Draft of a Letter of Recommendation to the Honorable Alex Kozinski, Which I guess I'm Not Going to Send Now

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DRAFT OF A LETTER OF RECOMMENDATION
TO THE HONORABLE ALEX KOZINSKI, WHICH I
GUESS I’M NOT GOING TO SEND NOW

Ysta Maya Murray*

Abstract

This legal-literary essay engages the current social and jurisprudential moment, encapsulated by the hashtag #metoo.¹ It focuses on the allegations, made in the first week of December 2017, that Ninth Circuit Court of Appeals Judge Alex Kozinski verbally sexually harassed former law clerks Emily Murphy and Heidi Bond. I wrote the lioness’s share of the piece during December 10–11—that is, in the days before news outlets reported that other women complained of Kozinski touching them on the thigh or breast while propositioning them for sex or discussing recent sexual encounters²—and concluded that Kozinski was unlikely to face impeachment or meaningful judicial censure, but that he should nevertheless resign because his maintenance of his judicial position was untenable.

What occurred next proved a shocking installation in the annals of American judicial history: After hiring feminist icon Susan Estrich³ as counsel and asserting that the claims against


¹ See Jeffrey Tobias Halter, Corporate America’s Dirty Little Secret - Sexual Harassment, HUFFPOST, Nov. 17, 2017, https://www.huffingtonpost.com/entry/corporate-americas-dirty-little-secret-sexual-harassment_us_5a08be4fe4b0ee8ec36942c4 (“On social media platforms, hundreds of thousands of women are raising their hands and saying #MeToo.”).


him were “not true,” Judge Kozinski did retire on December 18, 2017, explaining that he could not “be an effective judge and simultaneously fight this battle. . . . Nor would such a battle be good for [his] beloved federal judiciary.”

Beyond qualifying me, for the first time in my life, more as a baffled Hildegard von Bingen than as a grouchy Cassandra, the most notable aspect of my essay is its form. It is auto-fiction, composed in the style of a letter of recommendation that an unsworn U.S. law professor attempts to write for a student who seeks a clerkship with Judge Kozinski during those frenzied and confusing first weeks of December. The letter also contains editorial comment flags, written by an unidentified colleague.

The “foul papers” style of this letter permits an expression of the intense emotion catalyzed by the allegations against Judge Kozinski, and also allows us to consider the double bind that law professors and law students find themselves in with regard to clerkship applications tendered within a legal culture shaped by male dominance and white supremacy. Further, the document’s footnotes denote the copious subtext that can lie beneath the


6. See GEOFFREY ASHE, Hildegard von Bingen, in THE ENCYCLOPEDIA OF PROPHECY 103 (2001) (“[H]er glances at the future give her a place in the history of prophecy. She warned of disasters threatening the Church because of its corruption.”).

7. See Cassandra, id. at 103 (“[W]hile she could forecast the future, no one would believe her. Cassandra uttered her pronouncements in fits of frenzy suggesting insanity.”).

8. Lily Tuck, True Confessions of an Auto-Fictionist, LITHUB, Oct. 23, 2015, http://lithub.com/true-confessions-of-an-auto-fictionist (“The term ‘auto-fiction’ was first coined by the French writer, Serge Doubrovsky, in 1977 to describe his novel Fils (translated as both Thread and Son) as well as to describe a genre that was part autobiography and part fiction.”).

9. See E.A.J. HONIGMANN, THE STABILITY OF SHAKESPEARE’S TEXTS 17 (1965) (opining that foul papers are “any kind of draft preceding the first fair [that is, clean] copy”).
surface of oppressed people's sometimes strangled speech. The employment of the comment flags allows for a certain amount of “cross talk” to this outpouring, critiques that mainly express the position of the hegemonic power structure (except for some gadfly citations to Janet Halley, Jacob Gersen, and Jeannie Suk). In these comment flags, we can see how even the most basic aspects of legal discourse (Bluebook conventions; formatting; professionalism) encourage denial of the emotional disorganization and rage that flow from sexual harassment and other kinds of oppression. We also can discern how legal discourse’s obsession with “relevance” stymies the engagement of racial, class, and queer intersectionalities. Additionally, it is worth noting that some of these comment flags ask hard and valuable questions.

Together, this contest of voices and perspectives interrogates why calls for Kozinski’s resignation were “off the wall” on December 8—that is, that they were so unthinkable that he could gleefully brush them off during that first week of the month”—but legitimate on December 18. N.B.: The piece is written as if it is still December 11, just after the allegations of verbal harassment were reported, but before the complaints about physical touching came out in national news. That is, it is “written” in the moments before Judge Kozinski’s reputation suffered irreparable blows, and his remained a sought-after clerkship despite long-standing rumors and complaints of his misogyny.


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10. See Dolan infra note 24.
To the Honorable Alex Kozinski, of the Ninth Circuit Court of Appeals,

I write this letter to give my most enthusiastic recommendation that you hire my former student, [NAME REDACTED], for a position in your chambers as a clerk. I have known [NAME REDACTED] since 2015, when she took my Criminal Law class here at [REDACTED] Law School. [NAME REDACTED] proved from the very first week of the semester to be an extraordinary student: She demonstrated a keen legal mind by asking pressing, articulate questions that tackled the class’s most difficult issues, such as why so many men in our casebook seem to get voluntary manslaughter mitigations when they assassinate their wives, why battered women have such a difficult time obtaining self-defense claims when they kill their abusers, and whether the mens rea manipulations that courts engage in when dealing with obtuse defendants will actually protect women from the onrush of sexual assault and harassment that they apparently are doomed to endure in this country as a kind of blood inheritance.

11. See, e.g., SANFORD KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 463 (10th ed. 2016) (reproducing an abstract of Gressett v. State, 583 A.2d 718 (Md. 1991), which identified adultery as a “traditional” reasonable provocation in other jurisdictions); see also Knight v. State, 907 So. 2d 470, 478 (Ala. Crim. App. 2005) (quoting WAYNE LAFAVE & AUSTIN SCOTT, SUBSTANTIVE CRIMINAL LAW § 7.10(b)(5) (2d ed. 1986)) (“We note that if the modern tendency is to extend the rule of mitigation beyond the narrow situation where one spouse actually catches the other in the act of committing adultery.”).

12. See KADISH ET AL., supra note 11, at 903 (reproducing an abstract of State v. Norman, 378 S.E.2d 8 (N.C. 1989) (refusing a self-defense claim to a woman who killed her husband, who had been severely battering her for years)).

13. See, e.g., 113-16 (reproducing an abstract of Commonwealth v. Sherry, 437 N.E.2d 224 (Mass. 1982), which suggested that in a rape case, when the standard rule requiring mens rea would be impractical, the mental state of the defendant would be judged from an objective point of view).
[NAME REDACTED] then further demonstrated her intelligence and formidable work ethic to me the next year, when she enrolled in my Women and the Law seminar. In a semester that also saw [NAME REDACTED] volunteer at a battered women’s shelter and intern at an immigrant law clinic, she showed up for every class armed with a battery of demanding inquiries about the law’s treatment of subordinated people: How, she asked, can we protect women against sexual harassment without negating their agency or violating the principles of due process? Yes, how, Professor—she nearly growled at me in the middle of the seventh week—are we supposed to give voice to women’s silenced trauma using the “master’s tools,” that is, by safeguarding them with the very same system that hurt and gagged them in the first place?

[NAME REDACTED] then topped off her marvelous in-class performance by awarding me with her final paper, a tour de force that combined legal-literary analysis with hard-core doctrinal research: Her interdisciplinary and intersectional manifesto, titled Toward Reparations for Women in the Age of the Anthropocene, topped out at 65 pages, contained 267 footnotes, and concluded with an original blank-verse poem that argued for the impeachment of President Donald Trump on the grounds of his sexual harassment of Jessica Leeds, Samantha Holvey, and Rachel Cooks. For this dissertation, she received an A plus.

It is on these bases that I recommend [NAME REDACTED] to your chambers, as she would prove an invaluable addition to any office of the law. Her work ethic, empathy, astonishing capacity for legal exegeses, open-mindedness, and her passion for fairness make her a resource that you would well regret passing on. Moreover, if [NAME REDACTED] could count you as an employer and even a mentor, that would redound beautifully to her career: Since you are universally regarded as one of the most brilliant legal minds on the circuit, you have

earned a status as a “feeder” judge, a Supreme Court clerkship
You are one of the best and brightest
You have sent several clerks to positions on the Supreme Court,
such as the male Alexander (“Sasha”) Volokh, who clerked for Alito before ascending to a professorship at Emory Law, the female Theane Evangelis, who was sent “upstairs” to Sandra Day O’Connor and is now a partner at Gibson Dunn, the female Sandra Segal Ikuta, who also clerked for O’Connor and is now herself a Ninth Circuit Judge, and also the female Heidi Bond, a.k.a. Courtney Milan, who
the list goes on
partners judges academics like me but at fancier schools etc.
It is true that [NAME REDACTED] is a woman, a woman of color, and that in the past several days it has come to the attention of the news media that your honor is accused of verbally sexually harassing a variety of female clerks and/or interns. Like, I guess, making the aforementioned Heidi Bond/Courtney Milan look at porn and then quizzing her about it. Or saying garbage to Emily Murphy about being “naked.” All of the reports of sexual harassment that I have read are race

17. See Lawrence Baum, Hiring Supreme Court Law Clerks: Probing the Ideological Linkage Between Judges and Justices, 98 M A RQ. L. REV. 333, 342 n.37 (2014) (you have provided twenty-six clerks to Kennedy).
22. See, e.g., UNIV. OF NOTRE DAME, Jennifer Mason McAward, http://law.nd.edu/directory/jennifer-mason-mcaaward/ (last visited Apr. 19, 2018) (clerking for you and then going on to clerk for O’Connor).
neutral so I can’t tell about whether it’s race and sex harassment or sex harassment specifically pertaining to white women or maybe also differently abled women or queer women or . . .

You don’t seem to deny these allegations, but instead have said that you don’t remember any of that happening,” sort of like Reagan did when he had Alzheimer’s and was being deposed during the Iran-Contra imbroglio. But then maybe you do remember because when asked

25. See the companion Kathleen L. Grotta, Reproductiveizing the Intersections of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Affirmative Action, 1989 U. CHI. L. REV. 139, 140 (1989), which explains how the ways that women of color experience workplace bias are erased by dominant approaches to race and gender discrimination. On the intersectional women’s experience of sexual harassment, and the failure of courts to adequately address how race and sex must be considered together in harassment cases, see also Kathleen Abrams, Title VII and the Complex Female Subject: Notice, Lies, 92 MICH. L. REV. 2451, 2501 (1994) (“The acknowledgment that black women may be differently situated than white women with respect to proving a sexual harassment claim reflects a recognition that even as women—those who are claiming sexual harassment—claimants are constructed by race as well as gender. But the incomplete and flawed elaboration of that understanding by the courts has created difficulties.”). We must also, of course, consider the intersections of class, queerness, and disability when deciding how to respond to the muddled newspaper accounts of the complaints made against you. Indeed, if clerks are experiencing harassment at the Court of Appeals (or any hands), we cannot marshal a one-size-fits-all outrage or fear, but rather must worry about how the multivalent forms of sexual harassment may be experienced by a class of clerks that hopefully exhibits numerous forms of intersectionality. See, e.g., Sheerine Alemzadeh, Protecting the Margins: Intersectional Strategies to Protecting Gender Outlaws from Workplace Harassment, 37 N.Y.U. REV. L. & SOC. CHANGE 339, 368-69 (2013) (“LGBT advocates, feminists and all marginalized workers should continue to challenge, develop and transform Title VII sexual harassment jurisprudence to reflect and protect the fluid, evolving, and intersectional gender identities that comprise today’s workplace.”).

I don’t know, though. The other layer of oppression here may be in the paucity of intersectional people who are clerking on the Court of Appeals in the first place so that we are struggling to get to a position where we can worry about the intersectional experiences of abuse and harassment that we will face once there. See Chambliss, supra note 50.

26. See Dolan, supra note 24 (“I have no recollection of that happening.”).

about these complaints by the Los Angeles Times you didn’t say “huh?” but instead replied, “If this is all they are able to dredge up after 35 years, I am not too worried.” And then you also said, “I have been a judge for 35 years and during that time have had over 500 employees in my chambers. I treat all of my employees as family and work very closely with most of them. I would never intentionally do anything to offend anyone and it is regrettable that a handful have been offended by something I may have said or done.”

It’s cute how you use the passive voice, as well as the deflective “may,” as if this whole thing were a law school hypothetical—and then also appear to lay blame upon your hypersensitive clerks for not getting the joke in the first place.


30. See ANNE STILLMAN, GRAMMATICALLY CORRECT 289 (1997) (“In speech, the passive voice is often adopted by individuals wishing to minimize or evade personal responsibility for something.”).

31. OMFG, Anne Lawton, The Bad Apple Theory in Sexual Harassment Law, 13 Geo. Mason L. Rev. 817, 864 (2005) (“Judicial skepticism of sexual harassment claims is not uncommon. The concern is that absent tight judicial oversight sexual harassment law will become the legal dumping ground of hypersensitive employees.”).

32. You are unlikely to be impeached, since at this moment you have not been accused of a misdemeanor, either high or low. See U.S. Const., art. II, § 4. It is conceivable that you could be ousted for bad behavior, according to Saikrishna Prakash and Steven D. Smith. See Saikrishna Prakash & Steven D. Smith, Removing Federal Judges Without Impeachment, 116 Yale L.J. Pocket Part 95 (2006), https://www.yalalawjournal.org/forum/removing-federal-judges-without-impeachment. See also U.S. Const., art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior . . . .”).

It’s most probable that you will endure an aimless internal investigation, as you apparently did the last time you were found to be indulging in exploitative joshing. See Scott Glover, 9th Circuit’s Chief Judge Posted Sexually Explicit Matter on His Website, L.A. Times, June 11, 2008, http://www.latimes.com/local/la-me-kozinski12-2008jun12-story.html (addressing your collection of porn stored on a public website, which was the subject of a scandal in 2008). On judicial internal investigations, see Judicial Improvements Act of 2002, Pub. L. No. 107-273, §§ 11041-11044, 116 Stat. 1758 (codified in scattered sections of 28 U.S.C.) (providing the judiciary with the authority to take and investigate complaints of judicial conduct “prejudicial to the effective and expeditious administration” of the bench). On the self-regulating

Of course, Judge Kozinski, if you had been alleged to have done more than just talking about pornography or naked Pilates, then it would be at least conceivable that you could be successfully kicked out by Congress. If, for example, you had subjected someone to unwanted sexual touching, then that could qualify as a misdemeanor sexual battery in California, which is where you currently sit on the Ninth Circuit. See Cal. Penal Code § 243.4(e)(1), https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=243.4.&lawCode=PEN (“Any person who touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of misdemeanor sexual battery. . . .”). This offense has a one-year statute of limitations. See Cal. Penal Code § 802(a).

and that is why you are not warbling about how ashamed you are or desperately attempting to blackmail your victims with “dirt” that failed journalists dig up after being paid a hefty retainer.

I mean I don’t get it because you’ve sent all of these women like Theane Evangelis and Sandra Segal Ikuta to the highest realms of our professional stratosphere which must mean that you think women are

removed in 1802 for refusing to hear testimony and grant an appeal in an admiralty case, as well as for being drunk and cursing upon the bench).


all right intellectually and not some kind of subspecies who are not entitled

The thing is that I’m pretty confident that you’re not going to be impeached or investigated much or run out of town like Weinstein or sent to sex rehab like Kevin Spacey because no women have said that you impermissibly touched them," which renders your behavior only so much “bad taste,” which is far less troublesome than otherwise evidently unnoteworthy behavior like possibly molesting children or grabbing women’s vaginas.

And what this means is, if someone doesn’t soon say a magic phrase—like “sexual assault,” or whatever people might care about these women’s feelings—then this tempest will most likely die down, and you’ll emerge from the scandal as powerful and as adulated as ever. Indeed, even after we learned of your “funny jokes”34 back in 2008, we here at [REDACTED] Law have invited you to speak, and you have arrived amidst much excitement and preening and kowtowing by the faculty including by me myself in the hopes that you would hire one of my students as a clerk and we could network.


36. On what might happen if they did, see supra note 32.

37. See Karen Thalacker, “Have You Heard the One About the Judge Who Told Ribald Jokes…?”, HUFFPOST, Mar. 18, 2010, https://www.huffingtonpost.com/karen-thalacker/have-you-heard-the-one-ab_b_337789.html (“[T]he Judicial Council of the U.S. Third Circuit Court of Appeals has decided to take no action against Chief Judge Koziński for emailing jokes to a group of friends and associates, some of which allegedly included ‘tasteless’ material.”). Cf. Susan Estrich, ‘Me, too’—It’s Not All the Same, NOOZHAWK, Nov. 10, 2017, https://www.noozhawk.com/article/susan_estrich_me_too_its_not_all_the_same (“And then there’s the rest of the stuff: bad jokes, bad taste, bad talk, the kind of stuff we tell our kids not to say in the backseat when they’re younger.”).

38. See also Janet Haller, Split Decisions: How and Why to Take a Break from Feminism 53 (2008) (“Any force as powerful as feminism must find itself occasionally looking down at its own bloody hands.”).


41. Comment [NR22]: Your suggestion that Koziński is impeachable based on a few awkward jokes is profoundly “off the wall,” in good Jack Balkin’s phrasing. See Jack M. Balkin, Nobility and Faith: The Jurisprudence of Sanford Levinson, 38 TULSA L. REV. 553, 567 (2003): Koziński is a powerful, well-respected jurist. All he reportedly did was make a few off color comments. This is not enough to make a federal case. Do you really think it should be? Haven’t you made mistakes yourself before? Why are you being so pitiful?

42. Comment [NR23]: Since no one really knows what sexual harassment really is, or Hathaway v. Runyon, 132 F.3d 1214, 1221 (8th Cir. 1997) (“There is no bright line between sexual harassment and merely unpleasant conduct”), how can you argue for zero tolerance? You don’t even know what to be intolerant about and in your prophylactic mania, you’ll be creating a terror-stricken, banal society. See Jacob Gersen & Jeannie Suk, The Sex Terrorists, 104 CAL. L. REV. 881, 881–82 (2016) (“We call this bureaucratic sex creep—the enlargement of bureaucratic regulation of sexual conduct that is voluntary, non-harassing, nonviolent, and does not harm others.”).

43. Comment [NR24]: Re fn 40: you are now targeting your own home, and so I suggest that you be very, very careful.
And so if you’re still going to be almightily deciding huge cases and vaulting clerks to the Supreme Court and Emory Law School and Gibson Dunn and the Ninth Circuit itself then shouldn’t [NAME REDACTED] have the chance of clerking for you? And so then shouldn’t I be writing her this letter of recommendation so that you can hire her and “may[be]” honoredly ask her about pornography while at the same time providing her with exquisite legal training? Or am I abusing her myself by encouraging her to apply to clerk in your chambers which is false consciousness and an abjectly doomed use of the master’s tools?  

But then she can make her own decisions it’s not like I’m forcing her and we all have to make compromises in this life. I mean not only have I endured sex jokes and bullshit but I have been sexually assaulted myself which is why I got into the “Women and the Law” racket in the first place. I got beaten up in the back seat of a taxi by an employer and he spat all over me and it’s only because the driver intervened that he didn’t...  

I actually completely forgot about that for years until this #metoo thing started happening and then I remembered again which is making this letter hard to write because I am becoming blindingly enraged. But it’s worth emphasizing that you didn’t do that to the clerks. That is, I should give you due process like [NAME REDACTED] says...
even though this letter of recommendation is not a trial. Which is to say I should acknowledge yet again that you are not said to have touched anyone on the breast or thigh or molested them as children or raped them or asked them to be your surrogate or to have sex with you, you just "may" have just said horrible gross things that make women feel infinitesimally small and insignificant and powerless, which


48. See supra note 38.


is a kind of spirit murder, for which you are at this point likely be accorded either a mitigation or a complete defense, and also you don’t have to worry about retaliation of other kinds because we exist in a law and society that systematically denies women the promise of self-help.

You are untouchable with your coolness and despite the current female uprising that threatens to demolish your privilege right down to its “studs” I fear the coming backlash will save you you will probably die on the bench elegantly shrugging off stories of your lechery as if they actually burnished your nerdy reputation into a high gloss that reflects the kind of regnant Casanova who always leaves in his wake a trail of broken, disappointed, woebegone bitter harridans who make baseless accusations.

Judge Kozinski, despite all the terrible things that are currently being said about your conduct and character, I am still writing you this letter of recommendation in order that you hire [NAME REDACTED] to your prestigious chambers. I do this because I want [NAME REDACTED] to have the same glittering opportunities that you have enjoyed. You clerked for Justice Anthony Kennedy on the Ninth Circuit, and then Justice Warren Earl Burger at the Supreme Court. You were elevated to the Ninth Circuit by President Ronald Reagan in 1985 at the age of 35, which made you the youngest person serving as a federal judge in the country. And then in 2007 you were named chief judge of the Ninth Circuit, a laurel that has brought you national body. Inequality analysis, even in narrow form, starts where the interactions in question temporally start: with A, and what he does with his power."

53.


54.

See, e.g., supra note 11.

55.

See supra note 32. See the clip at Kozinski on the Dating Game (and Squiggy, too!), YouTube, Nov. 2, 2006 (last visited Apr. 19, 2018).

56.

On your Wikipedia page, for example, Wikipedia crowd sourcers have cited your infamous 1980s appearance on the Dating Game game show where you appeared to force a woman to kiss you but the Wikipedia people only smilingly call this a “surprise kiss,” probably because your date was giggling, which under male supremacy always means not agonized disgust but instead consent. See, e.g., the clip at Kozinski on the Dating Game (and Squiggy, too!), YouTube, Nov. 2, 2006 (last visited Apr. 19, 2018).
recognition and puissance.\textsuperscript{58} [NAME REDACTED] is a brilliant lawyer-in-training, and I know she could achieve similar herculean feats if she were given half the life chances as you, and that is just one reason why she should be toiling away for you in Pasadena next year.

But I also want you to hire [NAME REDACTED], a woman of color, for three additional reasons. First, because the presence of minority women clerks in the esteemed halls of the Ninth Circuit, or any federal clerkship, proves increasingly rare, and the scarcity of their influence at your level probably helps explain the damaged state of the law and nation at the present time.\textsuperscript{59} Second, if feminist law professors didn’t recommend female clerks to you, then that would leave you with no other “choice” than to hire solely male clerks, which itself would create a disparate impact\textsuperscript{60} and in its own way be like a harassment for every woman working in this field. And, relatedly, if you did not regularly hire clerks like [NAME REDACTED], then you, in your all-male sanctum, would grow all the more emboldened to replicate self-serving Title VII decisions like Swenson v. Potter, where you set aside a jury verdict in a sexual harassment case involving a hearing-impaired Postal Service employee who worried that a co-worker was going to rape her.\textsuperscript{61}

Perhaps you have been able to tell from the foregoing, your honor, that I am finding it difficult to write a clear and ethical letter that might also persuade you. My training in logic and legal writing appear to have failed me today—or maybe, somewhere in this cascade of typing and tears something else has succeeded—I can’t yet tell. All I know for sure is that while I must remain open-minded about unproven allegations against you, and while I also seek to obtain for [NAME REDACTED] every professional advantage that I can, I find myself thrashing and strangling within the double bind that is you. In short, I find that I

\textsuperscript{58} For the accomplishments listed in this paragraph, see Bio information on Alex Kozinski, \textit{Associated Press}, June 11, 2008.


\textsuperscript{61} Swenson v. Potter, 271 F.3d 1184, 1198 (9th Cir. 2001). On Melody Swenson’s hearing impairment, see \textit{id.} at 1193. On her fears of being raped, see \textit{id.} at 1189. See also \textit{id.} at 1200, 1204 (Fletcher, J., dissenting).
cannot write a letter of recommendation that might deliver [NAME REDACTED] into your authority, because I am losing faith in the institution that is supposed to protect the rights of women, and in the establishment to which I aspire to entrust my gifted and beloved students.

So your honor
Judge Kozinski
you see
you see that all of this is untenable
and you should resign.

[NAME REDACTED]

Comment [NR35]: My dear, you appear to have forgotten that “the law is reason, free from passion.” Aristotle, The Politics of Aristotle 146 (Ernest Baker trans., 1946).