A few months after I began my work on the United States District Court for the Eastern District of Pennsylvania, I attended a week of seminars in Washington, D.C., sponsored by the Federal Judicial Center. Besides covering many aspects of federal civil and criminal law, we had dinner each night with judicial luminaries, including one night at the Supreme Court dining with Justices White and Scalia. The host of our last such dinner was one of the nation's brightest court of appeals judges, who ate with us in a private dining room at a pleasant restaurant. He regaled us with his experience on his circuit.
Of all his good stories, however, one has stayed with me that I would like briefly to share here.

The judge described a case involving a state university's application of NCAA eligibility rules to exclude a gifted young athlete from his chosen game. When the young man was foreclosed from playing his sport in intercollegiate competition, he filed an action under 42 U.S.C. § 1983. As the judge was canvassing for us the interesting legal points at issue, he mentioned something in passing that, for me, eclipsed his erudite, witty account. He mentioned that during the oral argument he had noticed a young male face in the packed courtroom. The judge had wondered to himself, "Is that young fellow there our plaintiff?"

I suddenly felt saddened for this fine judge. I thought, you could not recognize—or even picture in your mind—this disappointed star who brought these stimulating issues before you? He had no face for you? There, I thought, is a pity.

This Essay is about avoiding that pity. I offer here one judge's view about judging, and, in particular, about a consequence of realizing that in every case there is at least one face, and usually more, who not only looks at what we judges do, but is profoundly and personally affected by our actions.

Although most speakers of American English use the word "passion" to refer to "amorous feelings or desires," that meaning is, in fact, the eighth of ten major definitions of the word in the 1989 edition of the Oxford English Dictionary. The very first definition in the Oxford English Dictionary, "[t]he suffering of pain," applies to litigants, as in "the passion of Sacco and Vanzetti." This application of "passion" does no more than recognize that the term "federal case" is not a cliché for our litigants. For all of them, their cases represent a major crisis in their lives that they will never forget.

As we consider some faces here, I would like to apply another meaning of "passion." The sixth Oxford English Dictionary definition is "[a]ny kind of feeling by which the mind is powerfully affected or

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2 Id. at 309 (definition 1).
3 Those of a philological bent will find definitions of "passion" other than the common American one, and these meanings, too, describe many of the cases that are filed in our Court. See id. (definition 5a) ("The fact or condition of being acted upon or affected by external agency."); id. (definition 10a) ("[A]n overmastering zeal or enthusiasm for a special project; a . . . vehement predilection . . . to . . . an aim or object pursued with zeal.").
moved." I here will argue that this meaning of "passion" has relevance to the business of the judiciary.

An example of how it is relevant may be found in the celebrated—and in its early years, condemned—action of my brother judge, Raymond J. Broderick, in the famous case of Halderman v. Pennhurst State School & Hospital

Halderman was Judge Broderick's landmark case that dealt with the constitutional and statutory rights of mentally retarded people. The first of seventy class-action civil-rights lawsuits filed around the country, Halderman has for over two decades served as a model for deinstitutionalization litigation in America.

Judge Broderick issued dozens of published opinions, the court of appeals published its share, and the Supreme Court twice weighed in.

Indeed, from the Supreme Court's second decision in 1984 until today, Judge Broderick has issued no less than twenty-four published opinions, and has entered hundreds of orders implementing his original injunction.

On February 9 of this year, Judge Broderick issued a forty-one page memorandum that, at last, looks to the end of the litigation that began on May 30, 1974.

Indeed, Judge Broderick's February 9 decision contemplates a terminal date of June 30, 1998.

In his canvass in this opinion of the "empirical evidence that class members are better off in almost every way since leaving Pennhurst and receiving individualized habilitation in the community," Judge Broderick offers a vignette that, I submit, tellingly reveals the passion

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4 Id. (definition 6a).
6 See, e.g., Halderman v. Pennhurst State Sch. & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977) (listing findings of fact and conclusions of law after a 32-day trial), aff'd in part and rev'd in part, 612 F.2d 84 (3d Cir. 1979) (en banc) (affirming on statutory grounds but reversing as to the scope of injunctive relief granted and avoiding constitutional claims), rev'd, 451 U.S. 1 (1981) (reversing the Third Circuit and remanding for consideration of state statutory and federal constitutional issues Judge Broderick decided). On remand, the Third Circuit affirmed its prior decision, this time on state statutory grounds, see 673 F.2d 647 (3d Cir. 1982) (en banc) (reissuing prior en banc decision), rev'd, 465 U.S. 89 (1984) (5-4 decision) (reversing, on Eleventh Amendment grounds, the grant of prospective injunctive relief against state officials on the basis of state-law violations). In 1985, a class-action settlement and consent decree was approved, see 610 F. Supp. 1221 (E.D. Pa. 1985), and in 1994, a contempt order was issued against the defendants for violation of the consent decree, see 154 F.R.D. 594 (E.D. Pa. 1994).
8 Id. at #11.
that accumulated in him after thirty-two days of testimony in the 1977 trial. At page twenty-seven of his February 9 Memorandum, Judge Broderick writes about the lead plaintiff as she was in 1977 and is now:

"Terri Lee Halderman, the original plaintiff in this action, was admitted to Pennhurst in 1966 when she was twelve years of age. During her eleven years at Pennhurst, as a result of attacks and accidents, she has lost several teeth and suffered a fractured jaw, fractured fingers, a fractured toe and numerous lacerations, cuts, scratches and bites." Today, the Court can happily report that Ms. Halderman lives in a one-level, ranch-style home with two roommates in Delaware County. Her home has a deck and a backyard where she enjoys the outdoors. She is in good health. She is provided with one-to-one staffing at all times, which enables her to participate in activities in the community during the day. 

It is quite evident that twenty years after her testimony, Judge Broderick has never forgotten the face of Terri Lee Halderman. Of course, he made legal history along the way, but query whether any judge, including Judge Broderick, would have invested the energy, patience, intelligence, and creativity that Judge Broderick has brought to bear for almost a quarter of a century without the passion Terri Lee Halderman animated in this insightful judge.

Compare Judge Broderick’s view of Terri Lee Halderman with a similar litigant before Justice Oliver Wendell Holmes and his brethren in 1927. In case the reader has forgotten who Carrie Buck was, here is Justice Holmes’s complete description of her:

Carrie Buck is a feebleminded white woman who was committed to the State Colony [for Epileptics and Feeble Minded for the State of Virginia] in due form. She is the daughter of a feebleminded mother in the same institution, and the mother of an illegitimate feebleminded child. She was eighteen years old at the time of the trial of her case. . . .

When Ms. Buck’s guardian and next friend, R.G. Shelton, took due process and equal protection exception to State Colony superintendent J.H. Bell’s intention to sterilize Carrie Buck, Justice Holmes and seven of his brethren (Justice Butler dissented) ruled against her. Justice Holmes likened the involuntary cutting of Carrie Buck’s fallopian tubes to the compulsory vaccination of adults during a smallpox epidemic. He also observed that “[i]t would be strange” if the

9 Id. at *12 (quoting Halderman, 446 F. Supp. at 1309).
11 See id. at 207 (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905)). It is perhaps not surprising that Jacobson readily came to Holmes’s mind. The case involved
Commonwealth of Virginia "could not call upon those who already sap the strength of the State" for a "lesser sacrifice" than military service sometimes required of those who did not sap that sovereign strength. And then the learned Justice almost invited Ms. Buck to thank him for her forced sterilization when he wrote: "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." Thus, as the night follows the day, Holmes held for the Court, "Three generations of imbeciles are enough." That's all. There, you have it.

Who would dare quibble with Chief Judge Posner's appraisal that places Holmes equal to, and possibly even greater than, Chief Justice John Marshall in the judicial pantheon? For Learned Hand, whom Chief Judge Posner ranks just behind Holmes and Marshall, "Holmes was," Professor Gunther reports to us, "an unblemished idol on the bench." Fifty years after Buck v. Bell, I am sure that Judge Broderick, review of the Supreme Judicial Court of Massachusetts's decision upholding a 1902 regulation of the Cambridge, Massachusetts, Board of Health requiring all adults not vaccinated since March 1, 1897, to get free smallpox inoculations at a time when "smallpox... was prevalent to some extent in the city of Cambridge and the disease was increasing." Jacobson, 197 U.S. at 27. Henning Jacobson refused to be vaccinated, apparently based upon his and his son's "great and extreme suffering" after similar vaccinations. Commonwealth v. Pear, 66 N.E. 719 (Mass. 1903) (same case). Far from what happened to Carrie Buck, Chief Justice Knowlton stressed that the Cambridge Board of Health did not have it "in their power to vaccinate him by force, and the worst that could happen to him under the [enabling] statute would be the payment of the penalty of $5." Id. at 722. The United States Supreme Court report suggests that Mr. Jacobson preferred jail to the payment of the fine. See Jacobson, 197 U.S. at 14.

Buck, 274 U.S. at 207.

12 Id.

11 In his review of Gerald Gunther's 1994 biography of Learned Hand, Chief Judge Posner may, in fact, by deft phrasemaking place Holmes at the apex: "Learned Hand is considered by many the third-greatest judge in the history of the United States, after Holmes and John Marshall." Richard A. Posner, The Learned Hand Biography and the Question of Judicial Greatness, 104 YALE L.J. 511, 511 (1994) (reviewing GERALD GUNTHER, LEARNED HAND (1994)). Evidence that Chief Judge Posner is a faithful acolyte at the Holmes altar may be seen in his editing of a book of Holmes pearls. See THE ESSENTIAL HOLMES (Richard A. Posner ed., 1992). In that collection, Chief Judge Posner unequivocally describes Holmes as "the most illustrious figure in the history of American law," Richard A. Posner, Introduction to id. at ix, and also engages in a rather labored, and somewhat disquieting, defense of Buck. See id. at xxvi-xxix ("We may find Holmes's eugenic enthusiasms shocking, although with the renewed interest (stimulated by modern medicine's ability to keep people alive in a vegetative state) in euthanasia, and with the rise of genetic engineering, we may yet find those enthusiasms prescient rather than depraved.").

15 GUNTHER, supra note 14, at 345.
when he decided in favor of Terri Lee Halderman, would not have allowed his name to be mentioned in the same breath with the great Justice Holmes.

I am equally sure, however, that, if given the choice, Terri Lee Halderman would not trade places with Carrie Buck—even to be before the demigod Holmes—for all the attorney's fees ever awarded under 42 U.S.C. § 1988. Justice Holmes might retort, "Well, what would you expect an imbecile to choose?" But would any serious person attribute her choice to feeble-mindedness? Or would Ms. Halderman's choice be an intelligent one because, just possibly, Judge Broderick discerned something in her that Justice Holmes was blind to in Carrie Buck?

The answer to this question really is not complicated. What Judge Broderick saw in Terri Lee Halderman, and what Justice Holmes did not see in Carrie Buck, was that she is a human being, with a human face.\(^{16}\)

\(^{16}\) Although Justice Holmes was pleased to consign Carrie Buck to the eugenic scrap heap, she lived to prove the great Justice wrong. Professor Paul A. Lombardo reports about what happened to Ms. Buck and her daughter, Vivian:

After Carrie left the Colony (in 1927), she married and became a member of the Methodist Church in Bland where she sang in the choir as she had as a teenager in Charlottesville. After twenty-four years of marriage, her husband died and she traveled to Front Royal, Virginia, where she met and later married Charles Detamore. He took work in farms and orchards and Carrie assisted a local family in caring for an elderly relative.

Throughout Carrie's adult life she regularly displayed intelligence and kindness that belied the "feeblemindedness" and "immorality" that were used as an excuse to sterilize her. She was an avid reader, and even in her last weeks was able to converse lucidly, recalling events from her childhood. Branded by Holmes as a second generation imbecile, Carrie provided no support for his glib epithet throughout her life.

Carrie's daughter Vivian, like her mother, was wrongly accused. On the basis of a nurse's comment that she was "not quite normal," Vivian Buck was used to prove her mother's hereditary "defects." Although she lived barely eight years, she too disproved Holmes's epigram. In her two years of schooling, she performed quite well, at one point earning a spot on the school "Honor Roll."


Lombardo also demonstrates in his definitive article that *Buck v. Bell* was a collusive suit orchestrated by three eugenics enthusiasts, one of them being Carrie Buck's counsel, Irving Whitehead. "Whitehead called no witnesses to dispute the specific al-
It may be objected that this is all quite unfair, because Judge Broderick is a trial judge and Justice Holmes was an appellate judge. Appellate judges see lawyers, not parties. There are two responses to this reasonable objection, one general, one relating to Holmes in particular.

The first response is that, just as seeing is not always perceiving, so perceiving does not always depend upon seeing. A case involving a litigant from another disfavored group will illuminate this point.

Justice Potter Stewart in 1961 got the picture from advocate Henry W. Sawyer, III, of a young man named Bernhard Deutch. Deutch was convicted in 1956 of four counts of criminal contempt of Congress for not answering four questions the House Committee on Un-American Activities put to him. Bernhard Deutch was a physics \textit{wunderkind} from Brooklyn who at sixteen went to Cornell. While there, he met a charismatic black law student named Ross Richardson, who eventually persuaded Deutch to join a small Communist Party cell. Richardson would drive Deutch to the meetings and collect dues from him.

Deutch’s participation was always half-hearted, and so he told Richardson he wanted to resign his Party membership. Richardson retorted that Deutch’s real reason was that Deutch was a “white chauvinist” who could not stand having a black in control. Deutch relented and remained in the Party until he came to the University of Pennsylvania for his doctoral work.

As Justice Stewart noted, Richardson had joined the Party “at the behest of the Federal Bureau of Investigation.” District Judge Alexander Holtzoff neglected to mention this resonant fact in his bench-trial findings, which throughout their Holmes-like brevity regarded Deutch as a stick figure. By contrast, it is apparent from the per-

\begin{footnotes}
\footnote{See \textit{Deutch} v. \textit{United States}, 367 U.S. 456 (1961). Deutch was sentenced to 90 days “in a common jail” and a fine of $100 for violation of 2 U.S.C. § 192. \textit{See} Brief for Petitioner at 8 (No. 233).}
\footnote{\textit{Deutch}, 367 U.S. at 460 n.4.}
\footnote{See \textit{United States v. Deutch}, 147 F. Supp. 89 (D.D.C. 1956), \textit{aff’d}, 280 F.2d 691 (D.C. Cir. 1960), \textit{rev’d}, 367 U.S. 456 (1961). Surprisingly, in view of this being a bench trial, Judge Holtzoff never mentioned Deutch’s name, but instead merely referred to him as “the defendant.” The Court of Appeals at least mentioned Deutch’s name, as well as his age at the time of the Committee’s inquiry, and where he was a student. \textit{See} \textit{Deutch} v. \textit{United States}, 280 F.2d 691, 693 (D.C. Cir. 1960), \textit{rev’d}, 367 U.S. 456 (1961).}
\end{footnotes}
sonal details in Justice Stewart's opinion that he perceived the face of a young man abused by his government, and not just "a Communist," as Carrie Buck was for Justice Holmes just "an imbecile." It was this perception of Deutch as Kafkaesque victim, I submit, that led Justice Stewart to supply the fifth vote for reversing young Deutch's conviction over four dissenters, including Holmes-worshiper Justice Frankfurter. Thus, Deutch teaches that appellate judges can perceive faces that even the best district judges do not see.

With cryptic economy worthy of the Holmes who gave us Buck, Judge Holtzoff repeatedly held, without any elaboration, that each unanswered Committee question "was pertinent on its face." See, e.g., Deutch, 147 F. Supp. at 92 (count two).

It being almost 30 years since his death, some may have forgotten, if they ever knew, what a distinguished figure Judge Holtzoff was in American law. In 1950, for example, with William W. Barron, Judge Holtzoff wrote the treatise, Federal Practice and Procedure. As Professor Charles Alan Wright acknowledges, our present "Wright & Miller" is the "lineal descendant" of that treatise. 1 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE at vii (2d ed. 1982). The Supreme Court regarded Judge Holtzoff as "the person who almost certainly drafted" what became the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1994). Kosak v. United States, 465 U.S. 848, 855-56 (1984).

Justice Stewart was anything but an automatic vote against the government in this line of cases. Only two years before Deutch, he supplied the fifth vote—and joined the four Deutch dissenters—in Barenblatt v. United States, 360 U.S. 109 (1959), argued just a month after Justice Stewart joined the Court. The majority upheld, over First Amendment objections, the power of a subcommittee of the House Committee on Un-American Activities to inquire into a witness's past or present membership in the Communist Party. See Barenblatt, 360 U.S. at 125-34. Justice Black wrote a powerful dissent, in which Chief Justice Warren and Justice Douglas joined, against the majority's "conclusion that, on balance, the interest of the Government in stifling these freedoms [of speech, press, assembly, and petition] is greater than the interest of the people in having them exercised," id. at 143 (Black, J., dissenting); while stating his "complete agreement" with Justice Black, Justice Brennan filed a brief, separate dissent, see id. at 166 (Brennan, J., dissenting). The high constitutional stakes in Barenblatt did not escape Justice Black's attention. See ROGER K. NEWMAN, HUGO BLACK 489-91 (1994) (discussing Black's Barenblatt dissent).

Although this history and the texts of Justice Stewart's and Judge Holtzoff's opinions support the analysis I have offered here, the account of the oral argument from Deutch's lawyer, Henry W. Sawyer, III, leaves no doubt that Deutch's face was decisive for Justice Stewart. After advocate Sawyer recited the facts set out in the text, he reports that Justice Stewart "leaned forward and said, 'Is that in the record, Mr. Sawyer? I said indeed it was ....' On hearing this, Justice Stewart sat back and said to a colleague (probably Justice Brennan), "'Outrageous . . . outrageous!' in a volume "more voice than sotto." Letter from Henry W. Sawyer, III to the author 2-3 (Mar. 2, 1998) (on file with author) [hereinafter Sawyer].

Justice Frankfurter joined the dissent of Justice Harlan, who wrote the Barenblatt majority opinion. Justice Whittaker wrote a separate dissent in which Justice Clark joined. In his compilation of Holmes-adoring essays, see MR. JUSTICE HOLMES (Felix Frankfurter ed., 1931), then-Professor Frankfurter wrote that Holmes "is led by the divination of the philosopher and the imagination of the poet. He is, indeed, philosopher become king." Felix Frankfurter, Mr. Justice Holmes and the Constitution: A
My second response is that, although it is likely that Justice Holmes had the same problem my circuit court judge had with his disappointed NCAA superstar, there is little reason to suppose that Holmes even cast his eyes into the well of the courtroom that April twenty-second in 1927. We know from his correspondence with Harold Laski that Holmes did not torture himself over Carrie Buck's plight. Three days after the case was argued, Holmes reported to his English friend that he got the assignment to write the Buck opinion "Saturday evening" (the day after oral argument), and wrote it "yesterday," (Sunday, April 24), so that it was "just sent...to the printer" on Monday, April 25.

It should not surprise us that Justice Holmes never pictured Carrie Buck's face. It was, after all, with Olympian detachment that Holmes wrote to Harold Laski, only seven years before Buck, "I always say...that if my fellow citizens want to go to Hell I will help them. It's my job." Ah, what fools these mortals be! clucks Holmes from on high.

Review of His Twenty-Five Years on the Supreme Court, in MR. JUSTICE HOLMES, supra, at 46, 54.

Advocate Sawyer reports that at the Deutch oral argument, his contentions "so annoyed" Justice Frankfurter "that after a colloquy with me in which I all but asked him to get off my back so I could address the rest of the [C]ourt, he turned his chair around facing backward." Sawyer, supra note 20, at 2 n.****.

Letter from Justice Oliver Wendell Holmes to Harold J. Laski (Apr. 25, 1927) in 2 HOLMES-LASKI LETTERS 937, 937-38 (Mark DeWolfe Howe ed., 1953). Fidelity to the complete historical record requires mention that Holmes did change one word in the draft he sent "to the printer" on April 25 for circulation to his brethren. In the "it is better for all the world" sentence quoted in full in the text accompanying note 12 supra, Holmes amended what was "kill degenerate offspring" in the final May 2 opinion. See Mary L. Dudziak, Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Text, 71 IOWA L. REV. 833, 859 n.178 (1986).

Letter from Justice Oliver Wendell Holmes to Harold J. Laski (Mar. 4, 1920), in 1 HOLMES-LASKI LETTERS, supra note 22, at 249, 249 (discussing Holmes's view that the Sherman Act is a "foolish law" that the country nevertheless "likes").

This caricature tones down Professor Gilmore's more savage critique of Holmes on this point:

[T]he function of the law, as Holmes saw it, is simply to channel private aggressions in an orderly, perhaps in a dignified, fashion. He reduced all of jurisprudence to a single, frightening statement:

The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.

That is, if the dominant majority...desires to persecute blacks or Jews or communists or atheists, the law, if it is to be "sound," must arrange for the persecution to be carried out with, as we might say, due process.

Does this difference in these two judges make Judge Broderick dangerous and Justice Holmes safe? Judge Bork, who worships Holmes as the High Priest of Positivism, would certainly answer, "Yes!" He likes the punch line Elizabeth Shepley Sergeant attributed to Holmes: "I am not here to do justice. I am here to play the game according to the rules." Judge Bork quotes this punch line because it supports Bork's view of Holmes as a paragon of judicial restraint, a view Justice Scalia apparently shares.

Chief Justice Burger, too, would answer, "Yes!" In a concurrence in \textit{Bifulco v. United States}, the former Chief Justice stood firmly on the side of Holmes's judge-as-referee-of-the-game role: "Our duty, to paraphrase Mr. Justice Holmes in a conversation with Judge Learned Hand, is not to do justice but to apply the law and hope that justice is done."

At the risk of profaning the idol of Chief Justice Burger, Justice Frankfurter, Chief Judge Hand, Chief Judge Posner, and probably a majority of my fellow active Article III judges, I cannot resist pointing out that neither the \textit{United States Reports} nor the \textit{Supreme Court Reporter} account of \textit{Buck v. Bell} shows any citation of any rule of any game after that sentence about three generations of imbeciles being "enough." And at the risk of desecrating the Holmes altar, may I suggest that the only applicable rule in \textit{Buck} comes from H.L.A. Hart's game of "scorer's discretion," in which the "scorer" decides, in his sole discretion, who has won the game? Can \textit{Buck} possibly be a law-bordered icon of judicial restraint?

\begin{footnotes}
\footnote{25} Elizabeth Shepley Sergeant, \textit{Justice Touched with Fire}, in \textit{MR. JUSTICE HOLMES}, supra note 21, at 185, 206. Sergeant begins her essay on Holmes with the sentence, "Here is a Yankee, strayed from Olympus." \textit{Id.} at 183.

\footnote{26} See ROBERT H. BORK, THE TEMPTING OF AMERICA 6 (1990) (quoting from his dissent from the denial of rehearing en banc in \textit{Hohri v. United States}, 793 F.2d 304, 313 (D.C. Cir. 1986), rev'd, 482 U.S. 64 (1987)).

\footnote{27} See Antonin Scalia, \textit{The Rule of Law as a Law of Rules}, 56 U. CHI. L. REV. 1175, 1176-80 (1989) (extolling the virtues of a "general rule of law" over the "personal direction to do justice," even within the "narrow context" of common-law lawmaking). Appropriately enough, we are told that Scalia's essay was first delivered as the Oliver Wendell Holmes, Jr. Lecture at Harvard University on Valentine's Day, 1989. \textit{See id.} at 1175 n.†.


\footnote{29} While there is no difficulty finding many Holmes critics in the academy, see, e.g., Louise Weinberg, \textit{Holmes' Failure}, 96 MICH. L. REV. 691 (1997), it is quite another matter to find them in the federal judiciary.

\footnote{30} Indeed, in the entire opinion, Holmes cited only one case, \textit{Jacobson v. Massachusetts}, cited and discussed supra note 11.

\end{footnotes}
Perhaps Buck and other cases in our history suggest that the real danger exists when judges see abstractions instead of faces. Carrie Buck, and others judicially disfavored in their time—such as Lloyd Barenblatt, Fred Toyosaburo Korematsu, and Dred Scott and his wife and daughters—could certainly be forgiven for agreeing with this suggestion.

On the other hand, does it risk a regime of idiosyncratic substantive due process—or of that odious practice known as "judicial activism"—to see Terri Lee Halderman and Carrie Buck as human beings who powerfully affect or move the judicial mind within the meaning of Oxford English Dictionary definition six of "passion"?

Please understand that I in no way intend by these remarks to devalue the importance of reason and scholarship in the hard work of judging at every level. I value scholarship precisely because every party before the court deserves the critical thought and painstaking efforts that are the hallmarks of the scholar's art. The fulcrum of definition six of "passion" is, after all, "the mind."

Nor do I take a brief here for a judge to be, as Cardozo caricatured, "a knight-errant roaming at will in pursuit of his own ideal of

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32 Compare the depiction of Lloyd Barenblatt by the majority in Barenblatt, discussed supra text accompanying note 20, with Justice Black's portrait in dissent, see Barenblatt v. United States, 360 U.S. 109, 134-35 (1959) (Black, J., dissenting). The person mentioned in Justice Harlan's majority opinion was always an unnamed "petitioner," who was "an instructor in psychology at Vassar College from 1950 to shortly before his appearance before the Subcommittee." Id. at 114. In his dissent, Justice Black, among other details, pointed out that "[a]fter service of the [Subcommittee] summons, but before Barenblatt appeared on June 28 [1954], his four-year contract with Vassar expired and was not renewed. He, therefore, came to the Committee as a private citizen without a job." Id. at 134 (Black, J., dissenting). Justice Black then demonstrated how the Committee's "pitiless publicity and exposure" campaign inevitably cost Barenblatt and others their livelihoods. Id. at 156-60 (Black, J., dissenting).

Or note how Fred Toyosaburo Korematsu was seen in Korematsu v. United States, 323 U.S. 214 (1944). Compare Justice Black's description of the unnamed "petitioner," id. at 215, with the person who was the focus of Justice Jackson's dissent, see id. at 243 (Jackson, J., dissenting) ("Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.").

Or consider Dred Scott v. Sandford, 60 U.S. (19 How.) 399 (1856). In fairness to Chief Justice Taney, Dred Scott and his wife, Harriet, and daughters, Eliza and Lizzie, were to him not abstractions, but rather "articles of merchandise," id. at 411, who could no more be citizens of Missouri than tables and chairs could be, see id. at 454.

To be sure, the shameful results in these three cases coincided with the then-prevailing direction of the political winds, but the presence of forceful dissents in all three demonstrates what happens when federal judges recognize that the buffer of Article III permits them to perceive faces in a judicial calm.
beauty or of goodness”—a view that Professor Burbank has, in his
elegantly savage, Burbankian way, recently associated with Judge Jack
Weinstein.

What I mean to add to our difficult craft is the constant recogni-
tion that, although we without doubt engage in an intellectually re-
spectable discipline, there is always a face or faces before us in every
controversy we decide. Those faces look to us in the passion they suf-
f er in the dramas of their cases.

The judicial enterprise I have in mind is really no more than what
the Framers contemplated when they created a Constitution whose
third Article requires real "Cases" and "Controversies" before "the ju-
dicial Power of the United States" can be applied. The Framers
therefore did not entrust us to consider abstractions, but rather to
de cide disputes with flesh-and-blood consequences.

And speaking of the Framers, consider in this context what one of
the most important of them wrote to the people of New York on Feb-
ruary 6, 1788, about the object of the Framers' labor that previous

the rationalist Cardozo could not resist the tug of Mount Olympus and its supposed
inhabitants when he wrote the introductory essay in Frankfurter's collection, which
begins with an epigraph from Euripides and later reports that Holmes "gives us
glimpses of the things eternal." Benjamin N. Cardozo, Introduction to MR. JUSTICE
HOLMES, supra note 21, at 1, 1-2.

34 See Stephen B. Burbank, The Courtroom as Classroom: Independence, Imagination
Judge Weinstein's judicial career is best understood as heavily influenced by his expe-
rience as a law professor, an experience that yields a strong individualism and an ac-
companying lack of regard for institutional accountability).

36 The delegates to the Federal Convention in 1787 consistently "defeated a variety
of proposals to give non-judicial functions" to the court(s) to be created under Article
III. PAUL M. BATOR ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE
FEDERAL SYSTEM 7 (3d ed. 1988). For example, the Convention rejected Charles
Pinckney's proposal that "[e]ach branch of the Legislature, as well as the Supreme Ex-
cutive shall have authority to require the opinions of the supreme Judicial Court
upon important questions of law, and upon solemn occasions." 2 THE RECORDS OF
THE FEDERAL CONVENTION OF 1787, at 341 (Max Farrand ed., 1911); see also 3 THE
CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1763-1826, at 488-89 (Henry P.
Johnston ed., De Capo Press 1971) (1890) (noting that on July 20, 1793, the Justices
advised President Washington that his inquiry of two days earlier appeared "to us to be
of much difficulty as well as importance," and then on August 8, 1793, informed him
that the "strong arguments against the propriety of our extra-judicially deciding the
questions" persuaded them not to do so); 10 THE WRITINGS OF GEORGE WASHINGTON
542-45 (Jared Sparks ed., Boston, Russell, Shattuck, & Williams 1896) (presenting 29
questions from President Washington that the Justices declined to answer).
summer in Philadelphia. “Justice is the end of government,” James Madison wrote in Federalist No. 51. “It is the end of civil society.”

That end is, I submit, for us something richer than Holmes’s flip-pant, “My job is to play the game according to the rules.” That end is something more than the judicial analogue of solving crossword puzzles or making pass-interference calls. That end is the achievement we win when we apply our mental faculties to their fullest in the passionate service of all those faces who look to us in our courtrooms.

We owe them, and our institution, no less.

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