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This is an Accepted Manuscript of a book chapter published by Routledge/CRC Press in *Judging and Emotion* on 2021, available at: <https://www.taylorfrancis.com/books/mono/10.4324/9781315180045/judging-emotion-sharyn-roach-anleu-kathy-mack>

Word count = 10,330

Chapter 1: Introduction

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Introduction

Judging and Emotion aims to identify the place(s) of emotion in judicial work and to understand how emotion relates to the core judicial value of impartiality.¹ The central argument is that emotion and impartiality in judging and judicial work are not alternatives or necessarily in conflict; rather, emotion is integral to judicial work. The important questions are how and when emotion enters judicial work, and the intersections among judging, emotion and impartiality. This approach contrasts with the typical treatment of emotion as something to be avoided, suppressed, or as inevitably resulting in stress, compromising judicial performance and well-being.

Judging and Emotion challenges the assumption that emotion is inherently unpredictable, harmful or a personal quality inconsistent with impartiality. Using extensive empirical data – interviews, court observations and surveys – *Judging and Emotion* demonstrates how judicial officers² understand, experience, deploy, display and manage emotion, as part of their everyday work.

This chapter first outlines the distinctive role of judges, their core obligation of impartiality, and the conventional model of judicial authority which rejects emotion and requires judicial officers to display an emotionless demeanour. The next section addresses the growing

¹ A growing and broad body of scholarship addresses the role of emotion in law. See for example Abrams 2015; Abrams and Keren 2010; Amaya and Del Mar 2020; Bandes 2001; Bandes and Blumenthal 2012; Conway and Stannard 2016; Grossi 2015, 2019; Temple 2019. This book intersects with this wider research, with a more specific focus on judicial experience and practice.

² In this book, the terms ‘judicial officer’ and ‘judiciary’ are used generically, to refer to any member of the judiciary, regardless of court level or type. Within Australia, the term ‘magistrate’ refers to members of the judiciary who preside in the lower state and territory courts, except in the Northern Territory where magistrates were given the title ‘judge’ in 2016. Australian magistrates are paid judicial officers, with legal qualifications, and are appointed until a fixed retirement age. The term ‘judge’ indicates those who preside in the intermediate and higher state and territory courts and all national courts. Jurisdictions outside Australia may use other labels for their judiciary or may use these terms, but the words may not have the same meanings as in Australia.

scholarship on emotion and the approaches of different disciplines including history, psychology, and sociology. A key theme is that context shapes the different feeling rules or norms that specify the appropriate emotion experience and display. The chapter then investigates emotion work and feeling rules in occupations and professions and addresses the judiciary as a distinctive profession. It concludes with an overview of the remaining chapters and some comments on researching emotion.

Judges and judging

Judicial officers embody legal authority and are the nexus between formal abstract law and the practical tasks of everyday judicial work (Roach Anleu and Mack 2017). Judges must perform their judicial role impartially and without bias in relation to any party or issue and must be independent, especially of government, in rendering decisions (Barak 2006; Council of Chief Justices of Australia and New Zealand 2017; Geyh 2013; McIntyre 2019). Judicial officers are required to apply existing law to proven facts within set procedures, ‘without fear or favour, affection or ill-will’.³ These are obligations of judicial attitude, role and practice (Lucy 2005).

The conventional model of the impartial judge casts judging as without emotion, emphasising reason over feeling and legal rules over emotion. ‘Ideally, judges reach their decisions utilizing facts, evidence, and highly constrained legal criteria, while putting aside personal biases, attitudes, emotions, and other individuating factors’ (Nugent 1994: 4, also see Bybee 2010; Epstein, Landes and Posner 2013; Moran 2009, 2010).

³ The full text of the oath as used for the High Court of Australia: ‘I, [name], do swear that I will bear true allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors according to law, that I will well and truly serve Her in the Office of Chief Justice [or Justice] of the High Court of Australia and that I will do right to all manner of people according to law without fear or favour, affection or ill-will. So Help me God!’: *High Court of Australia Act 1979* (Cth) s 11 and sch 1.

Dichotomisation of reason and emotion has persisted across post-Enlightenment Western knowledge systems, including law (Patulny and Olson 2019; Reddy 2009; Weber 1978). Emotion is regarded as reactive, irrational, unpredictable, associated with the body not the mind, with private sentiment rather than public obligation. This concept of emotion has:

long functioned as a catchall category for much of what law aspires to avoid or counteract: that which is subjective, irrational, prejudicial, intangible, partial, and impervious to reason (Bandes and Blumenthal 2012: 162).

These characterisations of law, reason and emotion treat emotion as incompatible with, and even potentially destructive of, impartiality and so threatening the legitimacy of judicial authority and the rule of law (see Krygier 2016; Tamanaha 2010). Maroney points out that this ‘insistence on emotionless judging – that is, on judicial dispassion – is a cultural script of unusual longevity and potency’ (2011b: 630).

Dispassion in judging has come to mean the absence of emotion in decision making and in demeanour (Goffman 1956). The incursion of emotion into judicial decision making can be a source or indicator of bias for or against a party or a claim. A judicial decision influenced by emotion, as a non-legal value or attitude, may be, or appear to be, biased and therefore illegitimate (Rachlinski and Wistrich 2017; Wistrich and Rachlinski 2017; Wistrich, Rachlinski and Guthrie 2015; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337). Conduct indicating loss of impartiality can be the basis for complaint and possible discipline of a judicial officer (Appleby and Le Mire 2014; Geyh, Alfini, Lubet et al. 2013; Roach Anleu, Mack and Tutton 2014).

The cultural script of dispassion requires that judicial performance be accompanied by appropriate judicial demeanour; conventionally, this would be emotionless, impersonal,

detached, and affectively neutral (Bandes 2009; Bandes and Blumenthal 2012; Maroney 2011a, 2011b). The judicial oath, ethics guidelines, codes of judicial conduct, appeal cases, and disciplinary proceedings, all convey expectations relating to impartiality, judicial dispassion, emotion, and its expression. The frequently expressed obligation for judicial officers to be courteous, patient and maintain decorum necessarily implies emotion and its management. A judicial officer's experience, management and expression of emotion, or lack thereof, is sometimes framed as judicial temperament (Maroney forthcoming). Norms about judging, emotion and emotion display are also communicated through occupational socialisation such as professional training, continuing education and formal and informal interaction among judicial officers (Wharton 2009).

Legal requirements that prescribe emotionless judging and demeanour, along with the cultural script of judicial dispassion, are not the only forces influencing judicial practice. In common law adversarial systems, institutional and structural factors include the delineated judicial role as a passive arbiter and guarantees of judicial independence (Geyh 2014). Legal language, prescribed procedures, and courthouse or courtroom design, all express ideas about judicial authority, impartiality, justice and the rule of law and so have significant symbolic and practical impact on judicial work (Mulcahy 2010; Mulcahy and Rowden 2020).

An extreme positivist conception of judging and legal authority constructs judges as operating only according to formal roles within the court and legal system and cannot readily accommodate a view of the judge as a human or social actor. Despite extensive challenge, from the legal realists in the early twentieth century, continuing through the critical legal studies movement, critical race theorists and feminist legal scholarship, the conventional

formalist construction remains a powerful image and benchmark (Davies 2017a; Gey and Rossi 2005; Goodman 2013; Green and Roiphe 2008; Tamanaha 2010).

Nonetheless, judicial practice itself constitutes the institutional structure and legal values, including impartiality. Structures both empower and constrain social action and the capacity for change or routinisation. In certain circumstances, human agents can (or are forced to) improvise or innovate in structurally shaped ways that can significantly reconfigure the very structures that constitute them (Sewell 1992). This conception of structure and action as mutually constitutive and transformative can be applied to judging and emotion. To conceive of judicial officers as human agents ‘implies that those agents are capable of putting their structurally formed capacities to work in creative or innovative ways’ (Sewell 1992: 4). This means that judicial officers may have the capacity to alter or transform the social-legal relations of which they are a part. Recognising that judicial work is more inter-relational, interactional and social than anticipated by the conventional image of judicial authority opens the possibility of investigating emotion and judging. This in turn allows scope to transform the conventional model of the judge.

Experience and display of emotion are embedded in the physical settings and institutional obligations in which judicial officers work – courtrooms, legal procedure, legal requirements – creating a constellation of relationships and interactions. While these structures construct and constrain the judiciary and judging, they also create opportunities and expectations for experience, expression and management of emotion. Despite the formal disavowal of emotion and attempts to erase and contain emotion, emotions are increasingly recognised as essential, though not uncontroversial, for judicial practice in everyday work (Bergman Blix and Wettergren 2018; Maroney 2011a, 2019; Roach Anleu and Mack 2013).

Judging and Emotion examines the interplay among impartiality, judicial authority and emotion in the social and institutional context of judicial work. In order to do this, it is first necessary to map out the conception of emotion that the book adopts and the related concept of emotion work.

Conceptualising emotion

Scholarship on emotion is vast, multidisciplinary and growing. Despite extensive research and writing on emotion(s), '[t]here is no commonly agreed-upon definition of emotion in any of the disciplines that study this phenomenon' (Mulligan and Scherer 2012: 345). Not surprisingly, different disciplines define emotion differently.

Historians document the diversity and complexity of emotion and emotion concepts across different eras and societies and show how 'knowledge of emotions and their classification have altered over time' (Frevert 2014: 10; also see Schnädelbach 2019). The term emotion assimilated and displaced previous words: 'Today we no longer talk of feeling, passion, fervour, affect, sensibility, sentiment, appetite, changes of temper, and its inclination, but for the most part simply of emotion' (Frevert 2014: 16). This displacement can be attributed to the increasing dominance of the natural science paradigm, instead of metaphysics or philosophy, to explain emotion.

The idea that emotion is basic, innate, human and therefore universal dominated the psychology of emotions from the 1970s to the 1990s (Wetherell 2015). This paradigm characterised emotion as spontaneous and involuntary, a physiological reaction to external stimuli (Ekman and Cordaro 2011). Contemporary psychological approaches generally agree

that cognition and emotion are intertwined and a rigid separation between cognition and affect is artificial (Barrett 2017; Frevert 2014; Scheer 2014). Emotion underlies all action; sharp distinctions between rational and irrational, between reason and emotion cannot be made (Barbalet 2008; Bennett and Broe 2007, 2010; Damasio 1994).

Another challenge in conceptualising emotion is to delineate the relationships among emotion, affect and feeling. Generally, affect is used as an umbrella term that includes emotions as well as stress responses and moods (Gross 2015). Some emotion researchers view affect as prior to and independent of intentions, meanings, interpretations, reasons and beliefs (Leys 2011). Others choose not to use the term affect because it is only one component of the ‘physiological-psychological-social complex of emotion’, and identifying or interpreting affect requires cultural and social input (Scheer 2012: 198 fn 26). Some researchers do not define emotion at all, and many use the term collectively – emotion – rather than referring to discrete emotions (Stets 2012). Others use the terms emotion and feeling interchangeably (Hochschild 1979; Scheer 2012).

A comprehensive conception of emotion encompasses interpretation and meaning given to experience and display comprising motor expression, bodily symptoms, and subjective experiences (Mulligan and Scherer 2012). Though emphases differ, most current conceptualisations of emotion:

- acknowledge physiological change in response to an event or situation that generates the emotion (Gross 2015);
- view emotion as the product of social interactions and embedded in interpersonal relations rather than a primarily individual phenomenon (Burkitt 2018);

- agree that emotion requires cultural categorisation using available language, discourses and narratives (Bericat 2015; Illouz, Gillon and Shachak 2014; Robinson 2014);
- acknowledge that concepts shape perceptions and experiences of emotion (Barrett 2017: 14; also see Ng and Kidder 2010; Holmes 2015); and
- recognise that norms (informal and formal) specify, regulate and shape the experience and display of emotions; their type, quantity, and intensity (Lively 2008; Lively and Weed 2014).

Judging and Emotion adopts a composite approach to emotion. Emotion is interactive, interdependent and context specific as well as subjective, internal and personal. Emotion is psychobiological (recognising instinct or impulse) and individual. It is also a social practice performed in, emergent from and embedded in social settings and situations. The terms emotion and feeling will be used interchangeably, and display is used to describe outward bodily manifestations including demeanour. Affect will generally not be used.

This book does not seek to classify or distinguish emotions – for example fear, frustration, happiness, joy, sadness – as discrete, separate, or easily identifiable phenomena.

Nonetheless, in emotion research, participants may use specific emotion words such as sadness, anger, frustration, pride, happiness to describe their feelings, or those they observe in others. As a result, despite ambiguity in distinguishing separate and identifiable emotions, a specific emotion or different emotions may be discussed rather than the broader, omnibus, singular concept of emotion.

Emotion as social practice

Several key insights follow from conceptualising emotion as culturally and historically embedded rather than primarily biologically or naturally given. Feelings that emerge in a social situation may engender multiple interpretations and be experienced or identified as several emotions. Emotions overlap and bleed into each other, making them difficult to disentangle. Feelings and emotions may be ambivalent, in tension or in conflict and not easily or immediately identifiable or describable (Burkitt 2018).

Emotion has to be realised in performance, it ‘is not a material thing to be possessed and then displayed ... [it is] something that must be enacted and portrayed, something that must be realized’ (Goffman 1959: 75). Emotion as practice is not just about the body and mind, physiology and cognition. It necessarily involves language, material artefacts, other people, and the environment, all of which are historically and culturally specific.

The language of emotion affects the ways emotions are experienced and expressed or performed. The images and metaphors that ‘English speakers routinely draw upon to think about “anger” as, for example, hot fluid in a container (boiling, steaming, bursting, etc)’, affect the experience of anger (Lutz and White 1986: 419). This image of anger, which perpetuates the notion of emotion as irrational and uncontrollable, has ‘surprising traction in the common law’ (Soriat 2019: 129) and has significance in understanding judging and emotion.

Observable bodily presentation, including posture, facial expression, gestures and tone of voice are often used to identify or suggest particular emotions, though they are unstable markers and heavily context dependent (Barrett 2017). Observers may assess and interpret

certain movements or sounds in emotion terms, but accuracy is not guaranteed, and scope for multiple interpretations of the same observations is wide.

Understanding emotion as a social practice recognises that emotive performance is oriented toward others in the social setting and implies an audience, even multiple audiences.

[T]he *doing* of emotion is an interactive performance that constantly shapes, develops, and alters the meanings of the emotion expressed ... [participants] not only display emotion through their bodily manifestations; they also perform emotion through narratives (Ng and Kidder 2010: 197, emphasis in original).

It is these inter-relations and interactions that form the context for emotion experience, display and management.

Formal and informal norms specify expected or appropriate emotion – experience, performance, expression, management – in particular settings or contexts. Ideally, these norms are distinctive, shared, and acquired through training and experience. They also change and are negotiated in social settings. Participants in any setting must, to some extent, be aware of, share and comply with the formal and informal norms relating to emotion (Rimé 2007). Not surprisingly, scholars from different disciplines adopt different concepts to describe these norms which vary historically, culturally and situationally, and vary in levels of abstraction and visibility. These concepts include emotional standards (Reddy 2009), emotional communities (Rosenwein 2006), emotionology (Stearns and Stearns 1985), emotional styles (Gammerl 2012), emotional regime (Bergman Blix and Wettergren 2016), and feeling rules (Hochschild 1979).

The social context or social setting itself can also have an emotion dimension. Terms such as emotional climate, emotional landscape, emotional environment, emotional ecology or emotional atmosphere refer to emotion that exists and endures beyond individuals, their

feelings and actions. The emotional climate or emotional atmosphere is a quality or characteristic of a collectivity, for example a workplace, a classroom, a courtroom, an organisation, or a community. Psychologists distinguish between emotional atmosphere – a transitory mood – and emotional climate which is a more enduring environment (Conejero and Etxebarria 2007; de Rivera 1992). These collective terms are used non-specifically in this book to refer to emotion that exists at the organisational or workplace level as distinct from the emotion that individuals experience, display and manage. Even so, the collective and the individual levels are inextricably linked through the social sharing of emotions and conformity with appropriate feeling rules (Karstedt 2019; Rimé 2007).

Judging and Emotion investigates the ways emotion is constituted, experienced, manifested, displayed and managed in judicial work. It addresses how judicial officers' approach and perform emotion. The focus is on everyday judicial work in its legal and social setting, in which emotion is disavowed yet essential. This setting is integral to understanding the constraints on and capacities for emotion and the ways in which emotion is experienced, performed and displayed.

Situationally specific norms pertaining to the courtroom regulate appropriate feelings and behaviour. Conforming to those feeling rules will entail emotion work. However, courtroom settings are complex; not all judicial officers feel the same things; not all connect bodily responses, sensations or feelings with emotion concepts; and not all will express or display their feelings in the same ways. Some of this variation will be personal and biographical, moulded by experiences, training and socialisation, others will be shaped by social institutions such as gender and social class, as well as by judicial and legal institutional norms. The emotions experienced and expressed by judicial officers, the management of

those emotions and judicial perception, interpretation and management of others' emotions, constitute and can potentially alter the emotional standards.

Emotion work and feeling rules

One conclusion that sits across much discussion of emotion is that: 'emotions are considered a domain of effort and individuals are expected to conform to norms and strive for ideals' (Reddy 2009: 311). The level and kind of effort has been calibrated in different concepts, sometimes used interchangeably: emotional labour (Hochschild 1983; Wharton 1999, 2009); emotion work (Hochschild 1979); emotion management (Bolton and Boyd 2003; Lively and Weed 2014); emotion regulation (Gross 2015; Maroney and Gross 2014); affective practice (Wetherell 2015); affective work (Craciun 2018); and emotional capital (Cottingham 2016; Heaney 2019).⁴

Each of these terms suggests some level of agency. Emotion is something that someone does, implying a capacity and situational or social expectation to control, even use, one's own emotional experience and display, and perhaps also to manage the emotions of others.

Emotion work is oriented to expectations or norms that 'inform the sense of what is "proper" feeling in the performance and reading of emotional expression' (Scheer 2012: 216). Feeling rules are 'guidelines for the assessment of fits and misfits between feeling and situation' (Hochschild 1979: 566). This raises the prospect of deviation from appropriate emotion experience and display (Roach Anleu 2006).

⁴ Other concepts such as service emotions (White 2014, 2019), emotional granularity (Barrett 2017; Gendron and Barrett 2019), and background emotion (Barbalet 2011; Bergman Blix and Wettergren 2018) suggest that some kinds of emotion-related work may not require conscious effort or even awareness. Backgrounded emotions can be part of a general routine or professional orientation experienced (or perceived) as taken for granted, natural, automatic, effortless even intuitive with low expressivity and not consciously experienced (Barbalet 2011).

Conceptions of emotion work all imply interaction, interdependence and social relations. The capacity, need or motivation to manage emotion does not occur independently of institutional or social contexts. The inter-dependence and interaction that occurs in social settings in turn constrains the amount and type of emotion permitted. ‘How specific emotions like grief, happiness or affection are generated, handled and expressed depends to a large degree on *where* they occur’ (Gammerl 2012: 164, emphasis in original). Assessing the meaning or significance of emotion depends on the context (Bandes 2017; Gross 2015). In one situation, anger can be disruptive; in a different one, it can remind participants of their responsibilities and enhance compliance (Maroney 2012). Instances of emotion regarded as unhelpful can motivate consideration of emotion regulation to bring non-normative feelings and expressions back in line with the norms operating in the setting (Lively and Weed 2014). This account links emotion regulation, whether of one’s own emotions or others, to the idea of feeling rules, emotion standards or styles, or to other conduct norms and the context in which the emotion occurs. Managing one’s own emotions and emotion display can function to manage others’ felt and displayed emotions. Both are necessarily intertwined: ‘emotion management involves the simultaneous attention to one’s own as well as others’ emotion’ (Bergman Blix and Wettergren 2016: 34).

Another facet of emotion management is the distinction between deep and surface acting. Surface acting describes the process of managing one’s outward expression, typically to conform with situational feeling rules; this can entail suppressing one’s actual feelings. Deep acting involves individuals actually experiencing the socially or institutionally expected feelings (Lively and Weed 2014). Because of the potential dissonance between the display and experience of emotion, surface acting is often associated with emotional exhaustion, stress, impaired well-being, burnout and depression (Grandey 2003; Humphrey, Ashforth and

Diefendorff 2015; Lively and Powell 2006; Ozcelik 2013; Schrever, Hulbert and Sourdin 2019). Research suggests that the negative impact of emotion work occurs when employees have to fake their feelings and engage in ‘false face acting’ (Hsieh, Jin and Guy 2012: 383). Display rules that require suppressing negative emotions seem to be the most emotionally demanding (Hsieh 2014). Hochschild (1983, also see Williams 2003) identifies emotional labour that is neither explicitly compensated nor considered compensable work as especially damaging or alienating. Professional occupations in which incumbents typically exercise more autonomy than employees in the service sector also engage in emotion work, but may avoid some of the negative experiences (Craciun 2018).

The concept of emotion work explicitly ties emotion – experience, display and management – to paid work, as a requirement of many occupations where employees directly interact with others, typically face-to-face. Hochschild coined the term emotion work to ‘refer to the act of trying to change in degree or quality an emotion or feeling’ (Hochschild 1979: 561). It ‘can be done by the self upon the self, by the self upon others, and by others upon oneself’ (p. 562). In *The Managed Heart* (1983) she further develops the idea that emotion can be commodified by introducing the concept of emotional labour to emphasise the relational and hierarchical nature of occupations found typically in the service sector. Emotional labour is work that ‘requires one to induce or suppress feeling in order to sustain the outward countenance that produces the proper state of mind in others’ (p. 7). It involves managing feeling to create a publicly observable facial and bodily display for the benefit of another person and is subject to supervision and evaluation.

Emotion work and professions

While not strictly conforming to Hochschild's original concept of emotional labour, the work of professional occupations entails emotion management.⁵ The suppression of emotion and personal feelings is a key attribute of traditional conceptions of the profession, implying emotion management as part of detached professional service (Abbott 1988; Wilensky 1964). The professions are characterised by 'disinterestedness' (Parsons 1954: 35). The requirement to be '*impersonal* and *objective*' limits the relationship with clients 'to the technical task at hand, avoid[ing] emotional involvement' (Wilensky 1964: 140, emphasis in original). Professional ethics oblige members to maintain social distance and prohibit expression of unregulated or inappropriate emotions, especially in the relationship with clients (Abbott 1983). Members of a profession typically 'supervise their own emotional labor by considering informal professional norms and client expectations' (Hochschild 1983: 153).

Three strong themes emerge from research on emotion work in professional occupations:

- (i) The occupational culture, organisational context, professional-client relationship, and inter-professional relations generate feeling rules that direct emotion work. While professions may not have supervisors in the same way as front-line service workers, they experience strong pressures to engage in emotion work.
- (ii) The nature of the interactions, the organisational setting, and professional norms all shape the kinds of emotion available, the experience and display of emotion,

⁵ The research on professions is vast with significant differences in the interpretation of professional attributes. Functionalist approaches acknowledge such traits as entry requirements, credentials, licensing, and the service ideal as intrinsic to certain kinds of work. Critical approaches take the same attributes as evidence of monopolisation, exclusion, and maintenance of prestige and status. Social constructionists examine the ways in which professional tasks and boundaries are maintained and negotiated in everyday work (Abbott 1988; Macdonald 1995; Roach Anleu 2010). A newer literature uses broader and more inclusive terms such as 'knowledge-based work' (Gorman and Sandefur 2011). These occupations (many relatively recent) are characterised by expert knowledge, autonomy, a normative orientation to service, and high status with associated financial and other rewards – all characteristics relevant to the traditional professions and to the judiciary.

which in turn can reinforce or challenge what is appropriate emotion experience and display.

- (iii) Emotion – display and experience – is embedded in the performance of professional tasks and can be a practical strategy or tool for influencing feelings or emotional expression of the self and others.

The judiciary is a distinctive professional occupation. Unlike other professions, judicial officers do not have a client relationship; their service ideal is abstract: to justice and the wider society (Roach Anleu and Mack 2005). The judiciary also has a constitutional role as an arm of government. Typically, courts are publicly accessible and their decisions publicly available. Although decisions are reviewable by appellate courts, the principles of judicial independence and security of tenure guarantee extensive autonomy in everyday work, in judicial decision making, and in courtroom practice.

More importantly, the judiciary shares several characteristics of professions that are relevant to the demand for and the limits on their feelings, emotion expression and emotion work. For judicial officers, especially in court, ‘authority is made concrete through practices of speaking, dressing, and feeling – in other words, through orchestrated performances’ (Craciun 2016: 365). As with other professions, the judiciary can use their own feelings and emotion displays to accomplish their daily tasks and professional goals. Judicial officers can adopt a certain demeanour to evoke particular emotions as a way to foster trust, or as an attempt to induce certain feeling states among participants in their workplaces. They can ‘make use of what they perceive to be their internal states as they attempt to understand and treat ... problems’ (Craciun 2018: 973).

Emotion and emotion work can have important positive effects on accomplishing professional work, including judicial work, without undermining professional authority. These empowering dimensions of emotion work have not received as much attention as the disempowering consequences.

Judging, emotion and emotion work

The human experience presented in legal cases entails a wide range of emotions. Courts can be places of considerable emotion, often deemed to be negative, for judicial officers as well as for other participants. Court users may experience fear, uncertainty, embarrassment, shame, or anger, which will affect their emotional displays (Booth 2012; Davies 2017b; Jacobson, Hunter and Kirby 2015; Karstedt 2002; Roach Anleu and Mack 2005; Schuster and Proppen 2010; Toy-Cronin 2019). Other feelings might include grief (Booth 2016), frustration (Tutton, Mack and Roach Anleu 2018), or remorse (Rossmanith 2013, 2015). The judicial officer must anticipate, perceive, interpret and/or manage these emotions experienced or displayed by others in the courtroom. Indeed, Hochschild (1983) includes judges in a list of some 15 occupations that involve substantial amounts of emotional labour.

The explicit recognition of a place for emotion in judicial work is especially evident in concepts such as procedural justice or procedural fairness and therapeutic jurisprudence (King 2003, 2006; Lens 2016). A key dimension of psychological models of procedural justice is that court users are more likely to comply with court decisions, even where they go against their interests, if they feel they have been listened to and treated with respect by authority figures (Burke and Leben 2007-2008; Hunter, Roach Anleu and Mack 2016; Tyler 1990, 2006).

Other recent scholarship on the judiciary and judicial practice in diverse legal systems points to the importance of emotion, emotional experiences, emotion management and emotion display (Bandes 2009; Bandes and Blumenthal 2012; Bergman Blix and Wettergren 2016, 2018; Elek 2019; Maroney 2011a, 2011b; Maroney and Gross 2014; Roach Anleu and Mack 2005, 2013; Tata 2020; Toy-Cronin 2019; Wojciechowski, Dowgiałło and Rancew-Sikora 2015; also see *Oñati Socio-Legal Series* (2019) 9(5), special issue on ‘Judging, Emotion and Emotion Work’). Much of the research to date tends to focus on the emotions experienced and displayed by the judicial officer, which the judicial officer must manage, for example anger (Maroney 2012) or disgust (Conway and Stannard 2019) or emotional capacities which judges may deploy such as empathy or compassion (Bandes 2009; Bergman Blix and Wettergren 2016).

One emerging theme, in mass media as well as scholarship, is judicial stress, vicarious trauma and burnout (see, for example, Pelly 2018; Thompson 2018). A recent Australian study finds that judicial officers report levels of psychological distress higher than those of the general population, and symptoms of burnout and secondary trauma are prominent features of their work (Schrever 2018; Schrever, Hulbert and Sourdin 2019). Strategies that address judicial well-being and resilience are now more visible, especially in professional development programmes (see, for example, Judicial College of Victoria 2019; National Judicial College of Australia 2019). In some jurisdictions, the head of jurisdiction’s responsibilities for judicial health and well-being are explicit and statutory (for example *Federal Circuit Court of Australia Act 1999* (Cth) s 12(1)).

While the language of emotion is rarely used in descriptions of the institutional role of the judge, concepts implicitly related to emotion exist. Formal judicial guides consistently exhort

judges to display qualities such as courtesy, dignity and patience, which necessarily imply interaction and therefore emotion. Examples include the American Bar Association *Model Code of Judicial Conduct* (2011), the Council of Chief Justices of Australia and New Zealand's *Guide to Judicial Conduct* (2017), the England and Wales *Guide to Judicial Conduct* (Courts and Tribunals Judiciary 2020) and the *Bangalore Principles of Judicial Conduct* (United Nations Office on Drugs and Crime 2002). This suggests the feeling rules and norms applicable to the judicial role entail considerable work to manage the experience and performance of judicial officers' own emotions and to elicit or suppress feelings or emotional displays in others (Mack and Roach Anleu 2010; Roach Anleu, Rottman and Mack 2016). Important emotion related qualities and the capacity for emotion work are part of the notion of judicial temperament, often identified as a qualification for appointment (see, for example, Australasian Institute of Judicial Administration 2015). Indeed, Maroney (forthcoming) makes this link explicit, by proposing that lack of judicial temperament can be understood as poor emotion regulation skills.

Institutional changes within courts, sometimes building on scholarship about judging, emotion and judicial practice, and related development of professional norms and regulation, expand the circumstances in which judicial officers are expected to be more emotionally engaged and expressive than anticipated by the conventional model of judicial authority. Judicial officers are now expected to recognise, and even manage, some of the social and emotional needs of courtroom participants (Booth 2016; Maroney and Gross 2014; McIvor 2009), or to adopt a judicial approach that conveys care, support, empathy and compassion (Bergman Blix and Wettergren 2016; Lens 2016). Problem-oriented courts such as drug treatment or family violence courts may be based on a philosophy of therapeutic jurisprudence which explicitly anticipates engagement between a judicial officer and court

users, especially defendants (King, Freiberg, Batagol et al. 2014). This engagement entails emotion. ‘While traditional judges strike a passive, neutral pose, the ideal problem-solving judge is active and engaged, displaying compassion and empathy’ (Lens 2016: 703; also see Fay-Ramirez 2015).

In many jurisdictions, the judiciary is becoming more diverse along a range of dimensions, including professional background, gender and race. Judicial officers bring with them different cultural, social and individual approaches to emotional experiences, display and regulation (Cahill-O’Callaghan 2013, 2020). Feeling rules are not only driven by the occupation, they are also affected by the incumbents of the job. Different emotions can be expected of men and women in the same occupation. Feeling rules and emotion work expectations are also shaped by race and ethnicity (Wingfield 2010). Such research signals the complexity of gender or race or ethnicity as explanations for differences in judicial attitudes, values and approaches, reinforcing the importance of context for understanding judicial emotion and emotion work. It also signals caution in inferring too quickly that observed differences in emotion, emotion display or emotion work among judicial officers of different genders, race, or other social characteristics are solely or primarily attributable to those differences (Harris and Sen 2019).

Increased attention to formal processes of judicial performance evaluation and discipline exposes gaps in the guidance available and regulation of judicial conduct in relation to emotion. Framing the question of emotion and judging as relying on individual judicial qualities such as temperament, or enforcing these norms through individual performance evaluation or discipline, also reinforces the idea that judicial emotion and regulation are personal rather than embedded in the social relations of the institutional context.

Judging and Emotion demonstrates that judicial emotion and emotion work are more than individual experience and conduct and include a much wider range of experiences than negative ones. As with other professions and occupations, emotion work can have many positive implications (Humphrey, Ashforth and Diefendorff 2015). While some emotionally-laden judicial behaviour could indicate that the judicial officer is not sufficiently detached and so raise questions about impartiality, judicial behaviour which effectively incorporates human personality and feeling may enhance public confidence in the courts and the judiciary (American Bar Association 2011; Council of Chief Justices of Australia and New Zealand 2017; Tyler 2003, 2007-2008; Tyler and Huo 2002).

Outline of chapters

Judging and Emotion relies on extensive empirical findings to understand emotion as a dimension of judicial work, situated in an interactional social context, bounded by rules and norms. It demonstrates the utility of emotion as a judicial resource to achieve the core value of impartiality.

Chapter 2 Emotion and everyday judicial work: The context

This chapter describes the contexts of judicial work, including the pace and volume of work, the varied interactions and the emotion which judicial officers and other court participants may experience and display. Dimensions of the judicial work context include court level, kinds of judicial work including trials, particular court participants such as unrepresented parties, legal representatives, jurors, or witnesses, and specific case types, for example sexual assault, domestic/family violence and family law. This chapter documents the interconnectedness among formal court structures, context, judging and emotion.

Given the relational nature of emotion and emotion work, distinguishing management of emotion and display to maintain and communicate impartiality in Chapter 3 from management of the judicial officer's own emotion in Chapter 4 and from managing the emotion of others in Chapter 5 is somewhat arbitrary. Judicial self-management can be inextricably linked to managing others, and similar approaches may be used for multiple purposes. Judicial emotion work may be directed towards self or others. A brief quote from interviews or court transcripts can raise several issues, belonging in different chapters. Nonetheless, it is helpful to address these three dimensions of emotion work in separate chapters.

Chapter 3 Judicial impartiality, emotion and empathy

This chapter investigates how judicial officers frame and perform impartiality in the legal context where feelings and the need for emotion work are embedded, but formally disavowed. Impartiality, and its performance as dispassion, is the touchstone for judicial officers' reflexive monitoring of the myriad emotions they experience. At the same time, their commitment to impartiality entails emotion work which requires recognising, not denying, a place for emotion. Judicial officers describe different conceptions of impartiality and several conscious strategies for maintaining impartiality as an internal state and its appearance through their demeanour. They understand that, while empathy is typically considered a challenge to impartiality, it also has an important, though circumscribed, place in judicial work.

Chapter 4 Judicial emotion: Experience, display and management

By examining what judicial officers say and do about their own feelings and emotion experiences, this chapter shows how emotion and emotion work are integral to the performance of judicial work. Empirical findings document the ways judicial officers manage their own emotion, especially when confronted with challenging cases or difficult face-to-face behaviour from other participants. As well as self-management, judicial emotion is also perceived, interpreted and managed by others, such as judicial colleagues and court staff.

Chapter 5 Judicial emotion work: Others' emotions

This chapter shows how emotion and emotion work are essential to the strategies judicial officers adopt to manage the emotions and conduct of other participants, especially in the courtroom. These approaches include anticipating, assessing or responding to others' emotions. Judicial officers may be able to avert an anticipated feeling or display, or they may choose to allow an expression of emotion within limits, or they may exert control after an emotional expression. Chapter 5 also maps the boundaries of the judicial role in relation to emotion management.

Chapter 6 Professional regulation of judicial emotion

Emotion experience, display and emotion work can be regulated in many ways. This chapter considers forms of professional regulation of judging and emotion, somewhat distinct from the self-management judicial officers undertake discussed in previous chapters. Regulatory mechanisms considered include judicial ethics or conduct guidelines, judicial performance evaluation programmes, complaint and disciplinary processes, challenges on the ground of bias, and professional socialisation, such as judicial education, mentoring and other forms of judicial communication. Although these mechanisms are rarely framed in the explicit

language of emotion or emotion work, they implicitly anticipate emotion from the judicial officer or others in the court, and communicate standards which regulate judging and emotion.

Chapter 7 Conclusion

The conventional norms of judicial behaviour are often interpreted as requiring feelings and emotional display to be repressed. As the research findings and analysis in this book demonstrate, judicial officers experience complex and sometimes intense emotion in their everyday work. They must deploy a wide range of emotion-related skills and qualities to accomplish their work within the institutional framework of the judicial role and the core value of impartiality (Roach Anleu and Mack 2013, 2017). This book demonstrates how emotion is a resource for impartial judging, as well as affirming the power of conventional norms linking dispassion with impartiality to anchor judicial emotion work.

Researching emotion

For the empirical researcher a key question is how to identify and collect reliable, valid data on emotion and emotion work. Scheer asks: ‘How do we know when a source is talking about an emotion?’ (2012: 218). A ‘source’ could be interviewees, individuals observed in their natural, everyday settings, respondents to a social survey, or historical or contemporary texts. A related research question is: ‘How do we know what they feel?’ (Wettergren 2015: 115). Emotion can be suggested by or interpreted from specific emotion language (sad or angry), a description of something as a feeling (upset), language that links the body and the mind (blood boiling) or observable conduct or physical states (raised voices, smiles). Similarly, when a judicial officer describes or displays emotion, whether in the courtroom or in

interviews, these same kinds of language or conduct can be the basis for an inference about emotion (Bericat 2015; Gammerl 2012; Rossmann 2015). In her focused ethnography of a family court, Lens reports observing what she describes as ‘obvious states of emotion (e.g., anger, crying, laughter)’ (2016: 707). Nonetheless, such signs may not accurately indicate felt emotion, or can be misinterpreted (Barrett 2018).

While some emotion states may be more obvious or “readable” than others, and some words or actions may appear to relate directly to feelings, problems of observational and interpretive error exist. What is obvious to some participants may not be to others. The emotion words and/or display may not align with actual feelings. The display may be an outcome of deep or surface acting, a part of emotion work (Hochschild 1983), or maybe generated by other internal or relational factors. Trying to infer a specific emotion from observed bodily signs is difficult. Barrett cautions: ‘You cannot recognize or detect anger, sadness, remorse, or any other emotion in another person – you can only guess, and some guesses are more informed than others’ (2017: 246; also see Bandes 2001). When investigating emotion that suffuses the practice of law and judicial work, it is essential to consider taken-for-granted emotions that may be unnoticed or assumed as normal, as well as emotions like anger and remorse which are typically more obvious and observable (Bandes 2001).

A third question is ‘how do they make use of their internal states and emotional displays’ to accomplish the work of an occupation or organisation (Craciun 2018: 960 fn 3). Much research attention is on the ways employees or members of a profession display emotion in an attempt to evoke certain feeling states or attitudes in others, such as trust, confidence, happiness, guilt or fear. Emotion display can be a positive resource or strategy, which can enhance job satisfaction, or lead to alienation, depending in part on the type of occupation or

organisation and the level of autonomy. This book focuses on the ways judicial officers manage their feelings, or express emotion, or convey emotion-related qualities such as empathy, to facilitate their everyday work, especially in the courtroom.

To meet the challenge of researching emotion in judicial work, *Emotion and Judging* draws on and synthesises several kinds of data obtained primarily through interviews, court observations and transcripts, surveys and publicly available data, including appeal court judgments. This multi-method approach enables deciphering emotion from different angles (Flam and Kleres 2015).

The different projects and studies providing the data for this book include:

- the *National Court Observation Study*, including transcriptions of court proceedings, 2004-05;
- the *National Survey of Australian Magistrates* 2007;
- the *National Survey of Australian Judges* 2007;
- interviews with judges, magistrates and court staff conducted as part of the *Judicial Officers and Workload Allocation* project, 2007-12;
- interviews with judges and magistrates undertaken nationally as part of *The Courts, the Judiciary and Social Change* project, 2012-15; and
- materials relating to judicial ethics, discipline and performance evaluation in Australia, the United States and the United Kingdom collected as part of the *Changing Judicial Performance: Emotion and Legitimacy* project, 2015-2020.

Research design and research methods are described in detail in the Appendix. When material from any of these projects or studies is discussed in the text, it is clearly identified.

Anonymisation and data presentation are explained in each chapter in a footnote where the data is first discussed.

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