

(What We Talk About When We Talk About) Judicial Temperament

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[I]t seems to me that temperament is the key to everything else that one does on the bench.¹

Elusive as it is important, judicial temperament is notoriously hard to define.²

Introduction

Judicial temperament is simultaneously the thing we³ think all judges must have and the thing that no one can quite put a finger on. The usual human response to worrying about something you can't pin down is anxiety. One moves from anxiety to action through specificity: a shape emerges from the fog, and we see what we are dealing with and what it demands from us. With temperament we have kept ourselves in the fog.

Being perceived as having a good temperament can get a judge confirmed or elevated; the opposite can stop her at the gate, or, if she already is serving, get her reprimanded or removed from the bench.⁴ Indeed, former Senator Joseph Biden has stated that, in evaluating

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¹ Confirmation Hearings on Federal Appointments: 1998 Hearings before the Senate Comm. on the Judiciary, Part 3, 105th Cong. 1033, Feb. 4, 1998, at 41 (testimony of Hon. Jeremy Fogel, nominee for the U.S. District Court for the Northern District of California).

² JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 6-7 (2006).

³ Who, one may ask, is included in or excluded from this abstracted “we”? Many constituencies have a potential interest in judicial temperament: legal scholars, lawyers, legislators and executive officials, court consumers, various segments of the public, historians, and social scientists. Each might mean something different by the term and hold different normative expectations thereof. I use the conceit of “we” cognizant of its indeterminacy, claiming an operative “we” of legal scholars, practitioners, and judges—those with the most direct theoretical stake.

⁴ William G. Ross, *The Questioning of Lower Federal Court Nominees During the Senate Confirmation Process*, 10 WM. & MARY BILL RTS. J. 119, 131 (2001) (U.S. District Court nominee Frederica A. Massiah-Jackson's nomination withdrawn after temperament questions raised—for example, by a sidebar in which she told a lawyer to “shut your fucking mouth” and another instance in which she stated, in open court, “I don't give a fuck”).

federal-court nominees, he and his colleagues “worry” about temperament most of all.⁵ It is intellectually and practically intolerable to have so much rest on so indeterminate a concept. If this key ingredient of judicial fitness remains as “[e]lusive as it is important,”⁶ it will remain a cipher in which one sees what one wants, in whose lack one sees what one fears. We need to know what we are talking about when we are talking about judicial temperament.

It’s not that people have not tried to wrangle the concept of judicial temperament; they have. But such efforts are scattered, relatively thin, and tend to follow one of two approaches. The first approach is to present laundry lists of desirable judicial qualities and behaviors without articulating what, if anything, unifies the list. The second approach, in contrast, treats judicial temperament as a fundamentally mysterious quality that one either has or does not have. Both approaches do a deep disservice to a critical measure of judicial fitness.

The list-of-good-things approach, for its part, is unduly capacious. Consider this sweeping concept offered by the prominent legal commentator Jeffrey Rosen, who wrote that temperament embraces “personality, character, upbringing and education, formative career experiences, work habits, and behavior when interacting with others.”⁷ We see similar sweep (and only partial overlap) in the definition of temperament used by the influential American Bar Association Standing Committee on the Federal Judiciary: “compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias, and commitment to equal justice under the law.”⁸ Other nominations for the category include humility, collegiality, wit, pragmatism, a “common touch,” likability, “the capacity and inclination to treat litigants as equals,” sensitivity

⁵ Confirmation Hearings on Federal Appointments: 1998 Hearings before the Senate Comm. on the Judiciary, Part 3, 105th Cong. 1033, at 667 (1999) (remarks of Sen. Biden).

⁶ ROSEN, PERSONALITIES AND RIVALRIES, at 6-7. See also Larry W. Yackle, *Choosing Judges the Democratic Way*, 69 B.U. L. REV. 273 (1989) (characterizing notion of judicial temperament as “unruly”); Sheldon Goldman, *Selecting Lower Court Federal Judges on the Basis of their Policy Views*, 56 DRAKE L. REV. 729 (2008) (“vague”).

⁷ ROSEN, PERSONALITIES AND RIVALRIES, at 8.

⁸ AMERICAN BAR ASSOCIATION, ABA STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 3 (2009) Many state standards echo this language. See, e.g., American Bar Association, ABA Standing Committee on Judicial Independence, Standards on State Judicial Selection (2000); Utah State Courts, Manual of Procedures for Justice Court Nominating Commissions 19 (2010) (defining judicial temperament to include “common sense, compassion, decisiveness, firmness, humility, open-mindedness, patience, tact and understanding”).

to racial and gender issues, not being addicted to drugs or alcohol, and absence of a criminal record.⁹

A concept that devolves to a highly diverse list of attributes that may or may not relate to one another lacks analytic distinction. It provides us inadequate tools with which to distinguish one person from another and fails to reflect the reasons for doing so. We might as well as whether the person is, or would be, a “good judge.”

That is the fault of the second approach, which suffers not from too much diverse content but from too little content at all. Without clear parameters upon which to rely, those asked to opine about an actual or potential judge’s temperament typically fall back on a thumbs-up-or-down. Typical among the assessments of now-Justice Elena Kagan, for example, was this comment: “her temperament is splendid.”¹⁰ The late Justice Antonin Scalia once offered an opposing but equally conclusory self-assessment. Asked “Is there such thing as an ideal judicial temperament, and if so, what is it?,” he replied, “If there is one, I don’t have it.”¹¹

With no clear criteria to distinguish *splendid* from *bad*, or either pole from the points in between, one questions the utility of the concept at all. It could even have negative utility. As others have noted, because of its murkiness “judicial temperament often has been a smoke screen for other objections to a nominee’s candidacy.”¹² When Louis Brandeis was nominated to the U.S. Supreme Court, for example, the *New York Sun* called him “utterly and even ridiculously

⁹ William G. Ross, *The Questioning of Lower Federal Court Nominees During the Senate Confirmation Process*, 10 WM. & MARY BILL RTS. J. 119 (2001); William G. Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 WM. & MARY L. REV. 633, 650 (1987) (quoting Laurence Tribe); Jeffrey S. Sutton, *A Review Of RICHARD A. POSNER, HOW JUDGES THINK* (2008), 108 MICH. L. REV. 859, 874 (2010) (“Temperament, perhaps most critically, affects how judges decide cases. Open-mindedness, not taking oneself too seriously, wit, self-awareness, humility, being a generous and respectful colleague, and being willing to work at getting it right all fall on the asset side of the balance sheet—as Posner (and I) would agree.”); James T. Hill, *Achieving Transparency in the Military Panel Selection Process with the Preselection Method*, 205 MIL. L. REV. 117, 137 (2010); Yackle, *Choosing Judges*, at 309; James J. Alfini & Jarrett Gable, *The Role of the Organized Board in State Judicial Selection Reform: The Year 2000 Standards*, 106 DICK. L. REV. 683 (2002).

¹⁰ Statement of Kim J. Askew, Chair, Standing Committee on the Federal Judiciary, American Bar Association, concerning the nomination of the Honorable Elena Kagan to be Associate Justice of the Supreme Court of the United States, before the Committee on the Judiciary, United States Senate, July 1, 2010, at 17 (quoting a questionnaire respondent).

¹¹ Public exchange between Associate Justice Antonin Scalia and Professor Alexander Boni-Saenz, February 13, 2012. Recounted in email from Alexander Boni-Saenz to Terry Maroney, Sept. 9, 2015.

¹² Ross, *Functions, Roles, and Duties*, at 649; see also William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 34-36, 65 (1990).

unfit,” and a group of “prominent Bostonians, including the president of Harvard, signed a petition” attacking his temperament.¹³ That accusation now seems wildly off-base in light of the reverence with which many now regard both Brandeis the man and Brandeis the judge. The objection was likely motivated by ideology, politics, and anti-Semitism.¹⁴

Politics can infect temperament-talk, but they also can illuminate it. The 2016 election of President Donald Trump made temperament a hot topic the way the 2009 confirmation hearings for Justice Sonia Sotomayor made “empathy” go “radioactive.”¹⁵ Trump’s detractors uniformly attacked his temperamental fitness to be President,¹⁶ complaining about “impulsivity, lack of verbal restraint,” reactivity when taunted, and love of “creating disorder”—not to mention alleged misogyny and mental health problems.¹⁷ Even his supporters were concerned: temperament was their single biggest worry.¹⁸ This rare convergence evidences a baseline, shared belief that some cluster of personal traits makes individuals more or less suited to particular positions of authority. Whether we are talking about judges or other government officials, then, we are trying to capture something about the human being. In order to predict how he or she will *act* in a specific set of circumstances, we are trying to get a sense of what he or she generally *is like*.¹⁹

¹³ Ross, *Participation*, at 7. See also Ross, *Functions, Roles, and Duties* (providing examples of judicial temperament being used to signify ideology or specific beliefs and values, such as racism).

¹⁴ Sheldon Goldman, *Selecting Lower Court Federal Judges on the Basis of their Policy Views*, 56 DRAKE L. REV. 729 (2008).

¹⁵ Peter Baker, *In Court Nominees, Is Obama Looking for Empathy by Another Name?*, N.Y. TIMES (Apr. 26, 2010); Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CAL. L. REV. 629, 631 (2011).

¹⁶ See, e.g., Dan P. McAdams, *A Psychologist Analyzes Donald Trump’s Personality*, THE ATLANTIC, June 2016; John Kelly, *From Jefferson to Donald Trump: A Brief History of Presidential Temperament*, SLATE, August 15, 2016.

¹⁷ Peter Wehner, *Why I Cannot Fall in Line Behind Trump*, N.Y. TIMES, Jan. 22, 2017, at SR 13; see also Adam Howard, *Trump’s Mental State is Becoming a Campaign Talking Point*, NBC News, Aug. 2, 2016, <http://www.nbcnews.com/news/us-news/trump-s-mental-state-becoming-campaign-talking-point-n621556>.

¹⁸ According to a pre-election Pew survey, 34% of Trump supporters worried about his temperament. One opined that Trump was like “a temperamental child saying anything in an attempt to get what he wants.” Clinton supporters voiced no concerns about her temperament; instead, their greatest worry was about trustworthiness. PEW RESEARCH CENTER, *IN THEIR OWN WORDS: WHY VOTERS SUPPORT—AND HAVE CONCERNS ABOUT—CLINTON AND TRUMP*, Sept. 21, 2016.

¹⁹ Charles S. Carver & Michael F. Scheier, *The Trait Perspective*, in CHARLES S. CARVER & MICHAEL F. SCHEIER, *PERSPECTIVES ON PERSONALITY* 13-44, 37 (7th ed. 2014).

So far, so good. But this episode in American political history further demonstrates how elastic the concept can be. During the campaign Trump declared temperament to be his “strongest asset, maybe by far.”²⁰ He characterized his temperament as a “winning” one, that is, consisting of knowing “how to win”²¹—not a quality commonly seen on any temperamental inventory, diverse though they are. In a statement with strong parallels to the judicial context, a prominent commentator observed that “a president’s temperament is his most important quality and it is the hardest to measure in the candidates.”²² Like “leadership,” “character,” and “values,” the concept—whether applied to executive officials or judges—can “get shapeless pretty fast.”²³

Our concept of judicial temperament need not, and should not, remain simultaneously vital and shapeless. This Article seeks to articulate judicial temperament’s theoretical core and in so doing to fundamentally re-orient how we think and talk about it. It posits that we ought to think of judicial temperament as a deep-seated set of specific personal traits—separable from intellect, training, and ideology—that, in dialectic with judicial environments and the predictable demands of judging, drive behaviors that we may deem desirable or undesirable according to the dominant normative expectations of our era. This way of thinking about *judicial* temperament synergizes with how our sister discipline of psychology conceptualizes *human* temperament. Psychology offers law a sharper notion of how temperament operates structurally and of what is consists substantively.

The Article proceeds as follows.

Part I offers an overview of extant notions of judicial temperament. The idea that the *good judge* is characterized by highly personal, non-intellectual traits has deep roots. Aristotle

²⁰ Katie Zezima, *Trump: My strongest asset ‘is my temperament,’* WASH. POST, Sept. 27, 2016.

²¹ *Id.*

²² John Dickerson, *How To Measure for a President*, SLATE, Oct. 1, 2012 (words like temperament are “used by politicians to critique their opponent without having to explain exactly what they mean”). It’s a fair question whether we require different temperaments of executive officials and judges. Doris Kearns Goodwin, for one, suggests there is something unique about presidential temperament. Peter Grier, *Donald Trump, Hillary Clinton, and the question of temperament*, CHRISTIAN SCI. MON., Sept. 22, 2016. Her view, as recounted by Grier: “Other historians tick off basic qualities that are useful in a wide range of situations. Humility, empathy, and patience have been evident in many of the best presidents. ... Liking people is important. So is resilience in the face of adversity.” Other good qualities include equanimity and confidence, “a certain joie de vivre that kept [certain presidents] from wallowing in anger or resentment.” *Id.*

²³ *Id.*

included “temperance” among his four judicial virtues, alongside justice, prudence, and fortitude.²⁴ Some centuries later Senator Lindsey Graham, questioning Neil Gorsuch at his confirmation hearing for the Tenth Circuit, emphasized that “being a judge is more than being smart”; to predict who will be a good judge “you have got to understand people underneath.”²⁵ This Part examines how we have attempted to discern and measure the qualities that lie “underneath” and what behaviors those qualities are thought to impede or promote. It distills both extant theoretical accounts (of which there are few) and the practice-oriented literature—judicial selection guidelines, codes of conduct, performance evaluation standards, disciplinary standards, and statements at confirmation hearings—to glean insight on commonalities and variance.

Though variance abounds, these sources do shed light on the behavioral work we hope temperament to perform. Judicial temperament generally is thought to manifest in consistent exercises of patience, level-headedness in challenging moments, treating people with courtesy, projecting a dignified demeanor, and being a respectful colleague. Perhaps surprisingly, some of the qualities commonly mentioned as undergirding these behaviors are emotional in nature, such as compassion. The same is true of qualities set out as judicial temperament’s foils, particularly a tendency to be quick to both feel and act out of anger.

The Article then turns to the psychological literature on temperament and personality,²⁶ in which emotion also is central. Part II sets forth two fundamental psychological insights that

²⁴ ARISTOTLE, *ETHICS*, in 9 *THE WORKS OF ARISTOTLE*, bk. 5, ch. 4 (W.D. Ross trans. 1925).

²⁵ Hearing before the Committee on the Judiciary, United States Senate, 109th Cong. 2nd Session, June 21, 28, and August 1, 2006, at 36.

²⁶ An important point of nomenclature deserves mention. When this Article refers to psychological concepts of temperament it means to embrace that discipline’s study of trait-level individual differences and their implications. See generally Part III. The psychological literature traditionally has distinguished between research on such phenomena in child development, historically labeled *temperament*, and research on adult manifestations of those phenomena, historically labeled *personality*. This theoretical and linguistic divide is declining, and my usage reflects that decline. Temperament theory as I apply it refers to trait-level differences in adults. That most or many of these have deep developmental origins underscores their tenacity but does not signify an interest in examining judges’ childhoods. See Jaap J.A. Denissen, *Personality Development Across the Life Span*, in *THE WILEY-BLACKWELL HANDBOOK OF INDIVIDUAL DIFFERENCES* 77-100 (Tomas Chamorro-Premuzic et al. eds., 2011); Marcel Zentner & Rebecca L. Shiner, *Fifty Years of Progress in Temperamental Research: A Synthesis of Major Themes, Findings, and Challenges and a Look Forward*, in *HANDBOOK OF TEMPERAMENT* 673-700 (Marcel Zentner & Rebecca L. Shiner eds., 2012); Mary K. Rothbart, *Advances in Temperament: History*,

together clarify what we ought to talk about when we talk about judicial temperament. First, temperament has a structural component. It operates as a constraint on the possible self; is an important determinant of behavior, particularly behavior under stress; and is not a unitary quality that one has or does not have but, rather, a cluster of qualities that determine one’s goodness of fit with particular environmental constraints and challenges. Second, temperament has a substantive component. It devolves largely to trait-level patterns of emotional reactivity and self-regulation. The traits underlying a term-of-art invocation of judicial temperament—that is, use of the term to signify that which is desirable in a judge—are, first, a tendency toward affiliation, prosociality, and empathy, and, second, relative skill with emotional and behavioral regulation, particularly the regulation of impulses.²⁷

When we talk about judicial temperament, then, we ought to be talking largely about emotion—both the emotional traits that sit at a person’s core and the behaviors those traits are likely to promote given the constraints and challenges of a particular judicial environment. Calling on these structural and substantive insights to build a foundational theory of judicial temperament has wide-reaching implications. It can shape mechanisms of judicial selection, training, support, and discipline. It can inform how we sort people into the specific judicial roles in which they are most likely to thrive. It also can affect how we construct and support the environments in which we ask our judges to work, in order to maximize chances of thriving (and minimize chances of failure) given their expected range of temperaments.

This new theoretical account also presents particular dangers. If the primary vice of extant accounts is indeterminacy, the primary vice of this one may be overdeterminacy. There is

Concepts, and Measures, in HANDBOOK OF TEMPERAMENT, *supra*, at 3-20, 9 (“in recent years concepts of temperament and personality in adulthood and childhood have increasingly come together”).

²⁷ Kirby Deater-Deckard & Zhe Wang, *Anger and Irritability*, in HANDBOOK OF TEMPERAMENT, *supra*, at 124-44, 126, 128; Ariel Knafo & Salomon Israel, *Empathy, Prosocial Behavior, and Other Aspects of Kindness*, in HANDBOOK OF TEMPERAMENT 168-79, 169; Zuckerman, *Models of Adult Temperament*, in HANDBOOK OF TEMPERAMENT, *supra*, at 56; Samuel P. Putnam, *Positive Emotionality*, in HANDBOOK OF TEMPERAMENT, *supra*, at 105-23, 109; Zentner & Shiner, *Fifty Years of Progress*, at 677 and Table 32.1 (“Traits with the broadest support across ages and models” are behavioral inhibition, activity, positive emotionality, anger and irritability, effortful control, and empathy and prosocial traits.”). See also William Revelle & Klaus R. Scherer, *Personality and Emotion*, in OXFORD COMPANION TO THE AFFECTIVE SCIENCES (David Sander & Klaus R. Scherer eds., 2009); Carver & Scheier, *The Trait Perspective*, at 21-28 (locating these traits within superordinate ones of emotional stability, agreeableness, and conscientiousness, and as inconsistent with “psychoticism,” defined as “a tendency toward psychological detachment from, and lack of concern with, other people,” high levels of which are associated with being “hostile, manipulative, and impulsive”).

nothing in this new account that guarantees that vice, but there is reason to worry that said vice might manifest. Part III concretizes those dangers by showing the ways in which our seemingly constant human drive to categorize ourselves and one another has manifested in schemes ranging from silly²⁸ to evil.²⁹ It specifies how this theory should *not* be used, thus inviting robust exploration of the many other ways in which it could.

The Article concludes by reflecting on the theoretical merits of its proposed account of judicial temperament. A theory should, first, explain.³⁰ This one explains why we have persisted in our belief in the existence and importance of something called judicial temperament, despite our equally persistent inability to get our arms around it. It also explains why certain qualities, such as compassion and patience, appear on most laundry lists. The theory also supports my instinct that being “prone to anger episodes that are relatively frequent and extreme,” a tendency I observed while researching judicial anger episodes, might lie at the heart of the puzzle of judicial temperament³¹—though this research has significantly expanded upon that instinct.

A theory should also predict, a function “more subtle and more difficult.”³² This one predicts that specific traits will manifest in desirable judicial behaviors (or their opposite) in interaction with certain features of diverse judicial environments. This new theory of judicial temperament can be probed, argued with, and tested, an iterative process that will meaningfully enhance our collective understanding of this critical aspect of judicial fitness—and, ultimately, our ability to operationalize that understanding through valid, reliable processes.

²⁸ Shankar Vendantam, *The Sorting Hat*, National Public Radio, Hidden Brain podcast, Dec. 4, 2017, available at <https://www.npr.org/templates/transcript/transcript.php?storyId=568418089> (exploring popular fascination with sorting people into Harry Potter houses—“brave Gryffindor, gentle Hufflepuff, smart Ravenclaw or ambitious Slytherin”—and the Sorting Hat’s connections with other systems for personality classification).

²⁹ JEROME KAGAN, *GALEN’S PROPHECY: TEMPERAMENT IN HUMAN NATURE* xic-xv, 4, 11 (1994) (noting that a society that seeks to enshrine differences in order to exert hierarchical control will find it expedient to freeze human qualities into categories that serve that goal); L.N. Fowler, *Temperaments: Their Classification and Importance, A Lecture*, in *LECTURES BY MRS. FOWLER*, (London: W. Tweedie, 1865(?)) (setting forth array of racialized and gendered temperamental typologies); WILLIAM SHELDON & S.S. STEVENS, *THE VARIETIES OF TEMPERAMENT: A PSYCHOLOGY OF CONSTITUTIONAL DIFFERENCES* (1942, reprinted 1970) (critiquing crude typologies of the past while simultaneously opining on characteristic temperaments of Jews and “Negroes”).

³⁰ Carver & Scheier, *What is Personality Psychology?*, at 5.

³¹ Terry A. Maroney, *Angry Judges*, 65 *VAND. L. REV.* 1207, 1213 n. 31 (2012).

³² *Id.* at 6.