Empirically Investigating Judicial Emotion

TERRY A. MARONEY*

Abstract

The empirical study of judicial emotion has enormous but largely untapped potential to illuminate a previously underexplored aspect of judging, its processes, outputs, and impacts. After defining judicial emotion, this article proposes a theoretical taxonomy of approaches to its empirical exploration. It then presents and analyses extant examples of such research, with a focus on how the questions they ask fit within the taxonomy and the methods they use to answer those questions. It concludes by identifying areas for growth in the disciplined, data-based exploration of the many facets of judicial emotion.

Key words

Judges; emotion; empirical research; research methods

Resumen

El estudio empírico de las emociones en la judicatura tiene un potencial enorme, pero poco explorado, para arrojar luz sobre un aspecto de la profesión judicial poco explorado previamente, sus procesos, resultados y efectos. Tras definir la emoción judicial, el artículo propone una taxonomía teórica de abordajes a su estudio empírico. Después, presenta y analiza ejemplos existentes de esa investigación, poniendo especial atención en la forma en que las preguntas que se formulan encajan en la taxonomía y en los métodos que utilizan para responder a aquéllas. Concluye identificando áreas de crecimiento en el estudio disciplinado y basado en datos de las múltiples facetas de la emoción judicial.
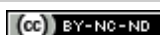
Palabras clave

Jueces; emociones; investigación empírica; métodos de investigación

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1. Introduction

How do we go about learning what we want to know about emotion and judging? Empirical work on judicial emotion both shows tremendous potential and is in tremendous need of growth. This article aims to support such growth by framing, describing, and analysing the questions that empirical researchers of judicial emotion are asking; identifying and evaluating the methods we are using to answer them; and proposing present areas of strength and need. It presents a snapshot of an unfolding research field in the hope of motivating a wide range of researchers to pursue the project within a common frame.

2. Theoretical foundations and definitions

I use the term "judicial emotion" as an umbrella term for three interrelated phenomena.[1] The first – *judicial emotional experience* – captures episodic experiences judges have in connection with their work, such as discrete instances of sadness, anger, pleasure, or joy, no matter their time duration. The second – *judicial emotion regulation* – captures how judges seek to manage their emotional experiences, as well as those of others (such as litigants and lawyers), in light of their professional constraints and demands. The third – *judicial emotional impacts* – captures the effects of these experiential and regulatory processes on judges' personal wellbeing and professional performance. Thus broadly defined, judicial emotion operates on both the intrapersonal and interpersonal levels.

My starting assumption is that judges' basic emotional processes operate as they do in all other humans (Maroney 2011a, 2011b). Judges' emotional experiences are "are elicited and differentiated by subjective interpretation of the personal significance of events", and thus reflect and express beliefs about how the world is and values about how it should be – that is, they are undergirded by appraisals (Calhoun and Solomon 1984, Lazarus 1994, Scherer and Ellsworth 2009, p. 45). Such appraisals interact with the physiological, experiential, action-oriented, and expressive components of emotion in a dynamic fashion (Scherer and Ellsworth 2009), affecting judges' bodily functions and how they process information, reason, and make decisions (Lerner *et al.* 2015, Niedenthal and Ric 2017). These internal componential processes unfold in relationship with others, and involve inputs from, and motivate behaviours in, the outside world. Judicial emotion reflects assessments of whether others represent a source of threat or support; how others view them, and how they would like to be viewed; and power and status differentials (Bergman Blix and Wettergren 2016, Barrett *et al.* 2016). Finally, judicial emotion is situated within cultural and social contexts that script what emotional experiences and displays are acceptable (Roach Anleu and Mack 2013, 2017).

My second assumption is that being a judge, in a specific judicial role, place, culture, and time, has a profound impact on all these emotional processes. Judges' professional milieu affects the stimuli to which they are exposed and the goal orientations in service of which they regulate their emotions (Hochschild 1983, Wharton 2009, Lively and Weed 2016). One critical goal orientation is the desire to satisfy the operative cultural script, which in the contemporary developed West leans heavily on the ideal of dispassion (Maroney 2011b). That ideal long has posited that the good judge is "divested of all fear, anger, hatred, love, and compassion" (Hobbes 1651/1904), and remains alive and well; indeed, not long ago the late U.S. Supreme Court Justice Scalia wrote that "good judges pride themselves" on "the suppression of their personal proclivities, including most especially their emotions" (Scalia and Garner 2008, p. 32). The extent to which any given judge internalizes that script – and not all do, particularly in the post-Legal Realist era (Brennan 1996, Posner 2008,

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[1] Different countries, and different jurisdictions within a country, subdivide persons serving a judicial function into many distinct categories designated by a distinct nomenclature (e.g., "magistrate", "judge", "chancellor"). I use the umbrella term "judges" to refer to all such persons.

Maroney 2011a, 2011b) – would be expected to shape emotional experience, regulation, and impacts in a deep way.

A new wave of empirical work – by which I refer to the systematic collection and classification of data concerning "events, circumstances, or processes" (van Boom *et al.* 2018, p. 7) – is now seeking to understand each of these aspects of judicial emotion. This wave fills an important gap. Legal empirical studies have grown rapidly over the last decades, but the field is largely dominated by the law and economics movement and, to a slightly lesser degree, political science (Zorn and Bowie 2010, Cross 2012, Epstein and Martin 2014, van Boom *et al.* 2018). It generally is guided by models that exclude emotion, such as rational choice theories (Baum 2010, Epstein *et al.* 2012). The emerging field of the psychology of judging, for its part, has left emotion largely unexamined (Klein 2010). Similarly, while the sociological study of professional emotional labour is thriving, only a small portion thereof takes judges as its subject (Roach Anleu and Mack 2017); the same can be said of the sociology of emotion more generally (Bergman Blix and Wettergren 2016). Further, for many legal scholars empirical research "remains a 'black box', with unfamiliar, obscure methods and unclear contributions" (van Boom *et al.* 2018, p. 3). Empirical study of judicial emotion thus has enormous but largely untapped potential to illuminate a previously underexplored aspect of judging, its processes, outputs, and impacts.

3. A proposed taxonomy of empirical research on judicial emotion

An emerging research field benefits from conceptual parameters within which to situate its growth. I previously have proposed a working taxonomy for the field of law and emotion more generally, an effort that has proven helpful in shaping that field's disciplined development by isolating and surfacing a hidden infrastructure (Maroney 2006). In that spirit, I offer here a closely-related conceptual framework of the different approaches one might take within the empirical study of judicial emotion.

TABLE 1

Emotion-centred approach	Investigate how a particular emotion or emotions (e.g., disgust, sadness, excitement) is or are experienced, expressed, or understood by judges.
Emotional phenomenon approach	Investigate the ways in which judges experience, express, or understand an emotion-related phenomenon (e.g., empathy, the affect heuristic, secondary trauma, emotional intelligence).
Emotion management approach	Investigate the ways in which judges seek to regulate the inner experience and/or outward expression of emotions and emotional phenomena, both their own and those of others.
Interactional approach	Investigate the ways in which judges' emotions, emotional phenomena, and their management shape, and are shaped by, interactions with others (e.g., litigants, lawyers, colleagues, the public).
Evaluative approach	Investigate how others (e.g., litigants, lawyers, colleagues, the public) perceive and assess judges' emotional experiences and expressions.
Legal doctrine approach	Investigate the ways in which legal doctrine is affected by how judges experience, express, or understand emotions and emotional phenomena (e.g., the impact of anger episodes on imposition of sanctions, how judicial disgust or concepts of regret inform rulings).
Legal culture approach	Investigate the ways in which judges' experience, expression, understanding, or management of emotion shapes, and is shaped by, the legal culture (as defined by, *inter alia*, historical, national or local context) within which they are situated.
Transformative approach	Investigate whether, in what way, and how judges' experience, expression, understanding, or management of emotions or emotional phenomena can be altered (e.g., through education or clinical intervention).

Table 1. Analytical approaches to empirical study of judicial emotion. (Adapted from Maroney 2006, p. 126 tbl.1.)

Any one of these approaches could be combined with others, be deployed comparatively, or explore variance over time; indeed, such multidimensionality is common and arguably preferable (Maroney 2006). Moreover, each approach will have differential goodness of fit with distinct research methods (Epstein and Martin 2014).[2] For example, qualitative interviews are relatively well-suited to get at how individual judges think about their emotions, their perceived impact and relevance (a question within an *emotion-centred* approach). Focus groups, clinical evaluation, and surveys are similarly optimal for capturing judges' conceptions of their emotional experiences and associated *phenomena*, such as stress; consciously-engaged regulatory strategies (an *emotion management* question); and the emotional demeanours and displays they believe are required of them (a *legal culture* question). Courtroom observations are relatively better-suited to capture both external manifestations of emotion and *interaction* effects. Textual analysis of media representations can reveal *evaluations* of judges' emotionally-infused behaviours. Experimentation enables causation claims, relevant to a *legal doctrine* approach (e.g., does induced anger increase judges' punitivity?) or a *transformative* one (e.g., does a mentorship

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[2] This article does not seek to replicate the contents of the many excellent methodology texts that represent an invaluable resource for the judicial emotion researcher (Patton 2002, Singleton and Straits 2005, Cane and Kritzer 2010, Epstein and Martin 2014). Nor does it engage deeply with research practices, such as the craft of field notes, interviewing, or content and statistical analyses (Weiss 1994, Emerson *et al.* 2011, Leavy 2014). Finally, it does not seek to encapsulate the vibrant empiricism of the affective sciences; not only is there no one clearly "right" set of theories about emotions, there is no one "right" way to research them (Ellsworth 1995).

program reduce the incidence and/or intensity of isolation?). At a more general level, quantitative methods – those that measure the distribution of finite options across known categories – are appropriate where the relevant phenomena are well-defined, whereas qualitative ones – those that capture the depth and detail of human experience and the meaning we make of it – are preferable when one seeks discovery of new conceptual categories rather than verification within previously established ones (Patton 2002, Luker 2008). Many researchers will find it useful not only to incorporate multiple conceptual approaches but to deploy mixed methods to capture data from multiple angles. Because it is difficult to determine how judges experience and express emotions in an environment that denies their relevance (Bergman Blix and Wettergren 2016), methodological care and creativity are key.

4. Insights from extant empirical studies of judicial emotion

Four major research programmes hold the centre of gravity within the empirical landscape. This section presents an evaluative synopsis of each, describing their approaches and methods, before presenting a similar (if shorter) analysis of other empirical projects.

4.1. The Judicial Research Project (Flinders University, Australia)

Over the course of the last two decades, Sharyn Roach Anleu and Kathy Mack have worked to illuminate the reality of Australian judges' work, including a focus on emotion. As they write in *Performing Judicial Authority in the Lower Courts*:

> As the courtroom, especially in the lower courts, entails very high levels of interdependence and a wide variety of social interactions, judicial emotions must necessarily be engaged. Emotional demands can include the frustration engendered in relation to time management, … the emotion, or lack thereof, displayed in different demeanours and the emotion work needed to achieve the required impersonal presentation in the face of emotionally challenging information and behaviour from others in court; and the manner of delivering the news in sentencing, both anticipating emotional responses from those in court as well as the emotional experience of formulating and delivering the sentencing decision. (Roach Anleu and Mack 2017, p. 173)

As this excerpt shows, their research is *emotion-centred,* in that it presents evidence of what work-related emotional states, such as frustration, Australian judges experience; it also identifies triggers for those experiences, such as the processes of criminal sentencing. It examines *emotional phenomena* such as stress, asks how judges *manage* emotion so as to produce desired public demeanours, and explores the impacts of both interpersonal *interactions* and norms attending their *legal culture.* Commensurate with the range of its theoretical approaches, Roach Anleu and Mack's research programme engages mixed methods to gather and analyse relevant data, including surveys, court observations, and interviews, each of which I briefly discuss below (Roach Anleu and Mack 2017).[3]

None of these methods would have held a reasonable prospect of success, however, without the researchers' close work with the Australian judiciary before, during, and after data collection. Judges are widely recognized to be a hard-to-reach group, both because of their elite status and because of the norms of confidentiality that shroud their behind-the-scenes work (Dobbin *et al.* 2001, Cowan *et al.* 2006). Relationship-building is critical to participation and candour, particularly when asking judges to disclose sensitive information about their emotions (Roach Anleu and Mack 2017).

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[3] Commendably, *Performing Judicial Authority in the Lower Courts* includes a detailed methodological Appendix, which I recommend to those interested in reaching a level of granularity not attempted here. Many aspects of the study and its methodology also are discussed in Roach Anleu and Mack 2005, 2013, and in Roach Anleu *et al.* 2014. This portion of the article confines itself to examination of the research programme described in *Performing Judicial Authority in the Lower Courts.* The Judicial Research Project has pursued further empirical projects since that time, one of which is briefly discussed later in this article (Roach Anleu *et al.* 2016; see also Roach Anleu and Mack 2018).

Further, if the dominant legal culture holds the division between reason and emotion sacrosanct, judges may be "vigilant not to expose themselves or their groups to critique that could question their positions or privileges" by participating in research that challenges that division (Bergman Blix and Wettergren 2015, p. 690). Roach Anleu and Mack therefore cultivated relationships of trust with court organizations, leaders, and individual judges, through correspondence; in-person consultation; and presentations about project's objectives, methods, and anticipated modes of dissemination. These efforts gave participants reason to buy into the enterprise and to trust assurances of confidentiality. Further, judges directly shaped the research – for example, through participation in and feedback on pilot phases – and shared in its fruits by having access to final analyses. Such time-consuming relationship work is a crucial element of a successful judicial emotion research project, particularly one of this scope.

Surveys. Roach Anleu and Mack conducted three national surveys, including (but not limited to) items related to emotion. Construction of a probability sample or "sampling frame" often is a particularly challenging aspect of collecting judicial survey data (Dobbin *et al.* 2001, p. 291, Patton 2002, Farole 2009). However, given the relatively small number of Australian lower-court judges (≈1,000), the Judicial Emotion Project was in the enviable position of being able to survey the entire population of interest.[4] They achieved a robust response rate of 50%, likely attributable to their relationship-building but also to structural assurances of anonymity. A pen-and-paper survey booklet was distributed via mail, with a prepaid mailback envelope with no return address; survey responses therefore were untraceable.[5]

As the researchers explain, because "a questionnaire asks all participants to respond to the same questions, it enables collection of the same type of information directly from a large number of people, and the responses are directly comparable" (Roach Anleu and Mack, 2017, p. 177). This comparability advantage is particularly strong for quantitative data generated through closed-ended questions with a finite response options (e.g., Likert scales), provided they are well-calibrated to isolate and capture the items of interest consistently across respondents (Luker 2008). Roach Anleu and Mack made good use of closed questions to yield quantitative data on judges' reported levels of stress, as well as the extent to which they value empathy and compassion, find their work emotionally draining, and experience work-related sleep loss (Roach Anleu and Mack 2017, pp. 64, 76 Tbls. 4.3, 4.5). Their inclusion of open-ended questions, in response to which judges could write their own answers, yielded important qualitative data on how judges experienced those phenomena. Collecting both quantitative and qualitative data in this manner nicely combines comparability

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[4] By way of comparison, there are more than 30,000 state-court judges in the United States (Malega and Cohen 2013), in addition to ≈1,200 federal judges (Federal Judicial Center n.d.) and thousands more in other roles. A population of this size is difficult to survey, and results may have a more diminished claim on generalizability. For example, the 2019 National Judicial Stress and Resilience Survey, briefly discussed later, was disseminated across the U.S. through jurisdictional chiefs and other judicial networks. Though this technique leveraged judges' familiarity with and trust in organizational allies, because the researchers did not themselves control the dissemination they cannot construct a response rate. Further, to heighten participants' faith in anonymity, they did not collect any geographical data from respondents, even at the regional level. Faced with such trade-offs, other researchers have surveyed only particular sorts of judges, such as U.S. Immigration Judges (Lustig *et al.* 2008), or have identified a substantively interesting subset of judges and used statistical methods to create a representative sample within it (Dobbin *et al.* 2001).

[5] The Judicial Research Project's last survey was administered in 2007, before online options were as prevalent as they are today. In today's environment, judges might be more inclined to expect, trust, and regard as less burdensome an electronic survey administered through a reputable secured platform, such as REDCap (https://projectredcap.org/about/). However, the physical format enabled inclusion of materials – an introduction letter, information sheet, and letters of support – that might be less effectively processed, and less easily available for ongoing reference, in an electronic format. Every format choice carries benefits and disadvantages of which the survey researcher should be cognizant, so as to pick the best fit with the research questions and population rather than the convenience of the researcher (Dobbin *et al.*, 2001; see also Farole 2009, describing a judicial survey offering the choice of responding online, via telephone, or by mail).

and flexibility, precision and nuance (Dobbin *et al.* 2001, Lustig *et al.* 2008). Finally, because Roach Anleu and Mack solicited demographic data, they were able to contextualize their data in light of important questions about the impact of variables like gender, age, and ancestry.

This element of the Judicial Emotion Project is a sound example of surveys' utility to the field. However, like all methods reliant on self-report, it is limited by the reality that judges who were willing to answer a survey and bare a sensitive aspect of the self may not be representative of the judicial population (Dobbin *et al.* 2001, Epstein and Martin 2014).

Observations. Roach Anleu and Mack's research programme also included a substantial court observation element. As compared to a probabilistic-sample survey, with observation what one loses in randomization and generalizability one gains in "quality of the description of nonrandom events" taking place in a natural setting (Blanck 1987, p. 339). In contrast to self-report through surveys or interviews, observation does not depend on the extent to which judges can and do "relate, account, explain, and render intelligible what they do to" a researcher; rather, it can illuminate their actual practices (van Oorschot and Mascini 2018, p. 207), including both usual and unusual events that might not be captured in official records (Roach Anleu and Mack 2017). The method therefore was particularly appropriate for examining interactions among judges, litigants, the public, and court personnel; judges' public delivery of decisions; and demeanour. By systematically recording judges' facial, verbal, and bodily displays, they gathered over 1,000 data points on demeanour alone, revealing a range of types: welcoming or good-natured; patient or courteous; routine, businesslike, or impersonal; impatient, rushed, inconsiderate, or bored; and harsh, condescending, or rude (Roach Anleu and Mack 2017, p. 119).

As the researchers note, observation does not speak to "the motives, intentions, or experiences" of judges and others in the courtroom, and therefore does not substantiate "claims about the subjective intentions, purposes, or emotions" of those persons (Roach Anleu and Mack 2017, p. 191). It can, however, identify points of disjuncture between judges' representations of those subjective states and how they actually act. Observations can capture occurrences that judges may not report, whether they are unnoticed, forgotten, taken for granted, or uncomfortable to admit. The demeanour data bear out this point. While in interviews Australian judges emphasized the importance of being welcoming and patient, such demeanour displays were uncommon in the observation sample: harsh, condescending and rude demeanour displays appeared at the same (low) rate as welcoming ones, and routine and impersonal displays were by far the most common of all (Roach Anleu and Mack 2017, p. 121 Fig. 6.1).

The nature of observation, though, forces choices and creates constraints (Patton 2002); most obviously, given that the researcher must literally sit through events in real time, she must select a relatively small number of locations, judges, and matters to observe. In this instance, Roach Anleu and Mack focused only on proceedings involving the "general criminal list", which forms "part of the work of virtually all magistrates at some point in their career" (Roach Anleu and Mack 2017, p. 187) and thus would speak to broader experiences across the judiciary. Rather than follow cases from start to finish, they observed whatever was on the list on a given day, creating a rich trove of cross-sectional snapshots. This choice reflected the need to make good use of researchers' time, as virtually all observations required travel; fortunately, it also allowed them to develop a feel for the range of judges' everyday experiences. They purposively sampled criminal-list proceedings in every state and territory and in a mix of urban, suburban, and rural communities. They also balanced observations of men and women, as well as judges of varying ages and tenures on the bench. These purposive sampling choices increased the time investment and logistical difficulty of the project, but enhanced Roach Anleu and Mack's ability to make claims as to both generalizability and explanations for observed differences.

Observation also places a premium on the credibility, skill, and rigor of the observer, whose subjectivity is both the primary research tool and one of its primary limitations. Roach Anleu and Mack sought to leverage the former and minimize the latter by always using two observers; creating, through an iterative process, code sheets and instructions to standardize field notes; and immediately debriefing and reconciling those notes, while supplementing them with transcripts, recordings, and case files when available. They then analysed their field notes through rigorous qualitative analysis. These details make clear the heavy investment of strategy, time, and effort required to generate useful observation data, an investment the judicial emotion researcher should carefully consider and justify.

Qualitative interviews. The third pillar of the Judicial Research Project, meant to triangulate surveys and observation so as to create a "sustained, multifaceted examination of the judiciary" (Roach Anleu and Mack 2017, p. 193), consisted of 38 in-person, semi-structured, qualitative interviews of judges purposively sampled from all court levels, in both metropolitan and regional areas across Australia (Roach Anleu and Mack 2017, pp. 192-96). Relationship building was particularly important here, as interviews "with elites" raise "specific challenges and issues of access" (Roach Anleu and Mack 2017, p. 193, citing, *inter alia*, Bergman Blix and Wettergren 2015). Interviews, ranging from half an hour to an hour and a half, were audio recorded, transcribed, and the transcripts analysed using the NVivo software package.

While (like the surveys and observations) these interviews had a broader focus, emotions emerged as one consistent theme (Roach Anleu and Mack 2017, p.195). This is not surprising, as interviews "can reach emotional connections that are not as accessible" through other methods (Pugh 2013, p. 53). Interview data "give voice to the lived experience" of judging (Roach Anleu and Mack 2017, p. 11), yielding a richness that makes the emotional component of everyday judicial work palpable. There is an undeniable impact of hearing judges describe "seeing absolute misery passing in front of you day in, day out, month in, month out, year out" (Roach Anleu and Mack 2017, p. 19); the loneliness of serving in a "one magistrate country town" (Roach Anleu and Mack 2017, p. 43); and frustration with inability to solve the social difficulties in housing, employment, and welfare that underlie cases (Roach Anleu and Mack 2017, p. 54). One quote from one judge can capture an entire realm of theory:

> There's often matters which bring tears to your eyes and I think that my role is that, my role isn't to sit there and empathize and cry with them, my role is to be the face of the judiciary, the face of the community, that face that is acknowledging that grief without participating in it as such but also I don't think there's anything too wrong in showing that you've been affected by what's happened. (Roach Anleu and Mack 2017, p. 67)

This judge is wrestling with the dynamic between how he thinks he is supposed to feel and act under one cultural imperative – the cultural script of dispassion – and the potentially clashing moral imperative to acknowledge suffering. This internal struggle would be difficult to discover by other methods. Interviews are well-suited to uncovering the "distance between how someone feels and how they feel they *ought* to feel", according to "cultural frames rendering some emotions more acceptable, expected or celebrated than others" (Pugh 2013, p. 51). This judge is also expressing a desire to be seen as a normal and caring member of the community (Maroney 2016). The literal "veracity" of such narratives is not as important as the "deep truths" they reveal about how judges look at themselves and their experiences (Luker 2008, p. 167). The Judicial Research Project's interview data exemplify how this method can add life to theory.

In sum, the Judicial Research Project presents an excellent example of what a well-rounded, high-investment, long-term research programme can look like. It demonstrates the value of recruiting mixed methods, as each brings something

different to the table. Such triangulation can compensate for blind spots and confirm otherwise ambiguous signals (Scarduzio 2011, Roach Anleu and Mack 2017, Bergman Blix and Wettergren 2018). By weaving together both quantitative and qualitative data, the Project leverages the power of carefully-designed external instruments and of the researcher-as-instrument (Patton 2002). Examining the Project's methods also demonstrates the impact that each research choice can have on the whole. For example, the choice to collect anonymous survey data on paper may have increased participation, but it also ensured that the data could not be linked across method. Roach Anleu and Mack could not, for example, compare any individual judge's views as expressed in the survey to her observed behaviour, or to her interview narrative (Roach Anleu and Mack 2017, pp. 192, 193). Such tradeoffs, being inevitable, should be carefully considered when establishing the research design.

4.2. Professional Emotions in Court (Uppsala University and Gothenburg University, Sweden)

The second major extant research programme on judicial emotion is the work of Stina Bergman Blix and Åsa Wettergren, major aspects of which they present in *Professional Emotions in Court: A Sociological Perspective* (2018).[6] They, too, focused on criminal cases in trial courts, and combined methods to investigate, among other emotional phenomena, the "silenced background emotions and tacitly habituated emotion management in the daily work" of the Swedish courts (Bergman Blix and Wettergren 2018, p. x). Interestingly, the two programmes diverged significantly at the basic level of analytic focus. While the Judicial Research Project focused only on judges but included emotion in a larger set of issues implicated in judges' everyday work, Bergman Blix and Wettergren focused tightly on emotion but examined both judges and prosecutors, the two legal professionals within the Swedish criminal system tasked with embodying and projecting reasoned objectivity.[7] Thus, though both research programmes squarely implicated the emotion-centred, emotional phenomenon, emotion management, interactional, and legal culture approaches, they came at those questions from a distinct analytic lens. In Sweden, the focus on *emotion-within-legal-objectivity* as opposed to *emotion-within-everyday-judicial-work* (including how judges square emotion with objectivity) drove inclusion of prosecutors, who in addition to being of interest in their own right functioned as a built-in comparator set.[8]

Even with this distinction, the research programmes have a great deal in common. Bergman Blix and Wettergren also invested heavily in relationship building – for example, early and ongoing contact with judicial leaders, and presenting the research to groups of potential participants. They also describe the critical role played by cultural insiders willing to negotiate entry; the first judge who agreed to be interviewed during the pilot phase "paved the way" for much that followed. As they write: "proposing previously unresearched topics, it is crucial to show that the topic (…) has resonance in the prospected field and that one has already established initial contacts" (Bergman Blix and Wettergren 2018, p. xi). They eventually gained the keys to the courthouse, "both literally and symbolically" (Bergman Blix and Wettergren 2018, p. xii), achieving "breakthrough" when a chief judge commended

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[6] Though *Professional Emotions in Court* does not include a methodological appendix, the authors helpfully pepper the text with call-out boxes titled *How did we do it?*, providing "relevant methodological information connected to the theoretical discussions" at that point in the narrative (Bergman Blix and Wettergren 2018, p. 2). The choice to make the methods literally visible to the reader throughout was a creative way of encouraging regular integration of the *what* and the *how*. Many aspects of the study and its methodology also are discussed in Bergman Blix and Wettergren 2015, 2016, and in Roach Anleu *et al.* 2014.

[7] Lisa Flower has rounded out the narrative of Swedish legal professionals' emotions and emotion work in the context of criminal cases in her dissertation work on defense attorneys, who – unlike judges and prosecutors – are required not to be objective but rather to be advocates (Flower 2018). Bergman Blix and Wettergren also interviewed 16 defense attorneys, though they were not the primary focus (Bergman Blix and Wettergren 2018, pp. 4, 32).

[8] I confine myself here to Bergman Blix and Wettergren's work on judicial emotion.

the project to all judges in his jurisdiction (Bergman Blix and Wettergren 2015, p. 700). Bergman Blix and Wettergren also deployed mixed methods, incorporating court observations (n=300, in four strategically selected courts in different locations across Sweden) and in-person, semi-structured, qualitative interviews (n=43). They applied to these methods a similar level of rigor (for example, with detailed code sheets) and gathered similarly rich individual narratives.

However, rather than use surveys to round out the research programme, Bergman Blix and Wettergren used shadowing. Shadowing is a combination of observation and interview, in which the researcher accompanies subjects as they go about their work, with the opportunity to clarify understanding of, and learn the subject's perspective on, what the researcher observes – for example, a courtroom interaction moments before, or a cryptic file (Scarduzio 2011, Bergman Blix and Wettergren 2015, van Oorschot and Mascini 2018). All the interviewed Swedish judges allowed the researchers to shadow them as well, enabling a rare look at the differences between judges' public "frontstage" courtroom performances and their "backstage" behaviours in the office settings where they spend the bulk of their time. Being with judges during transitions between front and backstage not only threw the performative aspects of the former into relief, but also showed moments in which judges managed their emotions once entering a space in which they could let their guards down. For example, one judge engaged in an "immediate backstage ventilation of a strong emotion, first experienced but toned down front stage", of being ashamed and embarrassed about the court's failure to locate an interpreter, resulting in further delay in a proceeding already marked by tension and technological difficulties; this same judge had shown that her efforts to "pull [her]self together" before the hearing began by pouring herself some water and taking a moment (Bergman Blix and Wettergren 2018, 0.106, 109).

Shadowing also proved particularly well-suited to illuminating "backgrounded" emotions, that is, those that remain outside of consciousness and orient the judge's attention to and attitude about other objects, such as habituated feelings of professional pride (Barbalet 1998, Bergman Blix and Wettergren 2018, pp. 20, 38-40). Self-report often fails to capture backgrounded emotional processes, including automatic emotion management (Compas *et al.* 2017). Shadowing, however, allows the researcher to prompt a subject to notice and name automatic processes by tethering the prompt to something immediate and concrete. Bergman Blix and Wettergren describe, for example, asking a judge why she had avoided an attorney's gaze throughout a court session that had just ended; the judge thought about why and reported that she had controlled her gaze so as to forestall undesired communications with the defense, though she had not explicitly thought about the behaviour when engaging in it (Bergman Blix and Wettergren 2018, p. 20).

Because the study's three methods all were housed in specific courthouses, Bergman Blix and Wettergren were able to reach a deep level of analysis as to individual judges, given the multiple points and types of contact. They dove deep into four sites, two urban and two suburban, minimizing travel (a factor made possible by the relatively few areas of population density in Sweden, and their relative proximity to one another, as compared to Australia) and maximizing consistent time in the building. What they lost by not collecting quantitative data across a probabilistic sample they gained in the texture and nuance of the deep dive. At the same time, their identification of consistent themes across the deep dives provides an alternative basis for claims of generalizability.

Another distinctive aspect of Bergman Blix and Wettergren's work is the extent to which they are explicitly reflexive about their own emotions. They discuss, for example, the "feelings of low self-worth, despondency, and resentment" that attended being rejected, ignored, or disrespected by judges in the course of their study, and the "strong feelings of pleasure" that attended their eventual "recognition and acceptance from elites" (Bergman Blix and Wettergren 2015, p. 690). Rather

than seek to set their emotional processes aside, they examined them to interrogate possible impacts on their analysis – and, at a deeper level, as elements of that analysis. As they write:

> To be able to better focus our attention and follow the fluctuation of emotional intensity, we also employed 'emotional participation', a method in which our own emotions were used as a tool to generate reflections and insights relative to the situations and persons observed. (Bergman Blix and Wettergren 2018, p. 21)

Treating researcher reactions as "an information source into the emotional processes in the field" is consistent with the feelings-as-information theory (Schwarz 2012); at the same time, it is important to surface and interrogate those reactions, as they are not unfailingly accurate (Bergman Blix and Wettergren 2018, p. 21).

In sum, the work of Bergman Blix and Wettergren serves as another excellent example of a well-rounded, high-investment, long-term research programme, one reflecting different methodological choices that yielded equally valuable data on judicial emotion.

4.3. The Judicial Emotion Project (Terry Maroney, Vanderbilt University, USA)

A third project is my own, focused on judges in the United States. The Judicial Emotion Project builds on my core theoretical work on judicial emotion, particularly emotional experience and its regulation (Maroney 2011a, 2011b, 2012). It has incorporated empirical investigation only in the last several years, and over time aspires to touch on each of my taxonomy's theoretical approaches.[9] While grounded in the same core approaches evidenced in the previously-described research programmes, this one involves a deeper investigation of the impact of emotion and emotional phenomena (for example, stress and isolation) on judges' personal well-being and professional performance (*emotion-centred, emotional phenomenon,* and *legal doctrine*). It also introduces a novel investigation of how judges might increase their facility in identifying, understanding, and regulating emotion at work (*transformative*).

This programme, too, places a premium on relationship-building, though that effort has taken a slightly different shape. The front line of that relationship-building has been frequent presentations about judicial emotion – again, drawing on my theoretical work – through seminars and conferences organized by court systems and judicial educational entities. I have cultivated a particularly close partnership with the Federal Judicial Center, the governmental agency charged with research and education for the federal judicial branch, in collaboration with which I regularly present content to both trial and appellate judges. Over the course of many years, such presentations have yielded valuable relationships with specific courts and individual judges. These are my cultural insiders, invested in the issues and the programme's success, on whom I now rely for access. Further, these educational seminars and the deep conversations that they occasion have functioned as an ongoing, nationwide focus group through which hundreds of judges continually educate me about their experiences and concerns, education I now pour directly into the research design. My educational work thus is not primarily a recruitment tool, though it now sometimes serves that function; instead, the enthusiasm with which judges have received the educational content has opened the door to pursuing empirical investigation. It also has deeply shaped the empiricism itself.

The core method at this stage in the Judicial Emotion Project's development is in-person, semi-structured qualitative interviews, each averaging two hours, with Article III U.S. federal judges from the trial and appellate courts.[10] Focusing on this sample

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[9] The ambition of the project mirrors to no small degree that now being pursued by the Judicial Research Project, as articulated in Roach Anleu *et al.* 2016, p. 65.

[10] "Article III" judges are the subset of federal judges authorized under Article III of the U.S. Constitution, as distinguished from other federally-employed judges whose authority derives from a different source

has a number of strategic advantages. A primary advantage is access, as many of my strongest relationships are within the federal judiciary; and as the federal judiciary is orders of magnitude smaller (n≈1,200) than the state-court bench (n>30,000), each relationship carries relatively more weight. A federal sample also eliminates many potential sources of variation for which any analysis would have to account, such as the need to stand for election, common in the states but not required of Article III judges, all of whom enjoy life tenure. These judges also share a simple, three-tier hierarchy; are bound by a common corpus of operative law; and (with limited exceptions) are generalists, whereas other judges tend to be specialized (for example, in family, civil, or criminal dockets). This relative uniformity, combined with the relatively small total population, amplifies the extent to which the interview data might illuminate phenomena touching federal judges as a whole. That concern also motivates purposive sampling for diversity, including by reference to sex, gender, race, ethnicity, age, and sexual orientation, each of which would be expected to affect the phenomena of interest; appointment by a Republican and Democratic president, a variable that draws outsize attention in empirical studies of U.S. federal judges, and to which any study therefore is wise to attend; and geography, given the enormity of the country, deep social and cultural differences between regions, and extreme variations in population density.

Some factors that recommend this sample for the initial research wave, however, also points to the importance of expanding beyond it in subsequent ones. Elections create job insecurity and vulnerability to public pressure (Miller *et al.* 2018), factors that may create particularly interesting interactional effects – for example, heightening judges' attention to how they think any emotional displays will be evaluated by the broader public, which may alter how they manage those displays – as well as impacts on wellbeing, such as stress. The emotional processes and challenges attending sitting daily in a crowded, low-resourced family-court docket may be quite different than those facing a well-resourced federal trial judge with a busy, but well-ordered, generalist docket in which every emotionally charged case – for example, a child pornography sentencing (named by every interview participant to date) – is outnumbered by relatively unemotional ones (such as patent disputes). Fortunately, many federal judges, including one-third of the interview sample to date, previously served in the state courts; to a surprising degree, then, the federal sample has proven a valuable source of embedded comparison data. Still, the Judicial Emotion Project certainly will want to include interviews with sitting state-court judges, a move that will tee up difficult sampling choices.

Substantively, the interviews—which are recorded and transcribed, and the transcripts then analysed qualitatively in the Dedoose software platform, using two researchers who code blind to the other and then reconcile coding differences in person[11] – are yielding narrative data as rich and detailed as those from Sweden and Australia. Even at this still-early juncture, though, interesting differences are emerging. The first reflects the U.S. cultural context. For example, the unusually punitive system of criminal justice in the U.S., particularly the ubiquity of high mandatory minimum sentences, appears to be a common source of challenge. This judge, for example, described a case in which a defendant's behaviour stemmed from a difficult background but was facing an extreme sentence:

> Those are the [cases] where I just want to fix society, and I feel horrible because I am bound to a certain set of laws that are overly punitive.

Numerous judges of diverse backgrounds have articulated a painful, frustrating sense of powerlessness in similar scenarios. While judicial frustration is ubiquitous, these data show a way in which its specific causes are not.

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and who have more limited terms of office and substantive jurisdiction (e.g., Magistrate, Immigration, and Bankruptcy Judges). By December 2019, interview data will have been collected with 25 judges.

[11] This dialogic process maximizes ability to identify and define emergent categories and cultivates interrater reliability.

Other emerging differences stem from the Judicial Emotion Project's strong theoretical grounding in psychology. Because the Project examines emotion and its management at work, it necessarily draws on sociological questions and constructs. My primary theoretical grounding, however, is in affective psychology, and my current collaborators work with Vanderbilt's Qualitative Research Core, housed in the Psychology department. One way in which this grounding manifests is in the detailed code book we have developed, by which we characterize demarcated units of narrative within an interview transcript. The code book includes many items drawn from affective psychology, such as discrete emotion states (e.g. relief, regret, and sadness) and known regulatory strategies (e.g. verbal suppression and social sharing). The primacy of such items also is reflected in many questions in the interview protocol, such as "Can you tell me about a time you got angry at work?", "when you felt angry, did you do anything in particular to try and cope with that feeling?", and "do you talk with other judges about the emotionally challenging aspects of your job?". The interview dialogue, not surprisingly, therefore tends to have a strong psychological cast. Some judges joke about being "on the couch"; commonly, they remark on being pleasantly surprised by the rare chance to discuss their emotions. In coding, we often place something a judge reports into a psychological category. For example, this judge is describing her work on an alternative court docket that aims to help troubled defendants successfully re-enter society, and the pain she feels when some predictably fail:

> I can try to give them as many tools as I possibly can, and resources to make good decisions, and have good things happen, but I can't control them. And really focus back on what my role is, and what my job is, and that it's very limited and it's really to give people tools and resources, and then let them take it from there, and remember that, you know, that all of our participants have agency. And it's their agency, not mine, and you really think about that, and then get comfortable with that idea.

We identify this judge as engaging in cognitive reappraisal, in which she reframes the meaning or attributes of a situation so as to change its emotional content and impact (Maroney and Gross 2014). Here, she is reframing her efforts not as a failure, but as a principled exercise of her authority, and further reframing the source of the bad outcome as choices for which she is not responsible and over which she has no power. Such reappraisal does not eliminate the emotion she reports, but appears to change it, from one of regret or guilt (focused on her perceived shortcomings) to one of sadness (focused on the defendant's difficult situation and poor choices), a more comfortable emotional stance if still an unpleasant one. This example shows how a different theoretical orientation drives a different operationalization of the interview method, with discernible impacts on the data those interviews generate and how they are analysed.

Developing and future aspects of the Judicial Emotion Project – in addition to development of a state-court interview sample – may be succinctly described. We have just begun an investigation of the "judicial wellness" movement, growing rapidly in the US but also in Australia and Canada. In the US, both state and federal courts have expressed alarm that physical and emotional impairment can harm ability to fulfill judicial duties (U.S. Court of Appeals for the Ninth Circuit 2015). This trend includes a proliferation of wellness guides and trainings; expansion of lawyers' assistance programs to judges; and direct provision of mental health services (Fogel 2016, Buchanan 2017, Smith 2017). We hope to learn what motivates that movement, what its leaders identify as the greatest threats to judges' emotional wellness, what impacts they believe emotional dysfunction has on judges' health and job performance, and the steps they are taking in response. That study will combine qualitative data from two sources: semi-structured interviews with judges, administrators, research professionals, and attorneys working to promote judicial wellness, and textual analysis of the materials judicial-wellness leaders generate, such as written and video wellness guides. We hope also to develop a survey

instrument, informed by the federal-judge interview study, any state-court interview sample, and the wellness study. This survey may draw on the 2019 National Judicial Stress and Resilience Survey, seeking to replicate it with a federal sample (<3% of its respondents were federal judges) and expand its scope to broader aspects of judicial emotion. Finally, I plan to study whether and under what conditions judges might learn through an educational module to grow their emotion-regulation capacity, ideally tying any such growth to concrete outcomes, such as self-reported instances of isolation, burnout, or inappropriate emotional displays. Such a study would draw on the intensive seminars I have co-designed and co-direct for mid-career federal judges.

In sum, the Judicial Emotion Project models a somewhat different approach than the Australian and Swedish examples on which it builds, even as it asks many of the same questions and uses some of the same methods, demonstrating some of the possibilities for variation based on local conditions and theoretical orientation.

4.4. JUSTEMOTIONS (Uppsala University, Sweden; Strathclyde University, Scotland; Research Institute on the Judicial System of the National Research Council of Italy; Vanderbilt University, USA)

The fourth major judicial emotion empirical research programme is the youngest. Under the leadership of Stina Bergman Blix is JUSTEMOTIONS: The Construction of Objectivity: An international perspective on the emotive-cognitive process of judicial decision-making. The JUSTEMOTIONS project "investigates how objectivity is constructed in different legal systems by comparing legal decision-making in four countries" (https://www.soc.uu.se/research/justemotions/). It proceeds from a similar theoretical foundation as Bergman Blix's prior collaborative work with Wettergren (also a collaborator here), grounded in the notions that for both judges and prosecutors, "objective decision-making relies on emotional information", and that these professionals' "own emotional experiences influence" their decision-making, for example, attributions of blame. It therefore embraces a similar cluster of theoretical approaches (*emotion-centred, emotional phenomenon, legal culture, interactive*) but adds a *legal doctrine* component. Significantly, it also adds a comparative element. Over a five-year term an international team is performing parallel research in Sweden, Scotland, the US and Italy, as these

> countries represent different legal systems (common and civil criminal law) and vary in emotional expressiveness (e.g. the Swedish subtle emotional regime versus the more expressive Italian). By contrasting decisions of three crime types – fraud, domestic abuse, and homicide – in different legal instances and in different countries, we will be able to identify and describe common features of the decision-making process based on actual practice.

In each country, a postdoctoral researcher will conduct fieldwork consisting of observations, shadowing, and interviews, with the guidance of a locally-based affiliated researcher to facilitate access and orient the junior scholar to local practice.

JUSTEMOTIONS represents the first explicitly comparative study of judicial emotion. Comparative work "helps refine the approach to a topic of inquiry by raising new conceptual and research questions and, on that basis, sharpening understanding of that topic" (Roach Anleu *et al.* 2016, p. 60). Its value in the judicial emotion context can easily be gleaned by comparing Bergman Blix and Wettergren's prior work with that of Roach Anleu and Mack. While the latter found multiple instances of incongruity between judicial emotional scripts and Australian judges' actual behaviour in court, in Sweden the two were largely congruent, with "privileged deviance" (Scarduzio 2011, p. 295) limited to extremely subtle actions such as placing a pen down on the table, which the researchers came to understand as a common expression of a judge's anger or irritation (Bergman Blix and Wettergren 2016). This emotion signal would have been utterly lost in a different cultural context. Similarly, the many overt and public expressions of judicial anger that I have documented in the US (Maroney

2012), and that form the basis of many US judicial disciplinary proceedings (Roach Anleu *et al.* 2016), would be extraordinary in Sweden. Such contrasts make clear the impact of distinct cultural scripts, such as the muted display rules of Swedish courts, a reality that requires the emotion researcher to attend closely to culturally specific "emotional regimes" (Bergman Blix and Wettergren 2016, p. 32), as the JUSTEMOTIONS project allows us to do.[12]

A final methodological innovation is to follow cases from start to finish, ideally from the moment a complaint lands in a local prosecutor's office until the termination of any direct appeals. This case-tracking method, unlike a daily-snapshot one, will capture a smaller universe of cases but provide greater depth within them, providing a unique opportunity to identify emotional influences in multiple actors' decision-making over time.

4.5. Other important empirical research on judicial emotion: a roundup

The previously-described efforts all fit within an ongoing, cohesive research programme. However, important empirical work has been and is being generated outside of such parameters. I present them here—again, with a focus on approach and methods, rather than on substantive findings—to situate them within the larger project of which they form a part, whether the investigators are aware of that project or not. While most such studies embrace a combination of theoretical approaches, I group them according to their centre of gravity.

4.5.1 Emotion-centred, emotional phenomenon, and emotion management

This cluster represents the bulk of extant research.

Emotional aspects of good judging. Two recent studies examine judicial concepts of "good judging", including its emotional concomitants. In the first, the Federal Judicial Center (FJC) compiled a single working group of federal judges, judicial clerks, and FJC staff to debate and formulate a comprehensive scheme of the range of competencies required of U.S. federal judges (FJC 2018). The method was simple: the group met multiple times, debated, drafted, and released a report. That report identifies "emotional intelligence" as a core judicial attribute, and links a number of other competencies to reduced stress and increased emotional well-being, happiness, and job satisfaction (FJC 2018, p. 29). The simplicity of the method contrasts with the length and detail of the report. While it is subdivided into multiple competency headings, it consists primarily of lists, with many competencies listing similar judicial attributes. Further, it makes a number of factual statements that it does not seek to prove, such as the assertion that when "judges practice collegiality" they "experience emotional well-being and reduced stress" (FJC 2018, p. 25). Nonetheless, the report is a valuable starting point, representing a collection of judicial leaders' beliefs. A qualitative researcher might perform textual analysis to discern, group, and analyse the report's emotional themes to generate a tighter framework; other judicial emotion researchers might comb the document for the empirically testable assertions it tees up.

The second study, by the Judicial Excellence Project of the National Center for State Courts (NCSC), took on a similar question and applied to it a more complex methodological design, and as would be expected yielded a more elegant set of findings. NCSC sought to identify the "general types of knowledge, skills, abilities, and other characteristics that judges themselves believe are important to judicial

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[12] A similar point about cultural situatedness is made by Johansen (2018). She conducted extensive observational research in Danish courtrooms, combined with judicial interviews. Her study concerned Danish judges' evaluations of criminal defendants' emotions – for example, remorsefulness – based on courtroom behaviours. As she notes, that examination is deeply influenced by the judges' cultural lenses; further, they were irritated by defendants' perceived failures to follow emotional scripts. See also Bosma 2019, for an experimentally-based examination of how Dutch judges evaluate crime victims' emotions. Both researchers ask how judges see the emotions of others, but future studies could reverse the direction of observation or ask judges to self-evaluate.

excellence" (NCSC 2017, p. 1; see also Elek 2019 – this volume). Researchers partnered with court leaders in Illinois, who nominated judges as exemplars of judicial excellence. They interviewed a subset of these "excellent" judges; from those interviews developed a preliminary conceptual framework; tested it with focus groups of the remaining "excellent" judges; revised the framework; and surveyed the focus-group participants about the revisions. Focus groups, while vulnerable to difficult group dynamics, are a relatively fast and cost-effective way to test ideas and identify themes for further research (Farole 2009), ideally yielding "high-quality data in a social context where people can consider their own views in the context of the views of others" (Patton 2002, p. 386). NCSC further triangulated their focus group data by surveying the interviewees about the post-focus-group framework.[13] The final framework identified nine elements of judicial excellence, organized within three distinct clusters, representing a significant step forward in how excellence – the elusive goal of all judicial education programming – might be understood, and thus pursued.

This iterative process yielded a number of emotion-relevant findings, among them that respected judges understand judicial excellence to require displays of empathy, compassion, and generosity; believe active engagement in working toward justice can buffer against complacency or burnout; and think that truly excellent judges care for their physical and psychological well-being, including by learning to "'compartmentalize'" and 'let go' of work at the end of the day, and after resolution of a difficult case" (NCSC 2017, p. 7). The report also reflects judicial leaders' view that their peers vary greatly on such emotional skills – indeed, that emotion is among the sites of greatest variance. Given the research design, particularly its limitation to a single state, NCSC does not claim to have identified a widespread view among U.S. judges, nor does it claim to describe widespread judicial practice. However, the data cohere nicely to show what well-regarded U.S. state-court judges believe to be best practices for judicial emotion and its effective management. It also identifies a perceived need for enhanced training and supports around judicial emotion, which could justify greater allocation of research funding to find ways to meet that need.

Accidental findings on judicial emotion. Schuster and Propen (2010) stumbled on rich judicial-emotion data when conducting interviews (and associated court observations) about how judges evaluate victims' emotionality when delivering victim impact statements. In that process they also learned that the Minnesota state-court judges with whom they spoke had their own emotional experiences, which they expended effort to manage. One of their 28 judicial interviewees described thinking he was going to cry while listening to an impact statement, but suppressing that behaviour because to maintain authority "you are not supposed to cry on the bench" (Schuster and Propen 2010, p. 89). Other judges spoke of feeling ground down by their work, as if working in a "factory" designed "to strip away emotions", leading the authors to conclude that "the emotional work to maintain an objective demeanor may lead to emotional detachment" (Schuster and Propen 2010, p. 89). Such an accidental find is not a method for which a researcher can plan, but it is reminder of the power of qualitative research to reveal unexpected categories of knowledge, and the importance of keeping an open mind to unexpected findings.

Judicial wellness. Judges' unique occupational stressors can "dampen both professional performance and personal happiness" (Chamberlain and Richardson 2013, p. 270), but there is "a serious and dangerous lack of research" into both causes and consequences (Bornstein *et al.* 2013, p. 304). It is this gap that the Judicial Emotion Project aims to help fill. However, some groundwork has been laid.

A preliminary study administered standardized tests of personality type and stress symptoms at judicial workshops around the U.S., hypothesizing a link between the

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[13] In all, the Judicial Excellence Project clocked 100 interview hours with 81 judges, 24 focus-group hours with 24 judges divided into 4 groups, and two years of labour. Their methods are detailed in a Technical Appendix.

two (Showalter and Martel 1985); a follow-up piloted a new measure, the Judicial Stress Inventory, to do the same (Eells and Showalter 1994), but the preliminary findings have not been developed further. A mixed-methods study of Romanian magistrates suggested high levels of work-related stress; interestingly, that study identified physical workplace conditions, such as inadequate lighting, as a primary source (Ciocoiu *et al.* 2010). A semi-structured interview study conducted by psychologists identified symptoms of secondary traumatic stress in a non-clinical sample of nine U.S. state-court judges (Chamberlain and Miller 2009; see also Bremer 2002). Clinical psychologist Isaiah Zimmerman paints a troublesome picture of isolation (Zimmerman 2000) and stress (Zimmerman 1981) among the judges he has treated, hypothesizing that judges experience high levels of distress associated with a combination of "social isolation", "chronic overwork", and particular personality profiles (Zimmerman 2000, p. 5). Finally, a web-based survey of U.S. Immigration Judges showed "significant symptoms" of trauma and burnout, as indicated by the Secondary Trauma Stress Scale and the Copenhagen Burnout Inventory, particularly among women (Lustig *et al.* 2008). In addition to gathering quantitative data on stress and burnout, that survey solicited a free response to the question "Please let us know anything else that would help explain the occupational challenges faced by immigration judges" (Lustig *et al.* 2008, p. 60). More than half of the respondents used that space to chronicle caseload pressures, poor infrastructure, emotional exhaustion, and the impact of hearing on a daily basis "the worst of the worst that has ever happened to any human being" (Lustig *et al.* 2008, p. 74).

These studies are useful in identifying potential contributors to, and moderators of, judicial stress (Eells and Showalter 1994, p. 82). However, they coexist with other data indicating relatively high levels of judicial job satisfaction, at least in some places (Roach Anleu and Mack 2017); indeed, even the surveyed U.S. Immigration Judges reported non-negligible levels of job satisfaction (Lustig *et al.* 2008, p. 74). Studies with clinical samples, like Zimmerman's, indicate that some judges are deeply and negatively affected by stress and isolation, but do not inform us about the extent to which the same is true more generally. Most of these studies are exploratory, small, or both; hence Bornstein et al.'s call for greater investment in such research.

Fortunately, this empirical space is filling in at increasing speed. In Australia, several highly-publicized judicial suicides accelerated a call for research to which Schrever, Hulbert and Sourdin responded, designing a mixed-methods study to "consider how judicial stress can be characterized, quantified, and, where required, addressed" (Schrever *et al.* 2019, p. 142).[14] Their methodology section strikes by-now-familiar notes on relationship building, trust, and confidentiality. They identified judicial leaders, gave presentations at five target courts, and pledged to keep confidential both judges' individual identities and the courts' name and location (a step also taken by Bergman Blix and Wettergren). Judges could choose to participate in up to three stages: a short survey on stress; a longer survey on mental health literacy, burnout, secondary trauma, and alcohol use; and a semi-structured interview going into greater depth on all these topics. The tiered approach was responsive to "judicial officers' general 'time poverty'", a strategy to increase participation at some level by those who would not participate at all were only the most time-consuming options available (Schrever *et al.* 2019, p. 143). Judges could choose to respond to the surveys on paper, with stamped mailback envelopes, or online through Qualtrics. The short survey enjoyed a 67% response rate; further, over 80% of those judges went on to respond to the second survey, and 40% elected also to sit for an interview. Consistent with the other interview studies, these interviews were audio-recorded, transcribed, and analysed for recurrent themes.

Interestingly, surveyed judges could choose to receive "personalised feedback". This novel option was meant to balance the need to offer anonymity against the benefits

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[14] Schrever and co-authors provide citations to every study they believe to have been published on judicial stress (numbering 15, including all those described above) (Schrever *et al.* 2019, p. 142 n. 3).

of "notifying and supporting participants when scores indicated psychological distress", an assessment that was possible given the surveys' incorporation of "widely used screening tools for mental health concerns", such as the Depression, Anxiety and Stress Scales 21 (DASS-21) (Schrever *et al.* 2019, p. 143).[15] Nearly half of the 152 survey respondents chose to "voluntarily forsake their anonymity" and receive that feedback through an emailed, password-protected document which, if any scores were in the high to severe range, recommended seeking support from provided resources.

Thus far, Schrever and her colleagues have analysed and published only the "primary analysis of the quantitative survey data – that is, descriptive statistics and normative comparisons across the various measures of stress and wellbeing" (Schrever *et al.* 2019, p. 153). That analysis shows the following. Like lawyers, judges report elevated psychological distress and problematic alcohol use; symptoms of burnout and secondary trauma are prominent features of the judicial stress experience; and judges' rates of depressive and anxious symptoms are relatively low, in contrast to the elevated levels found in lawyers. Together, "the findings reveal a judicial system not yet in mental health crisis, but under considerable stress" (Schrever *et al.* 2019, p. 167). As the authors acknowledge, their methodology has limits. Their research locations might be somehow unrepresentative, though they included every level of court; all self-report is vulnerable to biases, including social desirability bias; judges may lack insight into the frequency and intensity of their stress, a particular danger given the "stress denying culture of the Australian judiciary"; and they may have failed to reach the "most acutely unwell" judges (Schrever *et al.* 2019, p. 166). Still, this study – even at this first stage – represents a sea change in the level of disciplined scrutiny of judicial stress and trauma.

In the United States, the Coalition of Lawyer Assistance Programs (COLAP) has just released preliminary results of its 2019 National Judicial Stress and Resilience Survey; manuscripts are forthcoming.[16] Substantive overlap with the Australian Wellbeing Survey is considerable, including use of psychometric instruments such as the Alcohol Use Disorders Identification Test (AUDIT); however, this survey also examines resiliency practices, a positive psychology focus that Scherer et al. acknowledged would be an important next step (Schrever *et al.* 2019, p. 167). A number of methodological distinctions are notable. After two pilot phases and extensive relationship-building, COLAP attempted to reach a national sample including state and federal judges with a novel distribution model: a respected national judicial education organization (the National Judicial College) and state Lawyers Assistance Programs, with cooperation from state courts' chief justices, sent a link to the anonymous online survey to judges in their purview. The approach paid off with a large gross number of responses (n=1034). The distributed dissemination mechanism, however, prevents calculation of a response rate, and very low participation by federal judges (2.1%) indicates that the mechanism was not successful in reaching all sectors of the U.S. judiciary. COLAP also opted to increase the strength of its anonymity signal by not collecting any geographical identification. Still, it remains the largest such survey to date, and it achieved gender balance and robust participation from both trial and appellate judges in a range of urban, rural, and suburban areas. Substantively, measures of sources of stress, effects of stress, and alcohol had high internal consistency/reliability (.80-.90+), while resiliency measures were more varied.

Among the survey team's early findings are that common sources of stress include the weight of decision-making, caseloads, unprepared lawyers and pro se litigants; security concerns were less implicated, though some earlier studies suggested the opposite might be true. Stress effects included fatigue, sleep disturbance, attentional

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[15] Each of the psychometric instruments used is identified at Schrever *et al.* 2019, p. 146, Tbl.2.
[16] One of the lead researchers, Dr. David Swenson, provided me with a copy of the presentation made at the Coalition of Lawyer Assistance Programs' National Conference in Austin, Texas on September 25, 2019.

problems, and rumination. As in the Australian study, levels of alcohol dependence, depression/anxiety, and suicidal ideation were lower than might have been feared. And in the novel area of resilience, the COLAP survey found a gap between desired and actual levels of resiliency-promoting behaviours, with the gap smallest for healthy eating and physical exercise, and largest for asking for peer support; relaxation (e.g., yoga); mindful practices; and seeking out personally meaningful interactions with colleagues. Of course, the same concerns about self-report biases, failure to reach the most unwell judges, and the like obtain to this study as well, and the extent to which these judges are a representative sample on multiple levels is unknowable. Still, it too represents a sea change, the baseline from which future research will grow.

All the wellness studies, it should be noted, have a *transformational* element, whether as subtext or writ large, whether distal or proximate. Indeed, the Australian study incorporated a direct mechanism for helping judges access support and care. The COLAP survey explicitly positions its work as helping set the agenda for judicial wellness commissions, articulating justification for expanding remedial wellness options for judges subject to disciplinary complaints, and providing material with which to educate judges about wellness and how to achieve it. Interventions to increase skill in emotion management have proven effective in improving medical professionals' wellbeing and performance, but have not been tested with judges (Grewal and Davidson 2008, Granek *et al.* 2012, Shayne and Quill 2012, Cameron *et al.* 2013). These studies are likely to motivate such work.

4.5.2. Legal doctrine

The two studies described in this cluster are creative and thought-provoking. First, inspired by a public debate over whether a Supreme Court Justice – or any judge – ought to display a robust capacity for empathy, political scientists Adam Glynn and Maya Sen examined whether the experience of raising daughters might affect judges' rulings in cases involving women's rights (Glynn and Sen 2014). They made inventive use of on-the-shelf data gathered for other purposes (Singleton and Straits 2005), ranging from *Who's Who in American Law* to a dataset created by other researchers investigating judicial partisanship, to construct a new data set on U.S. federal judges' families. They then constructed a dataset tallying the outcome votes of judges of the U.S. Courts of Appeal in cases involving gender issues, such as sex-based employment discrimination cases. Using statistical analyses, Glynn and Sen showed that "judges with at least one daughter" vote in a more "feminist" fashion "on gender issues than judges with sons", a robust effect driven by "Republican male appointees" who otherwise would be expected to be relatively hostile to such claims (Glynn and Sen 2014, p. 38). They argued that the "daughter effect" (Glynn and Sen 2014, p. 51) – which does not generally "liberalize" judges, showing its impact only in gender-relevant cases – is most plausibly explained by affective ties, as follows. Male judges learn about women's challenges through having daughters; the learning journey is most significant for conservative male judges, who have the furthest distance to travel; and love makes this learning particularly meaningful. Thus, Glynn and Sen argue that having a daughter cultivates empathy in both its cognitive and emotional dimensions, and that such empathy makes a difference in how judges decide cases.

The rigor of Glynn and Sen's statistical methods enables them to make plausible arguments about causation and to mount arguments against rival explanations, such as preference realignment. However, the strength of their findings is reliant on the validity and reliability of their measures, and (as is typical with such a quantitative study) there is plenty of room to quibble with their choices. Most pointedly, much rides on their decisions as to what counted as a gender-relevant case, for example, the choice to exclude cases involving male plaintiffs, or claims about LGBT rights, and as to what sort of vote counted as "(1) antifeminist or (2) partially or entirely feminist" (Glynn and Sen 2014, p. 43). The latter is a relatively crude measure: it captures whether the vote was for or against a claim in favour of a female employee,

or in favour of expanding or restricting abortion access, but cannot capture why any given judge voted as they did. Still, this study makes an important contribution to our understanding of how personal experience and affective ties might influence judicial behaviour and decision making.

Second, in a rare example of experimentation involving judges, Wistrich, Rachlinski and Guthrie – a judge, a law-and-psychology professor, and a law professor – similarly explored whether and how affect might influence legal rulings (Wistrich *et al.* 2015). Some have argued that experimentation is a "luxury" that most empirical legal researchers are unable to afford (Epstein and Martin 2014, p. 7). Moreover, in no small part because of judges' elite status and high premium on privacy, they have not come rushing to the experimental stage. This research team, however, has conducted a series of low-budget experiments – generally consisting of short pen-and-paper exercises resembling quizzes, distributed and collected at judicial conferences – that have yielded fascinating results about heuristics and biases (Guthrie *et al.* 2001, 2007). In this more recent set of experiments they turned their attention to emotion. Judges read fictional scenarios and decided highly technical questions of law – for example, whether the text of a medical marijuana statute should be understood to require that a doctor's affidavit of medical necessity be generated *before* or *after* an arrest. Half of the judges read scenarios in which the litigants were sympathetic and/or likeable; half read scenarios in which they were not. Despite the clear legal irrelevance of this variation, judges were more likely to interpret law in a manner more favourable to the sympathetic parties, and less favourable to the unsympathetic ones (Wistrich *et al.* 2015). The experiments thus provide evidence that judges' legal decisions might be shaped in part by the "affect heuristic", that is, a rapid, felt sense of *goodness/liking* or *badness/disliking* that drives choices we then rationalize (Slovic *et al.* 2002). The affect heuristic "is an instance of substitution, in which the answer to an easy question (How do I feel about it?) serves as an answer to a harder question (What do I think about it?)" (Kahneman 2011, p. 139). In this instance, the research suggests that a judge's "feeling" about the affected party shapes his or her "thinking" about how to interpret ambiguous sources of law (cf. Chestek 2009).

The first strength of these experiments is their use of judicial subjects, thus eliminating the ecological validity challenge commonly levied against mock-juror studies, particularly those using undergraduate students (Epstein and Martin 2014). The second is Wistrich, Rachlinski and Guthrie's clever isolation of a legally irrelevant, emotionally-tinged variable, which allows them to make a clean argument about causation (Singleton and Straits 2005, p. 155). Their between-subjects design, in which no judge knew that any element was being varied, allows them to get at a phenomenon that judges would likely not be able to describe or might misrepresent if asked, one that runs directly counter to cultural expectations of "objective" legal decision-making. However, the artificiality of the experimental setting – the precise thing that allows the independent and dependent variables to be isolated – also is a weakness. Prominent empirical legal researchers, and some judges, have expressed doubt about the extent to which the trio's studies relate to what happens in real cases (Epstein and Martin 2014). Even the trio acknowledges the limitations of using short written hypotheticals, administered at a conference, to gauge highly complex phenomena that judges in real life experience over time, while embedded in multifaceted settings, and with real people attached (Wistrich *et al.* 2015). This is a common problem in experimental design: internal validity can be in strong tension with external validity. A final weakness is the bridge the researchers draw between the affect heuristic and emotion more generally; the latter is comprised of much more than quick, reactive senses of liking and disliking, of good and bad, and judges' diverse emotional experiences and their decisional impacts cannot be fully captured by this experimental design (Maroney 2015). Theses critiques do not diminish the importance of what Wistrich, Rachlinski and Guthrie *are* able to show. Their findings

may be narrow, but they intriguingly prompt us to find new ways to probe how affect and emotion might shape legal decision-making.

4.5.4. Interaction and Legal culture

Two studies led by Jennifer Scarduzio shed important light on how judges' public, interactional emotional displays and behaviours shape, are shaped by, and sometimes defy the cultural expectations of their courts. In the first (Scarduzio 2011), she used the observation, shadowing, and interviewing triad to investigate how U.S. municipal court judges in an urban area used "emotional deviance" from culturally salient norms in the public-facing aspects of their work, and how power and status fuelled such deviance (Scarduzio 2011, p. 289). Her fieldwork with 12 judges in two locations revealed two dominant feeling rules for judges in the busy criminal courtroom: neutrality and the expression of fairness, both reached through selective suppression of emotion expressions. However, it also revealed important departures in the form of humour, "displays of anger and frustration, emotional leakage in nonverbal displays" such as eye rolling, and "outright abuses of power through rude emotional displays" (Scarduzio 2011, p. 294). Thus, a space between ideal and reality becomes visible: "emotions that judges are expected to express in the courtroom and the emotions that actually emerge implicitly and nonverbally during the legal process are not always the same" (Scarduzio 2011, p. 296). Moments of emotional deviance were enabled by status and power; were noticeable because of their departure from norms; and were often used interactionally, in an effort to control the behaviours of others, particularly litigants. In a later study involving the same courts, Scarduzio and Tracy (2015) added further depth to this meeting point of culture and interaction by including court staff, including bailiffs and interpreters. This novel move also implicates those persons' *evaluation* of the judges' emotional behaviours. Scarduzio and Tracy argued from their data that bailiffs act as an "emotional buffer" between judges and defendants, that trio interacting "to shape emotions and the collective contextual environment through their communication and expressions", together creating and breaking the "sense" of what is transpiring (Scarduzio and Tracy 2015, p. 10). This study is laudable for providing a rare examination of the role of staff in policing emotion norms, including by mediating the influence of norm breaks.

A similar focus on the lessons of cultural and interactional deviance may be found in Roach Anleu, Mack, and Rottman's ongoing study that, like the work of Glynn and Sen, leverages on-the-shelf data. They use "two sources of publicly available information that can be used to identify the role emotion plays in disciplinary actions" against sitting state-court judges in the United States (Roach Anleu *et al.* 2016, p. 65): the archives of the Center for Judicial Ethics, and the public disciplinary records of the Arizona Commission on Judicial Conduct. Within these sources the researchers identify that subset of disciplinary actions involving emotions like anger, frustration, and antagonism, then performing a content analysis of the case materials, including transcripts. Such disciplinary cases by definition involve marked emotional deviance in interactions with others, generally litigants and the public. This study nicely displays the necessary interplay between method, research question, and permissible conclusions. As the authors acknowledge, the available data represent only the "tip of the iceberg" (Roach Anleu *et al.* 2016, p. 69), as few inappropriate judicial emotion displays result in disciplinary proceedings, and few disciplinary proceedings result in findings. The authors therefore rightly refrain from claiming that the data "provide a comprehensive or representative overview of the range of cases that entail emotion display and judicial misconduct" (Roach Anleu *et al.* 2016, p. 66), and acknowledge their limits in illuminating "the wider or general role of emotions in judicial behavior" (Roach Anleu *et al.* 2016, p. 69). However, those data are well-suited to an "extreme cases" approach, in which atypical cases shed light on the sorts of situations in which judges' emotions are regarded as well outside culturally accepted bounds, which can help us understand those bounds. Those cases show at least some of the concrete consequences of such abnormal behaviour, both for the litigants (whose rights may

be impaired), the judge (whose career may suffer), and the public (whose confidence in the courts may be diminished). Looking at the by-consensus worst judicial behaviour can reveal how the public and disciplinary bodies evaluate emotion norm noncompliance, how they theorize the links between emotional dysregulation and behaviour, and how they think about what sorts of emotional dysregulation might be remediable, and how – the last of these also shedding light on notions of possible emotional *transformation.*

5. Areas for future exploration

While the universe of empirical studies of judicial emotion remains small, when grouped together – as they are here, for the first time – they form a rich mosaic. However, the mosaic remains incomplete, with many missing pieces. Among my proposed theoretical approaches, those involving *evaluation* and *transformation* remain the least-well represented. Among the many available methods, experimentation appears to be the least frequently used. A thread pulling across all the extant studies is the enormous diversity of not just judicial emotion but the judiciary itself, and the concomitant need to attend closely to those sources of diversity, be they gender, race, geography, level of court, nature of docket, or job security; some studies are more explicitly attentive to such factors than others, and we collectively should be raising that bar (Wingfield 2010). Before concluding, this section briefly touches on other areas that are ripe for empirical exploration.

Databases are not the only available source for pre-existing materials that can be systematically collected and analysed. Some such materials are generated by judges themselves – not just written opinions in cases but also speeches, notes, diaries, letters, books, and articles. The widely-revered U.S. Judge Learned Hand, for example, wrote letters to friends and judicial colleagues reflecting on emotional aspects of his work (Jordan 2013). U.S. Supreme Court Justice Benjamin Cardozo delivered a series of lectures reflecting deeply on how emotion and reason intertwined in his decision-making (Cardozo 1941/1957), and wrote books – including his iconic *The Nature of the Judicial Process* – doing the same (Cardozo 1921). In more recent years, multiple judges have written memoirs in which they discuss a wide range of emotions, how they have worked to manage them, and their possible impact in cases (Gilmore 2010, Block 2012, Corbett 2016, Newman 2017). Judges have grappled openly with questions of empathy, anger, stress, and other emotional phenomena in articles for academic, judicial, and popular audiences (Kirby 1997a, 1997b, Thomas 1997, O'Brien 2004, Posner 2008, Chin 2012). These narratives are highly likely to be shaped social desirability biases (van Boom *et al.* 2018) and to reflect judges' high attunement to audience, seeking popularity among and respect from peers, lawyers, other government officials, and the public (Baum 2006). They nonetheless are priceless views into judges' mental maps (Luker 2008). Judicial biographies, too, are a rich source for discerning judicial emotion, the norms against which they unfold, the events that precipitate them, the relationships within which they are situated, and how they are managed (Domnarski 2016).

A similar point may be made about media representations of judges' behaviours. Indeed, print journalism long was one of the only ways in which laypersons could learn about what was happening in the courts. As the broadcast media and internet have proliferated and as jurisdictions increasingly allow cameras in courtrooms, third-person reporting commonly includes videos, audio recordings, and photographs. While most such materials capture judges' public appearances, private behaviour sometimes also comes to light. A state-court judge in Texas came under fire when his daughter posted on YouTube a video of him beating her in their home (Maroney 2012). The modern proliferation of multimedia sources capturing an ever-broadening swath of judicial behaviour serves up a rich trove of material with which to work. A nodding reference to the livestream of the Senate Judiciary Committee hearings (2018) for then-Judge Brett Kavanaugh to the U.S. Supreme Court – replete with vivid, norm-defying emotional displays – makes the point, as does Justice

Kavanaugh's opinion piece in a major newspaper the next day describing himself as "emotional", "perhaps too emotional at times", and asking that readers consider the reasons for his strong emotions and to judge him as a "son, husband, and dad" (Kavanaugh 2018).

Finally, as methods of studying emotion continue to proliferate across disciplines, we surely will see new methods moving into the judicial space. Important judicial leaders, such as the Federal Judicial Center, are actively encouraging judges to explore mindfulness strategies (Fogel 2016; see also http://themindfuljudge.com/). Perhaps soon we will see experiments testing whether mindfulness training for judges reduces levels of irritation and anger, increases displays of patience, alters other behaviours relevant to demeanour, or increases markers of personal well-being and professional satisfaction (Powell 2018). Neuroimaging cannot be far away, as researchers (including several sitting judges) already are examining the distinct neural pathways for determining fault and assigning punishment, a distinction thought to implicate emotion (Ginther *et al.* 2016; see also MacArthur Foundation Research Network on Law and Neuroscience, http://www.lawneuro.org/). The popularity of "microexpressions" research is another obvious candidate (www.paulekman.com). One can imagine a lab coding video of judges on the bench, in an attempt to spot 'leakage' of concealed emotion. Microexpression training, now a commercial product, might be marketed to, and tested on, judges as a tool for improving their emotional intelligence. Novelty, of course, is not the same as strength. Whether any new empirical angle on judicial emotion yields genuinely new insights built on a solid foundation remains to be seen, and depends in no small part on our collective willingness to analyse it with open-minded rigor.

6. Conclusion

The best news about the empirical study of judicial emotion is that there is so much to be done. Virtually any research approach is likely to have value in this relatively unexplored terrain, and many of the studies explored here point to the next set of questions in need of answers. Similarly, the range of methods available to study judicial emotion is exactly as wide as the range of methods used by the many disciplines with an interest in this area. However, no method is easy to pull off well, and each carries distinct advantages and disadvantages. The researcher of judicial emotion is well-served by considering a variety of ways in which to get at her research questions, thoroughly educating herself in ones with which she may be unfamiliar, partnering with allies with more solid grounding in those methods, and making fully informed choices based on her resources – resources of access, time, personnel, and skill – in light of what best serves her ultimate aims. By bringing together the universe of extant research in one place, situating them within a unifying theoretical frame, highlighting areas of overlap and difference, locating sources that invite a deeper dive into the methodological weeds, and suggesting areas where growth is most needed, this article hopes to accelerate the field's development.

That development promises to be exciting, and calls for disciplined interdisciplinarity (Maroney 2011). Insights may emerge from a certain "pedantic eclecticism" (Simon 2010), characterized by creative mixing of perspectives and methods in order to get at interesting, hard-to-reach questions (Maroney 2011). It is important, however, to continue to invest in the foundational theory-building work, particularly qualitative work, we still so sorely need. If observational and interview studies are resource-intensive, fMRI studies are far more so, and with a much less obvious payoff while we still have so many baseline questions. It is my hope that this overview, and the other work represented in this special volume, will spur the vital and creative work of discovery and, as we continue down the road, verification.

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