

JUDICIAL ACTIVISM IN TRIAL COURTS

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INTRODUCTION

“Judicial activism” has no fixed meaning. One might argue that it has either no meaning at all or multiple meanings with little to connect them beyond the predominant understanding that judicial activism is bad—a transgression of the judge’s role. Although most judges are trial judges, the term “judicial activism” is traditionally employed in the appellate, and especially Supreme Court, context, to refer to a liberal approach to interpreting the law, especially the Constitution. Supreme Court Justices, including several considered to be on the liberal (and, therefore, presumably activist) end of the philosophical spectrum, are among those who have used the term to criticize judicial opinions and conduct of which they disapprove.¹

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1. *See e.g.*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 486 (1989) (Stevens, J., dissenting) (lower court’s rejection of controlling Supreme Court precedent was “an indefensible brand of judicial activism”); *New Jersey v. T.L.O.*, 468 U.S. 1214, 1216 (1984) (Stevens, J., dissenting from order granting reargument) (“I believe that the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review.”); *Engle v. Isaac*, 456 U.S. 107, 123 n.25 (1982) (“It is immediately apparent that [the dissenting opinion’s] charges of ‘judicial activism’ and ‘revisionism’ carry more rhetorical force than substance.”); *Turner v. United States*, 396 U.S. 398, 426 (1970) (Black, J., dissenting) (“I wholly, com-

The modern critique of activist judges grew out of a preoccupation with what Alexander Bickel called the “countermajoritarian difficulty.” Beginning in the 1950’s and 60’s, legal scholars grew increasingly concerned that legal liberalism—faith in courts as an engine of progressive social change—was flawed because judges were not elected. If the law is not a science, as legal realism and later the critical legal studies movement so cogently argued, then what was left to justify this world of activist judges pursuing what seemed like their own personal agendas?² Judicial activism seemed in tension with democratic theory and those in favor of a pluralist democracy grew wary of a Court, removed from popular opinion, setting its course. It was out of this moment that we inherited the vision of the judge as umpire, a narrow and mechanistic view of the role.

Several scholars have sought to defend judicial activism in the context of appellate jurisprudence.³ Professor Roth’s article shifts the focus to the trial level.⁴ Drawing on their federal judicial experience, senior district court judges have promoted judicial reform in the areas of prosecutorial charging and sentencing primarily through dicta in opinions and extra-judicial activities—speeches and articles—while also occasionally making rulings that push legal boundaries based on their views about the law’s deficiencies. Professor Roth calls this activity “district court activism in criminal justice reform,” to capture that it both “signifies an active and engaged judicial posture” and “taps into debates about the proper role of the judge in our democracy.”

In this piece we follow Professor Roth’s lead by turning to the question of judicial activism in trial courts. In addressing judicial activism, we are particularly interested in the relationship between a

pletely, and permanently reject the so-called ‘activist’ philosophy of some judges which leads them to construe our Constitution as meaning what they now think it should mean in the interest of ‘fairness and decency’ as they see it. This case and the Court’s holding in it illustrate the dangers inherent in such an ‘activist’ philosophy.”); *United States v. Wade*, 388 U.S. 218, 250 (1967) (Black, J., dissenting) (“[D]eciding what the Constitution is, not from what it says, but from what we think it would have been wise for the Framers to put in it . . . to me would be ‘judicial activism’ at its worst.”).

2. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (1962); LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 19-20 (1996), Barty Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part V*, 112 *YALE L. J.* 153, 198-213 (2002). Ronald Dworkin pointed out this problem with process theory. See Ronald M. Dworkin, *The Model of Rules*, 35 *U. CHI. L. REV.* 14, 37-40 (1967).

3. Friedman, *supra* note 2, at 155 n.2; KALMAN, *supra* note 2, at 157, 231-32.

4. Jessica A. Roth, *The “New” District Court Activism in Criminal Justice Reform*, 72 *NYU ANN. SURV. AM. L.* 187 (2018).

judge's personality, emotions, courtroom demeanor and conduct of a trial. The active assertion of personality and emotional involvement in the trial is not necessarily a bad thing. In fact, on the trial court level, the exercise of discretion, which is fundamental to American jurisprudence, often requires just such emotional engagement. Bias, on the other hand, and impetuous decisions based on animus, ego, or whim are necessarily inappropriate. In its criminal contempt jurisprudence, the Supreme Court has conflated these two very different concepts under the rubric of judicial activism.

We begin by describing the Supreme Court's criminal contempt jurisprudence, in which the Court equates judicial activism in the trial courts with expressions of emotion, excessive engagement, and, ultimately, improper bias. We then critique the elision of these concepts. In doing so, we distinguish bias from activism, and improper impetuous decision-making from the proper, often active and assertive, use of discretion. This exercise is not merely semantic. Once we make this distinction, it becomes clear that the law should reduce opportunities for improper bias while fostering a courtroom atmosphere in which judges are encouraged to bring their own personal, emotional experiences to bear on the cases before them. Finally, we draw on H.L.A. Hart's recently discovered article on discretion to offer a theoretical defense of judicial activism in trial courts.⁵

By analyzing how judges preside over trials—one of their most distinctive activities—we seek to widen the picture of the judicial role. In doing so, we are inspired by Professor Roth both to better understand the meaning of judicial activism and to highlight its potential benefits. Untangling the concepts of judicial activism from bias and whim helps to free judges from the unattainable and undesirable ideal of the mechanical, disengaged arbiter while helping to ensure that they maintain an ethical approach to judging.

5. H.L.A. Hart, *Discretion*, 127 HARV. L. REV. 652 (2013). Hart wrote this essay in November 1956 while visiting at Harvard University, but the piece was not published until 2013.

I.
THE SUPREME COURT'S CRIMINAL CONTEMPT
JURISPRUDENCE: JUDICIAL ACTIVISM VS.
JUDICIAL DETACHMENT

In a 1972 decision, *Mayberry v. Pennsylvania*,⁶ Justice Douglas referred to the trial judge who behaves as “an activist seeking combat,”⁷ as distinguished from one fitting “the image of the impersonal authority of law.”⁸ He used the term activism to criticize a judge’s emotional reaction or overreaction when a party or lawyer insults the judge or disrupts the proceedings. By way of illustration, Justice Douglas pointed to the district judge in an early Warren Court decision, *Offutt v. United States*.⁹

Mayberry and *Offutt* were part of a series of opinions that addressed how trial judges manage courtroom proceedings, particularly focusing on the use of criminal contempt power in the face of challenges to judicial authority.¹⁰ By mislabeling biased judicial conduct as “activist” the Court in these opinions articulated an ideal of impersonal, disengaged judging that is unrealistic and undesirable. In doing so, the Court not only mislabeled undesirable conduct as “activist,” but also overlooked the value of an active judicial trial court in promoting fairness.

To understand how the Court came to identify trial judges’ “activism” with the expression of emotion and personality and, in turn, with impermissible judicial bias, some background in the development of the Court’s criminal contempt jurisprudence is useful. Although the decisions go back more than a century, a good starting point is the Court’s 1952 decision in *Sacher v. United States*,¹¹ which

6. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

7. *Id.* at 465. Other courts have occasionally adopted this characterization. See e.g., *Whisenant v. Allen*, 556 F.3d 1198, 1210 (11th Cir. 2009); *In re Dodson*, 214 Conn. 344, 368 (1990).

8. *Mayberry*, 400 U.S. at 465 (quoting *Offutt v. United States*, 348 U.S. 11, 17 (1954)).

9. *Offutt v. United States*, 348 U.S. 11 (1954).

10. In addition to the opinions discussed in this Part, see e.g., *In re Little*, 404 U.S. 553 (1972); *Ungar v. Sarafite*, 376 U.S. 575 (1964) (upholding summary contempt procedure, where defendant refused to answer questions and made statements that, although disruptive, did not attack the judge’s integrity); *In re McConnell*, 370 U.S. 230, 235 (1962); *In re Murchison*, 349 U.S. 133 (1955) (overturning non-summary contempt, where the judge who presided over the contempt process was the judge before whom the contempt occurred); *Cooke v. United States*, 267 U.S. 517, 536-38 (1925); *Ex parte Hudgings*, 249 U.S. 378, 384-85 (1919); *Ex parte Terry*, 128 U.S. 289 (1888).

11. *Sacher v. United States*, 343 U.S. 1 (1952).

preserved the power of the trial court to use summary contempt procedures while recognizing the potential dangers.

Sacher reviewed criminal contempt convictions arising out of *United States v. Dennis*,¹² in which several defendants were convicted of organizing the Communist Party to overthrow the government. After the verdict, federal district judge Harold Medina summarily punished several of the defense lawyers, as well as one *pro se* defendant, for their contumacious trial conduct, which included interruptions, repetitive objections, and insulting remarks about the trial judge.¹³ The principal legal question in the case was whether the power to summarily punish contempt occurring in the trial judge's presence must be exercised when the conduct occurs, or whether the judge may wait until the trial is over to exercise this authority.¹⁴

The summary criminal-contempt process is anomalous not only because it involves procedural shortcuts (e.g., no written notice of charges, no opportunity to call or examine witnesses),¹⁵ but also because of the trial judge's combined role as victim, witness, prosecutor, judge, and jury. Having been affronted by the alleged contemnor, the judge makes the decision to prosecute, draws on first-hand observations, determines whether the conduct observed proves the crime of contempt beyond a reasonable doubt, and, if

12. 183 F.2d 210 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

13. *United States v. Sacher*, 182 F.2d 416 (2d Cir. 1950), *aff'd*, 343 U.S. 1 (1952).

14. *See id.* at 428-30 (holding that contempt power need not be exercised immediately); *id.* at 460 (Frank, J., concurring) ("It would be a strange topsy-turvy doctrine that judicial justice is carefully and constitutionally administered when a judge explosively goes into high-blood-pressured action, but that it becomes dangerously careless - and unconstitutional - when the judge, controlling his temper, gives himself a chance to cool off and to act deliberately. It is a quaint idea that a judge's white-hot indignation is a better guaranty of justice than his more seasoned judgment."); *id.* at 463 (Clark, J., concurring) ("If there are breaches of courtroom behavior to the point of preventing the proper functioning of the court, the judge has the authority to take the necessary steps to secure order. But if the difficulty does not require so drastic steps—has indeed been surmounted without resort to them—and the question is one only of punishment, as retribution and example, then the ordinary requirements of due process must be satisfied.").

15. *See Ex parte Hudgings*, 249 U.S. at 383 ("[T]he power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to modes of accusation and methods of trial generally safeguarding the rights of the citizen"). Federal judges have inherent authority to punish contemptuous conduct. *Young v. United States ex rel. Vuitton Et Fils S. A.*, 481 U.S. 787, 793 (1987) ("[I]t is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders."). This authority is now codified in Rule 42(a) of the Federal Rules of Criminal Procedure.

so, enters a conviction and imposes a sentence.¹⁶ Although this agglomeration of roles defies conventional notions of disinterested judging,¹⁷ the trial judge's power to punish contumacious conduct immediately after it occurs in the judge's presence is considered to be a practical necessity to maintain order in the court,¹⁸ notwithstanding the opportunities for abuse.¹⁹ Although the Court has acknowledged the anomalous nature of the criminal contempt process,²⁰ it has consistently upheld trial judges' power to immediately punish contemptuous trial conduct.²¹

Once the trial is over, however, the necessity for a summary proceeding has abated. The judge has the option to refer the criminal contempt to a disinterested judge, who would afford the accused the full panoply of procedural protections—"the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial."²² When misconduct occurs outside the judge's presence, this procedure is required.²³ Over Justice Frankfurter's dissent, however, the *Sacher* Court did not impose this requirement when a lawyer's contuma-

16. *Green v. United States*, 356 U.S. 165, 199 (1958) (Black, J., dissenting) ("When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused.").

17. For example, a judge ordinarily cannot preside over a trial if the judge has personal knowledge of the disputed facts, is likely to be a material witness in the proceeding, or is acting as a lawyer in the proceeding. See MODEL CODE OF JUDICIAL CONDUCT Canon 2 (AM. BAR ASS'N 2010); see also *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1906 (2016) ("The due process guarantee that 'no man can be a judge in his own case' would have little substance if it did not disqualify a former prosecutor from sitting in judgment of a prosecution in which he or she had made a critical decision.").

18. "[T]he very practical reasons which have led every system of law to vest a contempt power in one who presides over judicial proceedings also are the reasons which account for it being made summary. Our criminal processes are adversary in nature and rely upon the self-interest of the litigants and counsel for full and adequate development of their respective cases. The nature of the proceedings presupposes, or at least stimulates, zeal in the opposing lawyers. But their strife can pervert as well as aid the judicial process unless it is supervised and controlled by a neutral judge representing the overriding social interest in impartial justice and with power to curb both adversaries." *Sacher*, 343 U.S. at 8.

19. See e.g., Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 442-43 (2004).

20. *Green*, 356 U.S. at 184.

21. *Id.* at 190-91 (Frankfurter, J., concurring).

22. *Sacher*, 343 U.S. at 9.

23. *Cooke v. United States*, 267 U.S. 517, 535-36 (1925).

cious conduct occurs in the trial judge's presence.²⁴ It reasoned that if a trial judge may summarily punish a lawyer when the contempt occurs in the judge's presence, the judge may delay doing so until after the trial, because delay averts potential harm to the client without prejudicing the lawyer.²⁵

Along the way, Justice Jackson's opinion for the Court in *Sacher* acknowledged that judges are only human and that their personal traits might interfere with the fair exercise of summary contempt power. He cautioned that if a contempt sanction is "imposed in passion or pettiness, [it] brings discredit to a court as certainly as the conduct it penalizes,"²⁶ and that the power is subject to abuse because "[m]en who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir."²⁷ But he expressed confidence that such flawed judges are in the distinct minority.²⁸ In other criminal contempt cases around the same period, other Justices expressed similar concerns about trial judges' emotional response when their authority is challenged, and the Justices were not necessarily as sanguine about the infrequency of this occurring.²⁹

24. Justice Frankfurter explained: "The particular circumstances of this case compel me to conclude that the trial judge should not have combined in himself the functions of accuser and judge. For his accusations were not impersonal. They concerned matters in which he personally was deeply engaged. Whatever occasion may have existed during the trial for sitting in judgment upon claims of personal victimization, it ceased after the trial had terminated." *Sacher*, 343 U.S. at 28 (Frankfurter, J., dissenting).

25. *Id.* at 9-10.

26. *Id.* at 8.

27. *Id.* at 12.

28. The Court observed: "Most judges, however, recognize and respect courageous, forthright lawyerly conduct. They rarely mistake overzeal or heated words of a man fired with a desire to win, for the contemptuous conduct which defies rulings and deserves punishment. They recognize that our profession necessarily is a contentious one and they respect the lawyer who makes a strenuous effort for his client." *Id.*

29. Compare *Ungar v. Sarafite*, 376 U.S. 575, 584 (1964) ("We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to their authority or with highly charged arguments about the soundness of their decisions.") with *Cooke v. United States*, 267 U.S. 517, 602 (1925) (Douglas, J., dissenting) ("An impartial judge, not caught up in the cross-currents of emotions enveloping the contempt charge, is the only one who can protect all rights and determine whether a contempt was committed or whether the case is either one of judicial nerves on edge or of judicial tyranny."); *Green v. United States*, 356 U.S. 165, 199 n.8 (1958) (Black, J., dissenting) ("A series of recent cases in this Court alone indicates that the personal emotions or opinions of judges often become deeply involved in the punishment of an alleged contempt.").

Attorney Offutt, the subject of an early Warren Court opinion, apparently found himself trying a case before the rare, irascible judge. Offutt was defending a physician, Dr. Peckham, accused of committing illegal abortions in the District of Columbia in the early 1950's. Offutt crossed swords with the federal district judge as well as the prosecutor throughout the 14-day trial. The judge berated Offutt for asking questions that contravened his prior rulings, remarking at one point in response to Offutt's professed misunderstanding, "You can't be as stupid as all that." When Offutt rose to object and disregarded the judge's instruction to return to counsel table, the judge threatened to call the Marshal to "stick a gag in your mouth."³⁰ Following the trial, which ended with a guilty verdict on one of the two counts, the judge expressed to the jury his disdain for Offutt,³¹ then summarily found Offutt guilty of criminal contempt, and sentenced him to ten days' custody.³²

A panel of the D.C. Circuit reversed Dr. Peckham's conviction, finding that the jury may have been improperly influenced by the district judge's questioning of witnesses and his hostile comments to Offutt, which, "though under provocation, demonstrated a bias and lack of impartiality."³³ But the same panel considered the trial judge fit to preside over Offutt's criminal contempt hearing. Although it reduced Offutt's sentence to 48 hours, the panel upheld his conviction,³⁴ concluding that the record amply supported some (though not all) of the judge's factual findings. Among them were that Offutt "made insolent, insulting and offensive remarks to the court, and was guilty of gross discourtesy," that he persistently asked questions that the judge had previously excluded, that he asked questions on cross-examination that were highly prejudicial and without foundation, and that he persistently tried to provoke a mistrial.³⁵

Invoking its supervisory authority, the Supreme Court overturned Offutt's conviction and remanded the case for a hearing before a different trial judge.³⁶ Writing for the Court, Justice Frank-

30. *Offutt v. United States*, 348 U.S. 11, 16 n.2 (1954).

31. *Id.* at 17 n.3 (1954) (The judge told the jury: "You have been compelled to sit through a disgraceful and disreputable performance on the part of a lawyer who is unworthy of being a member of the profession; and I, as a member of the legal profession, blush that we should have such a specimen in our midst.").

32. *Id.* at 12.

33. *Peckham v. United States*, 210 F.2d 693, 702 (D.C. Cir. 1953).

34. *Offutt v. United States*, 208 F.2d 842, 843 (D.C. Cir. 1953), *rev'd*, 348 U.S. 11 (1954).

35. *Id.* at 843.

36. *Offutt*, 348 U.S. at 17-18.

furter acknowledged that even judges must be allowed “a modicum of quick temper,” but in this case, he concluded, the trial judge went too far, “permit[ing] himself to become personally embroiled with” defense counsel.³⁷ Although a trial judge need not respond impassively to contumacious conduct, Justice Frankfurter urged trial judges to rein in strong feelings when invoking the contempt power. He wrote:

The power thus entrusted to a judge is wholly unrelated to his personal sensibilities, be they tender or rugged. But judges also are human, and may, in a human way, quite unwittingly identify offense to self with obstruction to law. Accordingly, this Court has deemed it important that district judges guard against this easy confusion by not sitting themselves in judgment upon misconduct of counsel where the contempt charged is entangled with the judge’s personal feeling against the lawyer.

Of course personal attacks or innuendoes by a lawyer against a judge, with a view to provocation, only aggravate what may be an obstruction to the trial. The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not give vent to personal spleen or respond to a personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice.³⁸

Justice Frankfurter punctuated these thoughts with the phrase for which the opinion is probably best remembered: “Therefore, justice must satisfy the appearance of justice.”³⁹

By way of contrast, in an early Burger Court decision, *Illinois v. Allen*,⁴⁰ Justice Black praised the trial judge’s demeanor. Responding to a *pro se* criminal defendant’s abusive and disruptive conduct, the judge ultimately expelled the defendant from the courtroom. The Court found that the judge had acted within his discretion, noting that the “judge at all times conducted himself with that dignity, decorum, and patience that befit a judge.”⁴¹

37. *Id.* at 17.

38. *Id.* at 14.

39. *Id.*

40. *Illinois v. Allen*, 397 U.S. 337, 347 (1970).

41. *Id.* Justice Douglas filed a dissent, expressing concern about the implications of the Court’s decision for political trials and trials where leftist radicals sought to provoke right-wing repression, viewing it as to their ultimate advantage. *Id.* at 351-57 (Douglas, J., dissenting). Notably, *Illinois v. Allen* was argued in February 1970, within a week of the verdict and sentencing in the “Chicago 8” trial, so all of the Justices were undoubtedly aware of the implications of its decision for criminal trials arising out of anti-war protests.

Which brings us to *Mayberry*, decided a year after *Allen*. *Sacher* and *Offutt* seemed to distinguish between two types of judges. There is the dispassionate judge, who, *Sacher* says, can be trusted to use the summary contempt power impartially. And then there is the judge like the one in *Offutt* who takes grievances too personally and strikes back. The latter, says Justice Douglas in *Mayberry*, is the “activist seeking combat,”⁴² who undermines the fair administration of justice by becoming “‘personally embroiled’” with another trial participant.⁴³

The distinction turned out not to matter in *Mayberry*. The trial judge in that case managed to keep his cool in the face of a *pro se* criminal defendant’s “highly personal aspersions, even ‘fighting words’—‘dirty sonofabitch,’ ‘dirty tyrannical old dog,’ ‘stumbling dog,’ and ‘fool’”—and other “[i]nsults . . . apt to strike ‘at the most vulnerable and human qualities of a judge’s temperament.’”⁴⁴ But even so, the Court held that as a matter of constitutional due process, the trial judge should have referred the matter to a fellow judge, one “not bearing the sting of those slanderous remarks and having the impersonal authority of the law.” Although, to maintain order, the judge could lawfully have punished the defendant on the spot, the judge could not defer the contempt process until after the trial and then preside over a summary hearing.

The Court in *Mayberry* could simply have overruled *Sacher*, holding that unless summary contempt is used immediately, it cannot be used at all, because afterwards the necessity for a streamlined process dissipates. But, instead, the Court merely restricted judges’ authority to defer a summary contempt hearing. It allowed judges to wait until after trial to summarily punish defiant lawyers as long as the lawyer did not target the judge personally. The decision bars judges from using summary procedures after trial only if they were personally attacked, on the theory that even if the judge maintained a calm exterior and had the opportunity as time passed to cool off, the judge’s emotional reaction would presumptively impair decision-making. The following year, a D.C. Circuit opinion invoked this understanding to overturn a post-trial contempt con-

42. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971). *Taylor v. Hayes*, 418 U.S. 488, 503 (1974), was another decision where the Court found that the trial judge was personally stung by the criminal defense lawyer’s remarks and therefore should have assigned the contempt proceedings to another judge.

43. *Mayberry*, 400 U.S. at 465 (quoting *Offutt v. United States*, 348 U.S. 11, 17 (1954)).

44. *Mayberry*, 400 U.S. at 466 (quoting *Bloom v. Illinois*, 391 U.S. 194, 202 (1968)).

viction imposed summarily against a peace activist's trial lawyer,⁴⁵ and a year after that, the Seventh Circuit did so more famously as the basis for overturning the summary contempt convictions of the defendants and defense lawyers in the "Chicago 8" trial.⁴⁶

II. REDEEMING JUDICIAL ACTIVISM IN TRIAL COURTS

Collectively, the Supreme Court's summary contempt decisions draw a connection between trial judges' conduct on the bench, their personality, and their emotions, ultimately equating biased judicial conduct with "activism," condemning activism as undesirable, and blaming activism on judges' inability to control their emotions. The Justices' underlying assumptions and ideas are contestable and, in the very least, worth examining.

A. *Judicial Engagement*

Various Justices seem to have traced the problem in a case like *Offutt*, where the judge failed to maintain a dispassionate demeanor, to the judge's uncontrolled emotion and his personal engagement in a dispute, which ultimately prove that the judge is biased.⁴⁷ In criticizing this behavior, they dismiss the judge as an "activist." But all of this inaccurately describes the problem. In doing so, the Court risks minimizing or at least denigrating the beneficial use of personal emotion in trial court proceedings along with this corrosive biased judicial behavior. In an effort to comply with the Court's mandate, judges might seek to hide their true motiva-

45. *United States v. Meyer*, 462 F.2d 827, 839-40 (D.C. Cir. 1972) (observing that *Mayberry* establishes that "it is of no significance that a trial judge who has been personally attacked has remained outwardly calm, so long as the attack is such that his personal feelings might reasonably be expected to have been affected").

46. *United States v. Seale*, 461 F.2d 345, 351-53 (7th Cir. 1972); *In re Dellinger*, 461 F.2d 389, 401 (7th Cir. 1972). For an account of the trial, see JOHN SCHULTZ, *THE CHICAGO CONSPIRACY TRIAL* (rev. ed. 1993).

47. See e.g., *Ungar v. Sarafite*, 376 U.S. 575, 585 (1964) ("Unlike . . . contempt cases from lower federal courts in which the Court found personal bias sufficient to disqualify the judge from convicting for contempt, this record does not leave us with an abiding impression that the trial judge permitted himself to become personally embroiled with petitioner."); *Brown v. United States*, 359 U.S. 41, 48 (1959) ("This is not a situation where the contempt was in any sense personal to the judge, raising issues of possible unfairness resulting from the operation of human emotions.").

tion, making it hard to distinguish proper emotional engagement from bias and personal animus.

The fundamental problem in a case like *Offutt* is the judge's trial conduct, not emotions. The court of appeals overturned the conviction of Offutt's client because the trial judge did not preside fairly. As the court put it, "indicating at times hostility," the trial judge "demonstrated a bias and lack of impartiality which may well have influenced the jury."⁴⁸ In other words, the jury could have inferred from the judge's words and behavior toward Offutt that the judge disfavored Offutt and perhaps Offutt's client; the jury could have been influenced by the attitude of the judge, as a respected authority, to convict Dr. Peckham. The same bias that the judge manifested throughout the trial rightly disqualified him from presiding afterwards over Offutt's contempt hearing. Whether the judge was actually predisposed against Offutt did not matter because, as Justice Frankfurter observed, "justice must satisfy the appearance of justice."⁴⁹ When put on trial for criminal contempt, particularly under a process giving so much power to the judge, Offutt was entitled to a presiding judge who both appeared to be and actually was impartial. The law and structure of trial court proceedings ought to minimize the chances that this sort of bias and improper animus animates a judge's conduct. It ought to go further by ensuring that proceedings appear proper, even if an individual judge has the personal strength to act fairly despite strong negative feelings toward any of the parties.

There is no way to know precisely why the trial judge was so hostile to Offutt—whether the judge had a prior run-in with the lawyer, whether the judge disliked doctors who performed abortions and anyone who represented them, or because of the lawyer's behavior in the particular trial. One cannot confidently assume, as Justice Frankfurter inferred, that the trial judge's demonstrations of bias were an emotional response to provocation.⁵⁰ The various opinions do not quote enough of the record to demonstrate that Offutt provoked the judge rather than the other way around. But even if Offutt overstepped first, one cannot necessarily attribute the judge's hostile reaction to an unchecked emotional response. The judge may just have been crotchety or intolerant, possessing character flaws of the sort Justice Jackson identified.

48. *Peckham v. United States*, 210 F.2d 693, 702 (D.C. Cir. 1953).

49. *Offutt*, 348 U.S. at 14.

50. *Id.* at 16-17.

More significantly for our purposes, characterizing the trial judge in this case as “activist” is problematic. The concept of “judicial activism” is often equated with a philosophy of judging. But the judge’s hostile courtroom demeanor, if in fact fueled by the judge’s unchecked emotional response to provocation, did not reflect a philosophical approach to the role, but a reflexive one. Drawing on emotions or personal experience may not only be consistent with, but also fundamental to the exercise of sound judicial discretion. As Professor Roth demonstrates, the exercise of judicial discretion can reflect a positive active vision of the judicial role. Therefore, it seems problematic to equate this sort of bias with activism.

To the extent that the trial judge’s “activism” consisted of injecting himself into the trial—making himself more like a player than an umpire—the label does not deserve the pejorative connotation. Justice Frankfurter evidently blamed the judge for allowing himself to become “personally embroiled” in a dispute with defense counsel, but it is uncertain what this means and why the judge was to blame.⁵¹ The judge’s personal engagement was unavoidable. Judges are participants in the trial as much as anyone else in the courtroom. They are not bit players: they have a more sustained role than witnesses, a more active role than jurors, and a more authoritative role than anyone else—they get the last word about how the trial is conducted and their word is law. Judges are necessarily engaged at every moment of the trial, and when their authority is challenged or tested, they almost invariably become “embroiled.” The problem with the judge in Dr. Peckham’s case was his choice of weapon: his statements were demeaning and his threats (e.g., to call in the Marshals, to have the lawyer gagged) were disproportionate to the defense lawyer’s perceived transgressions.

Trial judges have broad discretion in how they conduct trials. They are not simply bystanders, and they have a constitutional responsibility to make sure the trial “is fair and orderly.”⁵² Toward this end, judges may inject themselves into their trials as long as they do so in a manner that does not convey bias.⁵³ Sometimes, failing to do so is an abdication of responsibility.⁵⁴ There is room to

51. *Id.* at 17.

52. *United States v. Nobel*, 696 F.2d 231, 237 (3d Cir. 1982).

53. *See e.g.*, *United States v. Price*, 13 F.3d 711, 723-24 (3d Cir. 1994) (finding that the trial judge “did not overstep the bounds of prudent judicial conduct” in criticizing the length of defense cross-examination and “reacting to the failure of the defense counsel to accept the court’s rulings”).

54. For instance, in *Commonwealth v. Roldan*, 572 A.2d 1214, 1215 (Pa. 1990), the Supreme Court of Pennsylvania wrote:

debate, as a matter of judicial philosophy, how actively trial judges should serve as architects of a trial. At minimum, judges are expected to act on their own initiative—*sua sponte*—when the process seems to be going awry.⁵⁵ But judges also take initiative, injecting themselves into proceedings, to make the process and its outcomes fairer.⁵⁶ It is not always clear when judges exceed proper bounds. It is unhelpful to label the judge who crosses the gray boundary line an “activist” and to imply that it is undesirable for judges to take an active trial role, whether in response to lawyers’ and parties’ disruptive conduct or in general. There is a fuzzy line between being an assertive judge and an overly aggressive one, between being stern and being hostile, and the label does nothing to elucidate the distinctions.

To the extent the Court’s contempt-of-court opinions equate activism with excessive emotional engagement, they unfairly give “activism” a bad name. Equating activism with bias discounts the positive role that activism, as a philosophical approach to the trial judge’s function, may play at the trial level in service of fair process and impartial justice.

Judges should refrain from extended examination of witnesses; they should not, during the trial, indicate an opinion on the merits, a doubt as to the witnesses’ credibility, or do anything to indicate a leaning to one side or the other, without explaining to the jury that all these matters are for them.

That does not mean that a trial judge must sit idly by, a mere evidential technician, silenced in the face of the impossible, absurd, ambiguous or the frivolous. Nor should he leave unasked or unanswered questions that center the matter or amplify relevant testimony on the question or issue. It is a false and dangerous neutrality that would allow loss of liberty or property when another question at further inquiry would gain the fact, expose a false or improper premise, interest or bias of a witness, or correct insinuation unfounded in the record. It is not partisan to maintain the wheel, steering evenly, between competing and often aggressive counsel, anxious to set the course. Nor should a judge yield the gavel to zealous partisans or allow counsel to impose their contentions by contumelious conduct. When others than the trial judge control the proceedings, one side has lost their day in court.

Id. (quoting *Commonwealth v. Myma*, 123 A. 486, 487 (Pa. 1924)).

55. *See e.g.*, *United States v. Modica*, 663 F.2d 1173, 1185 (2d Cir. 1981) (recognizing trial judge’s responsibility to ensure that trial lawyers act ethically and “to control the overall tenor of the trial,” including by interrupting improper arguments, giving curative instructions, or reprimanding or sanctioning the offending lawyer).

56. *See e.g.*, A.B.A., STANDARDS FOR CRIMINAL JUSTICE, SPECIAL FUNCTIONS OF THE TRIAL JUDGE § 6-1.1(a) (3d ed. 2000) (“The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her own initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the [criminal] trial.”).

Consider, for example, the question of whether a trial judge should participate in plea negotiations. Federal judges are currently forbidden by rule from doing so,⁵⁷ but not all state judges are. In New York, for example, the state judicial ethics commission recently advised state trial judges that they “may suggest alternatives to a plea agreement offered by a defendant and prosecutor, provided the judge does so non-coercively and is careful not to create an impression he/she has prejudged the case’s merits.”⁵⁸ In a *New York Review of Books* article, Jed Rakoff, one of the activist federal district judges identified by Professor Roth, argued that federal judges should be allowed a role in plea discussions, to redress deficiencies in the criminal charging and plea bargaining process.⁵⁹ A judge who participates in plea discussions in a non-coercive, unbiased manner, where permitted by law, is active and engaged and serves a proper judicial function. Whether or not this is activism in a positive or negative sense depends on one’s view of the appropriate judicial role in plea bargaining—a question on which courts are evidently divided.

B. *Judicial Emotion*

Judges’ emotions and sympathies have traditionally been considered impermissible bases for their decisions.⁶⁰ Some persist in the view that judges must suppress their emotions and personalities.⁶¹ But we question the ideal of the “impersonal authority of the

57. FED. R. CRIM. P. 11(c)(1).

58. N.Y. Advisory Comm. on Jud. Ethics, Op 17-110 (2017). Where judicial participation is permissible, a judge may not pressure the defendant to accept a plea offer. See e.g., *People v. Sandoval*, 43 Cal. Rptr. 3d 911, 922 (Cal. Ct. App. 2006); *State v. Bouie*, 817 So. 2d 48, 56 (La. 2002); *Standley v. Warden*, 990 P.2d 783, 785 (Nev. 1999).

59. Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> [<https://perma.cc/2Q3S-DQU7>].

60. See, e.g., *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937) (“Doubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments.”). But see *Berger v. United States*, 255 U.S. 22, 43 (1921) (McReynolds, J., dissenting) (“[W]hile ‘[a]n overspeaking judge is no well-tuned cymbal’ neither is an amorphous dummy unspotted by human emotions a becoming receptacle for judicial power.”).

61. See, e.g., Mugambi Jouet, *Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court*, 26 ST. LOUIS U. PUB. L. REV. 249, 294 (2007) (“[J]udges have a duty to detach themselves from emotions so that they can rationally decide issues without any bias or unfair prejudice.”); Evan R. Seamone, *Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Improper*

law,” at least insofar as it implies that judges themselves should try to subordinate their own personalities, to become more like machines or computers than human. While judges should strive for impartiality, the ideal of judicial detachment—dispassionate, impersonal, unemotional judging—reflects an outmoded and unrealistic philosophy.⁶² Even on the appellate level, it is a long debunked fantasy to think that judges are like automatons, processing the facts and law and spitting out decisions uninfluenced by their individual personality. And, if achievable, it is questionable whether impersonal justice in this sense is desirable. Even if it were, the appellate ideal of impersonal judging does not translate to the trial level, where personality is among the tools that many good judges bring to their task. In response to disruptions, insults, and challenges to their authority, it is preferable to restore order through force of personality rather than to resort to more extreme and punitive measures. That is not to say that judges should belittle others or be belligerent or hostile. But judges can effectively express disapproval, communicate their expectations, and lay out the potential consequences of disobedience, all in a stern or forceful manner, without necessarily manifesting bias.⁶³

Likewise, the role of emotion in judging is not only inevitable, as Jerome Frank observed almost 70 years ago,⁶⁴ but legitimate. Nineteenth-century opinions assumed that judges’ emotions led to biased or unreasoned decisions,⁶⁵ but many would argue that emo-

Judicial Biases, 42 WILLAMETTE L. REV. 1, 10 (2006) (“Society expects judges to display professionalism by checking their emotions at the courthouse door and being impartial as they review and decide cases.”).

62. See generally Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 NYU ANN. SURV. AM. L. 497 (2009).

63. See *Berger v. United States*, 295 U.S. 78, 85 (1935) (Where prosecutor engaged in improper cross-examination and closing arguments, “the situation was one which called for stern rebuke and repressive measures.”); *In re Hocking*, 546 N.W.2d 234, 245 (Mich. 1996) (“To hold that a trial judge may not express strong displeasure or even anger, would ignore the reality that the potential for such reactions induces a level of civility in the process, without which the system literally could not function.”).

64. Green & Roiphe, *supra* note 62, at 497 (quoting JEROME FRANK, *LAW AND THE MODERN MIND* (1951)); see also Sharon Roach Anleu et al., *The Emotional Dimension of Judging: Issues, Evidence, and Insights*, 52 CT. REV. 60 (2016); Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1 (1994); Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855 (2015).

65. See Green & Roiphe, *supra* note 62, at 511.

tion has an important role in judging.⁶⁶ Perhaps not all emotions should be freely expressed, but many have a useful place. Consider the role of empathy in judging, which some equate with activism.⁶⁷ As Judge Denny Chin discussed in an essay several years ago, “the reality is that empathy and emotion play an essential role in the real-world, day-to-day administration of justice—particularly in sentencing.”⁶⁸ It is little wonder that the federal sentencing law, which significantly constrains judges’ discretion, is the target of many of the federal district judges who, in Professor Roth’s account, take an “activist” role. The Federal Sentencing Guidelines made the sentencing process more mechanical, precisely to reduce the apparent disparities that resulted because different judges had not only different sentencing philosophies but also, presumably, different emotional reactions to defendants and their crimes.

Some state courts have recognized that expressions of emotion are not the same as expressions of bias and that emotionally engaged judges can make decisions in an unbiased fashion. For example, an Ohio appellate court rejected a claim that the trial judge, who “was briefly overcome with emotion and began to cry” at a sentencing hearing was impermissibly biased.⁶⁹ It explained that “[t]he fact that the trial judge was briefly overcome with emotion and cried does not demonstrate judicial bias. It merely demonstrates that the trial judge is human and can understand and relate to other people’s feelings and emotions.”⁷⁰ Likewise, a Tennessee appellate court concluded that a trial judge could preside over a negligence case in an unbiased manner despite admittedly being “overcome with emotion” and becoming teary while viewing a video

66. See *id.* at 556-57 (discussing William J. Brennan, Jr., *Reason, Passion, and “The Progress of the Law,”* 10 CARDOZO L. REV. 3 (1988)); Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207, 1209 (2012); Terry A. Mahoney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 633 (2011); Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485, 1492 (2011).

67. See Kim McLane Wardlaw, *Essay, Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1658 (2010).

68. See Denny Chin, *A Role for Empathy*, 100 U. PA. L. REV. 1561, 1564 (2012) (defining empathy as “the capacity to understand and appreciate the perspective of others”).

69. *State v. Johnson*, 844 N.E.2d 372, 380 (Ohio Ct. App. 2005).

70. *Id.* (identifying judicial bias as “a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as distinguished from an open state of mind which will be governed by the law and the facts”).

offered in evidence.⁷¹ The court reasoned: “Contrary to popular belief, judges are human and, as such, have feelings and emotions. [T]he mere fact that a judge may feel emotion or may sympathize with a party does not, ipso facto, mean that he or she cannot be unbiased. It is the judge’s bias (actual or perceived), and not his or her emotion, that drives the inquiry of whether recusal is warranted.”⁷²

While, unlike empathy, some emotions do not deserve a role in judicial decision-making, one might question the assumption that judges cannot effectively restrain those emotions or give voice to them only at appropriate moments. *Mayberry* assumes that judges who are personally attacked, though permitted to exercise summary contempt power (if only of necessity) when misconduct occurs, cannot be trusted to preside in a disinterested manner afterwards. In cases such as *Mayberry* and *Allen*, trial judges responded dispassionately to provocative conduct. But the Court assumes that even if they are calm on the outside, victimized judges will be roiling on the inside, despite the passage of time, and incapable of preventing their emotions from overwhelming their decision-making.

It is at least plausible that using the same mindfulness and self-mastery that enabled him to avoid openly expressing hostility, a judge can avoid the unfair influence of negative emotions on fact findings and sentencing decisions in a summary contempt proceeding—that the judge’s dispassionate exterior matches the judge’s interior. If a judge can be expected to preside impartially in the heated trial in which the contempt occurred, it is uncertain why the judge cannot be trusted to serve impartially in the post-trial contempt proceeding. How is the anger that is presumed to result from being attacked different from other emotions that judges may experience throughout a trial? Many of us—including both professionals (e.g., therapists, teachers, police) and others (e.g., telemarketers, flight attendants, subway clerks)—are expected to keep calm and carry on in the face of challenges and insults that might provoke an angry response. Why not judges?

C. *Emotionally Engaged Judging*

The ideal of the rational disengaged judge is both unrealistic and flawed. On the trial court level, an umpire or automaton-like judge would have a hard time controlling the courtroom. Injustices

71. *Williams v. HealthSouth Rehab. Hosp N.*, W2015-00639-COA-T10B-CV, 2015 Tenn. App. LEXIS 310, at *16–20 (Ct. App. May 8, 2015).

72. *Id.* at *18.

in the application of the law would remain unnoted and opportunities to correct systemic errors would be missed. Legislators, who are inevitably unaware of all the circumstances and consequences of the procedural and substantive rules they adopt would operate without the beneficial input of trial court judges.

Judge Rosemarie Aqualina, who sentenced Dr. Larry Nassar for sexually abusing Olympic gymnasts in his care, offers an example of the benefits and some of the dangers of an emotionally engaged trial court judge. At Nassar's sentencing, Judge Aqualina allowed testimony from over 160 victims and repeatedly offered her support and encouragement. She also commented that it was her "honor and privilege" to sentence the defendant and referred to the victims as "superheroes." Some have praised her for courageously standing up for the young women victims, and others have criticized her for abandoning or exceeding the proper role of a judge.

Whatever position one takes on the substance of her comments, we disagree that she abandoned the proper judicial role. Judge Aqualina took command over the sentencing process and claimed a strong and assertive role in using her courtroom not only to mete out justice but to correct errors and omissions in a system that leaves little room for victims to tell their stories. Critics argued that she abandoned the proper role of neutral arbiter, took sides, and inappropriately broadcast her views.⁷³ But the judge at sentencing has never had to maintain a neutral stance. The defendant has been convicted and the purpose of sentencing is to draw on all sorts of information to find the right punishment and justify the sentence imposed.⁷⁴ Judge Aqualina took the moment when a defendant would not be harmed by her position to broadcast her views and correct what she saw as a flaw in a system that discourages sexual assault victims from coming forward. She drew attention to the injustice and did what she could to compensate for it without negatively affecting the outcome of the case or the rights of the litigants. This is the sort of trial court activism we are trying to rehabilitate.

73. See e.g., Anne E. Gowan, *How the Judge in Larry Nassar's Case Undermined Justice*, TIME (Jan. 26, 2018), <http://time.com/5119433/larry-nassar-judge-rosemarie-aqualina-justice/> [<https://perma.cc/V6MZ-73JC>]. Other commentators praised the Judge for giving the victims voice and encouraging other sexual assault victims to come forward. See e.g., Sophie Gilbert, *The Transformative Justice of Judge Aqualina*, THE ATLANTIC (Jan. 25, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/judge-rosemarie-aqualina-larry-nassar/551462/> [<https://perma.cc/RZ27-2UXQ>].

74. For a description of a judge's role as an "expert" in sentencing prior to the federal sentencing guidelines, see Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569, 571 (2005).

Of course, like all judges, emotionally engaged judges are subject to legitimate criticism. Even if one accepts the engaged posture, one might not always agree that a judge has engaged in the right way or expressed the most appropriate emotions. Some will agree with a judge's active involvement in a proceeding and others will think she engaged in the wrong manner or at the wrong time. Some will consider the emotions misplaced or unbalanced, while others will approve. An active judge, in the sense we have described, might well make controversial statements and decisions. Just as some judicial reasoning seems better than others, some expressions of emotion will seem more effective and appropriate. Not everyone will agree with or applaud the activist judge's choices in every instance. But, on the whole, the personal and emotional engagement with a case is both inevitable and beneficial. Hiding it under the guise of dispassionate judging will do more harm than good.

In engaging actively in the Nassar sentencing, Judge Aqualina invited both praise and criticism. Some argued that she identified too much with the victims and not enough with the defendant. In using her courtroom to correct for an injustice in the system, she celebrated Nassar's conviction and even implied that it would be an appropriate punishment if he were sexually abused like his victims. Critics have suggested that this was a thinly veiled message to inmates in prison to rape or sodomize Nassar.⁷⁵ Judge Aqualina empathized with the victims, but may have failed to balance that with empathy or at least sympathy for the defendant.

Criticizing the manner in which the judge has engaged in a proceeding or the particular emotions expressed is different from criticizing the judge for engaging at all. It is also distinct from accusing the judge of bias, animus, or whim. The criminal contempt cases discussed above demonstrate how important it is to distinguish a judge's emotional engagement in a proceeding from bias. Judge Aqualina's controversial sentencing shows that even when judges do not operate with inappropriate bias, they may express unwise or misplaced emotion. Discerning improper judicial bias is not an easy exercise, but it is more feasible when a judge is encouraged to make her decision-making process transparent rather than pretending to function in an automatic, disengaged way.

75. Rachel Marshall, *The Moment the Judge in the Larry Nasser Case Crossed the Line*, Vox (Jan. 25, 2018), <https://www.vox.com/the-big-idea/2018/1/25/16932656/judge-aqualina-larry-nassar-line-between-judge-advocate-sentencing> [https://perma.cc/Q2US-QAB8].

D. *How Judicial Emotion Was Equated with Activism*

We inherit the negative image of emotional trial court judges as activists from a decades-old debate about the role of the Supreme Court in American democracy. Generations of scholars have defended judicial review from allegations that the Court was merely a collection of unelected officials substituting their personal views for that of the elected branch.⁷⁶ Most of these scholars called for judicial restraint while appealing to the unique role of reason in judicial decision-making to defend the legitimacy of the court.⁷⁷ In the course of this debate, the concern over judicial activism could easily have been mistaken for a concern about emotional entanglement.

Perhaps the most important contribution to legal scholarship in America was made by the legal realists in the early twentieth century.⁷⁸ They argued, quite successfully, that there is no objective basis for legal decisions. Judges do not apply clear rules to attain an accurate result. Motivated by their own ideological beliefs and biases, they create the law.⁷⁹

Progressives at the turn of the twentieth century drew on this insight to criticize the *Lochner* Court for striking down regulatory legislation intended to protect workers and other marginalized groups from an increasingly cruel industrial economy.⁸⁰ New Deal liberals similarly saw the Court as the enemy of social change.⁸¹ In 1937, after President Roosevelt's famous court-packing plan, the Court grew compliant in government reform initiatives, but many progressive scholars still called on the judiciary to be careful and sparing with its power.⁸² Many critics continued to express skepticism about the role of courts in promoting social change even after the Supreme Court decided *Brown v. Board of Education* in 1954. Even though the largely liberal academy most certainly approved of the outcome of the case, many drew on earlier critiques of judicial activism to criticize the decision.⁸³

After World War II, critics grew concerned that legal realism might inevitably lead to a kind of nihilism. It failed to justify the

76. KALMAN, *supra* note 2, at 1-13.

77. *Id.* at 40.

78. Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 503-05 (1988).

79. *Id.* (arguing that the main break in legal thought is between the realists and the formalists).

80. KALMAN, *supra* note 2, at 18.

81. *Id.* at 45.

82. *Id.* at 19.

83. *Id.* at 34-37.

rule of law, which many saw as a necessary bulwark against fascism and communism.⁸⁴ At the same time, as Alexander Bickel argued in 1962, if judges make the law, then we are being ruled by a fundamentally anti-democratic institution.⁸⁵ Coining the term “countermajoritarian difficulty,” Bickel set the course for generations of scholars who would seek to justify the role of courts in America in the face of this challenge.⁸⁶ The process school did so by seeking a middle ground between legal formalism and legal realism, a way to justify judicial review without denying the fundamental indeterminacy of the law. The process school acknowledged that law is irreducibly creative, but argued that judicial review is nonetheless legitimate because judges are best situated to determine the outcome of individual cases.

Process school theorists focused on how processes and institutional arrangements lend legitimacy to legal reasoning. Each institution has a distinct area of competence and courts are unique in their ability to resolve problems through reasoned legal argument. Thus, the process school responded to the “countermajoritarian difficulty” by arguing that the law is distinct from politics not because it draws on transcendent legal concepts but rather because of the unique competence of courts to resolve problems in a particular way.⁸⁷

The process school maintained the fear of an active judiciary, insisting that as soon as courts go beyond their prescribed role, they endanger the entire judicial endeavor. When they exceed their area of competence, judges are indistinguishable from political actors, substituting their own views for that of elected officials.⁸⁸ If, for instance, the constitutional text can be ascertained through reasoned analysis, then judges are best situated to interpret it, but if the meaning is ambiguous, then judges act illegitimately.⁸⁹

84. See generally EDWARD PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973).

85. BICKEL, *supra* note 2, at 16.

86. KALMAN, *supra* note 2, at 37-39.

87. Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365 (1978).

88. BICKEL, *supra* note 2, at 15-23.

89. See Fuller, *supra* note 87, at 366-67. Critical Legal Studies took issue with the premise that there is any such thing as reasoned analysis, any determinate way to ascertain the meaning of a text. In the absence of this premise, the process school reasoning falls apart. Roberto Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 572 (1983). For an overview of the legal process school, see DAVID KENNEDY & WILLIAM W. FISCHER III, *THE CANON OF AMERICAN LEGAL THOUGHT* 207-353 (David Kennedy & William W. Fischer III eds. 2006).

In the 1970s, critical legal theorists contributed to the anxiety about the role of courts by arguing that law is an exercise of power, a way to maintain imbalances in society. Many process school scholars, who shared their predecessors' progressive politics, inherited a concern about the legitimacy of courts and judges, but they, unlike the critical legal theorists, sought to justify the Court's decision in *Brown* as well as other socially progressive Warren Court decisions. They did so, in part, by arguing that the Court is legitimate because of its unique ability to employ reason to resolve disputes. Judicial decisions can be legitimate even if they are creative as long as judges draw on their professional training and institutional competence to address critical questions in accord with reason and logic.

In part because process school scholars focused almost entirely on appellate judges, they argued that the unique role of judges, the thing that lent them legitimacy, was reason. Reason is traditionally opposed to emotion. Thus, as judges, scholars, and other critics brought up in this scholarly tradition observed trial court judges, they seem to have grafted this ideal of reasoned decision-making and its unwelcome opposite—emotion—onto trial court judges.

E. Activism as Discretion

One way to rehabilitate trial court activism from this demeaned status is to view it instead as the exercise of discretion. The law is invariably indeterminate. There are holes that need to be filled, definitions that are incomplete, facts or stories that remain vague, and laws whose consequences are not fully understood.⁹⁰ Trial court judges are inevitably called upon to fill these gaps. The law is designed to evolve in context. The way that the law and procedural rules ought to play out in the courtroom is similarly unclear. Ethical, evidentiary, and courtroom protocol are by necessity vague. By drawing on their experience, the unique vantage point of the courtroom, and their own emotional engagement with the cases before them, judges can and should take part in that process of elaborating these laws and rules. They should play an active role in the courtroom to contribute both to the narrative and the outcome of cases.⁹¹

90. Hart, *supra* note 5, at 661-64.

91. Scholars have discussed the role of law as narrative. See Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4-5 (1983); see also Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989).

H.L.A. Hart himself was a positivist who, like the process school scholars, sought a middle ground between realism and formalism. Like his American counterparts, Hart largely focused on appellate judges. But in a previously unpublished essay that was recently discovered, Hart defended a more robust role for other institutional actors in the development of the law. He argued that law is a collaborative, multi-institutional, creative endeavor.⁹² Law is essentially a discursive tradition, constrained by institutional norms and professional traditions.⁹³ Statutory and constitutional law are necessarily indeterminate. Rather than seeing this as a threat to the legitimacy of the system and the rule of law, Hart acknowledged that indeterminacy was a central and fundamental part of the law. In this essay, which was initially a presentation to a faculty philosophy group, Hart focused on how actors other than appellate court judges inevitably exercise discretion. The exercise of discretion is not inimical to law's legitimacy, but rather fundamental to it. As long as decision-making and active elaboration of law and norms are distributed to institutions with established traditions and in the best position to make those determinations, discretion is consistent with the rule of law. Trial court judges are well-situated to exercise discretion because of their proximity to the facts and their experience resolving criminal and civil disputes. Hart's understanding of discretion is useful in disentangling a positive sort of activism from biased or impulsive acts.

Hart began by distinguishing discretion from other forms of decision-making. Discretion, he explained, is not the same as indulging whim or desire. Thus, judges like the ones described above, who felt angry and insulted and lashed out at lawyers or litigants, were not exercising discretion. When a judge applies an obvious principle whose application to facts is beyond dispute, she is doing her job, but not exercising discretion. Discretion, Hart argued, lies somewhere in between caprice and this sort of logical deduction. Discretion involves the effort to do something wise or sound.⁹⁴ To exercise it properly, a judge draws on personal experience, exper-

92. As his biographer argues, H.L.A. Hart did not fully explore the different roles of institutional actors in legal decision-making, nor the way different institutional arrangements or differently trained decision-makers ought to approach their work. Nicola Lacey, *The Path Not Taken: H.L.A. Hart's Essay on Discretion*, 127 *HARV. L. REV.* 636, 647 (2013). While Hart may have left the institutional nature of discretion somewhat vague, others have argued that discretion and law itself must be understood in institutional contexts. John Bell, *Discretionary Decision-Making: A Jurisprudential View*, in *THE USES OF DISCRETION* 89-92 (Keith Hawkins ed., 1992).

93. Lacey, *supra* note 92, at 648.

94. Hart, *supra* note 5, at 657-58.

tise, and the unique respect and perspective that the office of a judge entails. According to Hart, the exercise of discretion should involve a special regard to preserving the role of courts in legal discourse.

To be fair, Hart does not explicitly envision a place for emotional reactions like empathy or anger in courtroom deliberations. The process school, with which he shared much in common, distinguished the institutional competence of judges by emphasizing their unique ability to conduct reasoned analysis, and reason is traditionally seen as something quite distinct from, if not directly opposed to, emotional reaction. Insofar as Hart and the process school relied on this definition of reason, their contribution no longer comports with contemporary understanding. Social scientists have questioned the traditional opposition of emotion and reason, concluding that emotions can and often do play an important role in reasoned decision-making.⁹⁵ Rather than threatening reasoned analysis, emotion facilitates it.⁹⁶ Emotions are based on reasons and motivate action.⁹⁷ This description of the intersection between reason and emotion is particularly apt when thinking about trial court judges. In the midst of busy and often adversarial trial court proceedings, judges ought to be thoughtful, but they need to act as well. Emotion can and should help translate thoughts into appropriate actions.

Hart's description of discretion in this almost forgotten essay is consistent with the kind of activism Professor Roth describes in her article and we discuss above. Hart distinguishes discretion from "whim" and "fancy," which we take to mean a fleeting desire or impulse, not all emotion. Emotions such as empathy and anger are consistent with and should inform a reasoned analysis. A robust view of the role of trial judges in resolving disputes, opining on problems in the structure of the criminal justice system, and interacting with prosecutors, defense attorneys, witnesses, and defendants is not only consistent with Hart's understanding of institutional actors like trial courts but also fundamental to it. Judges are not

95. Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 643-45 (2011). For a survey of the social science literature on how fundamental emotion is to judgment, see David J. Arkush, *Situating Emotion: A Critical Realist View of Emotion and Noncognitive Processes for Law and Legal Theory*, 2008 B.Y.U. L. REV. 1275, 1305-09. See generally CASS SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1998) (arguing that judging is really the application of a kind of practical wisdom, the pursuit of good outcomes, rather than the result of pure reason).

96. Maroney, *Angry Judges*, *supra* note 66, at 1212-13.

97. *Id.* at 1216.

automatons applying law in a mechanistic way to easily discernible facts and running the judicial process literally like clockwork. They are critical actors situated to use judgment informed by experience, expertise, and emotional engagement to control their courtrooms and resolve cases.⁹⁸ Hart may have been wary of embracing the kind of judicial activism described by Professor Roth because of his commitment to legal positivism, to the distinction between law and morality.⁹⁹ But his essay on discretion seems nonetheless to embrace a vision of the law that has more room for judicial creativity in trial courts than many process school scholars would traditionally allow.

One of the key contributions of the legal process school was a recognition that law is a dynamic process, created not just by the legislature but rather by many institutions and many actors.¹⁰⁰ Judicial activism in the trial courts, of the sort described by Professor Roth, seems a productive part of this collaborative process. While the legal process school may have contributed to the negative connotations of judicial activism, Hart's essay on discretion demonstrates that its lessons can support a far more creative and engaged view of the judiciary, a view consistent with and supportive of the activist judges Professor Roth describes.

As Robert Cover has argued, law is more than rules. It is the stories people tell about the law and the meaning it acquires along the way.¹⁰¹ The legitimacy of the law does not derive from its official source, but rather from its power to shape an ongoing dialog. The courtroom is often the center of this drama where the clash of different stories about the facts and the law vie for supremacy. In Cover's terms, the courtroom is an interpretive community, and the judge, like the other participants, plays a role in the development of law, the determination of facts, and the evolution of legal institutions. Trial court judges are not neutral observers or umpires. This new iteration of legal process does not tolerate the separation of reason from emotion. They are inextricably entwined, and as Hart argued, all actors draw on their own place and perspective to shape the dialog. Understood in this way, active emotional entanglement

98. See *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982) ("In contrast with the thought processes accompanying 'ministerial' tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decision-maker's experiences, values, and emotions.").

99. Lacey, *supra* note 92, at 637.

100. Geoffrey C. Shaw, *H.L.A. Hart's Lost Essay: Discretion and the Legal Process School*, 127 HARV. L. REV. 666, 672 (2013).

101. Robert M. Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 4-5 (1983).

is not only consistent with, but also necessary to, both justice and the appearance of justice.

CONCLUSION

The image of the stern and detached judge, presiding in a dignified solemnity over a trial, is one we have inherited from generations of scholars who fear active engaged officials who are not directly accountable to the electorate. But as H.L.A. Hart explained over a half century ago, discretion is a necessary part of the system. It is built into the nature of law and legal institutions. Far from a necessary evil that threatens to undermine the legitimacy of official actors, the proper exercise of discretion justifies their role.

Discretion, in the mind of many of the original process school theorists, involves only reasoned and principled analysis. But as Hart acknowledged, once we recognize all the myriad actors and institutions that inevitably exercise discretion in elaborating the meaning and application of the law, discretion must be something more complicated than reasoned analysis. Hart most likely would not have had in mind Judge Aqualina presiding over Nassar's sentencing, but unlike many of his contemporaries, he did understand that implementing the law is complex. It involves actors with institutional experience and expertise, involved in the articulation of law and its application to contested facts. Each institutional actor brings a unique experience and expertise to the process. As process theory evolved through the decades, many adherents abandoned the outdated distinction between reason and emotion, opting instead for a narrative view of the law. Individual actors are cast in important roles in the ongoing articulation of the law and its meaning. Emotionally engaged, even vulnerable, individuals are more suited to the role.

The separation of reason and emotion and the repudiation of the latter in the contempt cases fail to grasp the full complexity of the law. They fail to comprehend the important role that discretion plays. As Hart explained, discretion is not the same as bias, whim, or fancy. The structure of legal institutions should strive to minimize judges' arbitrary decisions. The activist judges Professor Roth describes are engaged not in an illegitimate grab at power, but rather a collaborative exercise of discretion. They contribute to a conversation and elaboration of the law with their unique perspective and respect for the courtroom.

