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**Emotions, and the Politics of Attention in
Judicial Reasoning**

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Image from "Weapons of Mass Destruction", Hannah Cass-Simpson and Noa Weinstein, Chelsea College of Art



Emily Kidd White

...
If you catch him,
hold up a flashlight to his eye. It's all dark pupil,
an entire night itself, whose haired horizon tightens
as he stares back, and closes up the eye. Then from the lids
one tear, his only possession, like the bee's sting, slips.
Slyly he palms it, and if you're not paying attention
he'll swallow it. However, if you watch, he'll hand it over,
cool as from underground springs and pure enough to drink.

"Man-Moth", Elizabeth Bishop, The Complete Poems 1926-1979

Winding up the inaugural Kellogg Lecture on Jurisprudence, Ronald Dworkin delivered a characteristically stylish last line to his Library of Congress, Coolidge Auditorium crowd: "Law is not literature" he said, "but law is closer to poetry than it is to physics...than to even – *sacrilege!* - economics." Like poetry, legal doctrine can, at times, be tone-setting and image-filled. It can prescribe a sensibility or a way of seeing a legal question, and demand fineness in qualitative distinction. It can also make sustained and exacting demands on one's attention. This paper explores this last demand, querying the role of emotions in sustaining judicial attention on a legal subject or question. It focuses on the service role for emotions in legal reasoning, which occur when a jurist consciously draws on emotion in service of a governing legal value or scheme.

It is common to think of emotions as momentary flashes, prone to fleeting. Though this view requires revision (some emotions, like love and grief, build and burn over time), it nevertheless exposes the difficulty of calling forth or sustaining an emotion where one wishes to do so. Consider, for example, the surfeit of calls to "pay attention", "stay angry", and "be outraged/resist normalcy" in the wake of Trump's election (Leon Wieseltier "Stay angry. That's the only way to uphold principles in Trump's America" *Washington Post* (November 11, 2016); Masha Gessen, "Autocracy: Rules for Survival" *New York Review of Books* (November 10, 2016). Through such calls, the conscious maintenance of an emotional state takes on an ethical or political imperative.

It may be difficult to draw on emotions to reason in accordance with a held value but to paraphrase Avishai Margalit (himself paraphrasing Wittgenstein), to consider it impossible is to paint a picture of man that we would not know. We regularly revise our emotional responses, or work to generate and maintain a certain emotional disposition, by putting pressure on our judgements, clarifying stakes, setting up habits of mind, conjuring up competing emotions, constructing images, and/or calling up past events.

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. There are times when legal doctrine itself calls upon judges to both understand and use emotions in different ways. One example, discussed in the paper, concerns the deep sort of seeing-attention to law's effects required under some constitutional law regimes. That certain forms of suffering, violence, or harm, are difficult to detect in the absence of focused attention is, I think, what Bishop's excerpted poem, here in epigraph, intends to express. The task of this paper is to begin to explore how emotions motivate and facilitate the kind of attention or quality of mind necessary to ascertain whether a legal commitment, to a right for example, has been violated.



Photo of Elizabeth Bishop and Louise Crane, Key West