

# Book Review

## *Judging and Emotion: A Socio-Legal Analysis* by Sharyn Roach Anleu and Kathy Mack (2021) Routledge, 213 pp, ISBN 9781138893023

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*Judging and Emotion: A Socio-Legal Analysis* is an important — one is tempted to say indispensable — resource for legal theorists and practitioners, sociologists, and anyone who cares about judging as it is practised in the real world.<sup>1</sup> Sharyn Roach Anleu and Kathy Mack have distinguished themselves as the foremost experts on the everyday lives and work of Australian judicial officers, with a particular focus on the human elements of judging. Their work is meticulous in method, grounded in theory, and sweeping in its implications, reaching well beyond the Australian context while remaining deeply rooted in it.

In this tight volume, Roach Anleu (a sociologist) and Mack (a law professor) draw on their extensive empirical data to push against traditional Western legal characterisations of judges' emotions as improper and incompatible with impartiality. Rather, they argue, not only do judges inevitably experience a wide variety of emotions in the course of their work, but they strive to shape those

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<sup>1</sup> Sharyn Roach Anleu and Kathy Mack, *Judging and Emotion: A Socio-Legal Analysis* (Routledge, 2021) (*Judging and Emotion*).

experiences and their expressions — as well as the emotional experiences and expressions of others, such as litigants and lawyers — to uphold both the image and the reality of impartiality. Rather than block emotions out, good judges selectively and strategically integrate them into their lives and work. This is an argument the authors have made before, including in their excellent *Performing Judicial Authority in the Lower Courts*.<sup>2</sup> Similar arguments also have been made by other scholars, myself included; it is impressive how seamlessly Roach Anleu and Mack draw on that broader body of work on judicial emotion while maintaining a firm centre of gravity in their own data.

Those data are compelling. As detailed in their methodological Appendix, since the early 2000s Roach Anleu and Mack have administered a series of national surveys of Australian judges and magistrates; conducted in-depth interviews with those judicial officers; and directly observed court proceedings. This three-legged-stool aspect of their work gives it particular solidity. Judges in Anglo-American systems work under what I have called the persistent cultural script of judicial dispassion.<sup>3</sup> That misguided script complicates research into the emotionally infused aspects of judging, as emotions are ‘formally disavowed’.<sup>4</sup> Roach Anleu and Mack’s consistent, careful and diversified approach enables them to get a good distance past that barrier. They make visible judges’ own conceptions of their work-related emotional experiences, how they see the script of dispassion (spoiler alert: none of them endorses it), and how they negotiate any tension between the two.

*Judging and Emotion* has a tidy structure. The authors begin by plainly stating their inquiry (‘to identify the place(s) of emotion in judicial work and to understand how emotion relates to the core judicial value of impartiality’), their argument (that ‘emotion is integral to judicial work’ and compatible with impartiality), and their empirical métier (concrete demonstrations of how judges ‘understand, experience, display, manage and deploy emotion as part of their everyday work’ in an attempt to achieve that compatibility).<sup>5</sup> Emotion here is conceptualised as both internal (that is, something judges experience subjectively and conceive of as inside themselves) and interactional (that is, patterns of relating that develop between people in specific situations). Judicial emotions are shaped by the structures and goals of courts, as well as by concepts of the judicial role, as those unfold within diverse contexts — for example, trial versus appellate proceedings, family, commercial or criminal cases, and the background emotion norms of local and national cultures. While (as Roach Anleu and Mack commendably acknowledge) there is no consensus definition of emotion on which to rely, this conception is well within the Venn diagram of interdisciplinary agreement. After introducing the reader to core concepts such as *emotional labour* and *emotion regulation*, Roach Anleu and Mack provide a helpful and data-driven overview of how judicial work plays out on the ground in Australia, covering such topics as case

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<sup>2</sup> Sharyn Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (Palgrave Macmillan, 2017).

<sup>3</sup> Terry A Maroney, ‘The Persistent Cultural Script of Judicial Dispassion’ (2011) 99(2) *California Law Review* 629.

<sup>4</sup> *Judging and Emotion* (n 1) 61.

<sup>5</sup> *Ibid* 1.

load and time pressures, types of case and court, and the various other dramatis personae with whom judges interact (for example, jurors, witnesses and lawyers).

The following chapters form the heart of the book, weaving together theory and data to show how judges conceptualise their emotions, impartiality and the relationship between the two. The authors canvass the range of judges' self-reported and observed emotions and emotional displays, as well as the strategies with which they seek to manage them; they also highlight the ways in which judges seek to affect emotional experience and expression among the dramatis personae. These chapters are detailed, rich, and the most important contribution of the volume. Before concluding, though, the book takes a turn of sorts, exploring how systems of judicial professionalisation, discipline and education implicate emotion. By the conclusion of *Judging and Emotion*, even the reader with little or no prior knowledge of the area will have a strong understanding of the major issues, a detailed understanding of some particularly important debates (for example, over the utility of judicial empathy), and — one hopes — a far deeper appreciation of the reality of judicial work and the emotional sophistication it requires.

Not all readers, of course, will be satisfied. Those who are looking for crisp, statistically expressed conclusions about the impact of various discrete emotions on concrete legal decisions will be particularly disappointed. This is simply not what Roach Anleu and Mack do. There are statistics, to be sure — for example, about the degree to which Australian judicial officers assess the importance of empathy, broken down by gender. (Second spoiler alert: both men and women tend to think it's important, and Roach Anleu and Mack show that while gender matters to questions of judicial emotion, it does not always follow the neat logic of stereotype.) But this inquiry is fundamentally qualitative, seeking to expand our knowledge rather than reduce it to a small set of variables. It seeks not to model whether an angry or sad judge might impose higher or lower sentences but, rather, to discern how judges experience cases involving serious crimes against children. It explores when, how and why they try to control their faces and bodies to project a particular demeanour (often despite a contrasting inner experience). It illuminates how they attempt to create boundaries between home and work, and details how they treat people who can be frustrating, scared or disruptive, or whose lives are terribly sad. In a typical statement, one of the interviewed judges describes handling people who come before her with 'compassion' and 'empathy', but then states that '[i]t may well be that the decision is just the same as you [would have made] otherwise'.<sup>6</sup> Another describes being open to difficult emotions when in the presence of enormous loss, 'allow[ing] them to come through you ... a little bit like letting the silt settle', and then 'mov[ing] them to one side' when reaching one's decision — leaving a critical ambiguity as to whether that silt leaves a trace.<sup>7</sup>

To those who find such ambiguities frustrating, or who think they skirt the 'real' (or only truly important) issue, I suggest having a more open mind. (After all, that is what Roach Anleu and Mack's judges say they try to do.) Judging is far more than choosing an ultimate legal outcome among the available options. Cases and

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<sup>6</sup> Ibid 78.

<sup>7</sup> Ibid 75.

court proceedings, too, are far more than their outcomes. Journeys are more than the end point. The procedural justice literature shows us that how people are treated matters, sometimes as much as winning or losing. *Judging and Emotion* shows us the concrete steps judges take that determine whether people feel treated well: acknowledging a litigant's anxiety, explaining an intimidating process, calling a break, or letting them go 'on and on' if that is what it will take for them to feel heard. We also see instances in which people are bound to feel poorly treated, such as being barked at to take one's hands out of their pockets, or addressed condescendingly as 'Miss'. The sum total of these interactions drives how a polity thinks about their courts. In that way, it *is law*. *Judging and Emotion* also gives us a front-row seat to judges' efforts to uphold public expectations even in challenging scenarios. They engage in self-talk about their oaths, unload and vent with colleagues and subordinates, and use breathing exercises to both be calm and appear calm. This is judging, just as much as interpreting a statute is. Further, in this volume we do see outcome effects. Fines are forgiven; adjournments are denied. Hopefully readers will not scan through simply to catalogue those effects but will take in the entire complex landscape.

Even one who buys fully into Roach Anleu and Mack's project might raise some constructive criticisms. The volume is, as noted, tight, and to a certain degree, formulaic. In each chapter, the authors delineate a theoretical frame; present highly curated survey, interview and observation data that fill out the frame; and then draw conclusions. Every time they quote a judge or present an observation transcript they immediately interpret it, which entails insight but also repetition. The reader is led through each section at a steady clip that becomes predictable in its flow. There are many advantages to these choices. Chief among these is clarity; one always knows precisely where one is and what Roach Anleu and Mack are arguing and why. Another advantage is accessibility to diverse academic readers, who can take in the material without an enormous investment of time or schooling in jargon and side-trips. A disadvantage, though, is that the narrative sometimes would benefit from more story and flavour. It will not naturally appeal to the broader public interested in issues of judging and courts. Judges, too, might sometimes find the style alienating, though they hopefully will be propelled forward by its many insights of direct relevance to their lives and work. I found myself wanting even more accounts straight from the judges' mouths. These first-person moments, so rare in our world, were uniformly interesting and instructive. I would happily have seen the page count expand, and the formula loosen, if we could have heard more of these judicial voices Roach Anleu and Mack worked so hard to capture.

Of course, this is a good criticism to have: better that the reader wants more rather than less. I also await with anticipation Roach Anleu and Mack's continued work on judicial discipline, performance evaluation, and education. This was to my mind the least effective part of the book, not because it is not important (it is, and vitally so) but because this is where the authors are still building the kind of rich data that underlie the remainder of the volume. There's a tea-leaf-reading aspect to this chapter that I look forward to seeing more fully developed.

*Judging and Emotion: A Socio-Legal Analysis* is both an impressive achievement and a valuable resource. It offers a rare window into the human realities

of judging and courts, particularly the role of emotion, historically so maligned and undervalued. The book does not achieve everything in this space; nor could it. But no-one who cares about judges as people and professionals, and about the role of courts as a site of democratic engagement, should pass it by. Rather than purport to draw a straight line between isolated emotional states and narrowly conceived legal impacts, Roach Anleu and Mack's deep dive offers something far more grounded and nuanced. It will stay at the top of my reference pile, looking just the way it does right now: bristling with sticky notes and tabs, full of highlighting and underlines, its margins bursting with commentary.

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