) but would be erring in understanding the constitutional guarantee, and hence in their efforts at legal reasoning. Time and time again we see judges draw on the emotions related to indignity and injustice (indignation, outrage, woe, pity, solemnity) register in their dissenting opinions (Maroney 2011) – or in majority opinions that disavow earlier dignity-violating laws. Legislators arguing for legal change and protest movements and community organizers know this emotional register well (see Waldron 2016).

As history has shown us, constitutional laws have systematically violated their own commitments (to equal protection, or to an equal recognition of dignity, for example), and these instances or patterns have not always been recognized by judges. Service emotions thicken judicial understandings of the right in question such that judges should feel the pressure of the charge of their alleged infringement. A judge training her eye on the painful category of a rights infringement should be open to an imaginative searching and attention to other sorts of harms that are analogous to those previously recognized as a violation of the right in question. Notice that a painful emotion can be painful without being excruciating, or halting; the appropriate pain is motivating in the sense that it aims to detect each of the relevant violations of a constitutional right.

[12] South Africa and Canada are both examples of legal regimes committed to the purposive and context-sensitive interpretations of constitutional rights (see O'Connell 2008, White 2017). Related here is Peggy Cooper Davis' proposal for a "responsive constitutionalism" approach to interpretation in the United States to confront the history of law-constructed and -sanctioned racial injustice (Davis 2009).

[13] Jeremy Waldron offers an illuminating example in his book *Torture, Terror and Tradeoffs*, in a discussion on the 8th Amendment to the United States Constitution, which protects against cruel and unusual punishment. Waldron pushes the question of why we use the concept of cruelty – itself a broad, inchoate legal value – in lieu of a list of interrogation techniques that should be outlawed. It is because we want to include all relevant instances of cruelty and not encourage a technical innovation in punishment techniques to evade an enumerated list (Waldron 2010a).

[14] Ensuring that judges are attentive, solemn, and meaningfully aware of historical examples of dignity violations ensures that claimants don't need to put in additional effort to elicit that sort of attention and concern from the judges. It should belong to them already under a constitutional rights system committed to the dignity value. "Plot, not spectacle" as Aristotle put it in his *Poetics*.

4. Conclusion

After great pain, a formal feeling comes –

Emily Dickinson (with R.W. Franklin, ed.), *The Poems of Emily Dickinson,* 1999

This paper set as its task an examination of the way in which a set of service emotions proves integral to judicial reasoning in the context of an alleged violation of a constitutional right. Here the focus is on the conscious cultivation and use of certain emotions that are part of legal reasoning in the adjudication of a constitutional right. Judicial understandings of constitutional rights are regularly sharpened by reference to past violations. At times, this involves the conscious retrieval of a series of emotions related to injustice to provide a richer understanding of the category of a rights violation. Constitutional rights are regularly introduced in a judgment via a line of precedents of significant emotional import and alongside references to symbolic historical events (McCrudden 2013). These are ways of loading the term with meaning, generating the appropriate mindset, for the purpose of determining whether the right in question had been violated in the case at hand.

The dictates of legal reasoning are established by governing law (though questions of interpretation remain), and where there are governing legal values, there will be emotions that form part of the use of those values. Judges can err in their use of emotions not only by drawing on extraneous ones, but also by using the appropriate ones in the wrong sorts of ways, or at the wrong magnitude.[15] The paper does not propose emotions as a panacea. A legal system that requires judges to draw upon some emotions in their interpretations of constitutional rights may serve as a corrective against excessive formalism and might, as this paper argues in part, call attention to previously unseen and unrecognized rights violations. Emotions are not, however, an apolitical phenomenon. Emotions can serve both progressive and pernicious political ends. Significantly, none of the foregoing amounts to a defense of existing legal orders, as much will turn on the political quality of the choice and description of the historical rights violations folded into the legal judgement, and/or the normative and political status of the legal system in question. Some emotions might possess a structure that renders salient certain physical and visceral presentations of human suffering while overlooking long-running and difficult-to-detect structural injustices. Judicial commitments to neutrality are insufficient to establish the quality of mind required to adjudicate constitutional rights in the context of their alleged violation. As history has shown us, laws have systematically violated their own constitutional guarantees of rights in ways that have not always been readily identified by judges.

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[15] This is distinguishable from the position that all emotions should be experienced in moderation. That would be a misconstrual of Aristotle's Doctrine of the Mean, which understood that under the right circumstances strong feelings are precisely what is warranted (Aristotle 1984).

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