

# The Emotional Dimension of Judging:

## Issues, Evidence, and Insights

Sharyn Roach Anleu, David Rottman & Kathy Mack

Judicial emotions—their display in the courtroom, influence on judicial behavior, and ultimately, their impact on public trust in the judiciary—are under scrutiny as neuroscientists and social scientists take a fresh look at judicial work and conduct. Emotions and their regulation raise important issues for the exercise of judicial authority, a role in which emotion is formally excised.<sup>1</sup> What has been called “emotional labor” is one of several key concepts guiding empirical research and offering insights into how judges undertake their work.<sup>2</sup> Other related or overlapping concepts include implicit bias, mindfulness, and procedural fairness. Judges have been introduced to these concepts and associated research through several articles published in the journal *Court Review* over recent years.<sup>3</sup> One of these articles, an American Judges Association white paper titled “Minding the Court: Enhancing the Decision-Making Process,” highlights the degree to which these scientific insights are interrelated in their implications for judicial work.<sup>4</sup> For example, consideration of these concepts and research initiatives has implications for judicial performance and the conduct of evaluations.<sup>5</sup>

This article seeks to enhance understanding of the role of emotions in judging and how emotions interrelate with other factors that influence judicial conduct, especially in court. It does so by introducing a four-year program of research, “Changing Judicial Performance: Emotions and Legitimacy”

(hereinafter “Emotions and Judging”), that is empirical in focus and comparative in perspective. The empirical component involves multiple sources of data in the United States and Australia that bear on the role of emotion in judicial behavior. The comparative component takes advantage of extensive qualitative and quantitative research available on the Australian judiciary that speaks directly to the use of emotions in judging.<sup>6</sup> Comparative research helps to refine the approach to a topic of inquiry by raising new conceptual and research questions and, on that basis, sharpening understanding of that topic.

This article is organized into five sections, beginning with an explanation of why judges should be interested in research on the role of emotions in their work. Section II offers a brief summary of the social science study of emotions generally and the manner in which it is being applied to judges. Section III provides an overview of a new four-year international study of judging and emotions. Section IV introduces the data sources available for a comparative study and uses that information to take an initial look at promising themes for the research. The concluding section offers preliminary observations on ways emotions in judging might be studied and the value of such research.

Before proceeding, however, it is helpful to be clear on what is meant by “emotion,” a term capable of covering a wide variety of states of mind and physical embodiment.<sup>7</sup> At a general

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### Footnotes

1. Terry Maroney & James Gross, *The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective*, 6 EMOTION REV. 142 (2014); Terry Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CAL. L. REV. 629 (2011).
2. See ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* (1983); Terry Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485 (2011); Sharyn Roach Anleu & Kathy Mack, *Magistrates' Everyday Work*

*and Emotional Labour*, 32 J. L. & SOC'Y 590 (2005); JAMES PTACEK, *BATTERED WOMEN IN THE COURTROOM: THE POWER OF JUDICIAL RESPONSES* (1999); Jennifer Scarduzio, *Managing Order Through Deviance: The Emotional Deviance, Power, and Professional Work of Municipal Court Judges*, 25 MGMT. COMM. Q. 283 (2011).

3. See, e.g., Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4 (2007); Pamela Casey et al., *Addressing Implicit Bias in the Courts*, 49 CT. REV. 64 (2012); Pamela Casey, Kevin Burke & Steve Leben, *Minding the Court: Enhancing the Decision-Making Process*, 49 CT. REV. 76 (2013); Terry Maroney, *The Emotionally Intelligent Judge: A New (and Realistic) Ideal*, 49 CT. REV. 100 (2013).
4. See Casey, Burke & Leben, *supra* note 3.
5. See Jennifer Elek, David Rottman & Brian Cutler, *Judicial Performance Evaluation in the States: A Re-Examination*, 98 JUDICATURE 12 (2014).
6. See, e.g., Sharyn Roach Anleu & Kathy Mack, *Judicial Authority and Emotion Work*, 11 JUD. REV. 365 (2013).
7. Jan E. Stets, *Current Emotion Research in Sociology: Advances in the Discipline*, 4 EMOTION REV. 326 (2012); JAN E. STETS & JONATHAN H. TURNER, *HANDBOOK OF THE SOCIOLOGY OF EMOTIONS: VOLUME II* (2014); Thomas Dixon, “Emotion”: *The History of a Keyword in Crisis*, 4 EMOTION REV. 338 (2012).

level, “emotions can be viewed as culturally delineated types of feelings or affects.”<sup>8</sup> Emotions can be understood as a product of social interactions; they are embedded in interpersonal relations and particular contexts.<sup>9</sup> They are experienced, expressed, or displayed and are recognized or interpreted by others. Judicial words and actions in court can entail emotional display and project feelings.<sup>10</sup>

One list of what constitutes “emotion” includes both positive and negative states of “happiness, joy, pride, guilt, disappointment, anger, frustration and anxiety.”<sup>11</sup> Another list, derived from empirical research (survey data) identifies “nine primary kinds of experienced emotions—tranquility, hope, joy, pride, self-reproach, anger, rage, fear, distress—and varying levels of correlation among these emotions.”<sup>12</sup>

Empathy has been widely discussed in the context of judging and has potential implications for understandings of impartiality,<sup>13</sup> though there is considerable debate about whether empathy or compassion are emotions or capacities.<sup>14</sup> Following Susan Bandes and Jeremy Blumenthal’s caution against using terms for specific emotions “as if they have stable meanings,”<sup>15</sup> this article does not attempt to distinguish among the various types of emotion judges may experience, display, or deploy.

## I. THE PRACTICAL IMPLICATIONS OF EMOTIONS FOR JUDGING

Conventional understandings cast the judicial role as strictly unemotional, with impersonality and dispassion central to neutrality, legal authority, and legitimacy. Emotion is viewed as inherently irrational, disorderly, impulsive, and personal and therefore inconsistent with the legitimate exercise of judicial authority.<sup>16</sup> Performance of judicial authority should evince emotionlessness.<sup>17</sup> These understandings also exclude and ignore the interpersonal dynamics that occur in court-

rooms. In sociological terms, the courtroom is more than a legal setting; it is a social situation in which information and emotions must be managed with similar strategies as in ordinary, everyday face-to-face interactions.<sup>18</sup>

The neglect of the emotional and interactive components of being a judge may have several potential consequences for how judges view and perform their work.

*First, despite the ideal of a dispassionate judicial officer, the everyday work of judging necessarily implicates emotions.* They are engrained in human behavior: “Put succinctly, emotions and decision making go hand in hand.”<sup>19</sup> Being a judge and having the benefit of a legal education may restrain the influence of emotions on courtroom behavior and work performance, but only to a degree. A recent research study concludes, “Most judges try to faithfully apply the law, even when it leads them to conclusions they dislike, but when the law is unclear, the facts are disputed, or judges possess wide discretion their decisions can be influenced by their feelings about litigants.”<sup>20</sup> At the very least, judges must undertake emotion work to regulate their emotions to present the image or outward appearance in the courtroom they believe appropriate when presiding over cases.<sup>21</sup> Their everyday work also requires emotional labor to limit the influence of their feelings on their decisions in individual cases in much the same way that implicit bias must be countered if its influence in judicial decisions is to be reduced.

*Second, judges’ failure to regulate their own emotions may lead to a violation of the applicable codes or rules of judicial conduct.*

**The neglect of the emotional and interactive components of being a judge may have several potential consequences . . . .**

8. Peggy A. Thoits, *The Sociology of Emotions*, 15 ANN. REV. SOC. 317, 318 (1989).

9. Kathryn J. Lively, *Status and Emotional Expression: The Influence of “Others” in Hierarchical Work Settings*, in SOCIAL STRUCTURE AND EMOTION (Jody Clay-Warner & Dawn T. Robinson eds., 2008); Kathryn J. Lively & Emi A. Weed, *Emotion Management: Sociological Insight into What, How, Why, and to What End?*, 6 EMOTION REV. 202 (2014).

10. Kwai Hang Ng & Jeffrey L. Kidder, *Toward a Theory of Emotive Performance: With Lessons from How Politicians Do Anger*, 28 SOC. THEORY 193 (2010).

11. Kristina Murphy, *Procedural Justice, Emotions and Resistance to Authority*, in EMOTIONS, CRIME AND JUSTICE 211, 211 (Susanne Karstedt, Ian Loader & Heather Strang eds., 2011).

12. Kathryn J. Lively & David R. Heise, *Sociological Realms of Emotional Experience*, 109 AM. J. SOC. 1109, 1127 (2004).

13. See Rebecca K. Lee, *Judging Judges: Empathy and the Litmus Test for Impartiality*, 82 U. CIN. L. REV. 145 (2014); Susan A. Bandes, *Empathetic Judging and the Rule of Law*, CARDOZO L. REV. DE NOVO 133 (2009); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Robin West, *The Empathetic Turn*, in PASSIONS AND EMOTIONS: NOMOS LIII (James E. Fleming ed., 2012).

14. Bandes, *supra* note 13, at 136.

15. Susan Bandes & Jeremy Blumenthal, *Emotion and the Law*, 8 ANN.

REV. L. & SOC. SCI. 161, 164 (2012).

16. See Maroney, *supra* note 1.

17. See Keith Bybee, *Paying Attention to What Judges Say: New Directions in the Study of Judicial Decision Making*, 8 ANN. REV. L. & SOC. SCI. 69 (2012); Leslie Moran, *Judging Pictures: A Case Study of Portraits of the Chief Justices, Supreme Court of New South Wales*, 5 INT’L J. L. CONTEXT 295 (2009); David Thomas, *Sentencing: The Case for Reasoned Decisions*, 10 CRIM. L. REV. 245 (1963).

18. Erving Goffman, *The Interaction Order*, 48 AM. SOC. REV. 1, 8 (1983); see also Sharyn Roach Anleu & Kathy Mack, *Performing Authority: Communicating Judicial Decisions in Lower Criminal Courts*, 51 J. SOC. 1052 (2015); PAUL ROCK, THE SOCIAL WORLD OF AN ENGLISH CROWN COURT: WITNESSES AND PROFESSIONALS IN THE CROWN COURT CENTRE AT WOOD GREEN (1993); DOUGLAS W. MAYNARD, BAD NEWS, GOOD NEWS: CONVERSATIONAL ORDER IN EVERYDAY TALK AND CLINICAL SETTINGS (2003).

19. Jennifer Lerner et al., *Emotion and Decision Making*, 66 ANN. REV. PSYCHOL. 799, 801 (2015).

20. Andrew Wistrich, Jeffrey Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?* 93 TEX. L. REV. 855, 911 (2015).

21. Maroney & Gross, *supra* note 1; Stina Bergman Blix & Åsa Wettergren, *A Sociological Perspective on Emotions in the Judiciary*, 8 EMOTION REV. 32 (2016); Scarduzio, *supra* note 2.

**[T]he role of emotion in judging, especially in the courtroom, is an emerging field of research.**

Codes of judicial conduct and criteria for judicial performance evaluation take emotions and their display into consideration. Such codes and criteria are most formally and specifically articulated in the United States. The American Bar Association's Model Code of Judicial Conduct (adopted in many states) provides rules and commentary indicating

that failure or inability to control emotions puts judges at risk of disciplinary complaints from litigants, attorneys, and others. Indeed, "[c]harges of impatient, angry and impolite behavior on the bench generate a large proportion of complaints filed with judicial conduct commissions."<sup>22</sup> The ABA's Model Program for Evaluating Judicial Performance also contains criteria related to the display of emotions.<sup>23</sup> In Australia, guidelines state that it is "desirable to display such personal attributes as punctuality, courtesy, patience, tolerance and good humour. . . . A judge must be firm but fair in the maintenance of decorum, and above all even-handed in the conduct of the trial."<sup>24</sup>

*Third, a conscious and appropriate display of emotions can play a positive role in court craft.* The increased focus on the positive side of emotion in decision making is general: "[p]sychologists in recent years have devoted considerable attention to the role—both positive and negative—that emotion plays in people's thinking."<sup>25</sup> The positive role emotions can play in judging is increasingly recognized as judicial officers are being asked to engage with court users in a more human and emotionally intelligent way and to manage emo-

tions, both theirs and others', especially in the courtroom.<sup>26</sup> The explicit recognition of a place for emotions in judicial work is especially evident in concepts such as procedural justice and therapeutic jurisprudence.<sup>27</sup>

## II. HOW EMOTIONS SHAPE JUDICIAL BEHAVIOR ON THE BENCH

The empirical social science study of emotions and work developed in the 1980s with a focus on people in jobs requiring interaction with the public. "Emotional labor" referred initially to the dissonance experienced by people in customer-service jobs. Such workers are expected to manage their emotions in a manner that presents the public with an employer-prescribed presentation of their selves.<sup>28</sup> Their outward display is supposed to be unaffected by their privately felt emotions. In the pioneering work of Arlie Hochschild, emotional labor is defined as "the management of feeling to create a publicly observable facial and bodily display."<sup>29</sup> Over time, the study of emotional labor extended to professionals like lawyers, medical doctors, and, recently, to judges—sometimes referred to as "privileged emotion managers."<sup>30</sup> Compared to service workers, "professionals interact with clients rather than customers and have a much greater degree of autonomy."<sup>31</sup> For these workers, the nature and complexity of the role of emotions is different.

Although there is considerable research and literature on judges, the nature of judging, judicial decision making,<sup>32</sup> and emotions, both experienced and expressed,<sup>33</sup> the role of emotion in judging, especially in the courtroom, is an emerging field of research.<sup>34</sup> Scholarly attention to emotions in criminal justice, especially trials and sentencing, tends not to consider emotion in relation to the judicial role across the range of judi-

22. CYNTHIA GRAY, *ETHICAL STANDARDS FOR JUDGES* 4 (2009). The American Bar Association Model Rule of Judicial Conduct 2.8 (Decorum, Demeanor, and Communication with Jurors) states: "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity." Comment [1] states that "Judges can be efficient and businesslike while being patient and deliberate." MODEL CODE OF JUD. CONDUCT r. 2.8 (AM. BAR ASS'N 2011).

23. See Elek, Rottman & Cutler, *supra* note 5.

24. See, e.g., THE COUNCIL OF CHIEF JUSTICES OF AUSTRALIA, *GUIDE TO JUDICIAL CONDUCT* 17 (2007); see also A. M. Gleeson, *Performing the Role of the Judge*, 10 JUD. OFFICERS BULL. 57 (1998).

25. David Klein, *Introduction to THE PSYCHOLOGY OF JUDICIAL DECISION MAKING*, at xi, xv (David Klein & Gregory Mitchell eds., 2010).

26. See Michael King, *Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice*, 32 MELBOURNE U. L. REV. 1096 (2008); MICHAEL KING ET AL., *NON-ADVERSARIAL JUSTICE* (2014).

27. Vicki Lens, *Against the Grain: Therapeutic Judging in a Traditional Family Court*, L. & SOC. INQUIRY (2015); King, *supra* note 26; KING ET AL., *supra* note 26; John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, 38 CRIM. LAW BULL. 233 (2002); Murphy, *supra* note 11.

28. Amy Wharton, *The Sociology of Emotional Labor*, 35 ANN. REV. SOC. 147, 155 (2009).

29. HOCHSCHILD, *supra* note 2, at 7.

30. Wharton, *supra* note 28, at 152; see also SHARON C. BOLTON, *EMOTION MANAGEMENT IN THE WORKPLACE* (2004); Sharon C. Bolton & Carol Boyd, *Trolley Dolly or Skilled Emotion Manager? Moving on from Hochschild's Managed Heart*, 17 WORK, EMPLOYMENT & SOC'Y 289 (2003); Charlen Westaby, *'Feeling Like a Sponge': The Emotional Labour Produced by Solicitors in Their Interactions with Clients Seeking Asylum*, 17 INT. J. LEGAL PROF. 153 (2010); Joy Kadowaki, *Maintaining Professionalism: Emotional Labor Among Lawyers as Client Advisors*, INT. J. LEGAL PROF. (2015); Åsa Wettergren & Stina Bergman Blix, *Empathy and Objectivity in the Legal Procedure: The Case of Swedish Prosecutors*, J. SCANDINAVIAN STUD. CRIMINOLOGY & CRIME PREVENTION (forthcoming).

31. Wharton, *supra* note 28, at 153.

32. See, e.g., LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006); Bergman Blix & Wettergren, *supra* note 21; LEE EPSTEIN, RICHARD POSNER & WILLIAM LANDES, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013); MICHAEL KIRBY, *JUDICIAL ACTIVISM: AUTHORITY, PRINCIPLE AND POLICY IN THE JUDICIAL METHOD* (2004); Jeffrey Segal, *Judicial Behavior*, in OXFORD HANDBOOK OF LAW AND POLITICS 19 (Keith Wittington et al. eds., 2010).

33. See HOCHSCHILD, *supra* note 2; Wharton, *supra* note 28.

34. See Bandes & Blumenthal, *supra* note 15; Maroney & Gross, *supra* note 1; Roach Anleu & Mack, *supra* note 6; Mary Schuster & Amy Proppen, *Degrees of Emotion: Judicial Responses to Victim Impact Statements*, 1 CULTURE & HUMANITIES 75 (2010).

cial assignments and judicial actions.<sup>35</sup> Some legal scholars provide important conceptual insights about judicial emotion but often depend on the reflections of a few judicial officers rather than substantial empirical data.<sup>36</sup> Similarly, the considerable professional literature about judicial performance evaluation, especially in the United States, mainly describes practical aspects of evaluation and rarely incorporates explicit attention to displays of emotion or to judges' experiences and perceptions.<sup>37</sup> One exception, an observational study of courtrooms in two American municipal courts supplemented by interviews with 12 of their judges, concludes, "it is clear that the professional work of judges is actually quite emotional, especially during the legal process."<sup>38</sup>

This brief summary of existing perspectives and research sets the stage for introducing the Emotions and Judging Project, dedicated to building a more systematic empirical foundation for studying how judges experience, manage, and display emotions, especially in the interactive environment of the courtroom.

### III. THE EMOTIONS AND JUDGING PROJECT<sup>39</sup>

The Emotions and Judging Project is a program of research designed to generate original empirically based knowledge about emotion and judging by investigating how emotion (including emotionlessness) is performed and managed. It aims to explain under which conditions judicial emotion and emotional expression appear and assess when and how such emotions enhance or detract from judicial performance. It will integrate new knowledge about judicial emotion with core concepts of impartiality and legitimacy to build an innovative understanding of judicial behavior, especially in relation to, or when interacting with, others in court.

In social science terms, this comparative project addresses the "fit" between emotion in judges' everyday work and the norms (explicit and implicit) regarding judicial performance and its evaluation. Norms are expectations for behavior that

can be enforced either as a rule by an authority (e.g., judicial canons) or by less formal reputation-based consequences (the latter are sometimes called "social norms").<sup>40</sup>

The Emotions and Judging Project responds to four key changes in judicial work that heighten the role of emotions, positively and negatively. First, the norms of judicial behavior are changing in ways that will expect or even require certain kinds of potentially emotionally laden conduct, or at least the appearance of greater engagement, and to recognize the emotional and social needs of others in the courtroom. One example is the growth of problem-oriented courts, such as drug courts, mental-health courts, and community courts. These courts often draw on therapeutic jurisprudence principles and increasingly rely on practices based on procedural fairness.<sup>41</sup> The link between judging and both therapeutic jurisprudence and procedural fairness is not limited to problem-oriented courts; these ideas, along with procedural-fairness principles and approaches, are beginning to inform everyday judicial work in Australia and in the United States, especially in lower courts.<sup>42</sup>

Second, another growing challenge to the conventional understanding of judging as detached and emotionless is the increasing proportion of litigants in the United States and in Australia that either need to or want to represent themselves in court. The role of the attorney is either absent or diminished in such cases. Both developments require greater attention to emotions, different emotional capacities such as empathy, and more emotion work, including management of the judicial officer's own emotions or those of others.<sup>43</sup> Each requires some judicial

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35. See Arie Freiberg, *Affective Versus Effective Justice: Instrumentalism and Emotionalism in Criminal Justice*, 3 PUNISHMENT & SOC'Y 265 (2001); Murphy, *supra* note 11; ROCK, *supra* note 18; Susanne Karstedt, *Emotions and Criminal Justice*, 6 THEORETICAL CRIMINOLOGY 299 (2002); JESSICA JACOBSON ET AL., INSIDE CROWN COURT: PERSONAL EXPERIENCES AND QUESTIONS OF LEGITIMACY (2015).

36. See Roach Anleu & Mack, *supra* note 2; Bandes & Blumenthal, *supra* note 15; Maroney, *supra* note 2; Maroney, *supra* note 1; Martha C. Nussbaum, *Emotion in the Language of Judging*, 70 ST. JOHN'S L. REV. 223 (1996); RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY (2001); Bergman Blix & Wettergren, *supra* note 21.

37. See David Brody, *The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust*, 86 DENV. U. L. REV. 115 (2008); GARY K. BURGER, ATTORNEYS' RATINGS OF JUDGES: 1998-2006, MOUND CITY, MO: REPORT TO THE MOUND CITY BAR (2007); Jennifer Elek & David Rottman, *Improving Judicial Performance Evaluation: Countering Bias and Exploring New Methods*, 49 CT. REV. 140 (2013); Rebecca Gill, Sylvia Lazos & Mallory Waters, *Are Judicial Performance Evaluations Fair to Women and Minorities—A Cautionary Tale from Clark County, Nevada*, 45 L. & SOC'Y REV. 731 (2011).

38. The study also claimed that "it seems municipal court judges use emotion as a tool, either implicitly or explicitly, to draw attention to the power they possess and to cue the defendants into which

behaviors are appropriate and which are not." Scarduzio, *supra* note 2, at 305.

39. The "Changing Judicial Performance: Emotion and Legitimacy" project is supported by Australian Research Council Discovery Project Grant (DP 150103663), including an International Collaboration Award with the National Center for State Courts.

40. Michael Hechter & Karl-Dieter Opp, *Introduction to SOCIAL NORMS*, at xi, xviii (Michael Hechter & Karl-Dieter Opp eds., 2001); SHARYN ROACH ANLEU, DEVIANCY, CONFORMITY AND CONTROL (2006).

41. David Rottman & Jordan Bowman, *Problem-Solving Courts*, in ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 4000 (David Weisburd & Gerben Bruinsma eds., 2013).

42. See Donald Farole, *Problem Solving and the American Bench: A National Survey of Trial Court Judges*, 30 JUS. SYS. J. 51 (2009); DONALD FAROLE ET AL., PROBLEM-SOLVING AND THE AMERICAN BENCH: A NATIONAL SURVEY OF TRIAL COURT JUDGES (2008); ROSEMARY SHEEHAN & ALLAN BOROWSKI, AUSTRALIA'S CHILDREN'S COURTS TODAY AND TOMORROW (2013); MICHAEL KING ET AL., NON-ADVERSARIAL JUSTICE (2014); Jamey Hueston & Kevin Burke, *Exporting Drug-Court Concepts to Traditional Courts: A Roadmap to an Effective Therapeutic Court*, 52 CT. REV. 44 (2016).

43. See Roach Anleu & Mack, *supra* note 2.

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engagement with court participants as people with social relationships and personal needs rather than as simply cases or legal categories.<sup>44</sup>

Third, there is increased attention to the qualities and skills needed for judicial performance as part of initial appointment, ongoing

professional development, and evaluation of individual judicial performance. Judicial appointment within Australia is being formalized, with explicit statements of required or expected skills and qualities.<sup>45</sup> Expanded professional development programs enable judicial officers to improve their performance according to articulated expectations that sometimes expressly address emotions.<sup>46</sup> Judicial performance evaluation, especially in the United States, identifies actions that conform to or depart from models of good or acceptable judicial behavior.<sup>47</sup> In the ABA Model Judicial Performance Survey, relevant criteria are found in the area of “Professionalism and Temperament” (as well as under “Integrity and Impartiality”).<sup>48</sup> In Australia, judicial performance is coming under broader scrutiny from governments and the public.<sup>49</sup> This desire for scrutiny and accountability has a long history in the United States, where formal judicial performance evaluations take place in nearly

one-half of the states and are encouraged by leading professional organizations such as the American Bar Association.<sup>50</sup>

Fourth, the composition of the judiciary is changing, with more women in all judicial roles. A substantial international literature addresses the question of whether women judges will make a difference to judging or will judge differently.<sup>51</sup> The conventional model of the judge may associate legitimate judicial performance with a particular kind of masculinity and its associated emotions and feeling rules.<sup>52</sup> Recent scholarship suggests that, regardless of whether women themselves judge differently, it appears that they may be evaluated differently.<sup>53</sup>

These developments are changing the definition of good judging. They create a practical tension for judicial officers in their everyday work and a conceptual tension for those seeking to understand judging. Judicial behavior that effectively incorporates human personality and feeling may enhance public confidence in the courts and the judiciary.<sup>54</sup> However, some human, emotionally laden judicial behavior could indicate that the judicial officer is not sufficiently detached and so raise questions about the impartiality and legitimacy of judicial authority.<sup>55</sup> The Emotions and Judging Project addresses these tensions by examining the ways judicial officers experience and display emotion and assesses the implications for legitimate judicial performance and its evaluation.

44. However, some question the legitimacy of more engaged judging, in light of conventional understandings of judicial impartiality as detachment. See Louraine Arkfeld, *Ethics for the Problem-Solving Court Judge: The New ABA Model*, 28 JUST. SYS. J. 317 (2007); Carol Heimer, *Solving the Problem of Trust*, in TRUST IN SOCIETY 40 (Karen S. Cook ed., 2001); Carol A. Heimer, *Cases and Biographies: An Essay on Routinization and the Nature of Comparison*, 27 ANN. REV. SOC. 47 (2001); Kathy Mack & Sharyn Roach Anleu, *Opportunities for New Approaches to Judging in a Conventional Context: Attitudes, Skills and Practices*, 37 MONASH U. L. REV. 187 (2011).

45. DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL (QLD), REVIEW OF THE JUDICIAL APPOINTMENTS PROCESS IN QUEENSLAND (2015), available at [http://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0016/441700/discussion-paper-judicial-appointment-review.pdf](http://www.justice.qld.gov.au/_data/assets/pdf_file/0016/441700/discussion-paper-judicial-appointment-review.pdf); JUDICIAL CONFERENCE OF AUSTRALIA, JUDICIAL APPOINTMENTS: A COMPARATIVE STUDY (2015); Simon Evans & John Williams, *Appointing Australian Judges: A New Model*, 30 SYDNEY L. REV. 295 (2008); see, e.g., AUSTRALASIAN INSTITUTE OF JUDICIAL ADMINISTRATION, SUGGESTED CRITERIA FOR JUDICIAL APPOINTMENTS (2015).

46. JUDICIAL COLLEGE OF VICTORIA, 2014 PROSPECTUS 8 (2014), available at <http://www.judicialcollege.vic.edu.au/sites/default/files/130827%20FINAL%20Prospectus%20-%20Web%20Version.pdf>.

47. AMERICAN BAR ASSOCIATION, BLACK LETTER GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE (2005).

48. These categories appear in all of the model surveys except for the juror survey. Relevant questions asked of attorneys include whether the judge: 4.a. “Acts in a dignified manner”; 4.b “Treats people with courtesy”; 4.c “Acts with patience and self-control”; and 4.g “Promotes public understanding of and confidence in the courts.” The surveys are available on the American Bar Association’s website. AMERICAN BAR ASSOCIATION, JUDICIAL PERFORMANCE RESOURCES, [http://www.americanbar.org/groups/judicial/conferences/lawyers\\_conference/resources/judicial\\_performance\\_resources.html](http://www.americanbar.org/groups/judicial/conferences/lawyers_conference/resources/judicial_performance_resources.html).

49. LAW REFORM COMMISSION OF WESTERN AUSTRALIA, COMPLAINTS AGAINST JUDICIARY: FINAL REPORT (2013); Sharyn Roach Anleu,

Kathy Mack & Jordan Tutton, *Judicial Humour in the Australian Courtroom*, 38 MELBOURNE U. L. REV. 621, 629-37 (2014); William Phillips, *Complaints Against Judges and Public Confidence in the Judiciary: Does South Australia Need a Complaints Handling Body?* 33 CIV. JUST. Q. 427 (2014); Gabrielle Appleby & Suzanne Le Mire, *Judicial Conduct: Crafting a System That Enhances Institutional Integrity*, 38 MELBOURNE U. L. REV. 1 (2014).

50. See Elek, Rottman & Cutler, *supra* note 5.

51. See, e.g., ROSEMARY HUNTER, CLARE MCGLYNN & ERIKA RACKLEY, FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE (2010); ULRIKE SCHULTZ & GISELA SHAW, GENDER AND JUDGING (2013).

52. L. J. Moran, *Judging Pictures: A Case Study of Portraits of the Chief Justices, Supreme Court of New South Wales*, 5 INT’L J. L. CONTEXT 61 (2009); Margaret Thornton, “Otherness” on the Bench: How Merit Is Gendered, 29 SYDNEY L. REV. 391 (2007); RAEWYN CONNELL, CONFRONTING EQUALITY: GENDER, KNOWLEDGE AND GLOBAL CHANGE (2011); RAEWYN CONNELL, GENDER (2002); R. W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 GENDER & SOC’Y 9829 (2005).

53. See Brody, *supra* note 37; Jennifer K. Elek, David B. Rottman & Brian L. Cutler, *Judicial Performance Evaluation Steps to Improve Survey Process and Measurement*, 96 JUDICATURE 65 (2012); Gill, Lazos & Waters, *supra* note 37; Elizabeth Tomsich & Mary Guy, *Perceptions of Authority: How Gender Affects Citizen Ratings of Judges*, 46 ADMIN. & SOC’Y 471 (2014).

54. See Kathy Mack & Sharyn Roach Anleu, *Performing Impartiality: Judicial Demeanor and Legitimacy*, 35 L. & SOC. INQUIRY 137 (2010); Tom Tyler, *The Role of Perceived Injustice in Defendants’ Evaluations of Their Courtroom Experience*, 18 L. & SOC’Y REV. 51 (1984); Tom Tyler, *What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 L. & SOC’Y REV. 103 (1988); THE COUNCIL OF CHIEF JUSTICES OF AUSTRALIA, GUIDE TO JUDICIAL CONDUCT (2007); Gleeson, *supra* note 24.

55. See Gleeson, *supra* note 24; COUNCIL OF CHIEF JUSTICES OF AUSTRALIA, *supra* note 54.

Four primary research questions drive the direction and methods of the Project's response to these important trends. They are:

1. What are the formal rules and informal norms that govern emotions in the performance of the judicial role?
2. What kinds of emotions, emotional expression, and emotion-related judicial behavior, including emotion-management strategies, actually occur in court proceedings?
3. How do judicial officers experience and understand the role of emotions in their work?
4. How can judging and judicial performance be conceptualized to take account of the place of emotion in the everyday work of judicial officers?

Next is a description of the relevant data available in Australia and in the United States and a preliminary assessment of what that data can reveal in relation to the four questions. The different types, quality, and quantity of data available from each country will be a critical element in the comparative aspect of the Emotions and Judging Project.

#### A. AUSTRALIAN DATA

Since 2000, the Magistrates Research Project and the Judicial Research Project of Flinders University, led by Sharyn Roach Anleu and Kathy Mack, have undertaken extensive empirical research into many aspects of the Australian judiciary on a national basis.<sup>56</sup> The projects have used interviews, surveys, and observation studies to investigate the attitudes of magistrates and judges toward their work, their experiences of their

everyday work, and the ways matters are handled in court.<sup>57</sup> Taken together, these varied data sources provide extensive information on judicial emotional experiences and on the ways emotion appears in the interactive dimensions of the courtroom.<sup>58</sup> In particular, the Judicial Research Project's National Court Observation Study has collected data on several aspects of the interactive dimensions of the courtroom, especially judicial demeanor.<sup>59</sup>

#### B. UNITED STATES DATA

The last large-scale national study of United States judges was conducted in the late 1970s.<sup>60</sup> More recently, evaluations of problem-solving courts have involved observations and surveys of judges and participants. There is no equivalent to the Judicial Research Project's rich data archive of social science research on which to build an analysis that can meaningfully address the research questions. Instead, the starting point for the United States is two sources of publicly available information that can be used to identify the role emotion plays in disciplinary actions.<sup>61</sup>

The archive of the Center for Judicial Ethics is the only national source of information on such disciplinary actions.<sup>62</sup>

**The Emotions and Judging Project addresses these tensions by examining the ways judicial officers experience and display emotion and assesses the implications for legitimate judicial performance and its evaluation.**

56. In Australia's system of government, federal courts operate at the national level, and separate court systems exist for each of the six states and two territories. All states and territories have a supreme court as well as a magistrates or local court. Magistrates courts adjudicate less serious criminal charges and lower-value civil cases, including small claims, and hear the first stages of all criminal cases. Australian magistrates are paid judicial officers with legal qualifications and are appointed until a fixed retirement age. Sharyn Roach Anleu & Kathy Mack, *The Professionalism of Australian Magistrates: Autonomy, Credentials, and Prestige*, 44 J. SOC. 185 (2008). They sit alone without juries in metropolitan, regional, and remote areas; those who appear in these courts are often unrepresented. Over 90% of all civil and criminal cases are initiated and finalized in the lower courts. AUSTRALIAN GOVERNMENT PRODUCTIVITY COMMISSION, *Court Administration*, in REPORT ON GOVERNMENT SERVICES (2016); Kathy Mack & Sharyn Roach Anleu, *'Getting Through the List': Judgecraft and Legitimacy in the Lower Courts*, 16 SOC. & LEGAL STUD. 341 (2007). There are approximately 160 judicial officers in Commonwealth courts, 400 state and territory judges, and 450 state and territory magistrates totaling over 1,000 judicial officers, organized into over 25 different courts. In this article, the term "magistrate" refers to members of the Australian judiciary who preside in the first instance or lower state and territory courts, and "judge" indicates those who preside in the higher (intermediate and supreme) state and territory courts or national courts. The terms "judiciary" and "judicial officer" are used more generally. For more information, see <http://www.flinders.edu.au/law/judicialresearch>.

57. See Sharyn Roach Anleu et al., *Researching Emotion in Courts and*

*the Judiciary: A Tale of Two Projects*, 7 EMOTION REV. 145 (2015).

58. Mack & Roach Anleu, *supra* note 54; Roach Anleu & Mack, *supra* note 6.

59. Mack & Roach Anleu, *supra* note 54; Mack & Roach Anleu, *supra* note 56.

60. JOHN PAUL RYAN ET AL., *AMERICAN TRIAL JUDGES: THEIR WORK STYLE AND PERFORMANCE* (1980).

61. States differ in the point at which a judicial-discipline proceeding becomes public knowledge and whether the fact-finding hearing is public. In 35 states, the fact-finding hearing is held in public. Of those states, in 28 the hearing becomes public when formal charges are filed, in 5 when answers to formal charges are filed, and in 2 when the public hearing is announced. In the remaining 15 states (and D.C.) where the fact-finding hearing is confidential, in 13 confidentiality is maintained until recommendations for public discipline are filed, and in 3 confidentiality only ends when the court orders public discipline. National Center for State Courts, *When Confidentiality Ceases in Judicial Discipline Proceedings*, NATIONAL CENTER FOR STATE COURTS, <http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/When-confidentiality-ceases.ashx>.

62. The Center for Judicial Ethics' *Judicial Conduct Reporter* quarterly "summarizes recent decisions and advisory opinions, reports developments in judicial discipline, and includes articles on judicial ethics and discipline procedure topics. The winter issue (the first one in the year) reviews the previous year." On its blog, the Center provides an update each Tuesday of all newly issued public admonishments, reprimands, and removals.

**Here, the focus is on three excerpts from public disciplinary actions as a first look at judicial misconduct related to emotions . . . .**

The Center's director, Cynthia Gray, kindly provided the authors with descriptions of 78 disciplinary cases in the Center's archive of disciplinary actions during the years 2011 to 2014. These included examples of "improper judicial demeanor by a judge on the bench" as well as incidents that relate to "abuse of contempt power," which can be seen as expressions of anger.<sup>63</sup>

The Project team will supplement this national source by accessing the online detailed public records of the Arizona Commission on Judicial Conduct. Arizona appears to maintain the most comprehensive publicly available descriptions of the specific events underlying the behavior that led to a public finding of misconduct. These public records allow us to place disciplinary actions based on judicial emotions into a wider context of discipline based on other behaviors.<sup>64</sup>

Disciplinary action against Australian judges and magistrates is initiated through misconduct proceedings and generally becomes public knowledge only when it results in an attempt to remove the judicial officer from office. This usually requires a resolution of both houses of the parliament.<sup>65</sup> New South Wales and the Australian Capital Territory are the only jurisdictions with a formal misconduct process that provides public information on serious disciplinary complaints and their outcomes.<sup>66</sup> However, such proceedings are very rare. In other states and territories, misconduct complaints are dealt with informally and do not enter the public record. The specific nature of misconduct proceedings and the criteria defining misconduct vary by the state or territory in which a complaint is filed and by the level of court on which a judge serves.<sup>67</sup>

This article looks at some examples of disciplinary actions drawn from the United States' Center for Judicial Ethics' national archive as a way to identify themes that might answer some of the Project's research questions. The examples of disciplinary actions based on emotions relate to the situation in the United States, taking advantage of what can be learned from emotional displays or reactions that led to a complaint being filed with a disciplinary body *and* ultimately made public. Such archives of public actions provide excellent sources of data for researchers concerned with judicial work as well as with showing how a state judiciary can demonstrate its accountability to the public. For the Emotions and Judging Project, the archives make it possible to conduct comparative research on emotions in judging in both Australia and the United States.

#### **IV. WHAT DOES JUDICIAL MISBEHAVIOR BASED ON EMOTIONS LOOK LIKE?**

This section provides an overview of what can be learned from the two data sources available to study emotions and judging in the United States, starting with the national archive and then looking at the information available from Arizona.

##### **A. CENTER FOR JUDICIAL CONDUCT ARCHIVES**

Under the ABA Model Code of Judicial Conduct, ways in which judges can behave intemperately leading to disciplinary action include "rude and abusive behavior, biased comments, misuse of the contempt power, and treatment of court staff, including sexual harassment."<sup>68</sup> Here, the focus is on three excerpts from public disciplinary actions as a first look at judicial misconduct related to emotions and a sense of the kinds of issues likely to be important to the Emotions and Judging Project.<sup>69</sup> These examples are chosen to illustrate research themes rather than to provide a comprehensive or representative overview of the range of cases that entail emotion display and judicial misconduct. Each example is followed by comments on the issues raised about the study of emotions and judging.

##### **1. Anger Acknowledged But Continued<sup>70</sup>**

The first example comes from West Virginia in 2012 and relates to divorce proceedings. The judge began with the following interchange with Complainant 1:

Judge: Before we get started . . . , if you say one word out of turn you're going to jail . . . do you understand me? Yes or no?

Complainant 1: Yes.

Judge: After we closed here you went out there talked to a reporter . . . five seconds after you left here. . . . This morning I now see an article from your little buddy Smith with a picture of my home . . . my home on the front page.

Complainant 1: [inaudible]

Judge: SHUT UP! [sound distortion] Did I tell you to speak? My wife is disabled, she is there alone . . . and you, you disgusting piece of . . . you put our picture of my house . . . because of you . . . my house has been vandalized four times[.] [Y]ou realize that of course because I'm sure you're probably in on it laughing about it. I swear to you. You're responsible. You are responsi-

63. E-mail from Cynthia Gray, Director, Center for Judicial Ethics, to the authors (May 29, 2015) (on file with the authors).

64. Rebecca Berch & Erin Bass, *Judicial Performance Review in Arizona: A Critical Assessment*, 4 ONATI SOC.-LEG. SERIES 927 (2014).

65. Roach Anleu, Mack & Tutton, *supra* note 49, at 631; Kathy Mack & Sharyn Roach Anleu, *The Security of Tenure of Australian Magistrates*, 30 MELBOURNE U. L. REV. 370 (2006).

66. Roach Anleu, Mack & Tutton, *supra* note 49.

67. *Id.* at 629-38.

68. GRAY, *supra* note 22, at 4.

69. For an earlier effort of this kind that is focused on "judicial rudeness," see Maxine Goodman, *Three Likely Causes of Judicial Misbehavior and How These Causes Should Inform Judicial Discipline*, 41 CAP. U. L. REV. 949 (2013).

70. *In re Watkins*, No. 12-1008 (W. Va. Mar. 26, 2013), available at [www.courtswv.gov/supreme-court/docs/spring2013/12-1008.pdf](http://www.courtswv.gov/supreme-court/docs/spring2013/12-1008.pdf).

ble. I am holding you personally responsible for anything that happens at my house. . . . It's disgraceful that you and your little buddies do not have the guts, the integrity, just the human decency, but no you gotta threaten my family now, well buddy, [it's] personal . . . it is personal. You have threatened my family and I promise you you will not hear the end of it from me. In fact. I'm going to recuse . . . I tell you I'm too angry to even be appropriate in this case.

Moments afterward, the judge apologized to Complainant 1's ex-wife and her counsel and decided not to recuse himself from the case. The judge continued the hearing, later accusing Complainant 1 of telling "a damn lie and you know it's a damn lie." Several times when Complainant 1 attempted to speak, the judge cut him off and told him to "shut up."<sup>71</sup>

In this interaction, the judge allowed personal feelings to influence his courtroom conduct, including starting the proceedings with an explicit threat to incarcerate one of the parties. The judge commenced hearing the matter with a display of anger and a threat.<sup>72</sup> This display of emotion was reactive. The complainant had talked with a reporter, and, as a result, a photo of the judge's house appeared in the newspaper. The judge linked this behavior with the subsequent vandalization of his house and fear for the safety of his wife, resulting in the display of anger in the courtroom. In the transcript, the judge acknowledges that he is angry and unable to be impartial but decides to continue hearing the case, despite the earlier claim that he would recuse himself, and almost immediately resumes his inappropriate conduct toward one of the parties.

The Judicial Hearing Board considered this incident among other complaints about the judge's behavior. The judge was found to have violated the West Virginia Code of Judicial Conduct. The Supreme Court of Appeals of West Virginia accepted the Board's recommended sanction: censuring the judge for 24 violations and suspending him without pay until the end of his judicial term (another four years).

## 2. Antagonism Toward a Courtroom Participant<sup>73</sup>

The second excerpt, from New Jersey in 2011, involved the filing of cross-complaints for restraining orders from Ms. P and Mr. P. The New Jersey Supreme Court's Advisory Committee on Judicial Conduct summarizes:

[A]fter [the judge] granted Ms. P's request for an adjournment to provide her the opportunity to obtain counsel, Mr. P. brought up the fact that he had not seen the couple's four-year[-]old child for approximately one week. . . . After asking Mr. P. several questions about his living arrangements, [the judge] asked Ms. P., "Why shouldn't [Mr. P.] see his daughter?" . . . [The judge] thereafter insti-

tuted a temporary visitation schedule for Mr. P., which was set to expire on January 7, 2010, the day of the parties' next court date. . . .

When Ms. P. indicated that her daughter was "not used to being with her father" for the length of time scheduled, [the judge] asked Ms. P. why she would have a problem allowing her daughter to spend time with her father when she had "no problem sending [her] daughter to a preschool where the first day she went, she was with total strangers." . . . The dialogue between [the judge] and Ms. P. continued as follows:

- Ms. P.: You don't need to yell at me, please.  
Judge: Ma'am, don't talk. You've got a problem with your daughter seeing her father?  
Ms. P.: Yes, I do, yes, I do, Your Honor, yes, I do.  
Judge: Well, ma'am, let me tell you something.  
Ms. P.: I do.  
Judge: You need some serious help.  
Ms. P.: Okay.  
Judge: Because you have no clue what it is to be a parent.  
Ms. P.: Okay. He has a severe mental illness.  
Judge: Ma'am, keep your mouth quiet. When I talk, you listen. Don't you dare talk back to me. I don't know who you think you're talking to, but you do not dare talk back to me. You understand that?  
Ms. P.: Yes.  
Judge: Then obey it. I'm not some friend of yours out on the street. I'm a Superior Court judge that demands the respect of my position, and you will give it to me. And you will not convince me that it's okay for your daughter to go spend time with strangers, but can't with her own father, because you know what you forgot? Let me remind you. There's only one reason why he's her father, that's the decision you made.  
Ms. P.: And it was a bad one.  
Judge: Ma'am—so, what does that tell me about your judgment? If you made a bad decision choosing him as a father, why should I believe anything about your judgment today? Well, you just admitted, you've got bad judgment.  
Ms. P.: I made a mistake. We all make mistakes, I'm human.

**In this interaction, the judge allowed personal feelings to influence his courtroom conduct, including starting the proceedings with an explicit threat to incarcerate one of the parties.**

71. *Id.* at 17-19.

72. See Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207 (2012).

73. *In re Baker*, No. ACJC 2010-151 (N.J., May 2, 2011) (Present-

ment), available at <http://www.judiciary.state.nj.us/pressrel/ACJC%20Presentment%20Max%20A%20Baker.pdf>.

**The judge clearly took sides in the custody dispute largely based on his own belief about best practices . . . and berated the party with whom he disagreed.**

Judge: And you're making a huge mistake when you tell me today that you don't think your daughter deserves to be with her father.

Subsequently:

Judge: Ma'am, don't talk back to me. Who do you think you are? Any parent that takes steps to limit the other parent's time with the child

doesn't qualify to be a parent. You want to do what's good for your daughter, encourage her to spend time with her father. That's her father. Not a stranger. He has equal rights, as you. You don't get any preference because you're her mother. And if you made a mistake, too bad. We're not going to punish your daughter today because of your poor judgment, and I'm not going to allow your poor judgment to continue. You understand that?

Ms. P.: Um hum.

Judge: When you come back on the 7th, you'd better hope that we don't hear there's been a problem with these three short periods of time, because if it was up to me, I was going to allow him to have your daughter from now until next Wednesday.

Ms. P.: She wouldn't go.

Judge: Oh, yes, she would. Oh, yes, she would. Because you don't understand, when I order it, it happens. It's not a request of you, it's an order. You know what happens if you disobey a court order? Ma'am, do you know what happens?

Ms. P.: Yes, I understand what happens.

Judge: You'll be sitting over there with this guy right here [referring to a shackled prisoner sitting in the courtroom]. This is not a request. I am telling you, it will happen.

Ms. P.: Okay, Your Honor.

Judge: And I am telling you—

Ms. P.: Okay.

Judge: —there will be consequences if you interfere with it. We understand each other?

Ms. P.: Yes.

Judge: All right. . . . Sir, enjoy your time with your daughter.<sup>74</sup>

The New Jersey Supreme Court reprimanded the judge for making extreme and excessive remarks, in a loud, hostile, angry, and antagonistic manner, to a mother after she questioned a visitation schedule.<sup>75</sup>

The judge clearly took sides in the custody dispute largely based on his own belief about best practices in child rearing and berated the party with whom he disagreed. The disciplinary committee relied heavily on the tone and volume of voice exhibited by the judge, noting that “the audio recording of the . . . proceeding was instrumental” in its decision to discipline the judge. Unlike the case above, the emotion display here does not seem to have been triggered by the actions of the applicant. The judge's decision is cast as a series of threats. If the daughter and mother do not comply with the court order, the judge indicates: “You'll be sitting over there with this guy [a shackled prisoner].” This threatening language is perhaps used to invoke the emotion of fear on the part of the mother.

### 3. Judicial Overreach<sup>76</sup>

In the next example, the judge's statements and interchange with the prosecutor display anger and frustration. The judge went so far as to threaten contempt proceedings, thus silencing the prosecutor. The police chief filed a grievance, and the State of New Hampshire Judicial Conduct Committee describes the complaint:

[I]n the context of a criminal matter . . . wherein the defendant appeared *pro se* for a trial on a Class B misdemeanor, [the judge] informally inquired of the defendant as to whether he had any evidence showing that his driver[']s license was not suspended. Following colloquy in open court between the Court and the defendant, [the judge] asked the defendant whether he would like to hear any more evidence. When the police prosecutor . . . objected reminding the Court that [the State] had not proffered any evidence, . . . [the judge] informed the prosecutor that the State had indirectly put forward its evidence. When the prosecutor continued to request that the Court move forward with trial of this matter, [the judge] responded . . . , “Be quiet. Be quiet. OK? Hey. When you sit up here you can decide. All right? Be quiet. Listen, one more time, be quiet. One more time, and I'm going to have these folks take you out of here, OK? There is a certain protocol—certain protocol you have? Certain protocol that I have. And you are stepping over the line. Don't step over the line.” When the prosecutor further attempted to address the Court, [the judge] responded: “One more time, one more time, one more time and you're out of here. You decide. You decide.” Under the threat of an apparent contempt finding, the prosecutor said nothing further.<sup>77</sup>

In this example, the judge's responses seems disproportion-

74. *Id.* at 4-7.

75. *In re Baker*, No. ACJC 2010-151 (N.J., May 2, 2011) (Order), available at <http://www.judiciary.state.nj.us/pressrel/D-95-10%20Baker%20Reprimand%20ACJC.pdf>.

76. *In re Jones*, No. JC-10-069-C (N.H. Jud. Conduct Committee, July

9, 2011) (Reprimand), available at <http://www.courts.state.nh.us/committees/judconductcomm/docs/ADMNReprimand-JudgeMichaelJones.pdf>.

77. *Id.*

ate to the prosecutor's reminder that the State "had not proffered any evidence" and request to continue with the trial. The judge's comments suggest his anger was caused by the prosecutor's intervention before the defendant could answer, which he perceived as disrupting court hierarchy, thereby questioning judicial status. The judge's anger is framed as reinforcing judicial authority: "When you sit up here you can decide." The judge is delineating the professional boundaries between the judiciary and the prosecution. By closing his demands with the questions "OK?" and "All right?" and the threat of contempt proceedings, the judge obtains the prosecutor's compliance and further demonstrates to the defendant (and others in the courtroom) that the judge controls the proceedings and the participation of other participants.

The New Hampshire Judicial Conduct Committee found that the judge had violated several Canons of the Code of Judicial Conduct and ultimately issued a reprimand. It also determined that "no . . . violations will recur by virtue of [the judge's] retirement" and that "the violations [were] not of a sufficiently serious nature to warrant the imposition of formal discipline by the court."<sup>78</sup>

## B. A FOCUS ON ARIZONA

The examples above are derived from the Judicial Conduct Center's database that seeks to include all public sanctions against a judge. The cases in that national database reflect a variety of state codes of judicial conduct and disciplinary systems.<sup>79</sup> For consistency in such arrangements, a focus on a single state seemed the best source for preliminary analysis. Examination of the judicial conduct commissions and their actions led to selecting Arizona for a closer look at the role of emotions in provoking public disciplinary actions. One advantage is that the Project can draw on all disciplinary actions over a specific time period and select the ones meeting criteria for discipline based on emotional displays. The Arizona Commission on Judicial Conduct, via its webpage, provides information on the numbers of complaints per year and their outcomes: dismissal of the complaint or sanction of the judicial officer, such as reprimand, censure, suspension, or removal. In cases involving a sanction, the Commission typically provides a copy of the complaint, a response to the notice of complaint prepared by the judge or the judge's lawyer, which is often detailed, and its order outlining the ways the behavior and demeanor of the judge contravened the Code of Judicial Conduct. Thus, while formal sanctions are rare,<sup>80</sup> these cases provide rich and detailed information on judicial performance and emotion display.

Both the Center for Judicial Ethics and the Arizona data represent only the tip of the iceberg of judicial discipline and an even smaller subset of judicial behavior generally.<sup>81</sup> While that

may limit what can be directly or obviously discerned about the wider or general role of emotions in judicial behavior, these materials do assist in addressing the Emotions and Judging Project's research questions.

The disciplinary cases can help clarify the scope and extent of the formal and informal norms that govern emotion and judicial behavior. This is an example of studying "extreme cases," which has both advantages and limitations.<sup>82</sup> One highly influential statement on the value of extreme cases argues:

[A]typical or extreme cases often reveal more information because they activate more actors and more basic mechanisms in the situation studied. In addition, from both an understanding-oriented and an action-oriented perspective, it is often more important to clarify deeper causes behind a given problem and its consequences than to describe the symptoms of the problem and how frequently they occur.<sup>83</sup>

On that basis, the data sources available to us in the United States can offer a tentative window into the role of emotions in judicial behavior at the extreme.

## V. CONCLUSION

Historically, judging has been presented as unemotional, emphasizing legal rules and reason to the exclusion of feeling and emotion. That is not currently, if it ever was, a valid description of how judges make decisions and behave in the courtroom. Emotion is inherent in all human behavior and is embedded in social interaction, including in the courtroom.<sup>84</sup> The actual desirability of viewing the judicial role as unemotional is being challenged by the changing nature of judicial work and by the greater understanding of the positive role emotions can have in generating better case outcomes and improved public trust at a time in which it is increasingly required.

This article offers a first look at the goals and current direction of the Emotions and Judging Project. One important direction is to learn from public records of judicial disciplinary actions in the United States. Over the life of the Project, the ability to make comparative statements about Australia and the

**The actual desirability of viewing the judicial role as unemotional is being challenged by the changing nature of judicial work and by the greater understanding of the positive role emotions can have . . . .**

78. *Id.* at 7.

79. See Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 *JUST. SYS. J.* 405, 407, 417 (2007).

80. See *id.* at 417.

81. To put these numbers in context, public disciplinary actions are rare. In 2015, for example, only 27 states issued any such actions; the annual national total was 115 public disciplinary actions, compared to a total of 122 actions in the preceding year. *State*

*Judicial Discipline in 2015*, *JUD. CONDUCT REP.*, Spring 2016, at 1; *State Judicial Discipline in 2014*, *JUD. CONDUCT REP.*, Winter 2015, at 1. (Data on file with authors.)

82. See Bent Flyvbjerg, *Five Misunderstandings About Case-Study Analysis*, 12 *QUALITATIVE INQUIRY* 219 (2006).

83. *Id.* at 229.

84. Sharyn Roach Anleu et al., *Observing Judicial Work and Emotions: Using Two Researchers*, *QUALITATIVE RES.* (forthcoming).

**[J]udges appear to have few or no clear statements as to what constitutes appropriate demeanor and emotional display.**

United States will grow as more data are collected.

Some observations can be made on the role of emotions in judging and on ways the study of emotions relates to current work on procedural fairness and the challenge of conducting meaningful assessments of judicial performance.

First, the value of research focusing on the emotional component of judging is evident. The role of emotion can be seen positively

as intrinsic to adapting to some of the major changes now taking place in judging. Enhancing the ability of judges to regulate their emotions can assist in managing difficult court situations, such as with self-represented litigants and during the presentation of victim-impact statements.<sup>85</sup> Judicial emotional display can be a positive factor in achieving desired outcomes such as reduction in recidivism and increased compliance with court orders, especially in problem-oriented courts. On the other hand, it is clear that inappropriate emotional display is an important factor in some of the most serious disciplinary actions taken in the United States—and perhaps in less serious complaints as well.

Second, the potential for insights from studying “extreme cases” such as public disciplinary actions seems clear. The work of states like Arizona and the Center for Judicial Conduct, in generating and collating public records of state actions, provides important statements of judicial accountability and enables valuable empirical research on the role of emotion in judicial behavior. Anger and other emotions appear to cause some judges to step out of a proper judicial role and engage in retribution against or mistreatment of individuals present in the courtroom. This is not confined to persons who are directly before the court; those in the public gallery can be the target of judicial misbehavior. Even recognizing and acknowledging an inability to regulate emotions in a particular case does not necessarily prevent a continuation of the improper behavior on the part of the judge. Emotions can be the basis of or the means to make evident a judge’s partiality toward one of the parties to a case.

Third, in both the United States and in Australia, judges

appear to have few or no clear statements as to what constitutes appropriate demeanor and emotional display. Rules of conduct tend to be worded in generalities even when commentaries are presented.<sup>86</sup> An important goal of issuing public disciplinary actions is to provide judges with specific guidance through examples of what constitutes behavior prohibited by the official rules of conduct.<sup>87</sup> Systematic study of these “extreme cases” can help provide such guidance. However, these sources are limited in their ability to provide guidance on positive emotional expression or experience.

Fourth, another potential source of specificity available to judges in some states are elements of judicial performance evaluation processes. Questions asked in judicial performance evaluation surveys or express criteria used in systematic observations of judges in their courtrooms can clarify expectations. That potential is unrealized for the most part because of the low quality of most existing surveys and the untested status of the observational protocols.<sup>88</sup> Judicial performance ratings can be affected by the gender<sup>89</sup> and race of the judge and of the observer(s), particularly with respect to different interpretations of the judge’s demeanor in the courtroom.<sup>90</sup> This may especially be the case in relation to emotions, as the expected experience and display of emotion are deeply gendered and raced.<sup>91</sup> As a result, judicial performance evaluations might reflect implicit gender and racial/ethnic bias. Research into emotion and judicial performance can potentially improve programs developed to evaluate judicial performance.

Fifth, there are also important positive links between emotion and judicial performance. The emotional state of a decision maker can influence or mediate the perception of fairness or its absence in the courtroom on the part of the decision recipient. Research shows that “people’s emotional state at the time of making procedural justice judgements can determine whether or not they perceive an encounter with an authority to be procedurally fair or not.”<sup>92</sup> Therefore, a judge’s appropriate display and regulation of emotions may underpin the role procedural fairness plays in satisfaction with general court proceedings and in the success of new court forums like adult drug courts in reducing recidivism and increasing compliance with court orders.<sup>93</sup>

Understanding links between emotion and procedural fairness offers judicial performance programs criteria that are

85. Tracey Booth, ‘Cooling Out’ Victims of Crime: Managing Victim Participation in the Sentencing Process in a Superior Sentencing Court, 45 AUSTL. & N.Z. J. CRIMINOLOGY 214 (2012); Susan A. Bandes, *Remorse and Criminal Justice*, 8 EMOTION REV. 14 (2016).

86. For example, the ABA Model Code of Judicial Conduct states in Rule 2.8(B) that “[a] judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity.” Judges are largely left to establish their own criteria for what is dignified and what is courteous. MODEL CODE OF JUD. CONDUCT, r. 2.8 (AM. BAR ASS’N 2011); see also COUNCIL OF CHIEF JUSTICES OF AUSTRALIA, *supra* note 54.

87. In the United States, the *Judicial Conduct and Ethics* series provides updates of disciplinary decisions relevant to specific canons.

See CHARLES GEYH ET AL., JUDICIAL CONDUCT AND ETHICS (5th ed. 2013).

88. See Elek, Rottman & Cutler, *supra* note 5.

89. See, e.g., Gill, Lazos & Waters, *supra* note 37.

90. See Tomsich & Guy, *supra* note 53.

91. See, e.g., Adia Harvey Wingfield, *Are Some Emotions Marked “Whites Only”?* *Racialized Feeling Rules in Professional Workplaces*, 57 SOC. PROBLEMS 251 (2010).

92. Flyvbjerg, *supra* note 82, at 212; see also Kristina Murphy & Tom Tyler, *Procedural Justice and Compliance Behaviour: The Mediating Role of Emotions*, 38 EUR. J. SOC. PSYCHOL. 652 (2008).

93. See ROSSMAN ET AL., THE MULTI-SITE ADULT DRUG COURT EVALUATION: EXECUTIVE SUMMARY (2011), available at [http://www.courtinnovation.org/sites/default/files/documents/MADCE\\_ES.pdf](http://www.courtinnovation.org/sites/default/files/documents/MADCE_ES.pdf); Maroney & Gross, *supra* note 1.

potentially better related to judicial performance in terms of perceived fairness, compliance and cooperation with court orders, and public satisfaction with and trust in the judiciary.<sup>94</sup>



**Sharyn L. Roach Anleu**, B.A. (Honors) University of Tasmania, M.A. University of Tasmania, LL.B. (Honors) University of Adelaide, Ph.D. University of Connecticut, is Matthew Flinders Distinguished Professor in the School of Social and Policy Studies at Flinders University, Adelaide, and a Fellow of the Australian Academy of the Social Sciences in Australia.

With Emerita Professor Kathy Mack, Flinders School of Law, she is currently engaged in socio-legal research into the Australian judiciary and courts. She has contributed to the Master's Program at the International Institute for the Sociology of Law, Oñati, Spain. Contact: [judicial.research@flinders.edu.au](mailto:judicial.research@flinders.edu.au), website: <http://www.flinders.edu.au/law/judicialresearch/>.



**David B. Rottman**, B.A. (Honors) University of Illinois at Urbana, M.A. University of Illinois at Urbana, Ph.D. University of Illinois at Urbana, is a Principal Researcher at the National Center for State Courts. His research considers what underlies public trust in the courts, the optimal methods for evaluating judicial performance, and principles for governing court systems. He has published over 60 articles and book chapters on topics important to the state courts, as well as numerous project reports. With Judges Kevin Burke and Steve Leben and Yale Law Professor Tom Tyler, he co-founded [www.proceduralfairness.org](http://www.proceduralfairness.org), which promotes application of procedural-fairness principles in the work of the state courts.

**Kathy Mack**, B.A. (magna cum laude) Rice University, J.D. Stanford Law School, LL.M. Adelaide Law School, is Emerita Professor of Law, Flinders Law School. She is the author of a monograph, book chapters, and articles on alternative dispute resolution, as well as articles on legal education and evidence. With Professor Sharyn Roach Anleu, she has conducted empirical research involving plea negotiations. Since 2000, they have been engaged in a major socio-legal study of the Australian judiciary. Contact: [judicial.research@flinders.edu.au](mailto:judicial.research@flinders.edu.au), website: <http://www.flinders.edu.au/law/judicialresearch/>.

94. Jennifer Elek & David Rottman, *Improving Judicial Performance Evaluation: Countering Bias and Exploring New Methods*, 49 CT. REV. 140 (2013).