“We are not robots, but we are expected to be unfeeling’: The contribution of emotion to judicial decision-making in the criminal courts”

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Dedicated to Justice of the Peace

Roberta (Bobbie) Roberts (Deceased)

Abstract

This thesis critically investigates the assumption that emotions are immaterial to effective judicial decision-making. Focusing on the role of emotions in the working lives of judges to include magistrates, a dramaturgical framework is adopted as a means of evaluating the role of emotions both 'backstage' and 'frontstage'. Utilising observations of over one thousand criminal cases, across eighty-five judges and magistrates, as well as informal interviews with ten judicial participants and an in-depth analysis of judicial quotes in the media, the research demonstrates that emotions have multiple functions within judicial decision-making. These range from the practical - just getting the job done, to the more strategic - as tools of evaluation and by way of justification for decisions made. A case is made for arguing that emotions also operate as tools for the maintenance of judicial power and control, and that this is sustained through retributive rather than compassionate strategies and polices. Within this mix, emotions perform a protective role, ultimately for the security and stability of the justice system. The thesis concludes by arguing that emotions can only be better utilised in courtrooms through the efforts of judges as agents of change: thereby necessitating an acknowledgment on their part as to the role emotions may play in progressing the law. While seeking to make a contribution to theoretical understandings of the role of emotions in the courtroom, the thesis concludes by making recommendations as to how emotions can be better managed within judicial settings in the future.

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Table of Contents

Chapter One

Introduction

"Reason is and ought only to be the slave of the passions and can never pretend to any other office than to serve and obey them." Hume, 1978 [1740], 462

Introduction

Research needs to pay careful attention to the complex relationship that exists between emotions and the judiciary. For law's official administrators, the doctrines and dictates of the law, relegate emotions as a topic of conversation to one which is not worth researching, as according to this ideology and tradition, emotions do not exist in judicial decision-making (Hobbes, 1651). Such a position tends to dissuade those interested in investigating the realities of judicial life, as such research, if approved, can become subject to rules and restrictions put in place by the legal hierarchy (Darbyshire, 2011). The above position was personally reiterated to me by this author who me offered advice to stay clear as it was too difficult for 'a novice' to get official support. Having completed my thesis, this obviously did not put me off but inspired me to find out more and to find ways to examine this phenomenon. Part of this inspiration came from my interest as a law student in victims within the criminal justice system (CJS). It became apparent that the only party excluded from research on emotions, were judges (Bandes, 2016[a]). I wanted to know why this should be the case, and why it appeared to me, having been in criminal courts many times (professionally), that fear, rather than apathy, looked to be the reason for the judicial office's counter claims for dispassionate judges and magistrates. If my inclination was accurate what was being implied here was the existence of a rationale connected to questions of power and control that served to shield judges, perhaps in the interests of maintaining a stable criminal justice system. And herein lies my research challenge. In the remainder of this chapter I will begin

to outline what I intend to achieve by the conclusion of this thesis, as well as pointing towards the contribution I would like to make towards an understanding of justice, judges, and their impact on a society upon which they have such a profound influence.

Background and Context

Emotions exist in judicial decision making and there is no longer a need to prove this (Abrams *et al*., 2010) but as they are claimed as being critical to legal reasoning (Hamer, 2012: 199) it is essential that research is conducted to understand how this might be the case. This matters to justice and to judges and should matter to those who insist on positioning the judge as a neutral and dispassionate arbitrator of the law (Griffith, 1997). This is unsustainable as such perceptions are known to be untrue, at least as far as some judges and academics are concerned (Bandes, 2012) In referring to judges I include consideration of magistrates but distinguish their roles where individuals are quoted or when case studies are included in the analysis.. Research on all judges within this context, is critical but is an area which is under-developed theoretically and empirically (Fielding, 2013: 97). For one, access to judges is problematic both from an academic viewpoint and from those who are the legal gatekeepers – the judicial office. Judges are relatively silent on this until emotions bubble up in the public courtroom arena and are captured as discussed by Sedley (2018) by the waiting and eager media for public consumption. However, according to Maroney (2011: 649) evidence is emerging that judges are not the blocks here, but that they are subject to the normative controls of the profession which attempts to eradicate the notion that emotions have any role in the law. For this research it is imperative that access is gained as academe also has a role in promoting the realities of judicial life. Positively, there has been a recent resurgence of academic interest in emotions and the law, spearheaded by a relatively small group of like-minded researchers from Sweden and Australia (Roach Anleu *et al*., 2021), now expanded to encompass other countries and academics who share a grounding in the psychology and

sociology of emotion (Maroney, 2015). This interest has widened to include the domain of the law, irrespective of jurisdiction (Posner, 2008) and coincides with the political rise of the victim in criminal cases which questions their visibility in the Criminal Justice System (Davies *et al*., 2020: 3). Within the jurisdiction of England and Wales, there has also been a noticeable shift in judicial behaviour both on and off, the stage of the criminal court. This is with regards to how judges express their concerns about the justice system (Schrever *et al*., 2024: 330), the stresses they are under and how they feel they are at breaking point in a system which lacks resources, not just for defendants and victims but also for judges (MA News, 2018).

Research Problem

There is a fundamental and wide discrepancy between what is officially articulated about the role of emotion in judicial decision-making and the realities of judicial practice. This is a problem as judges are obligated to engage in an official coverup, having signed the judicial oaths, which require them to undertake their role without, *fear or favour, affection or ill-will* (C&TJ, 2018). Emotions are then concealed as neutral processes, denied, and suppressed in order to promote the notion of the ideal judge (Hobbes, 1651), but according to Tata (2007: 425) still operate under the camouflage of judicial discretion and other processes such as the finding of remorse (Weisman, 2009). Judges, society, and justice, pay a price for this. For judges who can be seen as doing 'dirty work' (MacLachlan, 2024; Tigard, 2015; Hughes, 1962) this can mean increased levels of stress which affects their well-being, reputations, and careers. For society, the lack of compassionate approaches to crime can instil yet more anger, hatred, and disgust towards offenders and for justice this focus can lead to a punitive systems which only pay lip service to rehabilitation and restorative justice despite policy frameworks (Parliament UK, 2021; NAO, 2019).

Aims and Questions

The main question this thesis attempts to resolve is, what is the role of emotion in judicial decision-making and what are the grounds for the negative press which surrounds emotions, particularly within the legal environment of the courtroom? This involves trying to understand how emotions contribute to the wider judicial role, as decision-making is not a one-off event but begins earlier than sentencing, with the evaluation of the crime, the offender and the circumstances taking place on first contact with the case. Emotions appear to be the lynchpin upon which harm is assessed, and from which decisions are made. They matter, but how much? The aim of this research is to uncover how emotion matters, how they influence proceedings and to what extent judges play out their judicial responsibilities, in staged performances in order to retain a semblance of neutrality and dispassion. As such, I aspire to creating new theoretical models or at least contribute to those which are currently underdeveloped, with a view to reshaping opinions and attitudes towards emotion in judicial decision-making. As an end result, I aim to find out if the management of emotions, rather than their dismissal, would on balance, benefit and enhance the modern criminal justice system rather than damage it.

Contributions

In undertaking this research, I aim to contribute to a field that is particularly empirically deficient. I answer calls for more research in order to advance an understanding of how emotions impact on judicial decision-making and I pledge to give judges a central role in this by ensuring space for their words and sentiments is made a priority. I therefore facilitate and give expression to a much-needed judicial voice, currently absent from contemporary research. I aspire to offer new models of enquiry which refresh respected methodologies, for example, by combining Goffman's (1959) dramaturgical framework with reflexive and embodied techniques which utilise emotions as tools for research (Etherington, 2004). These

undertakings provide a means to frame this research, assist in justifying the methods and enable a logical and coherent structure, within which, to present the outcomes. By using the language of theatre, as advised by Gilbert (2001: 64) embellished, with reflexive critiques, I am able to control bias and prevent the clouding of perception. Questioning then has more meaning and as Agee (2009) contends, becomes an instrument for clarity, challenge, and evaluation. In terms of new theoretical dimensions, I create an evidential platform for fuller discussions of, for example, fear, as a hidden emotion but one which is potentially the leader in propelling judicial thinking but also a factor in increasing judicial stress. I aim to expose the illusionary nature of judicial performances which accommodate both real and contrived emotions and bring into sharp focus the use of deprecating language which seems incompatible with the professional ideals of good practice (Solan, 1993). The implication is that I will thereby push the boundaries of conventional thinking when it comes to the role of victims and emotions, and in doing so, I suggest that their emotional drives, may destabilise judicial power. In all of this, I suggest that judges are vulnerable to their own and others' emotions and need teams around them who can come to the rescue when needed. The extent of value gained from studying these various dimensions opens up the prospect of new knowledge, new theory, and innovative approaches. A final assessment of the value of my research is also to be found in the outcomes which are achieved, the recommendations made and the extent to which these can be applied to practice.

Current Limitations

This study takes place within a research culture which is sparse in terms of empirical detail, and this provides an exciting opportunity to contribute to new knowledge, to provide new insights into the working lives of judges,' their emotional labours and challenges with regards to managing and controlling their own emotional urges in the making of decisions regarding offenders. Theory is plentiful but lacks direction and is rarely integrated with or aligned to

practical evidence. This is acknowledged as commentators call for more research but importantly more studies grounded in real life, in the courtroom and focussing on judges specifically (Stets, 2015). This is what I set out to do but there are limitations, and one project cannot seal or resolve all the gaps and limitations that there are. There is limited guidance on frameworks for action, and no settled or strong methodological foundations to expand on or improve. With little history of engagement with the judiciary for the purposes of investigating judicial emotion, there are few examples, of successful research strategies, no set pathways from which to secure organisational agreement for judges to participate. Gaining permission and access to judges seems a critical first step.

Nature of the Topic

What emotions actually are, is the subject of extensive theoretical debate and challenge, a matter of perspective but they are also subject to variation in the contexts within which they emerge (Essary, 2017). Emotions are not static entities but are fluid reactions so there is no final product (Walle, 2020: 11) nor is there an ideal judge. Specifically defining emotions beyond normative understandings, does not assist in this project as I discuss in Chapter Three. Additionally, emotion's relationship with decision-making is also subject to the ethereal nature of both topics, both of which can be abstract and intangible, but also strongly felt and experienced (Weisman, 2009). Thus, careful attention is paid to the context in which emotions arise using familiar labels and descriptive characteristics to produce a narrative which can be understood, within law, emotion research and by those who just have an interest. What is more, it is important to acknowledge that this thesis also constitutes a response to the practical challenges of undertaking research in a judicial context (Chapter 4).

Access

In this research, I conceded that I would need evidence first, to make the case that emotions matter for all judges and for justice in order to persuade the official hierarchy. This perceived

limitation proved to be an advantage, as I was able to move forward and conduct my research independently. Access to both judges and magistrates, is still a consideration and a challenge which needs creative planning. So, in a preliminary phase of testing, which lasted three months, I undertook to experience the courtroom environments within which judges operate, to feel the emotional climate, to observe judges in order to settle on a plan which would provide the data, I sought to evaluate. Access to judges is also subject to the restrictions put in place by the judicial gatekeepers. These are usually courtroom staff, Clerks of the Court and Court Managers who control and oversee proceedings in the courtroom and in the public areas. It is important to cultivate these relationships as the power of access does not always reside with the judge. In summary, one of the key points, I make here, is that limitations can push one to create ideas and solutions to overcome obstacles, providing more interest and innovation so in the end, the barriers I anticipated, did not impede the outcomes of this study.

Thesis Structure

In this thesis as a whole there are a total of nine chapters, and each chapter is framed by a quote, an epigraph which either prefaces what is to come, highlights a theme or simply invites consideration of a philosophical position on emotion and its relationship to decision-making in the context of the law, and judges. These are intended to stimulate thinking and draw the reader in to the debates. In addition, each of the empirical chapters, five to seven, starts with an exemplar case, one which is selected as a focus but from which many other cases are analysed. As part of the background coding process each case has a unique reference number. These enabled me to track the records and authenticate the data, and some are linked to pseudonyms selected from theatrical sources, used in the text to protect judicial identity, particularly of those engaged in conversational interviews.

Chapter Two aims to provide background context and positions the judicial role within the organisational structures of the United Kingdom's, macro, Criminal Justice System (CJS). In encompassing both the Magistrate's Court and Crown Courts, judges officiate and make decisions regarding offenders. Judges, which in this thesis includes Magistrates, are presented as operating at the centre of this complex set of government organisations. Each agency is independent, but they are required under law and policy to work in partnership (Garside *et al.*, 2022). It is argued that they are dependent on judges to bring justice before the people in the delivery of the rule of law (Lord Neuberger, 2013: 3). At the core of this chapter is the argument that as a system founded on the principles of retribution and punishment (Deigh, 2016: 61), it is driven by associated emotions, such as, anger, fear, hate and hostility and that this is to the detriment of a more enlightened and compassionate model of justice.

In Chapter Three I critically consider the literature that informs discussions and arguments around the tensions which arise within the judicial role. I consider how debates around emotions and the judiciary have evolved. Theoretical models and the potential design of my project are also probed by exploring existing theory, particularly those grounded in social constructionism and through a review of empirical research outcomes in this area. It is through these considerations that I begin to embrace Goffman's (1959) dramaturgical model as a means to frame and give expression to the narratives which unfold.

In Chapter Four, I outline my qualitative approach to the overall research structure and finalise the research design which then informs the operational plan. As this is an area where there is a lack of empirical investigative activity and a somewhat disjointed approach to theoretical application (Roach Anleu *et al*., 2017: 46), I aim to create a model for the exploration of this problematic which will produce concrete but realistic findings and recommendations. Having explored the options for suitable theoretical models to underpin

my research, I propose a framework for action. In applying Goffman's (1959) dramaturgical model, I aim to bring judicial narratives to life and create a means by which this story can be constructed and told.

Chapter Five as the first of three empirical chapters, starts with an account of observations selected from attendance at least one thousand criminal cases in both Magistrate and Crown Courts. This included observing eighty-five judges and magistrates across fifty-five different court room venues; thirty-five Magistrates' and twenty Crown Court venues, with multiple observations undertaken in thirty-six at various locations across the UK (Appendix J and K). The case of the Travellers, fourteen men in the dock, is highlighted in order to illuminate how the criminal court acts as a place of ritual confrontation, a theatrical stage, where the plot lines include how judge's manage potential dangers and the risks, they take to accomplish a good performance (Fielding, 2006: 7, 26). Victims also have a place in these narratives but not just one where they are protected but one where they may be a risk to judicial power as they ignite emotions. There are glimpses of judges as vulnerable and people who also need to be rescued (Burton, 2013).

Chapter Six follows on from the formal courtroom observations in order to explore judicial emotions using more intimate, personal, and less formal conversational strategies. My analysis reveals the significance of judicial rehearsals in preparation for courtroom appearances, in essence a dress rehearsal which refines the judicial persona through impression management (Flower, 2020; Bergman Blix, 2010: 72, 97). I go on to consider issues of power and control, specifically as related to women judges discussing plots to keep them under the control and instep with a dominant patriarchal system.

Chapter Seven examines the role of language in the context of the judicial scripts, speeches made at sentencing and other less formal didactic and moral communications, directed at offenders but intended for public ears. I discuss how it is that themes of power and control,

judicial reputation and vulnerability are played out through judge's words in these scripts, which are central to the drama of the criminal trial, and which facilitate the on and off-stage productions (Minets, 2021: 288).

Chapter Eight merges the findings of the three previous empirical instalments in order to reflect on how emotions propel and influence judicial decision-making. Judicial emotion when acknowledged is blamed on forms of emotional leakage, something to be fixed and erased. Emotions are more varied than those which are entertained in a punitive system of punishment rather than rehabilitation (Garland, 2002). Here I argue that emotions are inevitable and that as natural human processes (Sidorov, 2013) can be tools to be valued and encouraged for the benefit of the justice system and judges themselves. It is therefore suggested that it is critical for justice that emotions are better understood in order to promote judicial well-being and to protect judicial reputations. At the end of this chapter, the functions that emotions can play in judicial decision-making are categorised and presented in a model designed to provide a unique theoretical model which explains their role.

In chapter nine, I discuss the extent to which the aims and objectives I set, are achieved. To do this I consider gaps in current research and identify how I address these in my study and offer practical guidance to help shape future research. As a project involving concepts which are not always easy to pin down, the topics of emotion and decision-making impose their own limitations, which I work through and attempt to resolve. One of the biggest challenges here lies with the official hierarchy that oversees the implementation of laws and policies and who deny the existence of emotion. This forms part of my recommendation section as judges are best placed to achieve such change from within, armed with new knowledge and courage

of conviction section as judges are best placed to achieve such change from within, armed with new knowledge and courage of conviction.

Conclusion

Having provided a flavour of what is to come above, I conclude this chapter by stating that there is a profound need for a more detailed consideration of how emotions operate and influence judicial decision-making, for better and for worse. What is certain, is that emotions are inevitable human functions which should not be denied, and which may indeed play a role as invaluable tools capable of enabling effective decision-making, and progressive change. To avoid emotions is to risk poor decision-making, unfair justice. Judges and magistrates are not just highly stressed elite professionals, they are human beings, part of the societies and communities in which we live. In the following chapters I hope to provide an empirical and theoretical basis for reaffirming this connection.

Chapter Two

Positioning the Judge in the Criminal Justice System

"Justice, when it's swift, is most effective; it's about ensuring that they see the shock and awe of the criminal justice system. Because we represent society, we want to ensure that society is reflected in our courtrooms, and we want them to experience what they made us experience." Nazir Afsal, 2011: 26

Introduction

This chapter positions the role of the criminal courtroom judge, within the wider macro context of the state and the criminal justice system (CJS). As the empirical data on judicial emotions reflects the period between 2015 and 2020, I discuss the CJS as it operated at this point in time. As I discussed in Chapter One, my research is aimed at judges who operate in the adult courts, Magistrates and Crown Courts with defendants and offenders who are seventeen and upwards. It is acknowledged that in exceptional cases younger people may appear in Crown Courts due to the severity of the crime they are charged with, but these court sessions are generally closed to the public unless special permission is granted (Criminal Justice Hub, 2021) thereby reflecting the rights of children and young people under legislation for example, The Crime and Disorder Act, 1998 and The Youth Justice System, 2019; GOV.UK, 2019). As outlined by Karstedt (2002: 310) official portrayals of the judicial role present judges as the central arbitrators of justice, a stabilising mechanism for the delivery of justice but also as the moral barometer for state policy, communicating social and legal expectations between state, citizen, and society. This sets the backdrop for the evaluation of the judge, in this thesis, as a human being, subject to the emotional pressures of everyday life which may emanate from every direction, political, legal, social, and personal. However, at the core of official dialogue is the directive that law, legal decision-making and

therefore the role delivered by judges on the public stage of the criminal courtroom is one which is emotionless, dispassionate, impartial, and objective (Gross, 2014; Schultz and Shaw, 2013; Bandes, 2009; Little, 2001). This can be aligned to legal and political pledges to maintain the rule of law and is traceable in modern history from Hobbe's (1651; Ch XXVI) Leviathan which in modern translations, argues that judges should be divested of all fear, anger, hatred, love, and compassion, to contemporary legal ambivalence about the role of emotion in law (also see, Abrams and Kerens, 2010). In this chapter I identify the conflicts between the official script of dispassion, which underpins the judicial role and the reality of judicial practice, while also demonstrating the fact that judges are also inevitably emotional beings (Maroney, 2016). With a refreshed interest in courtroom practices, there is what De Haan and Loader (2002: 247) refer to as a return of emotion to the courtroom process. This is the resurgence of what Pratt (2022: 111) calls populist punitiveness in sentencing, using antiquated practices of incarceration, zero tolerance, deterrence and three strikes policies. According to Pratt (2000) there is a growing tendency towards emotive, ostentatious shows where criminals not only get their just desserts, but the public witness it. Public beatings, stoning, even hanging have long since disappeared from British criminal justice, but arguably are replaced by other forms of punishment, which according to Braithwaite and Drahos, (2002: 270) shame, induce guilt and remorse in order to satisfy the public's emotive desires to see justice done. .

Policies and laws to promote open justice are articulated formally through legislation (Sentencing Act, 2020, s 57) and critiqued informally by the media and as suggested by Moran, (2014: 144). This fuels the direction of responses to punitive, emotionally laden punishment, where the judge is under close public scrutiny. The myth of judicial dispassion has gained some limited evidentiary ground (Maroney, 2011: 269) questioning why judges are being characterised as non-emotional, orchestrators of the law who only deal in sterile legal facts. In this thesis, I examine the arguments upon which the above claims are based,

taking into account the wider criminal justice system which operates in conjunction with the criminal courtrooms and their judges, but as a distinctly independent arm of the CJS (Garside *et al.*, 2022). I also examine the evidence for competing arguments which claim that the criminal courtrooms are emotional rather than neutral spaces (Mulcahy, 2007: 384), although I recognise neither position is well supported by extant empirical data.

This thesis seeks to critically understand what role emotions might play in the courtroom and how the CJS might learn from this. In order to critically understand the role emotion plays in judicial decision-making, one must scrutinise the immediate domain of the judge/magistrate, the criminal court rooms and how the judge works within this structure to secure the ambitions of their role (Schuster *et al*., 2010: 75; Mulcahy, 2007). But the criminal courts and its judges do not operate in total isolation from the whole of the criminal justice system. They must work in partnership to varying degrees with the other agencies which primarily make up the system, the Police, Crown Prosecution Service, (CPS), Prisons, and Probation. So before turning to the criminal courts I will outline how the macro system of criminal justice operates and how it works in partnership. As some areas of the system, such as prisons have a direct impact on the daily work of judges, there will be a more in-depth analysis of this area and their interrelationships with the criminal courts and judges.

The Criminal Justice System Evolves

The origins of the official judicial script are embedded within the constitutional traditions of Britain and the United Kingdom which therefore requires some consideration. The judiciary (Judiciary Fact sheet, 2020) is one of the three branches of the British state alongside the executive, and the legislature. Each branch is independent of the other and this is known as the separation of powers, which is designed to guarantee the independence and impartiality of justice. This separation establishes a system of mutual checks and balances designed to prevent abuses of power supporting the maintenance of a free society (OHCFHR, 2003,

2012). As the United Kingdom does not have a written constitution reference to these fundamental principles are found embedded within statute and in common law which has developed over centuries of legal decision-making, providing precedent to uphold the rule of law. All operational branches of the criminal justice system are obliged to adhere to the rule of law in order to prevent abuses of power, to encourage fairness, accountability, and consistency in the delivery of services (Sitar, 2021). The courts have a higher duty to monitor these principles, to ensure justice is done as they adjudicate trials and make sentencing decisions (James *et al*., 2022: 1-4). It is the judge and sitting magistrates who are responsible for ensuring that the trial process is conducted with fairness, impartiality, and neutrality in judgements, guided by, for example, the Human Rights Act 1998 and the Equality Act 2010. The judge also has oversight of the arrest and charging processes when defendants reach court and these must comply with the law and where a judge is aware that rules have been breached, they should dismiss the case on technical grounds (CPS, 2018;2023; Connelly *v* DPP [1964]; DPP *v* Humphrys [1977]).

The above places considerable power in the hands of the judiciary who can take an individual's liberty away but who also have the power to challenge decisions made by the other agencies, particularly the police and the CPS (Ventham, 2022). According to Rawls (2005) law becomes unjust when judges fail to apply the rules correctly, and also when subtle prejudices, biases and emotions counter the judicial oath of impartiality (Rawls, 2005: 235). But the view that emotion corrupts the process is not accepted by all (e.g. Moorhead and Cowan, 2007[b]) and some advocate that emotions play an important role in judicial decision-making (Bandes, 2009: 139) but also in the reasoning of all people involved in making decisions as part of the CJS (van Gelder, 2016; Damasio, 1994). It is argued that in order to avoid the erosion of public confidence and trust in the protection of rights and freedoms, the justice system must be seen as impartial, otherwise, there is a risk of undermining the rule of law and creating fears that civil disobedience and unrest will follow (Bach Commission,

2016: 10, 12). Judges are therefore required to be impartial, neutral, and dispassionate when adhering to the rule of law, but this creates tensions and conflicts for judges who are required to put their emotions to one side. There has been no official research to assess if or how judges manage to do this, but inconsistencies have been noted by criminologists in sentencing practice. For example, Bagaric, (2000) reflects on the views of Tonry (1995) and Ashworth (2015), that disparity in sentencing is caused by erratic emotional judges, saying the 'idiosyncratic intuitions of sentencers' (Bagaric, 2000: para, 1), sometimes exposes more about the judges than the offenders. According to Roberts (2011) suspicions of emotional involvement persist and have become part of the criminal justice system's mantra, repeated so often that they have contributed to major sentencing reforms (Sentencing Act, 2010, 2020) aimed at restricting judicial discretion and by implication repressing judicial emotions. Yet despite this, as Posner (1999: 317) states judges paradoxically need to rely on emotions to make legal evaluations.

Impartiality is required by all components of the CJS, not just judges but according to Kurth (2020: 101) it is not clear how emotions, such as disgust can be fully restrained particularly where emotive situations ignite certain emotions, such as disgust, anger, and guilt. There are questions as to whether impartiality and other related human traits such as neutrality, require the suppression of emotion (Maroney, 2015) or simply necessitate the adherence to rules regardless of background feelings (Levenson, 2007: 42). Alternatively, if one takes the actor approach then decision-makers may perform a semblance of impartiality on the surface, whilst retaining other feelings at a deeper level. Without an understanding of these issues criminal justice personnel, including judges, may be left unsupported to manage their emotions and be in danger of losing control or creating abuses of power. The competent judicial actor, however, will be able disguise inappropriate emotions which are not conducive with their particular public role, thus demonstrating a commitment to the rule of law (Goffman 1959: 218) but potentially interfering with decision-making, as emotions still

bubble under the surface and may seep out (Collins, 2004). The concern as discussed by Maroney (2013: 105) is that through the system's attachment to impartiality and declarations of dispassion, judges may become emotionally blind to human suffering, human needs and frailties. This is problematic for justice and as claimed by Mindus (2021: 96) can make for irrational approaches to emotion and this is potentially dangerous decision-making (Maroney, 2011).

Punishment by imprisonment is a central tenant of the CJS, the ultimate form of restitution for serious crimes committed (Gross, 2012). There is evidence that policy makers respond to what academe refers to as populist punitiveness, responses to crime which are driven by public mood and by the desire of politicians to be seen as doing a public good, as punishment appeases and promotes a sense of public solidarity (Carvalho, 2018: 217; Pratt, 2008: 364; Bottoms, 1995). Judges make their decisions within the context of the emotional climate and the prevailing attitudes towards crime, whether these are driven by political, cultural or societal concerns (Canton, 2015: 56). But while still having regard for the law, judicial emotions can drive the interpretation and use of legal statue and case law. Mańko (2021: 175) makes the case that judicial decisions are both juridical and political and the law does not apply itself, it is applied by human beings with emotional strengths and weakness. With a system which is constantly being reformed and changes which do not reflect progress but a decline in options open to judges when sentencing (Garside *et al*., 2020: 4; Halliday, 2021), judges are steered to being tough on crime and tough emotions are required to deliver such policies. Within this financially austere environment, rehabilitation loses its place and with that, judges also lose faith and confidence in community solutions which are underfunded (Sharrock, 2019: 38) and have increased risks of failure (Bullock, 2020: 121). But just as judges bow to criminal justice policies created by Parliament and the Executive, they can be catalysts for policy change at ground level, when impassioned to do so using common law and

precedence (Rigoni, 2014) but according to Lord Neuberger, 2013: 3) this is also curtailed when Parliament changes the law.

CJS: Structure and Operations

Judges and magistrates are located in a system which is more than an ideological concept, it is a complex arrangement of government departments, agencies and services which operate to manage and address crime and responses to crime (Ryan, 2022). It is also a system established and operated by people, where judges are not totally isolated from the internal agreements, issues and politics which emerge when people associate and interact (Blumer, 1986). As such, understanding the wider environment and inter-agency relationships within which judges operate, is critical in evaluating how impartiality and neutrality may work in practice.

While the courts are independent in terms of their decision-making, they are also dependent on the other criminal justice entities to provide effective support. At the helm, the Ministry of Justice oversees the Courts and Tribunal service (HMCTS), including victim and witness services, most of which are contracted out or provided by voluntary organisations (Ryan, 2022; Joyce, 2017: 139-165). It is also responsible for prisons, probation, community, and rehabilitation services, previously NOMS, the National Offenders Management Services (NOMS), renamed as HM Prison and Probation Service (Garside *et al.*, 2022). The Attorney General's office as the legal advisor to the Crown is responsible for prosecuting and overseeing the Crown Prosecution Service (CPS) (GOV.UK, 2022). The complexity of these monitoring arrangements at a national governmental level and at local levels can lead to a criminal justice system which is not always seen as effective, efficient, or fair with claims that judges are racially biased in their decision-making (Lammy Review, 2017: 69). The Bar Council (2022) found that access to justice was impeded by court closures and in a drive for funding efficiencies. Lammy (2017: 26) suggests that judges may encourage guilty pleas at the first

opportunity to relieve these additional pressures. Lammy (2017: 69) points out that practices across the whole of the criminal justice system produced evidence that overt discrimination and bias was a feature affecting BAME communities with race slipping down the list of priorities. What this and other reports suggest is that the CJS is constantly reforming, and under pressure to do so (MoJ, Sept 2020; Whitehead, 2018: iii; Baren *et al*., 2015) and it is likely that this will lead to poor practice, occupational stress, and emotional strain within and between each agency. This is the backdrop against which all judges make their decisions (MA, 2018).

Justifying Decisions

Even though it was observed that judges often made inconsistent decisions, the issue of emotional reaction has never been assessed as relevant (Roberts, 2012). There is little doubt that judges used their powers of judicial discretion to ensure a harsh and excessive punitive response was made during the riots, but they did not expand on why enhanced tariffs were justifiable (Pina-Sánchez, 2017; Lightowler and Quirk, 2014: 77). This lack of explanation is important in that this procedure is seen as a control mechanism to excessive judicial discretion (Fielding, 2011: 113). The Sentencing Council who is responsible for monitoring how judges operate within the guidelines has not commented or published any findings on why judges departed from their guidelines (Lightowlers and Quirk, 2014: 78). A systematic public review of how each area of the CJS responded to the riots has never taken place and the role of the judiciary remains unexplored (Lightowlers and Quirk, 2014: 78). Understanding how judicial discretion functions and comes about in sentencing is pivotal to my thesis question, as there are those who consider that some judges may use their emotions to make moral judgements under the umbrella of often unexplained discretionary decision-making approaches (Tata, 2007). This will be expanded upon in more detail when reviewing the role of the judge later in the discussion.

The Criminal Courts

At the centre of the CJS system are the criminal courts, Magistrate and Crown Courts where the judiciary are responsible for trying and punishing those found guilty of a criminal offence (Criminal Justice and Courts Act 2015; Coroners & Justice Act 2009). The judicial decisions that are made shape the route the offender will take, whether it is custody, a community tariff or/and a fine or full discharge. With most offenders being dealt with in the Magistrates Courts, there is as reported by Mont Du *et al*., (2017: 43) a lack of confidence in the effectiveness of community services. This has led to an increased use of prison as an option, with even sentences of a short length being introduced rather than community penalties (Brader, 2020). With this, prison overcrowding has become acute (Sturge, 2024; MoJ, 2020; MacDonald, 2018) leading to claims of penal excess (Annison, 2020). Judges are acutely aware that placing at-risk offenders in the community has ramifications for policing and probation, with services described again, as 'being at crisis point,' a term which is repeatedly used to describe the system (Cherry *et* al., UK Parliament, 2022; PSA, 2018). There are also consequences for judges if they are perceived as being soft on crime. This may include challenges to their judgments through appeals and potentially through the judicial conduct processes, which have the potential for reputational damage (C&TJ, 2023; Criminal Cases Review, 2021; RJC, 2015). Claims that the judiciary are too lenient emerge from various directions: governmental, political, legal, and public domains with the media persistent in stimulating such debates (Barry, 2021: 581). But despite the ability to challenge potential leniency through the Unduly Lenient Sentencing Board (CPS, 2021), the rhetoric that judges are soft on crime continues (Canton, 2015: 56; Cuthbertson, 2017: 1). This has been a feature of judicial criticism for years, emerging from the English media (Schultz, 2009) but also from political quarters (Skinns, 2022; Shetreet *et al*., 2013: 150). For example, in 1996, Michael Howard, Conservative Home Secretary along with Brian Mawhinney, urged the public to write

to the judiciary to complain about lenient sentences (Lester, 1996; Shetreet *et al*., 2013: 389). In 2007 the House of Lords Select Committee, took evidence from a group of journalists who reported that judges are perceived by the public as, "too left wing, too pro-human rights and too soft," (HLSC, 2007, Q 95, Q142). This is despite an annual assessment of unduly low sentencing appeals, showing that judges mainly get sentencing right, at least when compared to the sentencing guidelines and that the proportion of incorrect sentencing appears low (AGO, 2021, 2023). This information therefore weakens one of the arguments that judges are soft on crime and questions the role of compassionate type emotions in judicial decision-making. The suggestion here is twofold; one, that judges merely impose tariffs available to them, through the sentencing council's guidelines (Coroners & Justice Act 2009) or two, it is only the variety of punitive emotions which are permitted in a just deserts policy framework. This may create tensions for those judges who want to promote effective rehabilitation and restorative justice measures but are unable to do so, stimulating a range of emotions such as a sense of guilt in that the interests of all parties cannot be met. The 'dirty work' involved in sentencing is not then balanced with more positive outcomes for offenders nor do victims always achieve satisfaction leading to potential stigmatisation of the judicial role (Ashforth *et al*, 1999).

There are however other factors for judges to consider as in the context of austerity, financial pressures and concerns from staff unions, judges are not emotionally immune or isolated from the knowledge that their decisions could make bad service situations worse, particularly with the pressures on prisons (Howard League, 2017). Judges have some discretion in sentencing, but they should only use this after weighing up a number of responsibilities to include: the risk of reoffending, the potential for rehabilitation, the duty to consider public funds and reparations for the victim (Sentencing Act 2020, s59; s125 (1) (b) Coroners & Justice Act, 2009). These considerations, according to Roach Anleu *et al.,* (2017: 55) have a significant emotional impact on judges, particularly Crown Court judges

who have higher tariffs available to them than magistrates. Sentencing is an undeniable human process, and punishment is inherently emotional (Deigh, 2016: 56). There is also the potential for errors in judgements or unpredictable consequences of both custody and community penalties. Some judges have written openly about the moral and emotional tensions involved in sending offenders to prisons where they could be at risk of harm. To quote Justice of the Peace, Magistrate, Graham Hall (2019: 38-39), "First timers risk a severe beating or even being killed. How can we overlook this risk? Staff and prisoners may suffer violence, intimidation and even risk death…..but we do send them to prisons with such risks." Judges therefore, conceptually and practically, may have to do 'wrong' in order to do 'right' making them susceptible to the problem of 'dirty hands' (Tigard, 2015) as they engage in a form of 'dirty work' (Hughes, 1962). So, when confronted with these difficult moral issues, what then is the role of the judge and what impacts may such decisions have on judicial wellbeing?

The Judicial Role

As I outlined in the introduction there is a distinct judicial hierarchy between judges who operate within the various layers of the criminal court system, from the Supreme Court, Courts of Appeal, Crown Court to Magistrates Courts (see Appendix I) where most, except for the District judge, are voluntary and unpaid members of the judiciary. The Lord Chief Justice is the most senior judge, a Law Lord and alongside other senior professionals will be the major interface with Parliament (Berlins *et al*.,2000: 62). This thesis does not always make distinctions between the judicial roles or status unless it is necessary to clarify a point, to assign a quotation or to outline responsibilities which are separate from the routine court duties of judges sitting in Magistrates or Crown Courts. The term judge is generally applied to both paid judges and magistrates as the research is focused on the role of emotions and judicial decision-making within the criminal trial process. However in the interests of

accuracy it is expedient to identify the different tiers of judges and magistrates, and to establish where the focus of this study sits.

Magistrates Courts

The Magistrate's Bench covers seven regions with an estimated 156 Magistrates Courts in England and Wales, a reduction of 50% since 2009, handling 1.3 million cases annually (GOV.UK, 2023). Ninety-five percent of all criminal cases are resolved in Magistrate Courts (GOV.UK 2022), lower courts where the familiar three-person panel of lay (unpaid) magistrates sit. The official title of a magistrate is Justice of the Peace. Magistrates are ordinary members of the public who are encouraged to take office, following a period of training. Magistrates are under the guidance of legal advisors who sit in court sessions. Fee paid District Judges also sit in Magistrates Courts operating on an individual basis but have more legal experience and training and are appointed by the Judicial Appointments Commission. They must have a five year right of audience which is a statutory qualification and are usually solicitor/advocates and therefore experienced in criminal courtroom proceedings. Essentially what separates the lower court (Magistrates) from the higher (Crown Court) is their sentencing capability. During the period of this research, sentencing in Magistrates' Courts was limited to imposing a maximum of 6 months imprisonment. However this has recently been changed to 12 months (GOV.UK, 2024). The training, experience and qualification requirements of magistrates, therefore differ significantly from fee paid judges in Crown Courts and higher courts.

Crown Courts

Whilst there are different tiers of judges who operate in the higher courts most are referred to as puisne Judges or Justices (surname added). It is not always possible to distinguish the different types of judges but within Crown Courts two types of judges dominate, Circuit

judges and judges known as Recorders. There are 600 judges known as circuit judges assigned to the six geographical circuits in England and Wales. They are lawyers who hold a right of audience, with at least seven years' experience, or the experience of being a district judge for three years (C&TJ, 2023). Those who are senior take on more responsibility and more difficult cases. Each circuit has two presiding judges appointed by the Lord Chancellor to monitor operational issues. Recorders are essentially judges in training and have less onerous cases as they earn their status and experience over a period of up to five years. They are not necessarily distinguished differently in court, but written court documents may reflect their lower-level status.

A point to note and a reasonable assumptions to make is that judicial ability to cope with emotions is linked to experience, training, and the specific role and therefore arguably magistrates are more vulnerable (Flower, 2020: 167,169). However, assumptions regarding judicial background, although potentially relevant, must be subject to scrutiny (C&TJ, Biography, 2021).

Court of Appeal and the Supreme Court

Court of Appeal judges are senior judges with significant service and are appointed, as all judges are, by the Monarch following recommendations by a panel from the Judicial Appointments Commission. Titles can vary according to seniority, Lord Chief Justice, Lord/Lady Justice, LJ for short. The Supreme Court, the highest court in the land operates with twelve key players who usually have titles of Lord and Lady but only hears cases which are of public or constitutional importance. So it is unlikely that specific data will be generated from these sources, but these courts may have an influence on policy considerations. An outline of how sampling of the various judicial roles and courtroom locations is explained in the methods Chapter, Four.

Regardless of rank, status or court type every judge is part of the judicial machinery, pledging alliance to the Sovereign to uphold the law by swearing to take two oaths: one of allegiance to the Crown and the second, the oath of the judicial office. Collectively both are referred to as the Judicial Oath (Courts and Tribunals Judiciary, 2020). The oaths set the official conditions and conduct rules under which all judges must serve, continuing the traditions established by Thomas Hobbes (1651). This is the concept of the ideal judge, who is apolitical and who does not make independent moral judgements, and whom is thus theoretically free of emotional drivers (Branstetter, 2017: 778). Legal jurisprudence constructs the role of the judge as one where he/she is part of a legal process which aims to underpin the higher ideals and obligations of the justice system and goals of the state in responses to crime (Sedley, 2018: 82-89; Shetreet *et al*., 2013). The judge in this context is seen as the conduit through which law operates in the application of established legal rules and principles leading ultimately to punishment for those who have broken the law (Roach Anleu and Brewer, 2017: 47). The central role of the judge is therefore to impartially impose sentences based on a tariff determined as part of the sentencing guidelines (Sentencing Guidelines Council, 2014, 2008). Of course, this assumes that the judge is always accompanied by a decision-making jury, which they are not, and as in the Magistrates courts, the district judge/magistrates decides if the offender is guilty or not. The judicial role can then involve judges in determining the facts of the case, interpreting the law, applying the law, and deciding the outcome. Where there is a jury, the judge will advise them on points of law, ensuring they decide cases according to the law in a fair and impartial manner (Judiciary of England and Wales, 2020). Strengthened sentencing guidelines introduced by the Coroners & Justice Act 2009, aimed to provide more consistency in the application of sentencing rules and reinforce neutrality in judicial decision making (Roberts, 2011). With accusations that judges do not always act in an unbiased manner based on deep rooted perceptions (Roberts, 2012: 282-283) and are thus perceived as being in danger of exceeding their discretionary powers, the curtailment

of emotional reactions is seen as vital to upholding the rule of law (Knaul, 2014). The introduction of the Sentencing Act 2020, Part 4, s 57 outlines an updated code regarding judicial discretion and this may well be the point in decision-making where judges can become emotionally active (Wistrich *et al*., 2015: 962).

Judicial Discretion

Despite concerns about the extent and type of judicial discretion utilised during the 2011 riots to achieve harsher sentences and an initial attempt to control the span of judicial power, judges still maintain the ability to exercise their discretion in sentencing (Sentencing Act, 2020). There are good reasons for this, as discretion when fair and balanced can ensure that each unique case is considered on its merits, and this helps to avoid an overly mechanistic approach to sentencing (Tata, 2020: 15). The opposition presents a different case, seeing judicial discretion when applied individually as potentially irrational, emotional, and unequal (Tata, 2020: 14-15). This view clearly connects judicial discretion with emotions. There are two main types of judicial discretion, one which concerns procedural regularity as in the sentencing guidelines. Although here there are wide ranges of tariffs, and this leave some space for controlled decision-making options. The second is substantive, and this is where judges have freedom to use their own reasoning, to make decisions unhindered, outside the range if needed and it is this which represents their judicial independence (Gill *et al*., 2018). Using discretion still carries with it judicial responsibility for 'just consistency and just outcomes' (Kritzer, 2007: 333) essential to judge-craft but Moorhead and Cowan (2007) suggest judicial motives are also tinged with personal ambitions and the drive for status. The fact that some judges cannot or will not explain their decision-making invokes suspicions of self-serving intentions and potentially emotional involvement (Lowenstein, 2016; Fielding, 2011: 112-113). Such a distrust of discretion, according to Moorhead and Cowan (2007: 316), is seen as 'corrupting the ideal', a purist attention to the legal rules. Of course, that is if rules

exist and where they do not or where the rules are vague judges can interpret them as they choose. It does not help the case for judicial discretion that some judges are also resistant, even hostile to being monitored resenting outside interference (Gill *et al*., 2018; Fielding, 2011: 114). This raises concerns that judges may use their powers to pursue their own agendas, and this is made possible by using their emotions strategically in the form of moral judgements (Fielding, 2011: 101). The fact that judicial discretion is a process, individual to each judge and has obscure qualities can potentially provide a cover under which personal emotions may circulate freely but this has not been adequately researched.

What the judge does and says has a bearing on justice as a whole, as senior judges can influence the law by making precedent, by conducting a judicial review or responding to pressures in other branches of the CJS (Public Law Project, 2018; Hunter, 2015[b]: 8). This research critiques the judge, not in isolation from the world around them, but recognises the tensions in their responsibilities and their allegiance to both the real world and the ideological one which governs their role. This tension is magnified at points of conflict in the trial where the semblance of neutrality is challenged by the reality that justice needs emotion to flourish (Douglas *et al*., 2010: 146) and that decision-making is essentially a human and emotional activity (Maroney, 2011) where judges deal with the emotions of others, at the same time as attempting to manage their own. These features can collide at sentencing, which is the most likely place for judges to show their human face (Mackenzie, 2005: 55). As such judicial stress and wellbeing is a concern as judges are exposed to the worst of human nature (Judicial Office, 2021; Obineche, 2019). Appellant judge Lord Burnett of Maldon captures these issues when quoted as saying, “None of us are invulnerable to the effects of the materials that we see and hear in the course of our professional lives… there are some pretty shocking materials that comes across our desks and which we have to take into account to be able to determine the cases before us,” (Law Society Gazette, 2018, Oct 19th).

As asserted by the Centre for Youth Justice (CYCL, 2017: 14) retributive policies do not foster positive ideals or emotions, even though some judges wish to recommend rehabilitative measures in prison and in the community as these give hope to society, to offenders but also to judges for a better future.

A System Based on Punitive Emotions

Modern criminal justice and the corresponding judicial script delivered at sentencing, have their philosophical and historical roots in a punitive justice (Deigh, 2016: 60; Dockley and Loader, 2013: 3) arguably driven by penal populism (Pratt *et al.*, 2022). King (2008: 191) concludes that those who promote retributive justice, have deeply held assumptions about crime and punishment and this contributes to how criminal justice is organised. The concept of punishment and how it is felt and perceived is arbitrary (Van Ginneken and Hayes, 2017: 75) but not all sanctions within the law are punitive. But those which are, have distinctive features and are more than simply a deterrence from breaking the law. According to Deigh (2016: 56) a punitive sentence involves forms of state retaliation for crimes done, in other words retribution, a just desert response, based on the crime committed but also, arguably, on the emotions generated and embedded within punishments (Starkweather, 1992; Mackie, 1982: 1-3). It is for judges to implement state created punishments with the most severe being incarceration, whether they agree with them or not, and therefore judicial emotions could be seen as a secondary issue. Punishment is not explicitly defined within English law and therefore the extent to which judges are being punitive or even vindictive in their sentencing is opaque, a matter of perceptions and feelings, for all those involved. Carvalho (2020: 265) defines punitiveness as a ‘phenomenological complex', with a mix of intersecting experiences and practices involving the personal, symbolic, political, and structural. According to Carvalho (2020: 265) punitiveness goes beyond the boundaries of standard understandings of crime and responses, to encompass wider societal views, which

sees punitiveness as a consequence of society's vulnerability and sense of insecurity. The CJS is seen as inherently coercive by criminal justice theorists (Weisman, 2009: 51) and in this sense punitiveness is an emotional construct, one which exists culturally but one which according to Guiney, (2022: 1159) is also entwined with a political drive to punish.

Contemporary models of criminal justice evolved around theories of punishment, retribution, just deserts and deterrence (Baren *et al*., 2015; Tonry, 2011,1995) albeit it with interludes where rehabilitation and community approaches showed some strength. If certain acts of punishment are retributive, they are then as much about social and emotional relationships as they are about the law and involve responses which are likely to cause distress, pain, emotional payback and even pleasure in the act of punishment (Carvalho, *et al*., 2018; 217; Hörnqvist: 173). King (2008: 205) refers to this as a misplaced civic gesture, misplaced because the public are likely to be less punitive than judges believe. Research following the London riots of 2011, demonstrated that the public were open to alternatives to custody, a divergence from the seemingly punitive response of the courts (HC Justice Committee, 2021; Roberts, *et al*., 2013[a]). Despite this and campaigns for rehabilitation of offenders, government policy reverts back towards punitive punishment as being the main approach to crime (HCJC, 2023; Burnett, LCJ, 2020).

Whatever the theoretical explanation for why punish and how much, and there are many, the criminal justice system in the UK has the highest incarceration rates of any country in western Europe (Newburn, 2017, 2007). The argument raised here is that being punitive also means that punishments are, perhaps inevitably, driven by punitive emotions which are culturally bound (Gorden, 1990; Kemper, 1987). But a counter to this may involve a more logical and less emotional narrative. For example, this is seen in the rational actor model (Baren *et al*., 2014: 48; Tonry, 1995) where crime is seen as a rational choice and sentencing a logical response (Clarke and Cornish, 1985). Nevertheless, punishments are inherently

punitive, whether applied rationally according to a formula or not and in England and Wales the outcome of rational decision-making tends to include imprisonment. Contemporary criminology asserts that rational decision-making in any case is a combination of the cognitive and the emotional (Carvalho, 2017: 229). This adopts a position that suggests that punitive emotions underpin and drive the CJS full circle, but this is not the full story, as at the same time judges are accused of being punitive, they are also accused of being too lenient or soft on crime (Burnett, 2021).

As sending offenders to prison, is the ultimate punishment, the relationship between the courts and the prison service is of particular significance to my thesis. Judges are dependent on the availability of sufficient and satisfactory prison resources when they deliver a custodial sentence so should have regard for prisoner's human rights, safety, and compatibility (Padfield, 2017: 69; MoJ, 2016). The evidence that prisons are not places for reform and rehabilitation is compelling (Bullock *et al*., 2020: 123; POA, 2020 2019). That prisons may be unsafe destinations for offenders is a factor which judges cannot overlook (Hall, 2019: 38-39). Where there are options other than custody, judges are aware that the risks can be high and that the consequences of their decisions may lead to further serious crimes being committed. This being said, it is worth noting that imprisonment is associated with the highest rates of reoffending and reconviction particularly for those serving twelve-month or less sentences at 50% in comparison to other sentencing outcomes (MoJ, 2023).

However, judicial decisions which see offenders avoid prison invite challenges particularly from victims with claims that judges are too lenient or soft on crime. From a victim's point of view the judge may not be impartial and such reflections refute judicial neutrality, as other extra-legal factors are considered in sentencing (Victim's Commissioner, 2021). With the direction of justice policies and law steering a course towards tougher strengthening tariffs and appeasing the questionable public desire for tougher measures, judges are then placed

in the contradictory position of agreeing lower sentences based on the finding of remorse and not necessarily on the basis of any lenient tendencies.

Remorse

Taking remorse into account is referred to within the sentencing guidelines as personal mitigation factors or offender relevant, as opposed to crime relevant, factors and gives the offender a chance to argue for a reduced sentence on the basis of their remorse (Sentencing Council, 2019[a]; Maslen and Roberts, 2013[b]). Judges must consider the degree to which offenders are genuinely remorseful, if this is possible, and this involves the judge in more than a practical evaluation of offender claims but also in an emotional assessment. Finding remorse, according to Rossmanith (2015: 171) cannot take place without judges engaging in some kind of experiential exchange, at an embodied, even emotional level. So, in order to determine offender remorse, judges may need to feel it, and this provides direct evidence if exposed, that emotions play a role in judicial decision-making (Weisman, 200958). This is a contradiction to the claims that judges are dispassionate, emotion free and neutral, as they can find themselves in the position of being persuaded through emotional engagement with the offender. The finding of remorse is not a science, but it is subject to the ability of the offender in penetrating the emotional shield of each judge involved, as saying sorry is not enough (Zhong *et al*., 2014: 43). If remorse needs to be felt to be believed this endeavour, then requires judges to invest in an emotional process rather than assign a mechanistic checklist to find the level of offender remorse. In law, judges are not required to show compassion or sympathy, but they are required, in sentencing, to engage in a process to find the level of offender remorse (Sentencing Council Guidelines, 2019[b]). There is now significant evidence that offenders who do not demonstrate remorse are more likely to receive harsher or maximum sentences (Maslen and Roberts, 2013: 122). In part this is due to the inclusion of remorse as a mitigating factor (Crowther *et al*., 2016; Rossmanith, 2015; Roberts, 2011)

but also an established view that a lack of remorse deserves more punishment and less mercy (Zhong *et al*., 2014: 42).

Although the sentencing guidelines clearly instruct judges that a lack of remorse is not to be regarded as an aggravating factor it seems that in practice it can be (Sentencing Council, M3, 2019[a]). It is claimed (Maslen, 2017) that remorse is so embedded into western culture that it operates at an unconscious level even where judges have voiced their concerns about how to reliably assess this. A small study asking twenty-three judges to discuss the lack of remorse, revealed that some judges believed that the remorseless offender was more likely to commit further offences, was more dangerous and less likely to benefit from rehabilitation, warranting harsher punishment (Zhong *et al*.,2014). But judges are aware that assessing remorse is a subjective measurement, a "blend of emotions, belief, and reason" and therefore unreliable (Zhong, 2014: 41). Judges are therefore open to criticism if on the finding of remorse, the sentence is reduced, and the public may see this as judges being too lenient. But this is also a reflection of judicial power, a form of power which enables the judge to reward offender compliance and good behaviour (Thagard, 2016).

Victims, the CJS and Judges

The UK government has over a number of years positioned the victim as being at the centre of the criminal justice system, thus every branch should have effective policies and procedures to engage with victims of crime (GOV.UK, 2023; Victim Support, 2021; MoJ, 2020; HMG, 2018). According to Karstedt, Loader and Strange (2011: 3) and restated by Knight (2014: 20) new victim centred polices have contributed to a sense of heightened emotions in the courtroom leading to increased punitive attitudes in public discourse about crime. The victim's role in the trial process is limited unless they are witnesses to the crime under investigation. Victims however may have no or limited knowledge of what happened to them, even though they may have to cope with its aftermath. In British common law, which

is an adversarial system, the crime is viewed as being against the state not the victim and thus the role of the victim at trial is peripheral (Davies *et al*.,2020). Victim participation beyond giving testimony arises during the sentencing phrase where victims are permitted to present a prepared victim personal statement (VPS). This process contributes to successive governmental pledges to help repair harm done to victims and communities, giving victims a voice but not intended to give them an official role (MoJ, Victims Code, 2020; Edwards, 2004: 976). Not all judges permit the victim to read their statement in court and not all victims assert a right to do so, but the contents of the statement, aided by either a personal reading or a recording may make for an uncomfortable inclusion and have an influence on the judge but also on the sentence (Bandes, 1996: 381). Judicial contact with the victim either by personal attendance at court, or by the submission of evidence through the calling of witnesses or through the VPS, raises the potential for emotional involvement according to Blackman (2008: 8) pointing to contagion or some form of contamination in cognitive perception (Bandes, 2021). According to Windsor and Roberts (2020: 5) the VPS gives the victim an opportunity to "attempt to influence the judge in order to secure a higher sentence." They refer to this as an instrumental model of victim participation, but the VPS also encompasses an expressive approach which is more about the need for the victim to voice what has happened to them (Manikis, 2017: 66). Research to determine the potential influences and the emotional impacts, of victim communications on judges, such as the VPS is limited (Windsor and Roberts, 2020: 10). With sentencing tariffs within some categories of offence, having a wide range (Roberts, 2011), there is the potential for variable and biased sentencing leading to dissatisfaction.

According to Doak and Taylor (2012: 26) victim policies have contributed to a sense of heightened emotions in the courtroom leading to claims of increased punitive responses and attitudes in public discourse about crime. But there are two ends of a spectrum involved in assessing the interaction between judge and victim; one which delivers a punitive justice,

and one which requires the victim to demonstrate emotional vulnerability to determine harm done. One such case involved a woman who suffered years of physical and psychological abuse with periods of enforced imprisonment by her husband. The judge said that significant harm had not occurred due to the victim's strength of character. The perpetrator received 5 months custody, and the case is now subject to appeal on the grounds that it was too lenient (Teesside MC, 23rd Nov 2018). It would seem there is tentative evidence to endorse Rossmanith's (2015) view that judges need to engage emotionally but not just with the offender in terms of remorse but with the victim to be persuaded of harm done.

A System under Emotional Pressure

Regarded as having once been the best system in the world (LJH, 2018; MoJ, 2013) the CJS was assessed by the House of Commons Committee of Public Accounts as being "close to breaking point" (House of Commons, 2016: 3). As a structural entity it is seen as being in a permanent state of crisis, with reform after reform trying to fix complexities and inefficiencies in delivery, not improved by recent austerity cuts (Robins, 2021, 2018). Although described as a system, which gives the impression of a mechanistic, even technologically based means of achieving a set of justice aims, the CJS is nonetheless a human enterprise. As such its members are subject to the demands and pressures of working in a system which is, by its nature, stressful. There has not been a systems wide review of stress and workplace burnout across the different agencies which deliver criminal justice. But there are some studies which reveal how the staff within each distinct area are struggling emotionally. For example, findings by Stover (2017: 253-259) identified that apart from the physical encounters with prisoners, staff experienced major stresses when required to deliver both punitive approaches and rehabilitative tasks. The CPS has lost a third of its staff since 2010 up to 2018 (FDA, 2019) and in partnership with the Law Society and the Bar Association, the FDA union

have created a manifesto for justice. This calls for a properly resourced CJS because according to Richard Atkins QC and chair of the Bar Council, "the stress and strains of criminal practice have simply become unbearable," (Miller, 2020; FDA 2019: 6).

As identified earlier, judges are not immune to the tensions that come to bear in the courtroom and the rise in stress reported to the Magistrates Association was acknowledged long before Covid 19 (CJJI, 2022; MA, 2018). The demands of following ideological doctrines which require dispassion and impartiality seem at odds with being immersed in the emotional traumas that transpire at court on a daily basis (De Castro *et al*., 2013: 381; Morris, 2015). The judicial role is labelled by the institution of law as being unemotional and unfeeling, suggesting judges are less than human, a comment much disputed by judges themselves (Malcolm, 2009; Solomon, 1995: 31). The basis for this controversy lies within the official doctrine of neutrality and impartiality as discussed at the beginning of this chapter which calls for dispassionate judging but also calls for other professionals within the system to be as emotionally controlled (Maroney, 2011; Posner, 1999; Cardozo, 1921). Although the Judicial college was established to provide training and development to judges and magistrates, the handbook does not include any direct reference to how judges can be dispassionate or what impartiality looks like (Judicial College, 2020). Although a new magistrate support line has been made available, the task of identifying services to support judges is generally a difficult one (MA, 2021). This does not mean that support or counselling services do not exist, but it may indicate that arrangements are made in a more nuanced manner through colleges and line managers. The creation of counselling services throughout the CJS has grown over the years in response to the emotional demands placed on workers (MA, 2018; Law Gazette, 2018; CTJ, 2018:3). For example, a comprehensive guide to support prison and probation staff is now available (HMP&PS, 2020) and the police authorities offer the national Police Care UK service, to current and past serving officers and their families to help with the impacts of the unique challenges of the policing, (PCUK, 2023) but judicial

support seems to be lagging behind. In combination it would appear that the whole of the CJS is under emotional pressures, from insufficient funding, resourcing issues, staffing problems, stagnant and ineffective policies to initiate change, the inability to make rehabilitation work and failure to capitalise on restorative justice schemes (Kelly, 2021). But it is the sheer pressure of working in a system based on punishment which takes its toll.

Conclusion

The above contributions add to a building picture which may see the CJS as being subject to emotional pressures but the extent to which individuals and staff groups are affected by these pressures is not well researched. The introduction of a new survey of judicial wellbeing provides some optimism that this may change but there are no obvious plans to repeat this on a regular basis (Judicial Office, 2022). So, is the CJS which is arguably punitive in nature under emotional pressure? On the face of it there is limited empirical research, but there are an array of reports, audits and personal accounts that would indicate that it is. From the prison and probation systems to policing, a stream of reports and inspections find services under strain and the people within them and subject to them portrayed as emotional casualties (HM Inspectors of Prisons, 2020; Duxbury and Halinski, 2018: 932).

This chapter positions the role of the judge within the wider criminal justice system and identifies the judiciary as having multiple functions. Some of these include attention to partnership working, as without the cooperation of the police and the CPS (2018) courts would not function effectively. Without prisons and probation there would be ‘no solutions’ for judges to respond to crime. Judges also have a broader function which is a stabilising and scrutiny role, holding other parts of the CJS to account under the dictum of rule of law. Judges also need to be held to account through the rule of law with the ideals of impartiality, neutrality, and dispassion as core virtues, seen as a way to manage excesses of power. The judicial review process can according to Hadden (2021) bring questions of accountability into

the public arena, with all criminal justice services subject to examination and where the various parliamentary committees manage issues of concern relating to the CJS.

There are tensions and stresses involved here, with justice ideals coming into conflict with the practicalities of working and being a judge in a system which is seen as punitive and emotional. Judges are required to operate within this system as unemotional representatives of the law, somehow repressing their natural emotions as human beings. Judges are also subject to contrasting charges that they are both soft on crime and overly harsh, delivering justice from a punitive model of tariffs adopted by the sentencing council. The role of victims' in the bigger picture complicates this with an emotional pull-on judges towards doing justice: justice as seen by victims and the public. Rehabilitation efforts through strategic programmes have taken a back seat, often driven by a political culture of tough on crime policies, backed by legislation. What this all tells me is that while judges are central players in the criminal justice system, not enough is known about how they use, control, repress or deny their own emotions and what role emotions may play in their decision-making, in what is such an emotive environment.

Chapter Three

Judicial Emotions: A Literature Review and Theoretical Framework

*"*The problem with this lofty theoretical approach is that it descends from no-where, and consequently it tends to ignore the very human emotional foundations of justice and to neglect those passions in us which make justice both necessary and possible*."*

Solomon, 1995: 31

Introduction

It is claimed that emotions have returned to the criminal courts (De Haan *et al*., 2002: 247; Karstedt, Loader and Strang, 2011: 3), particularly with the rise in victim involvement (Davies and Cook, 2020; Rossetti *et al*., 2017; Jacobson *et al.*, 2015; Schuster and Propen, 2010). As the key decision-maker in the criminal court, judges are as likely as any other human being to be driven, influenced and susceptible to their own emotions particularly at sentencing (Maroney, 2011; Anleu and Mack, 2005; Mackenzie, 2005; Tata, 2002). This does not mean that the sentencing process is a completely emotional process, as calculations are essentially mechanistic, based on formulas for sentencing reductions (Anleu *et al.*, 2017; Roberts and Bradford, 2015). The range available for each crime can, however, be wide thereby leaving scope for judges to be punitive or indeed lenient. And yet, the extent to which emotions guide decision-making is not known and is under-investigated. In the UK with increased media interest in trials, such as the murder of Becky Watts in 2015 and the reporting of the presiding Court of Appeal judge who cried at the trial, this stimulates multiple questions about emotions in decision-making and fairness in justice. Can and should judges resist the urge to use their personal emotions in the decision-making process? Does strategic purpose override personal emotions? Are there any influencing factors which stimulate the judge's emotional reactions? Ultimately the key question is, what role do judicial emotions play in the criminal decision-making process and why does this matter? This literature review will

focus attention on those aspects which are central to answering these questions, shedding light on an area which has been neglected in research but also dismissed by the institution of law which governs judicial roles. Specifically, I will go on to discuss how best to develop a framework for the study of emotions in the courtroom, with a particular emphasis on the benefits of a dramaturgical approach to this end.

In the previous chapter, I discussed the criminal justice system, and the tensions caused by the positionality of the judge. I highlighted the fact that judges are inevitably emotional beings, operating in what is constructed as a non-emotional context, though this is also disputed. In this chapter I will critically consider the literature that informs discussions around this tension, and which underpin my argument that emotions matter, as they are at the very heart of the courtroom experience.

Defining Emotion

A significant amount of scholarly effort has gone into examining the nature of emotions and what they are (Morris, 2014; Turner, 2009; Margolis, 1998; Kemper, 1990). I am however guided by the growing research literature which says it is not essential to theorise on emotions generally, as we can recognise emotions when we encounter them through our social and cultural interactions (Shilling, 2002; Barbalet, 2002: 27-28). However, the question of what emotions actually are and how they play out in social settings remains enticing given the diverse forms emotions can take (Godbold, 2015; Gilbert, 2001). An examination of the literature soon reveals that defining what is meant by emotion is fraught with complications (Izard, 2010). This is potentially a significant barrier to emotion research as there is little consensus even within disciplines. Essary (2017) notes that emotion terminology is ambiguous, driven by disciplinary bias and that emotions are best defined by their context. As such within sociology there has been a move away from the production of fixed definitions as emotions are more “fluid than static, changing and contradictory” (Patulny *et al*., 2017:2).

Emotions also tend to be understood in normative terms in contexts where a shared agreement already exists (Bandes and Blumenthal, 2012; Abrams and Keren, 2010; Weisman, 2016; Lange, 2002). The interpretation of a particular emotion or emotional state is exceedingly difficult but from Durkheim's (1893) stance according to Scheve and Luede (2005: 318), "As long as individuals stay in the cultural or social structural setting they were socialized in, they are on the safe side when it comes to interpreting emotion expressions."

Given the unstable nature of emotion research and the concern that there is no guarantee of accuracy in interpreting other people's emotions or in understanding one's own emotions this may provide a valuable reference point (McKenzie, 2015:75). What is fundamentally important is how emotions function in social life and within the law as part of our social system. Emotion research is not a purely psychological construct and the shifting nature of disciplinary boundaries, may help in developing a more sophisticated understanding of what emotions are all about (Boddice, 2020: 131). Bandes (2009), a major figure in contemporary research on emotions in law, insists that a working definition and framework of emotions would provide an invaluable guide to research. One suggestion made by Canton (2015: 60) is that such a framework could be found within the flexibilities of a social constructionist model where there is a belief that people intuitively know which emotions are being communicated. To this end, the area of social constructionism will also be featured later in the chapter in an attempt to further interrogate how best to develop an effective emotions framework that supports research in the court setting.

Emotions: A Background

The controversial relationship between law, emotion and decision-making is not a new debate. Going back to ancient times, philosophers such as Aristotle considered the virtues of emotion in legal decision-making, as is common today but considered its virtues (Kurth,2020; Huppes-Cluysenaer, 2018: 14; Maroney, 2018; Douglas *et al*., 2010). Nussbaum (2001)

suggests that Aristotle provides a means for emotion to be accepted in law as a thought driven process rather than as a primitive, irrational, and uncontrolled sets of human responses. Bandes (2016[a]: 1) reflects that the legal system has "long been inhospitable terrain for the study of emotion" and that other disciplines are starting to share a consensus that emotions are deeply intertwined with the reasoning process (see also Maroney, 2015). This ideology goes as far as to claim that without emotions, reasoning itself is flawed (LeDoux, 1996). This suggests that judges need to recognise and use emotions effectively within their decision-making in order for them to be truly rational and in order to produce 'just' results (Solomon, 1995). But research in this area is limited and has traditionally been located within disciplines such as philosophy and psychology, without recourse to a more sociological context. A sociology of emotion is starting to emerge from under the influence of these domains and there has certainly been a refreshed interest in emotions and law (Anleu *et al*., 2015; Bergman Blix and Wettergren, 2015; Deflem, 2008; Harris, 2006; Anleu and Mack, 2005; Seidler, 1994). Nonetheless, empirical research on emotions in the courtroom and specifically judicial emotions is still relatively rare in what is an emerging field (Maroney, 2015: 5). My research is therefore designed to add to an increasing sociological understanding of legal decision-making and aims to bring an alternative narrative of judicial emotion to the fore with evidence from the field. Legal decision-making of course requires reason, but I also make the argument, drawing from the literature discussed below, that reason and emotion are intertwined and need to operate together to form rationale judgements. So, if Maroney's (2018: 11) claim is accurate and emotion is indeed a form of judicial wisdom, then the role of emotion in judicial decision-making should not be so controversial, and yet it undoubtedly is. An answer to this fundamental issue must first lie in an examination of law's relationship to society and law as a social fact to which I now turn.

Law as Social Fact

The history of law has been focused on its perception as a construction of social facts. For some this means law is a closed logical system of rules, but it is people who make law's rules and judges who wield serious power in this context (Green, 2012: XVI). In this sense, the notion of emotions or feelings have been noticeably neglected. There is arguably good reason for this: law is the product of a long philosophical and enlightenment tradition that steered its evolution around a series of analytical processes referred to as positivism and the concept that the only legitimate sources of law are to be found in written rules and regulations, therefore not in emotions (Grossi, 2015; Posner, 2008). During the 'age of reason' stretching from the sixteenth to the eighteenth-century enlightenment commentators such as John Locke (Marshall, 2006) and Immanuel Kant (1784) argued against the intrusion of morality and emotions into legal decision-making, citing reason and only reason as the basis for law (Deflem, 2008: 18). Their legacies still underpin core beliefs within western legal systems (Maroney, 2015, 2011; Grossi, 2015; Kerrush, 1991) and this has stimulated and privileged positivist thinking thereafter.

Auguste Comte (1851, 1854, 1856) is regarded as furthering positivism to resolve social problems, proposing that reason and reason alone should act as scientific method, which is neutral, objective, and therefore emotion free (Deflem, 2008: 101). According to Hart (1958[a]) Law's institutions adopted an analytical jurisprudence which evolved from these doctrines. Hart (1958[a]) in particular held that a sociology of law is in fact distinguishable from true law, a system which should be closed to any personal or social considerations and therefore closed to emotions. Hart is clear however, that some forms of social constructionism were positivist, and that the basis of law came from people thinking and acting according to mundane social facts Hart, (1958[b]). This ideology according to Prosser (2014: 179), does not recognise the importance of human agency or creativity generated by human emotions. What emerged

from the above process was a way of thinking about the law that explicitly excludes emotions from the process while, paradoxically, retaining the possibility that emotions might potentially intervene at the point at which human beings interpret the law as a social fact. It is this contradiction that I am seeking to understand in this thesis.

It would be inaccurate to assume that all early thinkers completely disregarded emotions from processes of decision-making, as according to Huppes-Cluysenaer (2018) and Karstedt (2011: 146), philosophers such as Aristotle (384 BCE-322) reflected on emotion. Many other philosophers and commentators particularly Christian thinkers Augustine (354-430), and Aquinas (1225-1274), followed much later by others such as Hume and Hutchinson in the eighteenth century (MacCormick, 2008), recognised the importance of emotions and feelings and developed their theories around the moral sentiments (Solomon, 1995: 37, 203-209). Solomon (1995) views Kant as having a harsh perspective on emotions but others such as Adam Smith (1880) find some middle ground. Although Smith is heavily criticised by Solomon (1995: 205) as understanding emotions from the perspective of others not from within oneself, Smith's views do help move the emotion agenda on in a beneficial way. Smith adopts a brand of public emotions akin to a set of professional emotions (Bergman Blix *et al*., 2019), those which reflect public rationality and give some credibility to the inclusion of some emotions in decision-making (Nussbaum, 2012). Smith, according to Nussbaum (1996: 23) felt that the emotions of the judge were those of a spectator who considers public sympathies but not his own. Adam Smith does, however, fall short in terms of full acceptance of the role of the judge's own emotions in decision-making, but his approach nonetheless opens the door for emotions to be more acceptable in law and for challenges to be made to the hegemony of judicial neutrality.

The distinction between private, public, and professional emotions has been taken up as a key structure within research by Bergman Blix and Wettergren (2019) through their

examination of professional emotions in the courtroom. They engage with other considerations which are important in the discussion of judicial emotions such as power positions and status, something which is lacking in the literature (Heaney, 2011: 259). Based on this review there are three major theoretical positions emanating from the above historical context when it comes to emotion and law. The first is the Kantian approach, which rules out emotion entirely in favour of reason and logic; the second is aligned to Adam Smith's (Solomon, 1995:74, 185) recognition of public/professional emotions which steer public decision-making splitting the private from the public and third, those theoretical positions which advocate that judicial emotions consist of both the private and professional, overlapping and driving decisions from behind the scenes.

The Kantian approach to emotions is ruled out in my research as the question as to whether emotions are involved in judicial decision-making has moved on from *if* to *how* (Maroney, 2015). My thesis is then more about the extent to which emotions are entwined with decision-making, the impacts, and implications, how emotion shapes law (Abrams and Keren, 2010) and justice (Solomon, 1995). The other two positions are still very much a topic for my thesis with a particular resonance to Adam Smith's notion of the judge as a spectator, a professional who is there to represent public interests other than his own (Raphael, 2009). A specific question I ask is whether judges use emotions strategically to achieve their judicial goals and if they can override their personal emotions in this process? As the judge has a degree of interpretive power in making law-based decisions, the lines around law as fact and law as a sense of public justice may be hazy. My concern then is with the degree to which emotions may intervene at this point of the process and how, in turn, claims as to the rational and scientific nature of law and it is playing out in a courtroom setting might be affected in the process.

Law, Reason and Emotion

A central argument for the inclusion or exclusion of emotions in legal decision-making still circulates around the relationship between reason and emotion and how this is perceived. The historical development of law evolving from the enlightenment philosophers explains how law has adopted a quasi-scientific approach to the maintenance of social order. But this does not explicitly explain why the institution of the law and indeed judges themselves perceive emotions as dangerous, thus leading to an official push for judicial neutrality and dispassion. One major explanation lies with the historical alignment of emotions as belonging to the personal, the private domain, the household, the family and specifically what was considered the domain of women. Whereas reason, as seen in the context of masculine power, societal management, politics, economics, religion, and law, positions men historically as having dominance over certain groups in society, the poor, those of lower status, criminals, and woman (Patulny *et al*., 2017: 5; Connell, 2005: 844-847).

The law as a patriarchal system and its courtrooms is still coded in a masculine fashion (Ní Aoláin, 2015: 229) where emotion is seen as the opposite of reason. However, there are signs that this is changing. Male judges are starting to take risks in expressing emotions especially those seen as being from the private and of the female variety, demonstrated via tears for example. The lines between reason and emotion are then further blurred and this has implications for judicial decision-making. Evidence for this is based mainly on media information and has received limited academic attention but the reason/emotion controversary is a fundamental concept which underpins my analysis of judicial behaviour. Why do judges avoid expressing some emotions over others and what happens if they do deviate from the expected judicial norms? The next section considers this question in more depth.

Reason and the Fear of Emotion

It is an undisputable fact that as human beings' judges are emotional beings, and yet personal standpoints are considered irrelevant to how legal judgements are made. Emotions must remain in the private domain (Patulny and Smith, 2017; Williams and Bendelow, 1998). Maroney and Gross (2014) suggest that even if law restricts emotions theoretically that the public life of judges is more complex as some emotions are contradictorily permitted into the legal domain, particularly those which convey a collective moral message to society. On the one hand law excludes emotions and on the other expects judges to use emotions in the interpretation of the law and in the justification of sentencing. Bandes (2009) refers to this as oddly schizophrenic.

However, the legal basis of decision-making is still centrally based on the concept that logic and reason, not emotions, are applied to legal dilemmas. My research challenges this. In legal scholarship there is little theoretical acknowledgement of the relationship between emotion and reason (Scheve, and Luede 2005; Turner, 2000; Griffiths, 1997; Kemper, 1978). Where it is acknowledged, reason is argued as remaining at the helm Monin *et al.,* (2007). Does this then mean that judges can legitimately express their emotions without this then influencing their ultimate decisions and if so, is this understood by those who are subject to the law? An alternative position is that judicial decision-making may appear neutral but that emotions drive decisions hiding beneath a façade of reason (Douglas, 2003). Do judges find rational explanations to cover up their emotions for fear of criticism? Linder and Levit (2010) argue that judges need to justify their intuitive based decisions, framing them with logical rational that conveys neutrally but is far from being objective. Wistrich *et al*., (2015) reinforce this in their research, which uses psychological tests involving 1800 American judges, concluding that judges cannot put their emotional reactions aside. Instead, they concluded that judges sought rational and reasoned facts to overlay their intuitive and emotional responses to their

earlier cases (Wistrech, 2015: 868). Even though there are ways to accept emotions in legal decision-making the standard doctrine taught to law students (Posner, 2008) shuts down these attempts moulding legal minds against emotions in decision-making (Douglas, 2015).

Law's authority, as supported by positivist theory, has been resistant to the concept that emotion in decision-making is inevitable and may add constructive benefits. In fact, the inclusion of emotions in law may potentially achieve a "more realistic and legitimate legal system" (Grossi, 2015: 58). This is why emotion matters, and why research needs to explore its impact on court settings. And yet efforts still concentrate on excluding emotions as in the example of the judicial oath which has remained unchanged for hundreds of years (Hobbes, 1661; Solomon, 1995). Indeed, the ideal judge is "devested of all fear, anger, hatred, love, and compassion," Hobbes, (1661:Ch, XXXVI).

Science, Reason, and Emotion

Outside the arena of law, scientific research has found that the brain's emotion and reason centres are positively connected and inextricably linked. Yet, this positivist contribution does not appear to have had any kind of an impact upon official legal doctrine. Damasio (1994, 1999), a leading neuroscientist, suggests that emotions are not luxuries to be excluded from reason, rather an individual's ability to reason needs emotion. In other words, emotions are integral to decision-making (Warr, 2015; Le Doux, 1996). Maroney (2011) cites cases of injured brain patients, where post-accident their capacity for emotion and rationality declines, providing clear scientific evidence of the emotion-reason dependency. Such evidence may assist in persuading those reluctant to consider emotions relevant to judicial decision-making. According to Mason (2013) advances in neuroscience, psychology, and philosophy, have begun to influence perceptions of the relationship between emotion and reason. Scholarship is thus less likely to exclude the possibility that emotion is part of reason or rational thinking (Baier, 1994; Damasio, 1995; Solomon, 1977). Emotion can in this view

be seen as an ethical and moral tool, guiding judgements, and decision-making. However, the shifting of mind-sets is difficult, particularly if beliefs are as endemic in the law as the literature suggests. Furthermore, the theoretical ambition to include emotions in legal doctrine and judicial decision-making, does raise issues of fairness in justice. If emotions create situations where judges deliver more sympathetic or less sympathetic judgements (Wistrich, 2015: 859) it is understandable that the judicial hierarchy continue to transmit the stance of neutrality, even if it is only one part of the narrative.

Law as a Reason only Zone

Although my research is not specifically aimed at addressing the lack of women in the judicial professional and possible discrimination based on gender (Rackley, 2013; Sommerland, 2013) this aspect needs some recognition. This is because there is a distinct connection between concepts of reason and the perceived emotions of women, which may influence all judges, whether they are male or female. Feminist literature suggests that the very reason that some emotions are seen as dangerous is precisely because they have been traditionally associated with women and that men fear this intervening in their professional lives (Barnett, 1998). For an extensive debate on feminist research and emotion see a collection of works compiled by Christine Sylvester, (2011).

Positivist beliefs about law and emotions also involve positivist attitudes about the relationship between gender, emotion, and reason. It may be that the law as a traditional masculine enterprise (Easton and Piper, 2012) still encompasses ideas about the instability of emotions associating certain emotions with women, distress, sadness, maternal love and so on. One explanation for the contemporary denial of emotions in judging is found in these persistent gendered concepts from the past (Haines *et al*., 2016). The sociologist Max Weber (1905), for example, portrays emotions as a function of “animal spirits that went coursing through our bodies, causing various emotions” (quoted by Solomon, 1995:210). He dismisses

all emotions in favour of practical reasoning (Solomon, 1995:199), defined as an aspiration for precision (Farrar, 2009). Weber was heavily influenced by philosophers Descartes (1641) and Kant (1784) both of whom according to Rawls (2005) were influenced by legal jurisprudence and contemporary theories of justice. Kant notably questioned the rationality of women assigning emotions to the private domain, detaching reason from emotions (Barnett, 1998: 97; Solomon, 1995:199).

The tie between women and emotion is still organised in distinct gendered ways and research suggests that women and men experience emotions differently (Patulny *et al*., 2017: 220). This, in turn, implies that judges are different in how they engage with emotions, in their dealings with both victims and offenders, according to their gender, though this may depend upon the degree of scripted performances and planning involved. These gender differences have been perceived as detrimental to legal judgment, with softer emotions viewed as weak and women being perceived to be volatile when they show sentiment, sensitivity, compassion, care, even anger, an emotion considered to be a male attribute (Maroney, 2011) associated with punishment (Pillsbury, 2016). Ironically this may point to the law's exclusion of emotion, in order to facilitate more diversity in terms of gender, a position feminists may reject as being covert discrimination (Cooper, 2044). Happiness, sadness, and fear are said to be more characteristic of women, with men all too easily being assigned the label of an aggressor (Parkins, 2012: 45). This according to Maroney (2012) is how male judges are commonly portrayed but there is dissent in the literature, between those who advise to 'beware the angry judge' (Posner, 2008: 101), and those who believe the judge represents the virtue of the law (Maroney, 2020). Angry judges can step in replacing society's need for direct, vigilante action thus retaining and controlling social order (Maroney, 2011: 1209). But this assignation alongside other emotions is also an outcome of the planned judicial performance, as all judges deliver what is expected of them by society, in attempts to protect their integrity but also their power and status. Aristotle cautions that anger can get out of

hand as it is immensely powerful, and there needs to be a balance, not too much, not too little (Huppes-Cluysenaer *et al*., 2018; Maroney, 2011: 1221). The literature points to the regulation of emotion and its containment as this will produce positive contributions. Kurth (2020) takes this further suggesting that some emotions, such as disgust, need to be cultivated in order to be valuable power tools. This may work for judges who need to communicate wrongdoing and therefore justify their decisions without the emotion of anger. There appears to be a contemporary move away from anger as the main judicial attribute, with literature aligning judicial emotions with tones of moral courage, the ability to do the right thing without outward displays of anger and fear (Putman, 2001; Lady Hale, 2019).

The avoidance of certain soft emotions and the display of others then, becomes less about gender, as men and women are both, of course, inherently emotional (Patulny, 2017) and becomes more about the emotions which attract judicial power and status, such as anger for example. However, it is also acknowledged that the male domain of law still operates with ideas about how male and female judges should normatively display emotions and being the angry woman judge can backfire (Maroney, 2011). Some research, such as that of Maroney (2012) has concluded that a central judicial emotion is indeed anger, and that as such the reputational damage is low, due to cultural acceptance of anger as a male feature. When Patricia Lynch QC verbally retaliated against a male offender who hurled abuse at her during sentencing, she was put under investigation by the Judicial Conduct Investigation Unit. There are no equivalent cases for male judges although it is highly likely that male judges in the same position may have reacted in a similar manner. Patricia Lynch was, however, found not guilty of misconduct (Hyde, 2017). Despite the lack of research Maroney (2012) suggests that there is male/female difference in how anger is interpreted. Male judges expressing anger are perceived as taking control, and as having power where females are seen as losing self-control. If one takes the latter position this perpetuates beliefs which are recycled and sustain the gendered division of emotions and it matters not, that these are argued on the grounds

of biology or culture. Both perspectives reach similar conclusions. So, in the pursuit of power and acceptance judges need to as Aristotle advised, harness the right emotions, with the right balance and of the right intensity (Putman, 2001) and it seems also according to expectations of gender.

An Alternative Perspective

Research on emotion and gender tends to focus on women through feminist jurisprudence and the literature is significant in its attempts to explore hostility towards the inclusion of women in judicial roles (Neave, 1995). There is a case however to pursue this from a different angle as the literature shows there is much less attention paid to male emotions beyond stereotypical conceptions of men as having more self-control than women. As my research emanates from a practical example of a male judge who cried, there is real life evidence of an increasing male emotionality within the judiciary. Of course, male judges are emotionally expressive, that is seen in the angry judge concept (Maroney, 2011) but new literature is emerging from the wider field of masculine studies which claim that many men now practice the softer or more emotional forms of masculinity (De Boise and Hearn, 2017; Holmes, 2015[a]). But if an emotional transformation is going on with respect to male judges in UK criminal courtrooms empirical evidence needs to be established to further verify this view and if so, is this a transient response to the strains of the judicial role or a more permanent cultural change? There is not enough data on this issue to prove as much either way and it should not be left to the media alone to have this debate.

Power, Emotions, and Judges

Heaney (2011) states that the literature on power is devoid of any association with emotions, but this has improved with recognition by political theorists that we are now living in an age of 'emotionalized' public life (Karstedt, 2002). Heaney advances the idea of emotions as a

form of social capital and therefore power with more particular reference to the state and politicians. Yet this does not appear to have penetrated academic discussions on the relationship between power, emotions, and the law especially at court level decision-making. Judges are representatives of the state but are simultaneously independent of the state. Either way, there is no doubt that they hold positions of power in society and in that sense, judges and magistrates are part of an elite. Judges as elites are motivated to seek power, status, and recognition (Bergman Blix and Wettergren, 2015; Hunter, 2014; Cowen *et al*., 2006; Fielding, 2002). Posner (2008) formerly a sitting judge suggests from an economic theoretical position that judges seek power, money, reputation, and prestige. Personal motivations are driven by different sets of emotions which at times override organisational, social, or even personal responses to a crime in the desire to gain status and power (Heaney, 2012; Kemper, 2011).

My research is concerned with how power, status and emotions cooperate and interact in the courtroom to produce decisions about people's lives. I am interested in how judges use their power and to what effect. The outcomes of using power are varied as judges have the power to be harsh, ruthless, and unforgiving but also the power to be kind, merciful and compassionate. Thagard's (2016) model of emotionally bounded power states, provides some guidance on how to identify power types. He posits that there are four kinds of power: coercive power which involve threats, fear, and intimidation; benefit power: which deliver rewards to remorseful offenders; respect power: where judges seek to extract respect for the law and their own role and normative power: where guilt, shame, embarrassment are levers for forgiveness (Scheff, 2005; 2000). This helps us to appreciate how power is connected to emotions, but the question is, do private emotions drive these power-based decisions or is the ability to demonstrate power in its different guises a reflection of strategic purpose, in such a way that the law is in control and the rule of law is protected? If criminal law is still distinctly punitive and retributive does the acceptance and encouragement of wider judicial

emotions in decision-making raise further concerns about justice? Do these concerns provide the establishment of law, justification for the control of emotions in decision-making? Literature from all relevant domains is sprinkled with comments about power, reason, logic, and emotions but there is a lack of concentration on these relationships in socio-legal literature and research. Bergman Blix *et al*., (2019) facilitate this as one of the few empirically based collection of studies to discuss power and emotions in a legal context. They admit though that judges in their studies hardly ever express opinions on power-based emotions, attributing this to Swedish cultural traditions (Bergman Blix *et al.,* 2019*:* 12). One could say the same about British courts and judges' but unless power dimensions are investigated one cannot make this assumption. Given the claim that emotions have returned to the courtroom, a refreshed examination of all judges is long overdue and in particular an analysis of the significance of power in decision-making needs to be understood. This is important as when power becomes the basis for courtroom challenges it may become a vehicle for emotional expression, those emotions personal to the judge and those which the judge adopts, as society's emotion surrogate in the courtroom.

Developing a Theoretical Framework

The identification of a robust theoretical framework for the analysis of judicial emotions would serve to resolve a number of complex issues raised by this thesis. Part of the function of this literature review is to identify which theoretical models would be most effective to use in the active stage of my research. As Coontz (2000) identifies existing theoretical frameworks are inadequate for the task of analysing judicial behaviour. In her view, there are no conceptual frameworks which currently explain the gap between the official legal doctrine that law and decision-making require no emotion (Hamer, 2012) and the reality of legal practice which suggests otherwise (Fielding, 2013; Maroney, 2011). My research aspires to fill this gap by exploring this incongruity through a sociological and philosophical perspective

on emotion that puts long held positivist beliefs under the microscope. To this end the ultimate aim of this chapter is to draw on the literature to assist in the production of a theoretical model suitable for the examination of judicial emotions in the context of the criminal trial. This is a difficult quest given that previous research efforts are criticised as being disjointed and incoherent (Maroney, 2015). A sociology of law and a sociology of emotion need to be better integrated. The strength of the official position on judicial neutrality is already well accepted and enshrined in legal doctrine and practice (Posner, 2008). According to this perspective emotions do not feature or contribute to legal decision-making. So, this research will examine the opposing controversial claim (as far as legal positivists are concerned) that judges use and need emotion in the delivery of their role. Emotion matters to justice (Solomon, 1995) but how?

Hobbes (1651, xxxvi) said that judges should be "divested of all fear, anger, hatred, love, and compassion", words that still make up the current judicial oath (Abrams and Keren, 2010). This transfers to contemporary legal ambivalence about the role of emotion in legal tradition as law still projects judicial decision-making as a non-emotional, scientific, and fact-based process. As such this research needs to acknowledge and take account of these long-held views on emotion's role in judicial decision-making whilst proposing other models to challenge the worst features of positivist philosophies. Positivist sociology may not provide the best theoretical framework for the investigation of judicial emotion as it has a remit which supports their exclusion from decision-making; thereby positioning women in an unfavourable position in that they must reject emotion in order to appear rational but further ignores the changing attitudes to male expression of emotion as being both reasonable and legitimate. As such, it is to the area of social constructionism that this chapter will turn.

Social Constructionism

An extensive body of literature found within the social constructionist paradigm provides theoretical contributions towards the understanding of how people interact with each other, within their cultures and within society itself. Such an approach sees systems such as law as a human and emotional process (Lange, 2002) not completely bound by rules. Social constructionist theory also offers practical insights in terms of creating methodological approaches to social research. A number of key theorists have sought to understand emotion from outside the setting of the courtroom. Sociology is paramount in this respect, stemming from the work of Emile Durkheim (1893) [1956] the so-called founding father of sociology and the architect of the social constructionist approach to emotions (Fisher and Chon, 1989).

Durkheim's Enduring Contributions

Durkheim (1893) referred to emotion as the glue which binds society together, centralising emotions as a critical area for analysis. This analogy does not tell us what emotions are, but it does reinforce the social and cultural importance of emotions over any biological, physical, or primeval interpretation. As an enduring concept emotion as social 'glue' provides a means to move on from fixed labels extending the spectrum of emotions to include feeling states such as mood and attitudes (Patulny, 2015; Lively, 2015). If one accepts Durkheim's (1893) view of the significance of emotions in social life what does this infer about claims that judges are unemotional in their legal decisions? If judges consciously separate themselves from their social groups, law is then divorced from the society it serves, law is potentially isolated from justice (Solomon, 1995). This is not a logical or feasible situation as the judge is more than an administrator of law's rules and judging is about more than the application of rules (Posner, 2008). The judge as a human and social being is a part of a collective society and emotions take over when impartial analysis does not provide answers (Posner, 2008: 105). Although Durkheim himself is known to have evaluated the law from a positivist perspective (Smith *et*

al., 2005) he only does so in the sense that an understanding of the law should be possible scientifically if social and moral facts not philosophy were accepted as the basis. What is important about Durkheim's work for the purpose of my thesis is his contention that emotions have their origins in the fabric of society rather than solely in individuals and that this constitutes a social fact (Durkheim (1897) [1997] *in* Scheve and Luede, 2005). Durkheim claims that emotions are needed as a collective response to crime and crimes as a moral outrage should be responded to with vengeance (Smith *et al.*, 2005:14-15). In many regards this view still underpins the criminal justice system in the sense that sentencing is based on a punitive model of dealing with offenders (Berry *et al*., 2012) through the use of punitive emotions such as hate, rage, anger, and disgust (Deigh, 2016). Durkheim laid the foundation for the concept that emotions underpin every action and that every action is generated by various degrees of bodily energy (Collins, 2004, 1993) which Durkheim called the effervescent effect. Clearly, such a position has potential for challenging our understanding of the norms and principles that underpin the courtroom as a decision-making space. The core challenge must be to unpick the illusion that judges are without emotions in their decision-making but how their emotions impact on this is very uncertain. Judges may not feel the emotions they are expected to or those which reflect public opinion (Wood, *et al*., 2009), and this may have implications for how judges adjust their external actions but also how judges resolve conflicting emotions. The growing literature in support of Durkheim's views has moved beyond the proposition that judges are emotional beings even in their legal roles, to trying to understand *how* not *if* emotions pervade the courtrooms.

The objective for my research is to seek evidence which reveals whether judges are able or not to resist acting on their emotional thoughts and feelings when sentencing. The official position is explicit, namely that judges must put aside their own emotions and the emotions of others in the pursuit of justice. But this is not necessarily the reality of judicial courtroom practice (Kwarteng, 2016). The relevance of Durkheim's views to this research is twofold.

Firstly, research should focus on the people involved in the drama. In this thesis, this is the judge who is nonetheless part of a collective group to be examined in the context of those involved in a criminal trial. Emotions connect and bind society together. Secondly Durkheim's authority and his prevailing contributions have helped to propel others such as Goffman and Hochschild; to examine emotions but they have moved well beyond Durkheim's interests in this regard (Shilling, 2005). Here there is divergence with a move from macro concerns to micro investigations about how people interact within their social groups (Fisher, 1989). As such, the judge cannot be the sole subject of emotion research as without people to interact with, judicial emotions are benign (Hope and Le Coure, 2012).

Durkheim's approach to emotion provides us with a means of reassessing how it is that emotion may impact upon the courtroom. One way of bringing this to life further in developing a more sophisticated framework for understanding the relationship between the court, the judge and emotions is through the dramaturgical approach and through the notion that the courtroom is effectively a scripted space. The work of Goffman (1959) is particularly important in this regard in so far as it allows us to come to terms with Durkheim's suggestion that social life is in a sense the product of collective and pro-active human interaction. One of the many concepts which links all three theorists is what Maroney (2011) identifies as the actor approach to studying emotions, although this is not a specific term used by Durkheim and more likely attributable to Goffman (1959) as the author of dramaturgy. Turner and Stets (2009) single out the legal actor approach as one of six main categories selected by contemporary research to assist in building a theoretical model for research practice.

Dramaturgy: Theatre Metaphor and the Actor Approach

As far back as Aristotle [322-384 BC] philosophers were framing the interpretation of human life in terms of drama where the human script contained plots, themes, characters, dialogue, rhythm, pace of delivery and spectacle (Laporka, 2018) . As You Like It; Act 2, Scene 7, delivers

the speech by Shakespeare's character Jacques and is probably one of the most famous of Shakespearian quotes., "All the world's a stage, and all the men and women merely players; they have their exits and their entrances, and one man in his time plays many parts." This is where the dramaturgical metaphor is said to originate from (Turner and Stets, 2005) and contemporary theorists and empirical researchers have followed this tradition using the theatre of the courtroom as a template for narrative accounts (Gilbert, 2001). Dramaturgy provides both a theoretical model which put emotions at the heart of the story. For those who have spent time in a traditional criminal courtroom or watched television courtroom drama there should be a recognition that the drama of the criminal trial on the surface, has much in common with theatre. In both settings, drama is acted out on a stage, in front of an audience; there are props and costumes, rituals and rules. There are dramatic roles, emotional outbursts, and ensuing conflicts between actors and where a prescribed script usually dictates the direction of each scene. Emotion brings interest and depth to the onstage performance engaging the audience in attempts to persuade them that the characters involved are authentic. The dramaturgical approach provides a lens through which to observe and interpret human interactions and a means to understand emotions (Hope and Le Course, 2012). The undoubted early leaders in the field in this context are Erving Goffman [1922 to 1982] and Arlie Hochschild [1940] both disciples of Durkheim. I will now turn to the specifics of their work.

Erving Goffman

Goffman (1959) is accredited with bringing this dramaturgical theory to the domain of sociology in his seminal book, *The Presentation of Self in Everyday Life* in which he aligns everyday social interactions with stage performances although there are various interpretations of what he meant by this. Some theorists suggest he means this literally (Benford and Hare, 2015; Tseelon, 1992: 116; Brissett and Edgely, 1990;) and just like actors,

people engage in presenting different selves in different locations, in public (on stage) and in private (off stage or backstage). Other interpretations insist Goffman did not in fact mean this literally at all (Dellwing, 2012). Rather than presenting a public or private self, Goffman intended his theory to portray the fact that people have a variety of 'faces' and that social interactions will activate the appropriate face depending on the audience concerned. Goffman's focus is on frontstage performance (Larsen, 2009) and he recognised individuals for having control over their scripts. This is perhaps slightly problematic for the study of judges as their public emotional scripts are effectively determined elsewhere. Control is therefore admittedly limited, but scripts nonetheless represent the self in their various forms and are derived from a cultural script which actors learn and act out on stage and direct as appropriate to the situation (Turner, 2005: 28). In this interpretation of Goffman's drama there is no attempt to disguise or misrepresent the true self but only to show a presentation of the self which fits the occasion. Judges know that on those occasions when they appear in court, they are expected to present an image of impassionate justice which fits the occasion. Alternatively, the presentation of self is all about strategic impression management (IM), it is about manipulating, disguising, and controlling the true self. Baumeister (1982:22) contends that an ulterior motive is engaged, one which rather than 'pleasing the audience,' as Goffman suggests, is about manipulating them. This is something worth thinking about in the context of how judge's articulate the decisions they make. Baumeister's interpretation of Goffman's theory suggests that judges can operational emotions to benefit their objectives. Emotions then become tools to achieve both strategic and potentially personal goals. But this leaves opportunities open for the actor (judge) to go off the scripted performance as his or her true self, responds to other factors in unmanaged or unpredictable ways. It is in these unmanaged spaces where off-script performances may surface and where there is potential for backstage emotions to emerge for evaluation (Boyd, 2003). Such evaluation has not been undertaken to any degree within a judicial context and part of the intention of this thesis is to identify

and analyse what happens when judges do go off script. The judge may not always be the poised, Goffman-like character who controls his/her emotions through performance (1956: 489). Goffman's contribution to the study of human nature is nonetheless effective in that many emotion researchers follow his basic framework which provides a workable model. One such example is Arlie Hochschild who has taken Goffman's dramaturgical concepts in new directions.

Arlie Hochschild

It is the work of sociologist Arlie Hochschild that most resonates with contemporary emotion researchers in the field of sociology (Wharton, 2011). She is respected for her allegiance to Goffman's dramaturgical and cultural approach but also for being heavily critical of the limitations of his theories (Brook, 2009[b]). According to Hochschild (1983: 228) emotions as seen by Goffman are passive and repressed as to be virtually "invisible, inconsequential to the point of disappearance". Hochschild extends Goffman's theories to include other avenues and not least the control and ultimate ownership of employee emotions by organisations. Her work clearly stretches beyond Goffman but draws on his heritage from Durkheim to Weber's appreciation of the power of bureaucracy and Marx's alienation concepts in attempts to understand emotion (Brook, 2011).

Hochschild (1983) presents an extensive mix of familiar sociological ideas remixed and reformulated but applies this to real life characters through her renowned research on workplace environments. She places the theatre/actor metaphor directly into the workplace and provides knowledge and experience of workplace research into emotions. She adopts Goffman's theatre and dramaturgical approach but places more emphasis on the influence of backstage emotions. Both the front and backstage being of course, applicable to my research. Hochschild's work is not without criticism as there are gaps with regards to how she handles issues of power, status, and class (Bolton, 2003). The assumption that employees

particularly women, do not have any choices and are estranged is disputed by Bolton (2003) as is the assertion that power always lies with the employer reinforces gender stereotypes. With her research focus on women, home, and work there is a distinct lack of attention to emotions and the professions or emotions and the elite. However, if her contention that the emotional labour involved in supressing emotions causes workplace stress and burnout, then judges would not be immune to this.

One of the key prompts for undertaking this research has been media interest in how judges handled workplace stress in extreme emotional circumstances and therefore their ability to be neutral in decision-making. Hochschild provides a justification for this research even if it is on the basis that judges are in danger of emotional burnout through the unnatural suppression of emotions. This is a sentiment which has been acknowledged recently by the Lord Chief Justice Thomas when he publicly admitted that "The sheer depravity of some of the evidence they have had to consider was putting them under a huge strain" (Doughty, 2018: Daily Mail Online 18th November). In contrast to Goffman, Hochschild focuses on how backstage suppressed emotions move forward into frontstage performances. The attraction of seeing the world, the organisation, the workplace, and thus the courtroom as theatre is maintained and Goffman's original framework persists. But scripts are presented by Hochschild as more than cultural endeavours and social encounters (Hochschild, 2019). They are acted out in line with formal organisational rules and rituals that are established in order to secure and reinforce higher order demands. This has particular resonance with the script of the judicial oath and the concept of the rule of law, the debate being how much emotion is suppressed as a result. The concept of ownership of employees' emotions has led some theorists to articulate that Hochschild's actors are "emotionally crippled" and that she denies the agency of people's decision-making (Bolton, 2003:290). One of many qualities a judge is recruited for is based on their ability to confidently apply legal rules to different facts and circumstances. Judges are expected to quickly perceive, comprehend, and understand

new concepts and abstract ideas (Tata, 2007). Added to this, qualities such as courage, integrity, experience, education are cited as needed for the art of judging (Shetreet and Turenne, 2013). Why then, as Hochschild suggests, would judges concede to their emotions being under the ownership of the judicial hierarchy and that through the signing of the judicial oath they have signed away their right to being emotional? Fielding (2013) discusses the pretence of judicial passivity with judicial activism played out undercover and that judges, can be skilled strategists for change. Far from their emotions being in the ownership of their organisations, judges are still in control and use emotions actively and strategically (Posner, 2008: Tata, 2007; Darbyshire, 2012; Griffiths, 1997). Even though I have challenged Hochschild's views with regard to the level of judicial agency, there is still value in ascertaining if emotions have an economic or strategic value in the courtroom. This then points to an examination of how judges use emotions and for what purpose and whether there are times when a judge recognises that organisational rules must overtake personal feelings in decision-making. It is noted that Hochschild does not seem to be concerned with those spaces which are unmanaged, "where moments of [emotional] truth may occur" (Bolton and Boyd, 2003:303) and that she does not consider spontaneous emotions (Katz, 1999, 1988). These observations suggest that there is a gap in Hochschild's work and gives strong pointers as to what needs to be observed for a fuller understanding of judicial emotions.

There is much to tie Hochschild and Goffman together theoretically. Both use the theatre metaphor as a means for understanding a particular social world which can be utilised in the context of the criminal trial, the location of my research. Both adopt the actor approach, and both are drawn to the concept of the script as being central to onstage performances. The ability to capture narratives within the scripts is an essential strand of my work. As Gilbert (2001: 64) says people live in stories not statistics and the dramaturgical approach will bring the story of judicial emotions to life. Both Hochschild and Goffman acknowledge the role of ritual in the reinforcement of moral boundaries (Fielding, 2013; Williams *et al.*, 1998) and in

the maintenance of impression management. This is particularly relevant to my research as the courts are a ritualistic environment and as Maroney (2011) theorises the official judicial image requires ritual homage to dispassion. This impression is played out via the official script but also reflected in the spectacle of the British trial with physical props, scenery and theatre aids setting the scene. Other dramatic effects may be visible or felt depending on the criminal case with varying degrees of impact. These may include atmosphere heightened by whispering and silence in the courtroom; the building tension and growing anticipation towards a climax; mood, sound and language features which contribute to the dramatic effect and explain why the theatre model is applicable to the British courtroom scene (Bachmann, 2010). Hochschild and Goffman share this approach but diverge in the relevance given to emotions in decision-making. In this research it does not matter that Hochschild, and Goffman have developed their theories in different ways as their central concepts are applicable to the criminal trial as theatre and to the role of the judge as a key actor. But there are reasons to be cautious. Unlike theatrical dramas the courtroom drama has real life consequences and the role of one of the key players, the judge is critical in decision-making and determining how the guilty should be punished. This legal and societal role therefore must be seen as more than acting but as a serious social and cultural duty. Turner (2005) advises not to get too carried away with the simplicity of the dramaturgical model but there are advantages to using this to investigate the judicial script of dispassion. Meanwhile, both Posner (2008) and Tata (2007) remind researchers that most criminal trials are routine in nature without a high need for logical analysis. But if emotions are ever present as Durkheim and Collins (1993) advocate, residing in the background to be activated by social situations and interactions then even the mundane context in which they arise has something significant to offer research.

Conclusion

Many disciplines have fed a state of affairs in which the law is deemed to be quasi-scientific, neutral, and dispassionate although this is now heavily contested (Hommel *et al.*, 2017; Abrams and Keren, 2010). This is even more so with science giving credibility to the importance of the emotion/reason relationship in decision-making (Warr, 2015; Maroney, 2011; Le Doux, 1996; Damasio, 1995). Maroney (2015: 4) sums up why law's acceptance of its relationship to emotion should matter when she says, "emotion shapes law, and law needs to get emotion right in order to function well." Even if the outcome is that the law as an institution monitors and comes to support judicial emotions more openly, this will be a success for those who challenge the myth of judicial dispassion (Maroney, 2015). But there is more to be gained by understanding the benefits of recognising emotions in decision-making, not least the stress caused by the judicial role and potential issues with fairness and justice.

Emotions are not seen, at least by sociologists, as objectively existing 'things' (Boddice, 2020, Umphrey, 2011). They are situated, contextual, relational, flexible, and temporarily dynamic (Walle, 2020) but never absent (Collins, 2004). They persist. Biological and physiological explanations for emotions cannot continue to explain this away (Kemper, 2011; Turner, 2005; Gordon, 1990). Like Durkheim's (1893) suggestion, as discussed in Scheve *et al*., (2005: 306), emotions are the glue which bind people together, society would not exist without emotions, and neither would justice (Solomon, 1995).

Although there are multiple manifestations, it is clear within the literature and in judicial practice that emotions have influence and impact upon the environment in which they are expressed (or not expressed). But in the area of criminal justice empirical research and data involving the key decision-makers is noticeably limited. This means that the intention to study judges *in situ* has the potential to be invaluable. This chapter confirms that the key question

of the role of emotions in judicial decision-making requires real life examination. This is because theories on their own are not persuasive enough, at least if they were, the arena of law would have changed its position already. The dramaturgical approach, both theories and method, advanced by Goffman (1950) and utilised by Hochschild (1983) in her analysis of emotions in the workplace particularly lends itself to the study of judicial emotions and decision-making. The theatre metaphor, with its frontstage performances and its backstage control of emotions, brings the issues to light in a way which can visibly represent how people behave and to how their emotions are expressed in societal contexts. The criminal courtroom and the judge as a decision-maker provides a key focal point in this respect and the core question, although it has many layers to it, remains, what is the role of emotion in judicial decision-making and is their empirical evidence which further unsettles claims of judicial impartiality and dispassion?

The next chapter will address the above question using the theatre of the courtroom as a methodological template for examining judicial narratives and using dramaturgy, with its driving set of concepts to examine the frontstage and backstage regions and the centrality of the script which brings both together. The thesis also aspires to ascertain if other theoretical and methodological approaches are necessitated in order to facilitate the use of emotion as an interpretative and evaluative research tool capable of shedding new light on how and why the courtroom operates as it does.

Chapter Four

Methodology and Research Design

"Even judges those tasked with keeping law dispassionate were inescapably emotional: Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge." Cardozo, 1921: 167

Introduction

The purpose of this chapter is to outline my qualitative approach to investigating the role of emotion in judicial decision-making, challenging the claimed neutrality and dispassion of the judiciary. This research agenda stimulates multiple questions about judicial practice and the personal experiences of judges whilst undertaking their professional roles. It is no longer necessary to continue to prove that emotions pervade the criminal courtroom, the evidence that they do is now well established (Knight, 2014; Karstedt, 2001). What we do not know enough about, is *how*, or even *if*, judges manipulate emotions within their roles or whether they are just subject to them, therefore influencing what they think and do (Putman, 2001). Emotion research must question at a higher and deeper level of sophistication to move the debate on, for example, asking if judicial emotions can be professionalised. I define professionalised emotion as the deliberate or intuitive use of emotions for strategic purposes within formal environments, and in this context the criminal courtroom. From this I consider if certain emotions function to support the judicia role and whether these could be identified, categorised, and formalised leading to a positive recognition that some emotions are essential for effective judicial practice within the judicial workspace.

Questions then arise; can judges move between and from the private sphere of feelings to the professional domains they inhabit? Can emotions become strategic tools which judges

use in the process of justice, and if so, how? I also reflect on my own positionality and how I navigated the complexities associated with being on the outside whilst gaining access to the inside.

Research Aims

The above questions guide the direction of this research, and the following is a summary of the aims I seek to achieve:

- To identify the contribution emotion makes to judicial decision-making
- To understand the criminal trial as emotional performance, examining the methods judges deploy to retain the visible dominance of objectivity in sentencing.
- Develop tools to evaluate how emotional elements are played out in court.
- Evaluate whether the management of emotions, rather than their dismissal, could enhance judicial decision-making practice; and,
- Consider new theoretical sentencing models or innovative policy

This is a subject matter that carries its own unique and significant methodological challenges (Patulney *et al*, 2014; Lively, 2014). On the surface, at least, the study of emotions in court and particularly those of the judge is a deeply subjective undertaking (Maroney, 2016; Ngulube, 2015; Becker, 1967). This is partly due to the fact that as a researcher I am dependent, to a considerable extent, on my own analysis of the emotion events I observe (Gilbert, 2001), while judges are also subject to the limitations of their own subjective self-reflections (Solomon *et al*., 2018). The significant role that the researcher plays in translating what is seen and felt by the mind and body, into data, then into narrative accounts is paramount (Brown *et al.*, 2011). Nonetheless, I do take account of the methodological recommendations available from the literature, most of which are focused on the difficulties of emotional engagement with the subjects (Pilbeam *et al.*, 2023). At the forefront of my reflections, I keep in mind the key dilemma of, 'how close is too close,' in research and to what extent should I use my own emotions, as a tool to understand how judges deal with

their own emotions (Mason, 2013). The researcher is not immune to emotional involvement, to the impacts of witnessing reported crime events that are harmful and distressing. So whilst the focus is on judicial emotions, the researcher needs to be aware of their own (Pilbeam *et al*, 2023). This involves examining, explaining, and justifying my own philosophical position, by exploring the ontological and epistemological assumptions which underpin my methodological choices. The outcome of these considerations directed the models I constructed and used for the collection, analysis, interpretation, and presentation of data to meet my primary research objective. This research is underpinned primarily by sociological perspectives, including Goffman's (1974) symbolic interactionism, expressed via his theory of dramaturgy, particularly, according to Benford and Hare (2015: 3834) with a focus on roles but I also integrate other intra and interdisciplinary standpoints which I discuss below.

From a number of different perspectives, including the academic and research communities, the legal establishment, and the media, it is clear that the question of the role of emotions in judicial decision-making, is one which fiercely divides opinion (Scarduzio, 2015[a]; Berry et al, 2012; Griffith, 1997). When debates surface, these can promote passion, anxiety and even fear, as judicial emotions, are a problematic subject (Little, 2001), often difficult to navigate and confront, and better left silent for some (Posner, 2008). However, as I established in Chapters One and Two, it is the growing voices of judges themselves, which are compelling, albeit when they emerge fleetingly within the courtroom, in moments of pressure (Olson *et al.*, 2014) or through deliberate judicial activism (Fielding, 2013; Paterson, 2013). As human beings, who operate as part of a democratic society, judges have the right to be heard and listened to, but this is severely curtailed under the office holders' rules of conduct (Courts and Tribunals Judiciary, 2020). A judge is expected to uphold the status of the judicial office, which requires them to be neutral, dispassionate, and impartial. The purpose of this research is to investigate the contradictions between what is officially articulated about judicial neutrality, and what is known anecdotally and evidenced in real life practice. Such dilemmas

contribute to significant methodological challenges, where access to judges is restricted or denied by officialdom (Cowen *et al.*, 2006; Fielding, 2002), and where judges are reluctant to risk their careers and status by speaking candidly to outsiders (Fitzpatrick *et al.*, 2015). Methodological adaptations, and thus modifications to the research design, are thus almost inevitable, in order to accommodate access issues (Burton, 2013). Judges, just like any other employee or volunteer, also have the right to be protected, and supported in their work, both physically and psychologically, but this requires an active understanding of the role that emotion plays in their decision-making. This cognizance needs to arouse those who are responsible for the well-being and professionalism of judges, but who seem resistant or oblivious to judicial calls for understanding (Baker, 2005; Karstedt, 2002). In a wider sense, a recognition of the emotional dimensions of judicial decision-making, has the potential to reinforce obligations of fairness towards those who seek justice, and to those who need to answer to justice. Much more academic research and professional awareness is needed to bring this problematic into the open, where it can be acknowledged that emotions have the potential to shape legal decision-making, and therefore influence and change lives. This is achievable through an examination of the extent to which emotions appear to influence judicial decision-making, with an analysis of the strategies judges deploy, to maintain the illusion of objectivity. My aspiration is to contribute to this area of active research, by discovering and analysing the real-life judicial stories embedded in courtroom practice.

The role of Judges in Inspiring and Justifying the Research

Whilst multiple claims and theories have been advanced (Stets and Turner, 2014) analyses of emotions in action, are still in noticeably short supply. Calls for more empirical and ethnographic research have stimulated and provided a rationale for my thesis, but the challenges and contradictions emanating from judges themselves also serve to motivate this research. The original catalyst for my particular inquiry, was the judge who cried publicly

during his sentencing speech in the case arising from the murder of a young woman, Becky Watts in 2015 (Stadel *et al.*, 2019). This incident caused a media frenzy, with public support for the judge being widely reported. There was an unprecedented response by the judicial office, likely aimed at damage limitation, as other judges and criminal justice personnel voiced their support for the judge (Doughty, 2015). The consequences of this very public challenge to official policy on emotions have been far reaching. Whilst the judicial office continues to avoid publicly recognising that emotions may influence decision-making, emotions are now consciously on their agenda (Magistrates News, 2019), albeit it as a problem to be solved. This, however, represents a major policy shift and shows that emotions matter (Fielding, 2006; Solomon, 1995). So now is the time to shed light upon this debate and for me to add to the momentum: but how? I of course need to clarify my key argument in order to set the direction for my action plan but before this, an explanation of the ontological and epistemological underpinnings provided substance for how to achieve this.

Central Argument and Hypothesis

Emotions exist in legal practice (Maroney, 2010: 629). Such a claim is now more than ever acceptable to the legal community, but only up to a point (Maroney, 2015). When this proposition is aligned to the process of judicial decision-making, particularly as related to judges, the recognition of emotion in this context can be treated as a betrayal of the office (Court and Tribunals Judiciary, 2020; Anleu *et al.*, 2014; Griffiths, 1997). I want thus to consider the suggestion that judges are not dispassionate, automatons but are emotionally alive and engaged when they make their decisions. I contend that emotions are necessary to the legal decision-making process and therefore to justice (Wistrich *et al.*, 2015; Solomon, 1995; Damasio, 1994). However, judges are driven and perhaps coerced to a degree by the legal system (Kerruish, 1991), to hide and suppress their emotional feelings and behaviours. This is done in the name of neutrality, a position staunchly advised, based on positivist

extremes, and still protected by long held legal doctrine (Anleu *et al.*, 2017; Shetreet and Turenne, 2013; Hobbes, 1651). Emotions, emotional judgements, and evaluations are therefore not seen as compatible with the role of the judge, particularly when sentencing. Judicial emotions do however seep out during courtroom processes, judgements, and sentencing (Barry, 2021; Maroney, 2016). I also propose that, it is as harmful to justice, and to judges to deny and suppress emotion, as it is, for uncontrolled and unmanaged judicial emotions to seep out in the pressure cooker atmosphere, that is the criminal courtroom. To deal with and reconcile these competing ideologies, the role of emotion needs to be examined, understood, and recognised, potentially as both a *virtue* and as a *vice* of the law (Maroney, 2020). I propose that an appropriate and effective balance of emotion in legal decision-making can be achieved with insight, and understanding of the role that emotion plays in decision-making. To do this, comprehensive empirical evidence is required, with data which is based in legal and judicial practice. This should be credible data, gathered from judges who operate in both the Crown Courts and Magistrates Courts, which is highly persuasive in providing answers to unresolved but critical questions, in support of finding solutions to the key problematic, *what is the role of emotion in judicial decision-making?*

Philosophical Perspective

In order for me to deal with the above question it is important that I establish a philosophical position on the research. An understanding of ontology and epistemology, two connected branches of philosophy, is indeed, essential in this regard. This helps to recognise one's own potential biases and creates the opportunity for a more reflexive approach (Trivedi, 2020, Moon *et al.*, 2014). Morgan (2020) advocates using iterative thematic methods even at this early stage, and as I confront my prior beliefs, I can work with them and use them, rather than setting them aside. As a reflexive interrogation, this invites a conscious re-examination of my beliefs and biases, helping to avoid the temptation of creating my preferred themes.

Ontology concerns the things that exist in our social world and the assumptions that we make about social realities (Snape and Spencer, 2003). These assumptions guide our thinking and in practical terms this helps to shape key arguments, to determine essential questions, while serving to validate the existence of a particular phenomenon. In the context of emotions, it would be hard to argue that emotions do not exist but there may be differences of opinion as to the form they take and their nature (Izard, 2010; Scherer, 2004; Little, 2001). Epistemology attempts to answer this as it is concerned with the knowledge of the things that exist. According to Crotty (2015, 1998:1) it is a way of "understanding and explaining how we know what we know" and assists in eliminating irrational or unfounded assumptions which can be particularly strong in the field of emotions (Mindus, 2021). It is the theory of knowledge which when embedded in the research helps to validate the process and determines how the research is designed, explains the choices made as to the methodology and methods, as well as how the data is analysed and interpreted (Moon *et al.*, 2014). A key ontological question arises, do we understand our world in objective or subjective terms? The answer to this establishes the research direction. Both ontology and epistemology have two distinct research pathways, one which is objective, therefore, positivist, scientific, quantitative in its processes and where there is only one truth to be discovered. The other, and the one I clearly adopt, is qualitative and subjective where there can be a range of possible conclusions to a problematic. This is because knowledge and understanding of the social and legal world of the criminal courtroom and their different spaces, is constructed by those who know and experience it. To get to the heart of what influences judges in their decision-making, one needs to access individual and collective interpretations where multiple truths are possibilities (Washburn, 2015; Todres, 2007). This is why it is critical to immerse oneself as a researcher into the specific field concerned, in order to penetrate a level of nuanced detail (Patton, 2002). For example, the sort of inconspicuous detail which emerged when I observed judges, involved the bowed or slightly shaking head, eyes averted

towards the ceiling, the hands over the mouth, the fast but quiet tapping of the fingers or pen on the bench. These small incidents on their own can be insignificant, but when patterns appear and are repeated this may suggest emotions are actively engaged. More than this, patterns may signal how emotions operate within the judicial zone, how they influence others and how these interactive although subtle, perhaps primitive forms of communication (Hommel *et al.*, 2017) may influence the judge. Attention to detail should therefore enable understanding (Vaismoradi *et al.*, 2013), aid the discovery of patterns, themes, and interrelationships (Patton, 2002: 41). This is inductive inquiry.

Inductive Methodology

Given my focus on emotions and the need for qualitative research in this area, my thesis follows an inductive pathway (Ngulube, 2015; Herlihy and Turner, 2013; Urguhart, 2013). This research is inductive insofar as it is exploratory in nature, suited to problems which are under-researched and where there is limited pre-existing knowledge, particularly from the research field (Patton, 2002: 41). All of these features apply to the conundrum of judicial emotions and decision-making. However, this does not mean that the research landscape is barren when it comes to a knowledge of emotion and judges. My interest in this quest has been sparked from my existing beliefs and ideas but there is much that is unknown and disputed. As a qualitative researcher I therefore adopt an openness and willingness to expand knowledge and to change position according to what I find in the field (Brown *et al.*, 2011). In terms of academic research, one may have the impression that inductive research starts with a blank sheet, but the reality is that beliefs and theories already influence what we know. The use of theory is not completely absent and indeed it is argued that it is virtually impossible to go “theory free” (Parry and Oystein, 2001; Parkhe, 1993). According to Parkhe, (1993) existing theory can have a pivotal role in the design of the research project, and this

is the case within my thesis, particularly with the use of dramaturgical theory (Manning, 2017; Goffman, 1959).

An Emotion Framework

In order to operationalise the research, I took notice of Bande's (2012) advice, and created a basic emotion framework, where I could check, reflect, and consider my philosophical understanding of emotions against a range of conceptual ideas. Starting with Thoits (1990) four elements of emotion, and adding to these, broader concepts developed by Patulney's (2017), Little (2001) and Waskul *et al.* (2012), I consider emotions as having a mix of: (1) physiological components, (2) situational cues, (3) expressive gestures and body language, (4) emotion labels, (5) feeling states, moods, attitudes, and desires and (6) emotions as the essence of the performative body. I do not distinguish between emotions, feelings, moods, and desires, as Solomon (1995) did, but see emotions as sharing space with each, providing the context and being the catalyst for these interrelated emotional states of mind and body (Kemper, 2011). This formative knowledge I kept as background information adding emergent themes to the early design template. The design also needed to incorporate how I would frame my thesis and what kind of formula would produce a whole and cohesive plan, made up of its different component parts. As an iterative process, I also adjusted my knowledge and understanding as my own early perspectives surfaced. I already had some knowledge of Goffman's (1961, 1959, 1956) theoretical approach to analysing people and institutional behaviour, and I recognised that his dramaturgical concepts could add order and shape to my project, a theatrical lens through which to understand people but one which would link all three methods together. For me, finding my methodological formula was also an experimental activity, requiring me to consider, reject or adopt new approaches. I wanted to achieve a consistency of evaluation across all three methods.

Dramaturgy, and the emotion framework, went some way to giving my project contextual shape and stability. By adding reflexive and embodied techniques I actively explored the role of emotions within the dramaturgical frame, using myself as a tool to develop meaning (Srivastava, *et al.*, 2009). Doing research on emotions through a 'lived experience' involved committing to engaging emotionally and intuitively with the cultural experiences of others (McIntosh, 2018). Thus, my study is designed to go beyond the reporting of emotion events and incidents, towards trying to experience and understand what it is like to be the judge, in those situations which evoke emotions (Becker, 2007: 102).

Ultimately, the ontological and epistemological positions which inform my research, are a combination of a history of personal experiences, religious beliefs, my professional work as a social worker and teacher with young offenders who persistently engaged with the law, balanced with continuous learning and insights from theory and new knowledge. The adopted philosophy in which the law is framed as being a neutral and dispassionate zone as far as judges are concerned, simply does not reflect my own experience and knowledge and this insight constitutes a persistent theme through my research. However, I also recognise that social structures, systems, and people within them change and evolve, so there is always a need to revisit previous understandings as change within the criminal justice system needs to be considered.

So, what does this mean for my research? What are the key ontological and epistemological assumptions I make and why are they suited to this study of emotion? At the heart of this thesis is an accepted reality that emotions are a human phenomenon, difficult to define, unpredictable and are not fixed, but constructed by society and variable in different contexts (Maroney, 2011; Gelder *et al.,* 2006). The fact that a stable definition of emotion cannot be agreed upon (Maroney, 2011; Scherer, 2005) reflects their capricious nature. Emotions are therefore more open to investigations which aim to explore their impact, their role, and their contributions and this is clearly seen through an interpretivist lens, taking a qualitative

approach. I strongly believe that those who rule out emotions within the judicial role, are supporting a narrow if not unsustainable ideology of law, one which mistakenly presents the law as being predictable, rational and the only version to be trusted by society (Abrams *et al.*, 2010). Although this traditional doctrine in my view is more aspirational than real, it still dominates how judges are expected to perform so cannot be ignored and needs exploration (Maroney, 2016; Hobbes, 1651). However, emotion free judicial inputs do not reflect my own knowledge and experience of the law and contradicts, the literature and accounts of others who have noted emotions in judicial practice. In chapter one, I indicated that my research would document the extent to which emotions operate and influence judges, challenging orthodox beliefs about emotions and judicial decision-making. From the outset I established that for my research to be persuasive I needed to produce significant credible data, not just in terms of volume but also in terms of special interest stories which attract attention. This suggested that I needed a range of methods, in different situations to address the key questions but also to provide detail and depth to enable the creation and presentation of data through judicial narratives, and I will discuss these in depth later in the chapter.

Building on the Methodological Literature

One of the most contentious issues in emotion research as illustrated within the literature, is whether to attempt to define what emotions are, in order to embark on and carry out research. I had to consider to what extent I should focus on definitions, a tricky question for researchers (Scherer, 2004) as there are infinite perspectives (Moors, 2014). Bandes (2012, 2009) argues that some kind of working definition or framework of emotion is needed as a prelude to embarking on research and this is undertaken and presented in the context of setting the research questions, later in this chapter. Within the literature, despite numerous philosophical, experimental, and empirical attempts to define emotions there is no clear consensus and the problem of finding theoretical definitions which can be relied upon,

continues (Izard, 2010). On consideration, I concluded that chasing specific definitions is neither productive nor needed in order to start or plan research as long as one sticks to Durkheim's (1956) contention that emotions are recognisable when encountered, providing that cultural norms and rules are adhered to (Scheve and Luede, [1897, 1997] 2005). This pointed to establishing and acknowledging that there are certain courtroom rules, etiquette, and rituals, symbols, and language, which are not necessarily part of everyday social life (Jacobson *et al.,* 2015). This also involved recognising that within the law certain emotions, or emotional states, such as remorse are central to judicial thinking (Rossmanith, 2018). Contemporary research also indicates that there is more accuracy in the interpretation of emotions, if undertaken from within one's own culture (Pogosyan, 2016). Therefore, within the judge's legal domain, the court process and the individuals who contribute to this, will determine, and shape the emotions which operate and circulate within the boundaries of this cultural and social arena (Karsdedt, 2002). The second and related reality is that there is no one specific template for how to undertake research on emotions and judges (Anleu *et al.*, 2021). There is general good practice guidance, and reflections from researchers in the field, but it will be of no surprise that a theory of emotion in judging and a clear methodology by which to investigate its operation is inconclusive (Maroney, 2016).

So, how to design my project, select the methods and data sources and capture ways of interpretating something as intangible as emotions, needs innovative and novel approaches? I am of course guided by those who have experience in this area, particularly where research is conducted in the courtroom and directly with judges. To this end, I pay specific attention to the academic and research projects of leaders in the field who have worked independently and collaboratively to create a new body of literature and empirical research to illuminate emotions in law, for example: Sharyon Roach Anleu (2021, 2015, 2014), and Katy Mack (2005), Lisa Flower (2020), Bergman Blix (2018), and Asa Wettergren (2016, 2015, 2010), Terry Maroney (2020, 2015), and Kate Rossmanith (2015, 2014). These emotion researchers

continue to call for more empirical research, and more interdisciplinary cooperation across countries, cultures, and legal domains to understand the role of emotions in law. However, methodological approaches to researching emotions in law, are still embryonic and disparate (Anleu *et al*, 2021) and specific methods of data collection need to develop beyond the standard interviews for example, which may yield distorted self-reporting (McKenzie, 2015). Edgley (2013) in proposing a dramaturgical methodology, cites multiple perspectives and theories suggesting that there is no one model which can completely reflect the real world as life is shaped by those who perceive it. Put another way, Mackenzie (2015: 2), advises that finding the meaning in what is observed is "situational, contingent and variable", particularly in the context of personal emotions, as people respond subjectively to their environments. This opens up opportunities to develop and present my individual approach to the research of judicial emotions, with the ambition that it will be of interest and value to the collective research community.

As dramaturgy plays a central role in my thesis, significant attention is given to this in the literature chapter three explaining it as theory but also its contribution to method and as a methodology. The use of dramaturgy, with its theatre metaphors of stage, roles, performances, and scripts helps me to resolve and manage a number of challenging methodological concerns. The primary one for me being how to give expression and clarity to my project, how to organise and analyse emotion data and how to shape and present the final narratives. Dramaturgy is the vehicle, the lens through which to visualise, understand and connect to the emotional experiences of judges within their roles.

Methodological Choices

Whilst the collection and analysis of data carries high responsibilities and risks need to be managed, there are other risks to note, particularly when using novel and creative methodological techniques. One of these relates to Goffman's (1959) dramaturgical

framework which uses theatrical metaphors to enable understanding, and to aid the interpretation of human interactions (Scott *et al.*, 2011). Although dramaturgy is not unique in terms of understanding human behaviour, it is not a regular methodology used in courtroom or legal research. This important and central feature of my design gave initial methodological shape and structure to my project, operating as an umbrella under which other complementary methodological concepts could contribute, for example the use of reflexive and embodied techniques (Pilbeam *et al*., 2023; Washburn, 2015). Dramaturgy has a practical application for my thesis; it frames the data, and its 'beauty' is that it is relatively straight forward to understand (Manning, 2017). If any research setting is suited to the application of dramaturgical theory, as Umphrey (2011) suggests, it is the venue of the criminal trial. This is not just because of the structural similarities to the theatre metaphor (Bachmann, 2010) but because dramaturgy is a means to interpret what people do on a particular stage, how actors perform particular roles according to the normative scripts written for them. Judges need a public stage to perform the ritual of overseeing justice, where they can be seen 'doing' justice (Arendt, 1994: 277; R v Sussex Justices ex p McCarthy, 1924). Importantly, the dramaturgical framework enabled common-sense judicial narratives to evolve from this form of research. There are, however, risks involved in using methodologies which reconstruct the drama of law. There are, of course, distinctions to be made between criminal trials and theatre. Yes, there are components which embrace theatrical elements to persuade and explain decisions, but there are also legal processes aimed at doing justice which must follow the law. Both can coexist but the trial is not supposed to be a re-enactment of a set script like a play but has fluid processes where judges have legal and emotional choices to make (Bachmann, 2010).

Risks: Using Dramaturgical and Reflexive Methodologies

It is a key ethical responsibility to ensure that the judicial story told, remains central and is not overly dramatised or personalised. Capturing the judge's version of their own story as they tell it, is therefore vitally important to building trust (Stets, 2015: 80) and maintaining the validity of the research (Malterud, 2001: 483). It is judges who initiate their own narratives, even if they are later overlaid with alternative interpretations which offer different scenarios. The use of dramaturgy as a methodological framework also invites caution, as there is the potential to distort the narrative (Oswald *et al.*, 2014), inviting the researcher's imagination to play a part in reconstructing or even inventing the judicial dramas (Manning, 1991: 72). Knowing this helped me to offset any potential inclination to embellish the information for dramatic purpose, and this is particularly relevant where emotions are involved.

Even so, judges may not react positively to external interpretations of their performances and some safety mechanisms were put in place to recheck the data and scrutinise the memos and notes written at the time. Another layer of diligence was added by using reflective and reflexive techniques, reviewing narratives as they emerged, and sharing insights with judges and their aids and with those audiences and courtroom participants willing to discuss courtroom events. As a lone researcher, the reality is that most of the data is interpreted based on researcher analysis and reaction, particularly where judges are not directly accessible to give comment. Limited interviews and conversations with judges provided opportunities for participant insights and for them to challenge my interpretations. These were specifically designed to encourage judges to self-evaluate their performances in court and to reflect on their emotions but also to question mine. There is no guarantee however, as proposed by McKenzie, (2015: 74) that any form of self-evaluation, researcher or judge based is the 'true' story, both are perspectives. Ultimately, during the observations I am

regarded as an outsider and need to tread carefully when invading other people's private and professional domains as I am dependent on cooperation within fragile relationships (Dwyer and Buckle, 2009).

Although dramaturgy frames the whole research process, it can only go so far in explaining how emotions as a dramatic feature are present and how they are intuitively evaluated. Other complementary techniques, to include reflexive and embodied techniques (Etherington, 2004) are used to check understanding and to provide depth to the dramaturgical analysis. In terms of this research, reflexivity and embodied elements are essential to fathom the emotions of others and oneself. This task involved more than observing and thinking but it was also about feeling and experiencing the emotion events I encountered. I therefore take account of how I feel in the process in order to understand or gain insight into how others feel. Reflexivity is closely aligned to the scrutiny of personal beliefs and preconceptions, being prepared to adjust them in order to understand this inter-emotional relationship (Bergman Blix *et al.*, 2016: 34- 35).

The risk however is that one's interpretations and responses to others, may not be completely accurate and that the legal domain and research generally for that matter may, reject these strategies as having a fragile substance (Holmes, 2015). Nevertheless, embodied research is about engagement with the external and internal world of judges and has an intimate connection with culture and self (Meier, *et al.*,2012; Willaims *et al.*, 1998). The reflexive researcher takes account of their own emotions using them as a tool for interpretation and evaluation (Etherington, 2004: 19). Whether using dramaturgical methodologies or reflexive, embodied techniques justifying why they are suitable, how they are used practically, and what they contribute, is essential to credibility.

Methods

I started my project with a preliminary three-month phase of investigation which aimed to confirm the methods I intended to use. This period of discovery naturally progressed to a more formal period of planned activity. From this, three formal data collection activities commenced with direct observations of judges in criminal courts, judicial interviews and conversations, and the collection of written media data relating to judicial scripts and speeches. I had already in mind, certain methods for data collection; observations, and interviews, as common approaches to qualitative research, and these seemed a logical way to proceed (Patrik *et al.*, 2019). From the outset I believed that the research should incorporate the direct views and opinions of judges, that they should have a voice or at least an opportunity to provide comment, evaluation or indeed challenge to my interpretations. My original plan was to attend as many different criminal trials as possible both in Crown Courts and Magistrate Courts and to follow these up with formal interviews. It was when the judicial office declined my request for support (Judicial Office, 8th Sept 2015), to interview judges, that I realised the importance of and my dependence on, direct observations. I would need to ensure that I gained as much relevant data from the observations as possible, given the fact that judges are not usually accessible during or after trials. For example, Crown Court Judge L says: "Although I agreed initially to take part in your research, I realise we are obliged to refer such requests to one of our preceding judges. I have done so and the advice I receive is that this is not something they feel I should undertake. So, I am very sorry I must respect this directive and withdraw."

I needed to be clear about what I was looking for from the methods and what the differences in data would produce. At this point I simply did not know, and I decided to invest time into a preparation phase. Here my attention was focused on what significant decisions and learning emerged from the preparation phase which would move my project forward. The

preparation period, although focused on direct observations of judges in court, provided me with a broader action plan, a template for all three methods of data collection, and gave genesis to the techniques of data analysis I would go on to use.

The Preparation Phase

As discussed, I undertook a preparation phase that lasted three months (25th of September 2014 2nd January 2015). In this period I undertook a mix of court sessions on various days of the week, according to my capability and capacity to do so. This exercise enabled me to immerse myself in this legal environment and ultimately to construct a more formal data collection plan, which is summarised in Appendix L. I had no pre- conceived expectations of what I would encounter. Rather I wanted to experience the atmosphere, to begin to understand the rules and protocols involved when acting as an observer. As I became familiar with courtroom routines, I recognised the necessity to make connections with courtroom staff as they were the key to me accessing information and accessing the availability of judges for interview. The decision to attend specific courts was based on their accessibility, i.e. the time and costs involved. As I lived near three major Crown Court venues, (Liverpool, Mold and Chester) as well as several Magistrates courts, these served as initial reference points. Although I collected judicial data during this phase, I could not allow an opportunity to record judicial emotions to pass, I was more concerned with identifying the challenges of undertaking observations and of finding ways to resolve these in advance of the primary data collection period. I found for example, that some days enabled a lessor volume of relevant data to be collected than others. For example, it became clear that some days generated more data and interest than others. On Fridays, judicial activities in some courts almost ground to a halt. In contrast, and in Magistrate courts, Mondays were very busy with a high volume of defendants waiting to be processed for incidents of disturbing the peace, being drunk and disorderly, assaults and domestic violence following football matches. However,

and on the days on which there was a high volumes of cases, their processing tended to be quicker and, mechanistic potentially restricting the time for judges to exhibit emotions. Anger, irritation and frustration dominated these hectic days. Based on these insights I tailored the timing of my observation visits. Though not completely avoiding Mondays and Fridays, I opted to utilise Tuesday to Thursday as the days I regularly attended court during the formal observation phase of my data collection.

The preparation phase transitioned into a more formal data collection phase which comprised, observations, interviews and informal conversations, and the use of judicial scripts and quotes accessed via media sources. A summative chart of sampling approaches is provided at Appendix L, but more detail of each is provided in data chapters, five, six and seven.

The benefits of the preparation phase were significant in raising my appreciation of court settings and of the data collection opportunities and challenges. For example, it allowed me to recognise the almost complete unavailability of judges for interview, and the consequent need to create informal conversational opportunities by attending events which put me in physical contact with judges. These conversational events were informal in the sense that encounters could not be planned in advance and topics of conversation would be led by the situation and context, though where opportunities arose to divert the talk to emotions this is what I intended to do. I had already set up some interviews, but judges started to withdraw early on, and I needed a strategy to deal with this. I fully recognised that I was the 'stranger' (Simmel, 1950), being on the outside of the group that I wanted to research. My solution to this challenge was stimulated through membership of the Magistrates Association as an associate researcher, where I saw adverts for judicial events and training to which I then had access. I started to attend selected events where I could naturally engage with judges and where I could observe and communicate with them on a more informal level, as judges did

not necessarily know or were informed that I was researching judicial emotions. Alongside the ethical questions that this raised, I had a growing an awareness that I was engaged in 'dirty work'. I was an intruder within the judicial group, a deviant (Becker, 1963, 1967). This strategy supplemented the limited number of planned interviews I did undertake, but also directed me towards conversational, reflexive interviews which produced unguarded emotional content. These encounters helped to bridge the gap between being on the outside with moments when I was regarded as an insider, one of the group. I reflect on this positionality in Chapter Nine.

Ethical practice, particularly in situations where judges are unaware that their comments may be used as evidence in research is still a key priority and where I can, I inform judges of my intentions. Agee, (2009: 41) reminds researchers that inquiries into other people's lives are always a matter of ethics. Denzin (2001) refers to this type of interview as performative, where the joint encounters become a vehicle to initiate performances, to produce text and encourage those who wish to, to tell their stories of emotion. This style of reflexive interview was also transferable to those interviews which were planned, but where traditional question and answer modes were not as effective, mainly due to the fact that judges like to feel in control by dominating proceedings. As the researcher is more proactive and participatory in these more fluid debates, avoiding the distancing that traditional interviews produce, a richer more emotionally driven environment can and was achieved.

Judicial Scripts and Quotes

During these early days of factfinding and testing of methods and approaches I also noticed the consistent importance and power of judicial language, judicial use of words, phrasing, and verbal communications (Philips, 1998). This alerted me to judicial emotions and passions but also to the potential for detecting hidden emotions and motives through language. I therefore decided to introduce a third method, adding to what I was finding during

observations. I started simultaneously collecting judicial speeches, judicial quotes and comments using mainly media sources. In the end, I covered five hundred cases, across three hundred and eight judges/magistrates, accessing materials on a national basis. The capacity to record language systematically and accurately is a challenge during observations, and even within interviews where recordings and note taking are possible. These administrative interruptions can, as reported by Baker (2012: 6) interfere with the flow of the process, as stopping to record can make the researcher "less observant and less involved". This was particularly the case, when I was actively engaged in discussions, but I was also eager not to distract the judges involved. These issues were overcome by introducing the third but separate method of reviewing various forms of judicial script. The preparation phase solidified my three methods: I would watch judges performing, I would interview and engage conversationally with judges, and I would pay specific attention to judicial words, phrasing, and use of emotional and emotive language used in scripts across the three methods. By widening my sources and altering my techniques to include published written materials, mainly judicial quotes, I opened up an extensive reservoir of literature and materials based on real life, judicial situations. Chapter seven considers the reliability of such evidence, making the case that as the media is the main mechanism through which judges communicate with the public, then this inclusion is valid provided that media opinion is removed, and only direct judicial quotations are included for analysis.

Sampling Strategies: A Summary

The sheer volume of empirically based data available was unexpected, given the general academic view in the field of emotions that judicial data is hard to generate (Bergman Blix *et al.*, 2016; Cowen *et al.*, 2006). Each data chapter will outline in detail how data collection choices were made but here I provide a summary of my key decisions. In the first instance the perspective that data is hard to generate, motivated me to consider how I would collect

sufficient data, and I embarked on planning the three routes to achieve this through observations; interviews/conversations and media data, quoting judges. I did not select any specific start or end date to data collection although I did anticipate that the preparation phase would last around three months, (late 2014 into 2015). The research process was undertaken in a part-time capacity, allowing a six-year period in which I could collect and analyse data as well as complete the writing process. Collecting data over a longer time frame led to the accumulation of a significant volume of data but also allowed for the development of a longitudinal piece of research. Through this I was able to recognise changes, to and, patterns of, emotional behaviour across multiple venues and amongst judges. With formal access to Court Serve, an official legal database I was able to identify planed criminal case hearings 24 hours in advance. Simultaneously I collected and recorded media data and this became a regular daily practice which ran from April 2015 to September 2019. This was particularly useful when I could not attend full day court sessions. The interviews were fixed and pre-arranged, and these went ahead as planned. The chart at Appendix L summarises the sampling criteria for each method.

This collective data not only provided enough evidence to address the problematic, but generated and stimulated research questions that go far beyond this inquiry. Taking a triangulation approach (Yeasmin *et al,* 2012) enabled me to examine judicial emotions from three contrasting vantage points, with these data sets being compared to identify commonalities, discrepancies and patterns. Where one method did not produce the insights I sought, I relied on the other methods to bridge that gap. For example, recording of judicial words and speeches through note taking, either physically or mechanically was not always permitted in court. Capturing the essence and accuracy of judicial commentary was sometimes dependent on my short-term memory, until I could make notes out of court. Even short delays in recording left some potential data gaps. Thus I was able to fill these gaps by referring to the judicial interviews I undertook, and the judicial quotes recorded by the

media. Undertaking the judicial interviews provided me with closer human contact than the courtroom observations and media data allowed. This was important as the interviews enabled me to assess my observational assumptions. The analysis of media reporting (i.e. judicial quotes) helped me to collect an extensive library of story lines relating to judicial emotions, with the text, words and scripts made readily available for analysis in terms of story narratives and content.

Data set one and three yielded extensive information. This was a deliberate approach, as discussed. It enabled me to recognise the point at which all the key issues and insights capable of being generated were exhausted (Hennick and Kaiser, 2022). Where data starts to repeat itself this provides an indication that adequate sampling had been achieved, though this was ultimately a matter of researcher judgement. Whilst academic opinion suggests the above, this was not always the experience I can report. It was clear to me that despite the judicial tendency to cover up emotions, the wealth of data I captured enabled robust insight of the manifestation and uses of emotion in court settings. These insights gained in the preparation phase of the research prompted return visits to observe in the same courts and the same judges. The sample size for the observations therefore was not predetermined but flexible, which can be seen as a strength of this approach (Patton, 2002, p 273). This is referred to as process orientated data collection by Rahimi *et al* (2024) meaning that there is no specific point when saturation occurs but a range of points where I, the researcher, became satisfied with the amount of data collected. This typology was applied to both the observations and the media data. This is complemented later in the process by thematic or code saturation as various themes emerged although at different rates and scales (Bowen , 2008), described in detail as part of the data analysis section of this chapter.

Saturation is not just about the quantity of observations, the theming or coding of data, but about my positionality as a researcher. Repeated observations allowed a greater degree of

detachment, a natural process of desensitisation, whilst enabling me to stay close to the emotional experiences revealed in the data collection processes (Pilbeam *et al*, 2023). It was noticeable that the more cases and judges that I observed, the more accounts of emotion that I read in the media, the less I was surprised or shocked. Practical advantages of this approach also emerged, as I needed to make relationships particularly with the Clerks of the courts. It took time to build the trust that these relationships depended on. I also developed my recording documentation, trialling and improving these skills within the courtroom environment.

Operationalising the Methods

In total, over a thousand direct observations were undertaken, involving eighty-five judges, in total fifty-five courtroom venues with multiple visits at thirty-six criminal courts: ten judges were interviewed, with six judges taking part in singular discussions, lasting up to an hour each and four judges in two paired sessions, lasting up to two hours each. Alongside these more organised interviews, I had multiple discussions, conversations, and debates with those in judicial and supporting roles, mainly at organised legal conferences and events publicised by the Magistrates Association magazine. These were shorter engagements often only minutes in duration, but nevertheless, exposed me to judicial opinions and topics of concern to them. As with the direct observations collecting the data discretely involved me in memorising significant judicial comments and behaviours, then as soon as possible transferring these memory notes to paper. This challenge provides further justification for the inclusion of the third data activity, the analysis of judicial scripts and quotes, drawn mainly from published media sources, newspapers, and news web sites, using words claimed, as being only those of the judges overseeing criminal trials. These documented judicial comments helped to compensate for the potential loss of some data collected during direct observations and interviews, vulnerable in the short periods between making mental notes

to creating more reliable and reviewable written notes. I consider the validity and reliability of using such an approach in Chapter Seven. Data arising from secondary sources mainly the media, covered five hundred criminal cases nationally, across three-hundred and eight judges sitting in either Magistrate or Crown Court venues.

Research Questions

The key to moving beyond abstract concepts of emotions in judicial decision-making is to construct appropriate general questions but also tailor these to each methodological approach. As it is no longer necessary to continue to prove that emotions pervade the criminal courtroom, (Knight, 2014; Karstedt, 2001) questions will move beyond these basic considerations, to exploring how emotions operate within the courtroom and the judicial space, both physical and emotional. Whilst emotion research has developed, we still do not know enough to answer the question as to the significance of emotions role in judicial decision-making. What we do not know enough about, is *how*, or even *if*, judges manipulate emotions within their roles or whether they are just subject to them, therefore influencing what they think and do (Putman, 2001).

In order to fully comprehend the role of emotions in judicial decision-making I considered a range of viewpoints, and these helped to establish a set of baseline questions (Appendix A) to kickstart this research. The initial questions which surfaced emanated from my own beliefs and experiences, and these were developed in order to produce tentative themes. As an iterative process these questions could then be dismissed, refined, combined, or maintained as new beliefs emerged with exposure to new data. This led to creating firmer themes, some of which were still subject to being reshaped (Morgan, 2020:4). Such questions included: In what circumstances do judges' personal emotions leak out and what happens when they do? Are there any influencing factors which stimulate the judge's emotional reactions? For example, what role do victims have in shaping judicial responses? How do judges resist the

urge to use their personal emotions in the legal decision-making process? Do institutional obligations and strategic purpose override personal emotions? What are the consequences and impacts of judicial emotion for others, for judges and for justice? Are emotions tools of manipulation or are judges just subject to them? Even early questions produced the following themes: 1. Extent of emotion leakage; 2. Triggers and influences; 3. Strategies to control and resist emotions; 4. Use of emotions as a tool; 5. Private versus strategic deployment and 6. Consequences for victims, judges, and justice. Specific emotions were not directly pursued, and no formal definition of emotion was generated, in order to guide me. However, where an emotion or an emotional enactment was generated and repeated within the data, establishing a pattern of judicial emotions, these formed key themes, leading to potential narratives, or being dismissed as insignificant to the key question.

Spontaneous Questioning

Whilst having prepared questions is essential a feature of semi-structured interviews spontaneous questioning also had a place with questions arising in the moment initiated by something said or done. A clear example detailed in Chapter Six, is where I was in an informal conversation with a woman judge. I had asked her if gender differences impacted on her views of emotion within her role. At this, she became highly defensive, seeing the question on gender and emotion as a reference to her capability or even her right to work alongside men. Gilbert (2001: 52) cautions that women can react to the "emotional dimensions of interviews" and questioning, suggesting researchers should be prepared for responses that are equally emotional. This point of course, may also apply to men although it might manifest in different ways. The point is, there is a risk that interviewees may close down, but in this case the judge opened up about the continuous efforts needed by women judges to prove themselves to their male colleagues (Rackley, 2013). This involves women judges deliberately taking certain emotional positions, for example by displaying aggression and being punitive,

traditionally masculine traits (Holmes, 2004: 221). In this judge's view, women judges are expected to show compassion and softness, and such emotional positions can be seen as weak, particularly if it is a male judge (Maroney, 2011). For me, this unplanned encounter led me to consider how male judges, in particular, maintain the semblance of neutrality, through masculine identities and to ask questions on what impact this may have on defendants and victims.

Changing Direction: An Iterative Approach

I did not set out to examine gender and emotions, or gender and judges *per se*, but I consciously decided to take a gender valued or feminist approach to this research and continue to use gender pronouns (Jenkins *et al.*, 2019). So spontaneous and opportunistic questioning came to be an essential feature of the project design, as research is likely to go down unexpected paths. I also recognised the value of taking a risk by asking sensitive questions and on occasions, this proved to be highly productive. However, asking spontaneous questions is a skill involving dialogic and conversational abilities, mastered with practice and with an awareness of one's own biases but also the ability to recall key questions sitting prepared in the background. As a mature student with a long career and history involving work with sensitive and vulnerable people, I drew on this and recognised my ethical responsibilities to get this type of questioning right. I also did not intend to investigate any particular labelled emotion, anger for example, but left the data collected, to determine direction and tell the story of judicial emotions. Running in parallel to the accumulation of questions which aid the hypothesis, central arguments started to take shape. This is crafted from strong convictions, prior knowledge, and reasoned intuition, and provides a data analysis rationale and a direction for the research.

Data Analysis

Given the volume of data I had started to accumulate, it was clear that I needed a systematic process to transform the raw data collected above into meaningful, more structured, and manageable data formats. Producing smaller data sets, with similar groupings proved to be an effective strategy in terms of identifying recurring themes, patterns and relationships which would then ultimately address my key question. In addition to this, coding assisted me to clarify my own thinking and judgements, enabling me to organise the data around the methodological and theoretical framing I had decided upon, and I discuss the complementary strategies I used in this regard below.

Multiple Coding

There are multiple coding methods available to researchers which assist in establishing core themes, leading to coherent narrative stories, a coding method in itself (Salanda, 2016). Choosing which ones to use, was for me a matter of practice and learning as some coding methods have similar formats, they may overlap or be the same just with different titles. In the end it was the ones that fitted with my study which produced the best clarity and results. In the description of how I used coding, which was not a linear nor solo activity, but more of a spiral process, as Mao, *et al.*, (2016) suggest, I emphasise that I used coding as a means to support theming and narrative inquiry. My goal was to create emotion themes and coding processes did give me a starting position (Basit, 2003). The coding processes I utilised fell into three types, the first to include: descriptive type coding, referred to as inductive coding which can encompasses emotion coding (Saldana, 2016). This is suited to research on emotions which involves social relationships, intra and interpersonal participant experiences but is also compatible with the internal processes of "decision-making, judgement and risk taking" (Saldana, 2016: 125).

Inductive/Emotion Coding

This type of coding is borne out of the data, where common-sense, orthodox labels emerged, generated either from my observations or from judges themselves. Within the data there are many examples where judges expressed their own emotions with phrases such as 'I feel distressed' or 'angry' or 'sad.' At this stage, these descriptors of emotion are just accepted, and no other interpretations are placed on these observations, unless there are obvious contradictions to be noted, or if obvious pattern categories are suggested. Emotion coding involved more than the verbal, but extended to nonverbal indicators, facial expressions, body postures, even silences and these observable or recognisable features needed to be categorised by me, as the researcher and were therefore more subjective in nature. As actions and emotions are intertwined two sets of data are generated from the emotion coding, data which is labelled as an emotion or set of emotions and data where the coding captured the extended experience, the culture, the background, the context, the triggers. Thus providing 'thicker descriptions' than words alone (Oatley *et al.*, 2006). As I became more experienced other coding techniques were overlaid onto the initial data and as my confidence grew some ran in parallel, to the point where theming then became a coterminous activity.

Dramaturgical Coding

The second type of coding used in this research is dramaturgical coding, which is suited to the judicial stories collected as part of this thesis, where terms and conventions of the theatre are applied to the data (Saldana, 2016: 146). The judge then becomes the key actor, with other participants, including the audience becoming part of the cast. Dramaturgical coding played its part in the creation of the narrative structure, as all court cases have the same set or stage, the same roles/players, the same scenes and rituals, performances, sentencing speeches and the same ultimate outcome, that is, the sentencing of the guilty. Through an

examination of judicial scripts, I was brought closer to my subjects (Patrik, 2019; Bachmann, 2010).

Literary and Language Coding

The third coding type, Saldana (2016) refers to as the literary and language methods of coding. These involved using a mix of approaches, dramaturgical, narrative and content analysis in particular, and were aimed at establishing wider emotion patterns through an analysis of judicial discourse, dialogue, and emotion content. Here I placed an emphasis on the judicial scripts, the story lines, using line by line analysis of the content. I identified the emotion words, phrasing, and judicial language as spoken directly on stage and/or contained within the written manuscripts for each legal drama, the court reports, my own transcripts, and media reports. This coding process produced a consistent pattern of emotion across all judicial performances and revealed a sense of frequency and commonality in the use of emotive words, phrasing, and themes.

These scripts were central in pulling the judicial plays and dramas together (Turner, 2009); in unearthing the emotions which were buried beneath the surface of the judicial performance (Hochschild, 1983) and enabled a deeper understanding of the emotional dynamics in the courtroom setting and beyond (Posner, 2009). In analysing the scripts, the clarity of judicial intention can be exposed, for example, through how judges use scripts as a tool to exercise power and control, persuasion, and manipulation and not just as a method for personal venting (Visser, 2017). A depth of analysis is further achieved through the literary and language experience which is initiated by words both oral and written. This refers to the atmosphere, the symbolic meanings engendered by judicial performances and how words are crafted to captivate, engage, and draw audiences into the storyline the judge wishes to portray. Whilst logically, embodied experiences are generated from the whole dramatic performance, that is its visual and audible components, analysis of textual materials (Brown

et al., 2011) can still induce an embodied response. Words can however separate us from the total experience, so it is how words are put on paper which matters, as words create rhythm and rhythm creates emotion (Lindquist, 2021). As with drama the trial produces its own lexicon of emotions found in the scripts and these are not neutral if selected by judges for public consumption. Understanding the origin of each is necessary to distinguish which emotions are private and which are corporate.

Practicalities

In order to reduce and combine data into manageable units, I initially used NVIVO software but found manual coding more creative and inspiring, then combined this with word processing options (Basit, 2003). In using manual coding, I support the view of Gallagher (2007) that software packages can produce style but can lack nuanced substance. For me, taking a manual approach using pen and paper enabled me to add memos, notes, and work with the data intuitively. As the main themes were established, I was able to depend on the electronic coding, and then themes, using IT based, word processing search techniques, underpinned by basic content analysis, using key emotion words. The cyclical process of continuous review, data reduction, categorising, and reflexive attention to the detail, aided the mapping of relationships between emotions, between situations and between judges. This also illuminated the fact that some emotions such as anger, and sadness have triggering emotions which precede them, and actions which inflate and change the volume of the particular emotion or event. It is these, sometimes unpredictable, features that raised issues of ethics and risk, as emotion data is created in that moment, by the circumstances, the crime, the personality, and attitudes of the judge (Tiede, *et al*., 2010), by the other players, including the researcher and the audiences. These interactive influences are also subject to the often volatile and emotional environment of the criminal courtroom and even similar circumstances will not produce the same outcomes. This is what makes my research unique.

Structuring the Narratives

With a particular emphasis on the emotional character of the judges in my study, I shaped the data into the judicial stories, the emotional narratives, considering how emotions informed and influenced judicial motives, conflicts, strategies, and attitudes, contributing to their decision-making. Judicial comments recorded and quoted in Chapters Five to Seven are labelled to reflect the different tiers of the court structure. These are abbreviated as follows: **CC** for Crown Courts, **MC** for Magistrate Courts; the Judiciary within each, **J** for Crown Court judge, M for Magistrate, or **JP** for Justice of the Peace in Magistrate Courts.

Continuing with the dramaturgical framework, I organised the themes and story lines into three distinct chapters, following key theoretical components of Goffman's (1959) theory, as discussed in earlier chapters. To recap, Goffman's dramaturgical analysis focuses on two associated ideas: the stage or action zones known as regions and on the social roles enacted or performed in each region. There are a number of regions, but I concentrate on two. The first is the frontstage region which informs Chapter Five, and mirrors the data found during direct observations of judges in the criminal courtroom. Here I concentrated on the emotional content of the judicial presence on the courtroom stage, including how I experienced any incidents, episodes or performances involving emotion. The second region is the backstage area, were the data derived from interviews, and conversations, provided the substance for Chapter Six. This second method provided contrast to the formality of the frontstage criminal trial but was also complementary as it revealed information often guarded and suppressed, during public trials. In dramaturgical terms the backstage area is where judges rehearse and prepare for their frontstage performances (Goffman, 1959: 109-140) but also where suppressed emotions make more of an appearance.

It was clear during both stages of the research how judicial narratives took a central role in proceedings, aiding impressions along the way. Basically, judges seemed to excel in the

retelling of the crime story, particularly where defendants were found guilty and where sentencing decisions needed to be justified. The sentencing speech is also a key place where judges present official narratives on crime, but also where they have the opportunity to demonstrate their own abhorrence and distain for immoral and illegal acts against society. The importance of these narratives led to Chapter Seven, where the significant role of language and linguistics found in both the formal and informal scripts was recognised as pivotal. In Chapter Seven the third method, therefore, changes direction to look at the central and critical role of scripts in isolating and exposing judicial emotions both frontstage and backstage, examining how scripts, scripting, words, and language shaped judicial performances and roles. The narrative stories concentrate on the role of scripts, how they exclude emotions or how judicial emotions leak out through verbal and nonverbal scripts. When judicial activism is apparent or where subtle influences are suggested, the narratives tell the story of how judicial emotions operate, and how they destabilise traditional ideologies of emotion and law.

Ethics

Research inquiries, particularly those looking into the private area of other people's lives demand the use of professional ethics. Ethical principles are initially driven by professional research standards and my approach to this was assessed through the internal University ethical approval process (Appendix, B). Integrated with this, were the personal choices I made, often intuitively, but also combined with emotional foundations which guided my own decision-making. For example, I was conscious that gaining judicial trust needed honesty, and I would need to work on building relationships to this end. I also held a strong belief that emotions are reliable ethical guides (Mason, 2013). This helped to remind me of my ethical and moral boundaries when forming relationships with participants, and in the construction of the questions I asked, whether planned or unplanned (Agee, 2009). I contend that this

awareness also served to protect the integrity of my research work. Based on guiding principles provided by the Economic and Social Research Council (ESRC, 2023), the British Sociological Association (BSA, 2017), guidance on ethical research and other frames of reference, such as the Nolan Principles (Principles in Public life), my research is bounded by combined standards to include: integrity and transparency; negotiated confidentiality; professional respect and honesty; limitation of risks and harm; maintaining the dignity of all participants; and where possible and reasonable, securing informed consent; taking accountability through openness and maintaining the independence of my research. These principles were slightly adapted for each data method. For example, the criminal trial and judicial performances are fully accessible to the public and formal consent to observe trial participants is not required. However, to encourage good rapport with judges I made them aware of my intentions to conduct research. In contrast, interviews with judges demanded more explicit attention regarding judicial consent, as information being shared may have been of a personal nature, given to the researcher in the moment, and perhaps regretted post discussion. Whilst attending events and conferences, judges often assumed I was also a judge simply because I was there. The approach I took here was semi-covert, as I did not expose my status nor reason for attendance unless asked, or where I considered that I should do so ethically and morally according to the ethical standards I had established for my research. Regarding the ethics involved in using secondary data, particularly relevant to method three, the media quotations, there is still a requirement and duty to treat materials within the expectations of professional standards. The avoidance of harm to individuals is paramount even where the information is already in the public arena (Gilbert, 2001). Importantly with the use of press reports on judges, only verifiable quotes are used as data, as such cross matching of information across the media and official sources if available is undertaken to check authenticity.

A contextual understanding of the information provided via this type of medium is also, of course, essential to ensure clarity and any press interpretation or opinion is excluded from my data collections. The risk of misinterpreting judicial quotations in isolation and other judicial data is possible and countering these risks is part of a continuous process of checking and auditing. It is understood that the media have motives and may try to set agendas which may influence how judges are perceived (Schulz, 2009) but this is balanced with legal protections. Any unfounded, unjust, or erroneous presentation of a judge or their comments falls under the Contempt of Court Act (1981) and the rules for media reporting (CPS, 2018) and this reminds court reporters of their own obligations of fairness under threat of possible imprisonment. Whilst use of media quotes my raise concerns it is important to remember that the public gain their knowledge and opinions of the court system and of the judge, primarily from media sources (Moran, 2014) and to a degree the judiciary have a working relationship with the press where standards and ethical rules apply. To include media induced data on judges and potentially their emotions is therefore legitimate providing the data is untarnished and detached from personal and political media influence. Details of how these principles are translated into research practice are covered in each of my empirical chapters, specifically Chapters Five, Six and Seven. In preparation for each data collection activity, a range of documents and data recording templates were constructed, modified, and improved over time to include general information about the research project, confidentiality agreements, and consent forms, all of which were shared with participant judges either directly pre-interview or through the Clerks of the Court, prior to courtroom observations and interviews (Appendix C, D).

Data Management

The management of data is critically important with regards to achieving best practice in research and in meeting ethical standards both morally and legally. As a researcher, I fully

understand the obligations in law to protect and manage data according to the Data Protection Act 2018, current associated regulations (GDPR) and by providing a comprehensive updated data management plan RDMP (2020) following the Digital Curation Centre's policy (2013). In summary, I took various measures to ensure identifiable participants were safeguarded, while also making sure that their identities were not disclosed, unless information was already in the public domain, as many legal cases and judges are. To maintain an element of participant confidentiality, customised abbreviations were constructed, based on participants' title, status, role, and name, the location of the trial courtroom and crime category. This initial coding related to the protection of participants and resulted in the creation of specific manual code books to which only I had access. It is noted at a stretch that it would be feasible for an interested party to identify some of the key individuals involved. Nevertheless, as all criminal court trials are accessible to the public and the media, protecting participants completely was not always practical nor achievable. I made participants aware of this in all communications I had with them, particularly highlighting this within the confidentiality agreements and consent documents (Appendix C, D). Different types of data are yielded from my research: data, which is available to everyone through court reporting, data arising from personal contact with judges which requires their consent to use in the thesis document, and data which emerges from my own interpretation of these emotion events. This latter form of data is the product of my own analytical skills as a researcher, with the complete understanding that it is the researcher's evaluative opinion as to what a judge may have been feeling. This also involved an assessment of how judges' emotions impacted on me, with the aid of memos and field notes. Data of this nature is therefore 'owned' by me, but judges, were encouraged to share in these interpretations and to counter them, where possible. The security of data in the form of written notes, memos, diaries, digital recordings, manual coding transcripts, and the transfer of these records to more formal IT based spreadsheets also involved ensuring that all records remained safe for

the period of necessary access before destruction (Manchester Metropolitan University, RDM Policy, 2020). As such IT based materials were pass-coded and hard copy transcripts were secured in a filing cabinet, in a locked office off campus, thereby reducing potential access. It is not the intention of this research nor is it appropriate to share my data with any other person or body for future research purposes. However, it is anticipated that findings could result in stimulating further research in this area.

Conclusion

This chapter demonstrates many of the complexities of researching emotion as a genre, one which is denied as ever influencing legal outcomes, at the higher levels of legal and governmental officialdom. Part of this is ironically born out of fear, as emotions and their contributions to law, are difficult to articulate and research creates difficult challenges to long held beliefs that participants can find difficult. But without challenging such norms, the *status quo*, and the potentially erroneous perception of judicial neutrality and impartiality are maintained and reinforced. And yet those involved at ground level in their daily experiences of law and emotion, from legal practitioners including judges, to the public question the rationality of accepting that judges are less human in their thinking, in their performances and in their decision-making. After all it is emotion which drives the law as without it there is no law (Solomon, 1985), no humanity and ultimately society is damaged.

There is evidence to suggest that emotions do play a key role in the courtroom and as a phenomenon it is now accepted by professionals and academics that this is the case but more than this, judicial emotion is an area which is attracting more and more interest as what remains an under explored element of 'doing justice.' Despite such research challenges and barriers judicial emotions is researchable, with careful design, an attention to philosophical appropriateness, and the deployment of a clearly articulated conceptual and theoretical model as a means to enabling better informed communication. For the researcher, the

investigation of emotions is fraught with ideological, methodological, and practical issues of implementation but these are not insurmountable and such a challenge should be embraced in order that we better understand how courts work.

Chapter Five

Observing Judicial Performances Onstage

"I have no naïve notion that a judge without any emotional attitudes exists, and I have no desire to live in a society in which such sub-human or super-human judges exercised the power of judging." Jerome Frank, 1932: 674

Introduction

In this, the first of three data chapters I will present the observational data collected from attendance at over a thousand criminal trial cases, all of which have or are due to progress to formal court hearings in Magistrate Courts, Crown Court and in Courts of Appeal. In doing so I engage in direct observations of eight-five judges, across fifty-five courtroom venues with thirty-six courts receiving multiple visits, as they undertake their judicial duties. These include pretrial processes such as plea and bail hearings, formal trials and a significant proportion of cases which are devoted to the sentencing stage. Interpretations, evaluations, and conclusions are drawn from multiple acts and scenes from within different trials, at various stages of the criminal justice process. For every presented case there are many other elements which arose, which when coded fall into thematic categories, demonstrating recurring and connecting emotion themes within the data. However practically, space prevents the inclusion of all the trials observed, but also the fact that many trials produced similar thematic materials means it is unnecessary to detail them all. To this end the presented cases are illustrative and representative, but all cases observed, have been reviewed, and organised into thematic data sets, which contribute to telling the judicial story of emotions in the courtrooms, as I observed and experienced them. The process of data organisation enabled the selection of an observed, exemplar case, used as an initial working thematic template, which is added to by drawing on the many other cases observed. This

process of selection was clearly and systematically aligned to the conceptual and theoretical framework I discussed in Chapter Four and particularly as it relates to Goffman's dramaturgical concepts. My role is to assess whether these judicial performances meet the desired expectations or whether when judges go off script, they do so with emotions which have the capacity to interfere with neutral decision-making. The data generated is thus interpreted from this dramaturgical perspective.

In order to make the most of the extensive data available, I initially use the exemplar case study, referred to as the "Traveller" case, as a means of structuring my observational evaluations and as a way to illuminate key themes attached to emotions and how they arise, and I reinforce this with evidence from the other cases. I use these testimonies in tandem with the known literature to present a narrative understanding of judicial emotions, and to reach some conclusions as to how emotions interface with judicial decision-making. At the core of this chapter lies the emotional choices made, and risks taken by judges in terms of managing complex and unsettling cases. This chapter outlines the 'tactics' used to maintain judicial power and control, in order it seems to retain their reputations and respect as judges. The Traveller case provided me with an opportunity to assess an unusual case, which had all the elements and thrills of high drama, including a hint of dangerousness and risk taking, features of human behaviour which are driven by emotion (Putman, 2001). The judge sits centre stage in this analysis, and it is his or her plot which is of interest rather than that of the defendants. Victims also take the stage as a key threat to judicial challenges, with the potential to draw out judicial emotions hiding behind evasive courtroom strategies. The use of humour and laughter in the Traveller case draws a particular interest, in that such emotional tactics could easily backfire in the pursuit of judicial goals. This case has it all dramatically, and enabled a deeper evaluation of how judges may need to be rescued, and by whom. But tracking the emotional content of this case leads to asking some unpalatable questions, including the extent to which judges display a natural desire to punish and

whether they experience pleasure in this. These themes unfold as the Traveller case is put under the spotlight revealing judicial stress but also judicial courage.

The Traveller Crown Court Case

The Traveller Case centred on the claimed rape, sexual assault, and human trafficking of underage school girls, by members of the travelling community. It was alleged that multiple rapes took place where the girls were forced at knife point to take part in sexual acts, with groups of men over a sustained period of time. In addition to the forty-five charges of rape, some members were also accused of sexual exploitation of minors, of taking indecent images, videoing the alleged crimes and of being in possession of drugs for distribution. One defendant was aged thirty-one, another twenty-four and the rest were aged between eighteen and twenty-one. All fourteen pleaded not guilty and it was decided by the sitting judge to split the trial into two, as the numbers involved were unmanageable.

Why This Case

The Traveller case stands out amongst many as being illustrative of how emotions are used for strategic purpose, not just those emotions traditionally seen as being the norm in judicial performances, anger for example (Maroney, 2011) but also other emotion-related frameworks such as humour and laughter (Anleu *et al.,* 2014; Bolton and Boyd, 2003) which are utilised when circumstances demand creative thinking by the judge. As an exemplar case it highlights core emotion themes and how the everyday work of judges revolves around the management of the courtroom dramas to retain the trial structure. In a sense whatever the trial case, the show must go on, justice must be seen to be done (Bachmann, 2010) and it must be done in the form and structure advocated by law, ritual, and practice (Scheffer *et al.,* 2009; Fielding, 2006). There is a recognisable order to these courtroom dramas, and this is arguably achieved through the stability of judicial power and authority and in the

successful control of participants and proceedings. Jacobson *et al.,* (2015: 2) refer to this as "structured mayhem" and in the end even defendants are highly compliant with courtroom rules and social protocols (Kirby, 2015). The Traveller case is one of those cases which risks uncontrolled mayhem in the courtroom, not just due to the number of defendants appearing together, but also because of the volume of serious charges alleged. How the judge approaches this dilemma creates theatrical interest and positions this case as one which has potential for dramatic outcomes and emotional involvement. Of course, the form and structure of the criminal drama is seen as core to the rule of law and therefore justice (Umphrey, 2011; Scheffer *et al.*, 2009; Perry, 2001), but this stability can be unsettled by judicial agency and by the inevitable and unpredictable influence of human emotion active in the moment. As such, the other cases observed will also explore what the Traveller case does not, that is the extent to which emotional leakage overrides strategic purpose. The Traveller case serves as an example of how elements of emotion are interwoven into each scene with the judicial script both verbal and non-verbal a central focus for understanding emotions.

Travellers in the Dock: Crown Court May 2016

I am settled to the right of a large glass dock which is slightly elevated. The audience is seated, Crown Court Judge Appleby (pseudonym) enters. Everyone rises; the judge has full view of the dock. I have good sight of both. As soon as I enter the court, I recognise that something unusual is going on beyond the familiar awkward silence and atmospherically induced tension created by acoustics, the architectural structure and layout of the physical courtroom experience. This starts with the appearance of two large robust men who position themselves one at each access door, behind the dock and in direct eyeline of the judge. This is the only time I have seen this during a thousand plus cases. At first, I thought the men were court security, but I learn from the court clerk they are associated with the defendants, and

it is oddly unnerving that they are permitted to obstruct the entrance and exit doors of the courtroom. My own attendance at court is highly monitored and controlled. I am told where to sit and what to do, yet two men acting like nightclub bouncers stand boldly as part of the scene, apparently unrestricted. This draws my attention in apparently emphasising the extent to which emotions are already activated even before proceedings begin. The presence of these men felt intimidating as there was no evidence of any court security or police to counter this. The judge continues with his directions without any acknowledgement of their physical presence. It seems likely he may have agreed to this arrangement in advance. There is a sense of staging, and that deals are being discussed behind closed doors.

The judge then asks the clerk to call the defendants to the dock. One by one a total of fourteen men, mostly in their early twenties, appear in the dock from below, a dramatic entrance. All are dressed smartly in suits. The charges are then read out. This lasts for an hour, and the sheer volume is surprising. A total of forty-five charges per individual are read out by the clerk including rape, sexual assault, human trafficking for sexual exploitation, drug dealing, carrying offensive weapons, kidnapping, GBH and false imprisonment. Each charge is repeated as the defendants' names are called out, and this adds to the already tense atmosphere. All defendants plead not guilty. During this activity, the judge keeps a direct gaze towards the dock only diverting his eyes to make a few notes or to look at documents. The judge asks questions regarding bail conditions, trial dates moving forward and the wearing of electronic tags, which had been imposed at an earlier Magistrates hearing. I had not anticipated what was to come as the same judge in his previous case came across as being stern, and cold. His emotions are hard to read in the Traveller trial, but there is an ambiance of fear, an atmosphere of uncertainty. In his previous case the judge refused to accept any mitigation and did not show any leniency towards the offender concerned who is found guilty of fraud, for passing off a fake £20 note in a pub. Despite pleas for compassion on the grounds of mental health, the judge in a loud and rather threatening voice said, '*take*

him down.' I expected this solemn and harsh tone to be carried forward into the Traveller case, particularly in view of the serious nature of the charges. It was not, and the judge's behaviour and his demeanour are in stark contrast to what has just preceded.

To this point the Traveller judge does not expose any particular emotion or emotional state. He appears calm and is expressionless. The initial decisions he deals with are administrative, with long pauses and silences, where the judge takes his time to review documents. These silences are uncomfortably powerful, as the defendants are shuffling in the dock, whispering and clearly uneasy. Similarly, barristers are moving foot to foot, examining paperwork looking for signs that the judge is ready. There is an air of anxious anticipation. I experience a sense of judicial power and authority being invoked in these periods of silence as the judge glances occasionally to view his audience. The opening scene seems as if it is being framed by the judge deliberately and tactically. Then, specific requests start to flow in from the female defence barrister with an unusual first name, which the judge continually uses in communications. For the sake of confidentiality her name is replaced with 'Maserati.' This is an unusual breach of bench protocol as the use of first names is not the norm and could suggest a lack of impartiality or preferential treatment on the part of a judge, something a judge would normally want to avoid. I describe these interactions as being jovial even slightly *risqué*, and on the brink of flirtation which could also be interpreted as potentially misogynistic. The FDB appears to be uncomfortable, contorting her face and lowering her head, not always making eye contact with the judge who is smiling widely, and apparently teasing the counsel. The judge's tone of voice and his body language is more open, arms moving and gesturing in complete contrast to his previous case, suggesting deliberate actions on his part. The defendants are amused and laughing, and the judge communicates with them, using smiles and frequent purposeful eye contact. The male prosecution barrister (MPB) is referred to by the judge, using only his surname, the accepted formal approach. There is a notable contrast in judicial behaviour and performance when compared to his

previous case. It is not clear why the judge has decided to break protocol and potentially, at least, risk his reputation in this regard. This judge appears to be performing, choosing to portray a different judicial character, giving out a different impression. A distinction can be made between the two cases which may explain this unexpected behavioural change. In the previous case the judge had the role of making the final sentencing decision, therefore the solemnity of this ritual is important. In the Traveller case the judge's role is to decide next steps in the early process of bringing the case to formal trial. It is reasonable to conclude that different impressions and emotions are therefore engaged to assist the judge in dealing with such challenging circumstances. The change in emotional style between the two cases suggests that the judge has consciously considered and planned his strategy, selecting and using emotions to structure the dialogue and outcomes.

The FDB asks for the removal of electronic tags; the return of passports to enable some of the group to go on holiday to Spain and permission to travel out of the local bail area to attend the annual Appleby festival, an event popular with travellers. On hearing this list, the judge says, "Maserati are **you** going to B… in Spain for **your** holidays [emphasis added] or are you Christmas shopping?" The judge's tone is playful, with Maserati's first name being elongated and accentuated. Laughter erupts several times from the dock and public audience. The judge makes smiling eye contact with the defendants whilst directing a question to the defence.

"How many police stations are there in B…. [Spain]," the judge asks?
"I don't know" says Maserati.

The Judge is laughing sarcastically and in a clear put down says:
"I bet the CPS does not even know how many there are in Blackpool."

Laughter echoes again from the dock. The judge then asks the prosecutor to name the closest court to the annual traveller event at Appleby. He could not, citing somewhere near Wales. Taking an opportunity to chastise the prosecutor, the judge retorts.

"I take offence at your suggestion that no-one knows where North Wales is. Tosh - good grief - learn your geography. I bet Maserati knows," [Lingering on her name, then laughter, from the defendants].

Then looking towards the dock, the judge says,

"so, you want to have a good time in B…... Spain, ummmmmh [teasingly], shall we let them Maserati?"

A brief exchange ensues between the judge and defence counsel with the judge outlining the legal obligation for defendants to stay away from witnesses. Reassurances that they are not flight risks are then given by the families of the defendants via the defence barrister. The removal of electronic tags and the return of some passports is agreed, despite objections, and despite a previous case ruling which imposed electronic tags and curfews. All defendants are released on bail. There are jeers and laughter from the dock with defendants shaking hands, smiling, and shouts of relief at odds with the formality of the context. I consider why this judge decided to overturn the decisions of a previous ruling, and whether his exchanges with the defence barrister had any role to play. Did the strategy of involving humour invoking lighter emotions make it more difficult for the judge to impose bail restrictions or did they serve to diffuse a dangerous situation?

Response and Interpretation

The Traveller case caused me to consider why an experienced judge should engineer a situation which encourages defendant joviality, using his interactions with a female professional to create a micro drama of humour and laughter. This is particularly questionable in the context of a case alleging serious sexual offences against young women.

The judge put himself in a situation where he could potentially be accused of unprofessionalism, bias, or judicial misconduct (Delahunty, 2018). The use of humour, laughter and flirtatious joking initiated by the judge, seems at odds with the alleged attacks on young women that were under the court's consideration. The judge did not convey any moral messages or express any condemnation of such crimes, as is frequently observed in the other cases. Instead, the judge seems to utilise a female barrister as an object, to stimulate humour amongst the defendants. This sits uneasily with the already recognised negative impacts of traveller life on women, reinforcing hierarchical gender roles (EHRC Report, 2009; Cemlyn, 2009). It is conceivable, but unlikely that the judge did not realise his actions to be controversial. His performance comes across as strategic and planned, acted out, and delivered with confidence. However, underneath the judicial laughter there is still a sense of a deeper plot. It is the male barrister who comes off worse by being subjected to more mockery and dismissive commentary than his female professional equivalent. The judge appears to use the male barrister to demonstrate his power, challenging and pushing him to give an emotional response. This is a mini power battle, central to the plot and script, one which the counsel knows he cannot win due to his status in relation to the judge. On reflection, although suggestions of flirtation are described, the judge's agenda, does not feel like one intending female humiliation or male domination *per se*. There are a number of possible explanations for these tactics, one of which is that the judge wants to distract the defendants and that he has agreed this strategy in advance with his fellow actors. The judge wants to encourage the defendants to laugh, and the higher purpose may have been to reduce any threat of disruption. Of course, the judge may have felt intimidated by such a large number of defendants, and this may be a management strategy for a short hearing. Using humour, laughter and at times sarcasm, the judge diffuses a potentially difficult situation, with fourteen defendants in the dock. The judge could have selected other routes of emotion, for example anger and disgust, to induce fear as a means of maintaining control.

Instead, in selecting humour the judge invokes laughter and creates alternative theatre which enables him to maintain his authority and control. This power is held, not just over those directly threatening judicial power, the defendants, but is aimed at all participants, court observers and in turn wider society who are targeted. As the role of the judge here is also concerned with influencing the public, it is critical that the courtroom story, is the one where the judge maintains his dignity, respect, and power. These narratives are therefore not just about the individual judge or individual cases and how the authority of the courts should be widely respected. They are about justice as a whole, and how all judges seek to assert their authority to maintain the momentum of the legal play. On balance, I conclude that the judge is constructing a visual drama of power as he asserts authority over both counsels, but in different ways (Scarduzio, 2015[a]). The flirtatious undertones and the masculine challenge, serve to undermine the authority of both counsel's roles, leaving the audience in no doubt who is in charge. Thus, the judge maintains his emotional balance with his authority and power intact.

The Use of Humour and Laughter

Although the focus is off the defendants the judge is still sending them a clear message about who is in control, using his status and power with counsel to secure this. Anleu *et al.,* (2014) establish that the use of humour by judges, as long as it does not go too far, can play an important role in situations where tensions can get out of hand. After all, there is no obvious security in the courtroom other than the two unofficial gatekeepers, so it is unclear how the judge would have handled any disruption. However, it seems the Traveller judge has a reputation for encouraging laughter, using humour in many of his other cases. This appears to be a well-rehearsed and practiced strategy which has worked for him in the past. By using the mask of humour, the real feelings and emotions of the judge are not exposed, and he portrays the image he decides is most beneficial at that particular time. A review of ten other

cases overseen by the Traveller judge show that he does engage in regular banter, joking and teasing with counsel. Court circuits are relatively small geographical areas and have distinct legal patches. Professionals know each other and counsel would be familiar or would have made themselves aware of the judge's particular style of operation. Judicial levity seems to be part of the Traveller judge's emotion management approach particularly in cases of sexual abuse (BB27/16; N77-85; N74 C 3&4). This may be coincidental, but it is worth considering if humour as an emotion-based strategy, somehow protects and shields the judge from revealing his true emotions with regards to these kinds of offences. Judicial decision-making can involve 'dirty work', with judges facing difficult moral dilemmas even experiencing moral distress (Tigard, 2019; Nick & de Wijze, 2023). In effect, the judge is wearing the Goffmanesque dramaturgical mask or as in later theoretical models presenting one of his multiple selves (Goffman, 1959, 1963).

I could speculate forever about the judge's strategic or personal motives. But it is the uniqueness of this case which still stands out for me in over a thousand cases I have observed. Emotions seem to be deliberately selected here and channelled on this occasion through the medium of humour, sarcasm, and laughter. Whilst there is a suggestion that the judge uses humour to shield himself, it is also well known that physical laughter and humorous situations, although not specific emotions as such, can have benefits in reducing tensions (Turner, 2005; Collins 2004: Kemper). The use of anger and threats to instil fear would have been less likely to succeed as the defendants outnumbered court officials. In any case, aggressive approaches could attract legal dissection, possibly leading to claims of traveller bias, weakening the case against the group. Other options including judicial sadness, disgust and condemnation would not be appropriate at such a pretrial case as such emotions could imply judicial imbalance, with sympathies towards the claimed victims. So, there were few options available to this judge who seems to want to control and manage the emotional climate, particularly in the dock. There are signs that his tactics were also to benefit himself,

in that, he would not be the trial judge going forward. His strategy may have been a practical approach to getting this phase over swiftly and uneventfully, but if this were the case, the judge took unnecessary risks in his use of humour.

Rescuing Judges from Risk-taking

In light of the above, there is an early indication of a link between specific emotion-based strategies, power and risk-taking. What kind of risk takers are judges? Is risk-taking associated with their power ambitions and status and if so what range of emotions does this involve? In their research, Anderson *et al.,* (2006) found that past successes lead to riskier behaviour and that the emotions most frequently involved are anger and happiness. The Traveller judge chose what appeared to be a well-rehearsed light-hearted approach. With the introduction of more risk-based approaches to judicial decision-making such as the new sentencing guidelines which were implemented to achieve more consistency, there is an implied assumption that judges need to be controlled and protected from the influence of their emotions in their decision choices. Risk-taking is fuelled by power ambitions, and judges, as a professional elite, have a reputation for being highly motivated to succeed but they are also driven by a sense of social responsibility and are seen as 'guardians' of public interest (Fielding, 2011, 2006, 2002). Emotions are intrinsically linked to judicial decision-making but necessary to fuel actions (Anderson *et al.,* 2006; Collins, 2003). Whilst judicial conduct rules and norms dictated by the hierarchy are well known, sometimes judges still need to be rescued from taking dangerous emotional risks in the spur of the moment. This unrecognised duty can fall to court clerks, as I observed in the Magistrates Courts I attended. In a series of Magistrate hearings with crimes ranging from theft, assault, drug possession, criminal damage, domestic abuse the court clerk plays a dominant advisory role continually stopping the judge-magistrates and reminding them of points of law. The clerk rescues them on a number of occasions from imposing sentences too high for the crimes and interrupts

when there is excessive chastisement of the offender. The panel, and one particular Magistrate amongst them, seem eager to show their power emotionally, venting their disgust at the behaviour of offenders. As the Magistrates retire to discuss issues, the clerk faces the audience, apologises to counsel for the obvious '*inexperience*' of the magistrates panel, saying, "It's my job to ensure they don't get carried away and that the job doesn't go to their heads." **MC**JTNote57

I was surprised that a court official would publicly undermine a Magistrate, but from this I realise some judges may need guidance and support. The clerk is formally part of the Magistrates team and is more than an administrator but legally trained and knowledgeable. However, Judges who operate alone in Crown Courts are potentially more emotionally vulnerable as their clerks tend to take a step back in recognising the judge's legal status and potentially their wrath if undermined by junior staff. Even if these judges are legally qualified, more experienced, and differently trained to Magistrates, emotions, power, and risk taking are still a reality within all judicial roles: but who will rescue the lone judge? This triggers more questions about judicial support, in the absence of a visible team who can help to moderate and influence the judge's choice of emotional strategy. On the face of it would seem no-one does, but this ignores the interactions judges' have with other court participants and where emotion-based support may be on offer.

Team Roles and Judicial Power

I argue that the above situation can be best understood through the lens of emotion, but it is important to recognise the normative conditions under which judges, and counsel interact. As a strategy it is common for barristers/counsels to take the brunt of judicial joking (Scarduzio, 2015[a], 2014; Anleu, 2014: 649). Counsels are expected to laugh and engage in judicial bantering performing as intermediaries taking on a "buffering role" between the judge and defendants (Scarduza, 2015[b]: 343) but occasionally witnesses. This has the effect

of reminding judges that they have legal boundaries to abide by and should not take unprofessional risks. I observe this form of protection in a number of cases, and in different forms. In one case the Crown Court judge seems to be struggling emotionally when he decides to question the victim during their evidence. He is not satisfied by the responses given in a case of sexual assault and rape (**CCJ**RR615). The young women concerned has significant learning difficulties and is struggling to give clear explanations and answers, on examination by the defence. Even though she is hidden behind a screen and accompanied by a mental health professional, this apparent lack of cooperation, frustrates the judge. The judge is becoming more and more forthright, tapping his bench, and raising his voice in a harsh irritated tone saying, "If you do not answer my questions clearly, I will not give you another chance. This case will be over" (**CCJ**RR615).

Clearly the judge is not aware or convinced that the potential rape victim, has learning difficulties or has been raped or both. This angry intervention does not settle the victim-witness, who becomes more distressed. It is the prosecution barrister who comes to the judge's rescue, asking for a brief recess to discuss a point of law. I remain in court to hear the barrister, then aided by the defence explaining the victim's vulnerabilities, their lack of understanding and confidence in giving their evidence. On return the judge steps back into the role of silent observer rescued by co counsels, his emotions contained and under control. In other cases, where judges are seemingly under pressure, it is usually the legal counsel who rescue their judges, mainly observed as requesting breaks. Judges also rescue themselves by suggesting a recess. These breaks tend to come at points of high drama which generate intense emotional atmospheres and tensions within the courtroom. These incidents can affect judges emotionally. For example, the family of a young drug dealer with previous good character pleads with Judge Wood not to send him to prison. His mother and girlfriend cry out loudly. At this point JWW stands up, looks towards the floor and mutters,

"I can't deal with these tears; you need a break to compose yourselves." **CCJ**W1114

The speed of the judge's exit suggests it is the judge who needs the break. Throughout the data samples, there are other examples of counsel rescuing judges from delicate emotional situations; sometimes suggesting a break or assisting the judge by taking control of conversations:

"If it helps your honour, may I interject." **CCJ**E1114

The rescuing of judges by counsel suggests that they are not the lone workers they are often portrayed as being, by authors such as Paterson (2013), but are team participants. In the operation of a trial this is not a traditional team insofar as most members are not directly contracted by the judge or court services. But there is a sense of professional allegiance between judge and counsel. Team roles are clearly demarcated in the Traveller case with the judge dominant and centre stage, both counsels are inferior to him, and they appear to cooperate with his performance. There is little dissension or opposition, and counsel are compliant reinforcing the judge's dominance, which according to Goffman (1959) is a necessity for the maintenance of power. Team cooperation seems to be of critical importance in assisting the dramatic and strategic objectives of judges but also serves to moderate risk-taking. The data indicate that when a judge needs to be rescued, or when he or she needs opinions or emotional support this is signalled in code to counsel and clerks. In this situation, the professionals involved know the judge needs help and coded communications protect the judge's integrity and power.

In a number of cases I have been permitted to stay to observe both counsels giving support to the presiding judge, informing, advising, and agreeing next steps. The judicial team incorporating counsel could thus be said to be something akin to Goffman's (1959:108). "secret societies" in that, members are, "in the know" and are conspirators in putting on the show for the audience." However, this team cooperation often appears one way with judges

turning on counsel, targeting them, and taking out their frustrations, apparently deliberately and publicly. On examination it seems these exchanges are often related to breakdowns in administrative tasks, with a judicial tendency towards irritation, frustration, and anger. The targeting of counsel rather than defendants may provide a safer way for judges to release their tense emotions. Frustration is a "normal emotional response to everyday inconveniences," (Maroney, 2016: 9) but if judges show these feelings towards defendants this could be conceived as bias and emotional interference, even imbalance. In my experience, above and beyond everyday frustration, scolding (Fielding, 2006, 2013) and rudeness (Scarduzio, 2015[b]) appear to operate as a judicial strategy deployed routinely to engender an element of fear, in order to produce unease within offenders and by way of unsettling the arguments made, particularly by the defence. Being rude may be more than just a judicial disposition, it may be an emotion strategy laying the groundwork for punitive sentencing. Defendants must surely consider what may be to come for them. So, emotions can be used to communicate and to signal possible outcomes preparing the various audiences for judicial decision-making. One might question why experienced professionals would go along with a judge who wields power, in a potentially disrespectful manner but it appears there is generally little professional dissent by counsels. In fact, the advice from a barrister of fifteen years is, "don't upset the judge." **CCJ**T315

This sentiment is supported by court clerks who recognise harsh judicial emotions as a feature of everyday judicial communications. On occasions when the courts are closed and I have been asked to step outside, I have listened to offenders turning up for their cases to be heard asking clerks, "what mood is the judge is in today?" For experienced clerks and repeat defendants there is an awareness that when the decisions are in the balance, judicial emotions are pivotal and directs those directly involved to avoid challenging the judge.

Judicial Challenges

When counsels do challenge the judge or attempt to influence their decision-making this usually results in emotionally charged verbal warnings, swiftly followed by instructions for counsel to return to their expected team roles, and to judicial respect, support, and deference. Judges need to be seen as retaining their power, so professional disputes are kept short, while language is kept sharp and to the point. Emotions help to control timing, as a challenge to judicial power requires immediate attention. For example:

Judge B to CPS counsel:

"If this continues, we will fallout." **CCJ**B716

Judge N asserts his power rebuffing challenges:

"Not good enough," **CCJ**N315

"When was the last follow up, don't give me such nonsense, I am not stupid."

"For me to comment on…., There's a surprise, Carry on." [said in a harsh angry tone].

"I am not prepared to accept this, keep quiet, you have had your say."

Judge N to defence: brow contracted, chin brought forward, slow, strong tone of voice.

"Next time I won't show the same charity." **CCJ**N14a

Judge N to DB shouting, "It is not your job to criticise the police, it is mine." **CCJ**N59

Judge O to DB thumping the bench with his fist, "Get on with this." **CCJO**15

"I warn you: you are close to contempt." **CCJ**N19

"Get your act in order," said in a strong, deliberate voice with pointed finger. **CCJ**O15b

"Let's keep this simple;" said slowly and deliberately with hissing emphasis. **CC**JON21

"I am not prepared to accept this," said sternly in a raised voice. **CCJO**N22

Emotions are not just listed here as evidence, but the sentiments and construction of the dialogue is active, in that threats are issued by the judges. These are both verbal and nonverbal, but they are not passive communications. Judges are taking personal offence, suggesting their inner emotions are triggered, whilst at the same time, they are making efforts to reinstate their power, professionally. This points to personal and professional emotions as being combined rather than unnaturally separated but this is an unstable relationship (Blix, 2010).

Dissent from counsel may be equated to team disloyalty, undermining the judge. If certain emotions are used as control devices in the maintenance of power, this could work more effectively, should prominent others such as counsel demonstrate their cooperation and willingness to conform (Hope and Le Coure, 2012). But what happens when victims are in court? Does their presence change the dynamics, the interactions, and the nature of the emotion-based strategy deployed? It is difficult to imagine the traveller judge engaging in humorous tactics if the victims had been present. Challenges to judicial power do come from this unexpected source, as more subtle objections may be attributed to the victims, particularly if they present and give testimony. There is evidence in the data that judicial tactics do change as the result of victim attendance and participation at court. Judicial risk taking may also be more circumspect as victim lobbyists, advocates or activists challenge judicial methods, language, and behaviour. Perhaps the greatest influence on judicial emotions and therefore potentially their decision-making is the challenge from victims and just by their presence judges have to fully confront their own emotions about the crime, the victim, and the defendant.

Victims

The presence of victims, their families, and friends, often steer a judge towards being sensitive to their situation (Karsedt, 2002). However, judges are wary of victims being

excessively emotional, as they are alert to potential challenges of emotional involvement and influence (Levenson, 2007). In the Traveller case victims are not present, and the judge knows this. Of course, I cannot know for certain if the judge would have changed his strategy had the victims been in court. In terms of visible victim participation, personal statements are seen as the main opportunity for victims to tell the judge how the crime has affected them. From an analysis of my data, judges do admit to being moved emotionally, saddened by victim testimonies, and publicly recognise victim "bravery" and "courage" (**MCJ**515*;* **CCJ**L820). Whilst the literature suggests many victims do not necessarily want punitive sentences but to be treated fairly, with respect and to have closure (Victim Support, 2020) there is still suspicion that victims may seek to secure higher punishments (Davies, 2020; King, 2008). Judges are alert to this and conscious of their own vulnerabilities as Levenson, (2007) points out. Based on my data it seems likely that judges may attempt to avoid being swayed by the victim in person. So, if it is deemed unnecessary for a victim to read out their statement this may alleviate some emotional pressure on the judge. For example: in a case of historical sexual abuse of both young boys and girls, the female victim is refused permission by the senior magistrate to read her victim impact statement (**MC**Note69). I record a lack of sensitivity towards the victim as the magistrate gives no reason for the refusal. I also note that this case was amongst many during that day which were fraught with delays. The chair of the three-panel Magistrate's bench is continually tapping his fingers, scolding court staff and counsels, showing a level of irritation in his voice and through his facial expressions. Why it is the victim was refused permission to read their statement is unclear, perhaps judicial patience and time were running out. From my perspective, it was unclear if the victim was in court, or not, although one would assume this would be known to the judge and both counsels. Judges do experience some level of emotional resonance when examining written impact statements, with Crown Court Judge Mint saying, "this makes for very sad reading," (**CC**JM820). Of course, victims may choose not to do this, but

the reality is that all judges, have to manage trials within time limits and victim inputs may disrupt judicial timetabling but the level of impact on their own emotional health is now a topic for direct discussion by judges in court.

The Victim Hierarchy

In those cases where the victim is given attention by the judge, there is a noticeable increase in the sympathetic content of their verbal scripts and in the associated performances of some judges. This appears to be related to some kind of victim hierarchy where one's place as a victim is determined by the level of blame attached (Jankowitz, 2018) and as Fohring (2018) points out, the uppermost position is reserved for the truly innocent victim where stereotypical qualities of victimhood are socially and morally recognised. Kemper (2011) suggests that emotions are structurally embedded in these hierarchical social relationships. On reviewing my own data, certain victim types seem to attract sympathetic emotional responses. These include victims who are obviously disabled, the elderly, and infirm, children and some women, mothers for example. All are perceived as being highly vulnerable, lacking the ability to defend themselves. Within my data there is an obvious victim hierarchy, a plot to recognise the most deserving of victims, a story line which is recognisable within the judicial space. These hierarchies also have a correlation to intense judicial emotions, anger, disgust, and rage towards the offender, as well as expressive sadness and compassion for victims. In a Crown Court case involving three elderly people the judge ignores the defendant's family who are crying and pleading with him to show compassion. Despite the defence barrister arguing that this is a first offence, that the offender is young, that prison would have a detrimental effect the judge declares:

"I must take into account the age of your victims, their vulnerability. You are despicable, this is despicable." C**CJ**2117

"I have never come across such an assault on an elderly and disabled couple."

[Voice conveys emotional concern and disapproval.] **CCJ**1518

These victims are not in court, but damaging photographic evidence is available. Although I have highlighted a case where a judge is agitated by the victim, judges generally seem to react with compassion when, in their view, vulnerable victim-witnesses are being excessively cross-examined by counsel. In a case of historical sexual abuse, the victim-witness appears distraught and confused as technical legal terms are used. The judge steps in, instructing the prosecution barrister to keep quiet saying he would assist and interpret. This is not the neutral arbitrator but a judge who recognises human distress, showing protective instincts and kindness.

"Don't you see that you are frightening the witness and that she does not understand? I will translate but you need to be kinder." **MCJP**2519

[At this point District Judge RPR explains legal terminology to the witness, his voice is soft and caring].

Rossmanith (2015: 171) argues that in order for judges to recognise offender remorse, they need to somehow *feel* that experience. The same must apply to judges and victims, but if they do not connect on an emotional level, then the victim may slip down the hierarchy in terms of priority (Fohring, 2018). These representative examples confirm the continued existence of a hierarchical structure of victimhood (Jankowitz, 2018: 232). Christie's (1986) concept of the ideal victim lives on in judicial thinking and opens the way for emotions to influence judicial decision-making. Although it is recognised that judges are sometimes are less sympathetic to victims who make risky choices such as excessive alcohol intake, I cannot report any judge in my data responding in this way. Instead, certain groups attract higher judicial interest and emotions than others. It becomes clear in the analysis of victim-related judicial emotions there is variability, but a moral hierarchy provides a framework for emotional interjections and thinking. However, judges often redirect their emotions by

focusing on the crime and on offender and the victim is seemingly invisible. Whether victims influence judicial plans or not there is still a fear that they might (Levenson, 2007) and this may undermine judicial power. One explanation for the limited court participation of victims apart from the fact they do not have legal representation is that judges know they may react to victims with real and personal emotions and may wish to avoid this. Victims' more than offenders may therefore pose a risk to judicial order and control. This is a possibility which needs further investigation as judges may steer a distant course from victims, to avoid emotional engagement which could risk their judicial reputations.

Judicial Stress

During my observations judges regularly express the pressures they are under just to keep pace with workloads. I have noticed this more so, when the victim is not obviously in court, suggesting some sensitivity towards them. So, giving more time to include the victim may exacerbate the judge's stress levels, particularly if the judge has already reached their conclusions. These pressures can be expressed through judicial behaviour often physical displays of frustration but also directly. For example, this judge who has just completed fourteen cases says:

"Judges are overwhelmed by the workload, long lists, no judges, and cuts." **CCJS**2815

Another says after taking a recess:

"We are only human. We experience stress, we have worries and anxieties." **MC**JP15

And another on sentencing says:

"This is a difficult job, no time. The only solution is tissues and water." **CCJ**O1715

Here judges express their own predicaments rather than those of the victim. Although it is worth noting that I can also attest to judges showing compassion and concern for different family members who have suffered assault. In one such case the mother of a young repeat

offender is praised by the judge for her efforts to turn the offender's life around. She gave evidence previously but also reads her statement in court. The defence suggest that some blame should fall on the mother as she could have "locked her door to her son" to prevent these attacks. At this suggestion, the district judge intervenes and scolds counsel saying:

"Parents and mothers are not to blame. They are not all failures but often victims. In this case the mother is so desperate to help her son she puts herself last. She loves whilst he [the offender] hates." **MC**DJ917

The judge in this case gives the offender another chance, suspending his sentence not for him but for his mother, the victim. In another example it is clear that Judge O is persuaded by the victim and makes his decisions with her in mind.

"I believe the victim's written and verbal testimony not yours. She was vulnerable. You have a history of frightening others. You show no remorse, no shame. She showed courage in coming here today. This is reflected in your sentence." **CCJ**Sh2118

So, it seems that the attendance of the victim can make a difference to judicial emotions, and this may have implications for sentencing. Their absence can also give judges space to vent, and to reveal the emotional impact of the job. These varied incidents also reflect that there are multiple and fluctuating emotional responses. Judges are subject to their own emotional reactions which can change but are also influenced by the external context and the detail of the cases put in front of them. Emotional patterns can alter and dissipate; therefore, it cannot be assumed that judicial emotions are fixed nor that they automatically influence judges' decisions.

Public Interest and Crime Type

Emotional patterns are in evidence as judges articulate their prepared scripts, as a means of justifying their decision-making, particularly during sentencing speeches. The data suggest this is usually for general public consumption and not directly aimed towards the victim, as

such, except in certain circumstances; for example, in those cases which draw national media attention, such as the murder of Becky Watts, in 2015. The descriptive impact of the crime on the victim, stands out here, as being the Judge's starting point in this case before he moves on to discuss more generally the type of crime involved. Such high-profile cases may steer the judge towards directly acknowledging the suffering of the victim but in many cases, I observed, judges seem to limit this, perhaps because the prosecution have said all that needs to be said and a focus on the public message, becomes a priority. Having an intense focus on the victim can increase judicial expression and stimulate specific judicial emotions but particular crime types, can also invoke even more passionate displays from judges. For example, I observed this in cases of child sexual abuse, particularly where the abuser is female or where the female does not intervene to prevent harm (UNODC, 2019). In these cases, some judges condemn women defendants for the abandonment of their motherly protective instincts (Heidensohn, 1996). The emotions of anger and disgust accompany such situations, and the focus is then not directly focused on the victim but on the type of crime. I observed a particular case where the mother of a 3-year-old girl was left in no doubt what Judge Mason thought of her, on revealing his emotions.

"You are an aberration, an abomination, you are a morally contemptible example of a women, a mother who should have cared for her child. You are disgusting to me and to all women." **CCJ**28518

In contrast this judge praises the defendant's male partner for reporting the abuse and for secretly videoing evidence showing how the young girl was subjected to sexual attacks. Ostensibly this seems morally commendable but the evidence gathering lasted several weeks where the child was left alone to suffer frequent repeat attacks for the purpose of collecting evidence. This is an example, for purposes of public consumption at least, where the type of crime and gender of the defendant, rather than the type of victim, appears to engage the judge emotionally (Heidensohn, 1996).

Emotions and Crime Types

My data involves many cases of historical sexual abuse of children by men. Judges are often accommodating, compassionate and appear to go out of their way to ensure the comfort of these male defendants. The court clerks could easily undertake such duties. The judges' I observed are seemingly neutral in their interactions with friendly exchanges, smiles and one district judge referring to the defendants as "gentlemen" (**MC**DJ2516), not "aberrations" as in the above case. Setting aside the possibility of gender bias, it should be considered whether or not the passing of time, helps to diminish or dilute the most aggressive of judicial emotions, such as disgust, anger, or rage or is it the age of the men who are now mostly elderly that is a factor here? Do judges feel sadness and compassion for elderly defendants? The permission to sit, the offering of water or extra time to respond are common judicial gestures towards elderly defendants/offenders. However, I observed the opposite albeit in a small number of cases where the defendant/offender was a female abuser and was not permitted to sit. These were usually at the pre-sentencing stage where guilt had already been determined. What brought these to my attention was that in a similar case a male offender was permitted to sit. This case involved historical sexual abuse, the male defendant was 66 years old and had abused his three granddaughters over a long period of time. In contrast a younger female who had been found guilty of being an accomplice to crimes of sexual abuse involving multiple children, was not given leave to sit. Both cases were heard by the same Crown Court judge. In other instances, judges seemed to differentiate their approach according to the age or gender of the defendant or both. Given the small number of female abusers who appear in court I do not claim a trend here, but it is something worthy of note. Some of the cases are also high profile with press and television cameras waiting outside the courts. Judges are aware of this (HMC&TS, 2020[b]) may feel under pressure to refine their performances for media consumption. Even though judges can be distracted by the profile of the individual offender; their age and their vulnerabilities, it seems that certain crime

types create the circumstances for passionate judicial responses. Female abuse of children is one example, which is exposed as being particularly morally objectionable to judges. Another that causes particular distress is the growing use of acid as a means of disfiguring women, who have been perceived to be disloyal to their partners and husbands.

Judge Newby in an Acid Attack Trial: Crown Court

"This was a wicked attack. You are cruel and vengeful…. designed to degrade. You are evil. Acid attacks are rare but in other countries are used as punishment of women, to degrade and to control. No remorse has been shown. Innocent people were arrested. I will not show any leniency." CCJN1916

The effect on judges, of culturally defined violence against women as in the acid case above is another dimension not yet fully explored in emotion research. Why should one method of abuse with similar outcomes rank higher than another and do judicial emotions expose this lack of parity? If the violent method of choice is for example a knife or acid and both achieve permanent disfiguration, why do judges seem to react more intensely to the latter crime? I shall return to this in Chapter Eight.

Judicial Reputations

Judges build reputations of power mainly through their engagement of the harsher emotions such as anger, fear, and disgust (Maroney, 2016) and this is reflected in my data. Traditionally softer emotions are regarded with suspicion, and judges seek to retain power through the appearance of confident, strong decision-making. Speedy decision-making especially in routine cases appears to be one strategy to achieve this. Given that judges have the power to alter lives it is surprising to find that many judges seem to make instant evaluations and decisions. The evidence presented is often dismissed with a wave of the hand, or "I have heard enough, my decision is made." This may relate to judicial experience, competence in the role and because there is a practical need to deal with cases swiftly. However, the

instantaneous nature of decision-making is somewhat deceptive, as the judicial actor may simply be shaping the audiences view of their power. In practice the judicial evaluation of an offender's guilt and remorse and the judge's subsequent decisions are more cumulative, building from first contact and reducing the time needed for consideration at sentencing. Although some cases are particularly complicated, and at times judges do withdraw to consider evidence for days, many sentencing decisions are decided as soon as the evidence is presented. These processes start early in the judge-offender interactions giving space and time for judicial emotions to be involved as the trial progresses. Signs that judges have already made decisions before the end of the trial are particularly evident when the defence ask the judge to be compassionate and to consider the impacts of prison on the offender. Often as I observed, judges respond within seconds, leading to questions about how they reached their conclusions so quickly. For example: In a complex fraud trial, the judge did not pause when the defence made a compassioned plea for a community sentence Within two seconds the judge orders the offender to be "taken down" saying,

"Custody will be hard for you, but you are going to prison, this is deserved." **CCJ**RR16

In a case of drug selling, the defence pleads for the first-time offender to be given a community order and for the judge to recognise the harm prison would do. In response the judge said, "No, mitigation, 3 years." The judge gets up, leaves the court waving for the offender to be taken away. **CCJ**W218

Inciting Judicial Emotions

My data reveals that there is nothing that irritates and angers a judge more than when defendants fail to attend court, or where they refuse to leave their cells. This show of disrespect for the judge and the courts, challenges judicial power and requires an immediate and often punitive emotional response. For example:

Judge NW bangs his fists on the bench when a defendant fails to attend court issuing an arrest warrant saying with a threatening and loud tone.

"Get him to court and I *will* deal with him. I am not happy. This is not satisfactory. He's your client, he'll be my prisoner." **MC**DJ1214

Judge O seems jubilant when an offender in a dangerous driving case does not appear.

"I will give you a little time to locate him, but he will go to jail." Smiling, he bangs his hands on the bench saying, "I have won. YES!" **CC**JO2115

Failure to attend does stimulate angry verbal comments but most judges I observed, simply respond nonverbally, albeit somewhat performatively, contorting their faces, frowning, with eyebrows raised, eyes rolling, shaking heads, combined with the use of flailing arms or heads buried in their hands. Whether the judge is articulate and impassioned in their condemnation of disrespect, or whether they simply show non-verbal irritation, it can be assumed that the judge might not forget when it comes to sentencing.

"Don't disrespect my court or you will find yourself facing a longer sentence." **MC**JP15

"This is your very last chance to avoid prison. Next time if you come back to my court, I will punish you very harshly. No more chances. I will not be taken for a fool; you will show respect even if I have to force you." **MC**JP2615

Failure to attend equates to disrespect for the law, the courts, and the judge. It becomes personal and reputational as the judge needs to dampen any impression that they are not fully in control (Tata, 2007). A semblance of respect is therefore sought from all parties in recognition of judicial power even to the point where the judge feels ownership of the physical courtroom, their professional domain.

"How dare he treat **my** court like this" **MC**DJN69

"My court, **my** rules" **CC**JON132

"Don't disrespect **my** court." **MC**DJ2517

"This is **my** court. I will hold you in contempt." **CC**JC17/14

"Keep quiet or leave **my** court." **MC**MR815

So, whilst the Traveller judge uses the normative power of humour to tone down the emotional temperature, other judges, as Maroney (2011) suggests, display, and use anger and coercive threats to demonstrate their judicial power. Anger is powerful, it can promote fear and achieve compliance, but too much anger may go too far attracting claims of emotional imbalance. For example:

A defendant pays men to throw acid in his girlfriend's face, disfiguring her for life:

"I will not show any leniency. You disgust me if I had my way you would rot in prison for ever." **CC**JW1914

Drug Dealing Parent:

"You are scum, I detest you and I have to be frank: your children are likely to follow your criminal path." **CCJ**Sh117

Emotional leakage accompanied by the misuse of power can reflect badly on a judge but also does the reputation of emotion itself harm, as uncontrolled emotions are viewed as dangerous (Mason, 2013; Abrams and Kerens, 2010) rather than supportive of justice (Solomon, 2001). Judges do not wish to be seen as emotionally unbalanced, as this may indicate that their power is out of control and may lead to appeals or even judicial conduct inquiries. On most of these observed occasions the data demonstrate that some self-regulation kicks in or professional teams come to the rescue. Judges show that visible emotions, those which are shared deliberately or occur spontaneously can be brought back under control; but it is the hidden emotions which may can escape scrutiny.

Power, Punishment, and Pleasure

The most obvious kind of power in the western criminal justice system is coercive power and it falls to the judiciary to dispense punishments which are essentially punitive and emotional in nature as King (2008: 205) points out. Judges join the profession knowing that ultimately it is their role to see that justice is seen to be done and this means making punishment decisions. Though Judges also have the power to be compassionate, to recognise and reward defendant respect, and remorse, they also have the power to shame (Thagard, 2016) and it is the power to punish which dominates their end role, that of sentencing. There is no doubt based on my observations that emotions, mostly of a negative nature accompany judicial decision-making. The higher the sentence the more emotions such as anger, disgust and rage emerge, operating in addition to sentencing guidelines to strengthen justification. The data also tell another story, one where judges appear to experience a degree of emotional pleasure through the act of sentencing. The judicial words below are imbued with emotional tone, brought to life on the criminal stage, with chosen language and gestures but also punctuated with emotional rhythm which at times can reach an emotional crescendo. All of the judges quoted here, convey a sense of pleasure, satisfaction, and threat. Some even openly admitting the pleasure they would gain from being harsher.

Attempted murder, Judge RPR presiding: Crown Court

"This is shocking, unbelievable. I am appalled and disgusted. I am angry and sad for the victims I **will not feel any sympathy only satisfaction** in seeing justice done." **CC**JRP615

"Now it's my turn, I'll be smiling, you won't," [said with finger pointing towards the defendant.] N72/15

District Judge G when sentencing makes comments such as,

"…no sympathy for **that**."

Laughing loudly and eyes directed at the defence counsel he says,

"I could go higher. That would **please** me, so be careful." **MC**DJG2317

Judge W, on defence pleas for mitigation the judge smiles broadly and says,

"I am minded not to do so. This will **not satisfy** me." **MC**JP2116

Breach of bail for possession of drugs and being drunk and disorderly, Judge G.J candidly says,

"I take **absolute pleasure** in sending you straight to prison. Your bail is revoked." **MC**DJ0715

There is, indeed, data which suggests a correlation between the act of punishment and resultant pleasure or at least some kind of personal satisfaction. Conversations about judicial pleasure in punishment do not regularly occupy legal domains and would counteract any formal claim to judicial neutrality. In law research this is almost silent but other domains do examine this relationship, though not specifically in relation to judges. Hornqvist (2021:161) suggests that there is an "obscene enjoyment" to be found, and that punishment has a "joyous, passionate, dimension." Canton (2015:63) states that the desire to punish is widespread and that there is "satisfaction in contemplating the suffering of the wrong doer." Other more palatable explanations support the view that as individual members of society we (including judges), are emotionally motivated to seek utility, that is to find a sense of worth and purpose, a desire for recognition. This takes us back to the territory of judicial power, the need to be publicly useful, to be powerful and to be seen to be powerful (Carvalho *et al*., 2018).

Conclusion

Headline findings from the observational data suggest that power is a central component in judicial life and that emotions are used to achieve strategic purpose. Judges may recognise the need to rescue themselves from being seen as emotionally vulnerable but despite the portrait of the lonely judge, they have allies and teams who provide emotional support and direction. Judicial reputations are entwined with the impression of power, and as such I

propose that a major threat to judicial order and control lies not necessarily with the defendants but with the victims who have the potential to influence judicial decision-making with their statements. This is particularly when these statements are made in person. Judges do seem to quickly adjust their focus in the sentencing speeches away from victims, towards discussing types of crime, or the offender's culpability and character. The observations also show fleeting glimpses of emotions which often lie hidden, such as the potential for pleasure in punishment. Alternatively, less common crimes, those which may be culturally nuanced, particularly the violent treatment of women, can draw judges out from behind their masks of neutrality to reveal emotional impacts and responses. Emotions pervade the courtroom, and they are used by judges as tools to manage what they consider to be their space. But the craft of judging requires emotional regulation and degrees of emotional and dramatic performance in order to justify and persuade the public that justice has been done. If these are not in balance judges may be accused of being led by their emotions. Chapter Six will seek to put more meat on these bones by focusing on what goes on behind the scenes, in the backstage area, where a range of judicial interviews and conversations were conducted that mirrored many of the findings presented above.

Chapter Six

Judicial Rehearsals: Interviews and Conversations

"Whoever is devoid of the heart of compassion is not human, whoever is devoid of the heart of shame is not human and whoever is devoid of the heart of right and wrong is not human." Mencius (Confucian Philosopher) 372-289 BCE

Introduction

This chapter follows on directly from the courtroom observations and informs the analysis of the role of emotions in judicial decision-making, by examining data collected from a small selection of formal and informal interviews and communications and exchanges with judges. Pseudonyms are attached to judges, district judges and magistrates to protect their identities. The pseudonyms are prefixed with **M** for magistrate and **J** for Judge, **DJ** district judge. Here I engage in a range of conversations, particularly that with District Judge G. Winter whose case is particularly informative, and I use direct questioning to gain personal insights into the place of emotions in the judicial role, as these judges experience it. I also fill gaps in questions arising from the courtroom trials which remained unanswered, inconclusive, or which required further clarification. I had already observed some of the participating judges in their own court settings which enabled me to activate the interviews, setting the scene with reference to a familiar trial. As a starting point for our conversations particularly for those judges I had not seen or met before, I provided examples of other judges opinions and guidance on judicial pressures (Fielding, 2006). I also shared an artist's impression of the distressed Judge Dingeman, an image which had a particular resonance with the interview judges (Appendix E). All of the participants were aware of the aims of these interviews/meetings and agreed to relate their own views of emotion, reflecting on the criminal trials they had overseen and those which they were aware of which have had some

lasting impact on them. In keeping with the dramaturgical approach which underpins my thesis, I encouraged the judges to take the centre stage, to reveal their thoughts, their more personal emotional scripts, and to consider offstage, their own trial performances. In doing so each judge had a story to tell, the trial set has been dismantled, the wigs and gowns are off, and the rituals of the courtroom do not dominate these scripts and the role these formalities play are now under scrutiny of the judges as they talk.

Judges' Professional *v* Private Thoughts

Observational data and findings from the courtroom trials presented in Chapter Five, provided the foundations for conducting the judicial interviews. The data show that despite institutional requirements that judges should follow strict rules of dispassion in court, this is not always possible, desirable, or indeed the actuality. There is a growing sense from the data that there are organisational directives predicated on legal doctrine which excludes or supresses emotions (see also Herlihy *et al*., 2013; Maroney, 2006). Then there is the reality of judicial practice which produces an opposing perspective, and if viewed from a dramaturgical position, indicates that judges share an understanding of a different legal life in practice (Benford *et al*., 2015). The judicial machinery makes it clear that personal emotions must remain in the private domain (Patulney *et al*., 2017). However, there is also evidence from courtroom practice that judges use emotions to facilitate the delivery of justice (Solomon, 1995). This may appear contradictory, but many emotions on display in court may not be personal at all, reflecting a different conception of emotions: a genre of specific emotions designed to support the judicial role and the functioning of justice (Walle, 2020). Chapter Five attests to the importance of such 'strategic' emotions. As a society we generally agree to abide by common rules, claimed as reasoned and rational principles of justice which also require the suppression of emotions (Solomon, 1995: 55). Yet emotions are central to judicial performances and have implications for decision-making as Damasio

(1994) and Bergeman Blix *et al*. (2015) suggest. Anger, disgust, compassion, pity, and other emotions are carriers of information, with messages designed to reinforce our general notions of right and wrong, crime and punishment (Pillsbury, 2016).

Rather than all emotions emanating from judges' inner reactions, some groups of emotions may constitute tools of their trade and benchmarks for reinforcing a common moral understanding of what is right or wrong (Gelder, 2016). What became clear from the court observations is that judges seem to perform to these ends but there are also occasions when some judges' breach the rules, when their inner emotions cannot be held back, effectively seeping out (Bolton *et al*., 2003). I refer to these moments as emotional leakage which are clearly observable in my data, even in the front stage conditions of the criminal courtroom. Goffman (1959) refers to such private emotions as backstage emotions, which should in his view be filed away and silenced in favour of a more acceptable front stage persona, particularly in working and professional life. In the case of judges, occupational etiquette demands dispassion, neutrality, and impartiality in the judicial role. There are contradictions and exceptions to this as some emotional performances are seen as acceptable and necessary in the delivery of justice.

As the courtroom data confirms, anger, laughter and displays of compassion may be necessary to convey symbolic messages in relation to crime and punishment (Mason, 2013). Hochschild (1983), furthermore, suggests that due to efforts in emotion management and given the extent of emotional labour needed, background emotions sometimes inevitably intrude into the front area. Judicial performances can then be infiltrated with a range of personal emotions seen by the judicial hierarchy as potentially damaging to decision-making and to the rule of law. These invasions of emotion from the back to the frontstage stimulate questions as to the triggers and purpose of such emotionally driven events. The observational data in Chapter Five suggests that emotions are consciously and strategically brought to the

surface by judges but that there is also genuine emotional leakage where attempts to keep emotions in the backstage, fail. The line between controlled and uncontrolled emotions in judicial behaviour is also difficult to assess, not least given their conscious effort to supress and silence. That is why it is essential to have some voluntary backstage commentary from judges, described here as interviews and conversations, to lift the Goffman 'silence' and to let the voices of judges be heard.

Ask the Judges

It is, of course, exceedingly difficult to draw conclusions from observations alone, and perhaps it is ethically questionable to reach a view, without some attempt to gain insight from the judge involved or judges who have a view based on their own experiences. Whilst academic speculation is possible following observations, claims are never concrete but rather constitute argued conjecture (Cohen *et al*., 2007). Some judges may just be competent actors in their performances; some may be inexperienced; some may be reacting to the occasion and to a specific set of circumstances. The fact that official support to interview judges was withdrawn by the judicial office, made my research difficult but also injected some challenge when it comes to developing a novel methodology. Nonetheless, some Judges and Magistrates did consent to interviews despite advice not to get involved. This is interesting and demonstrates that some judges do want to talk about emotions.

The Interviews: Ethics and Confidentially

Dramatic performances are not just the domain of the onstage trial in action. Interviews, particularly informal ones can provide another platform for judges to act out, and to practice and project their judicial personas. It is well-established that as part of an elite group judges are notoriously difficult to interview even when access and consent is gained (Derbyshire, 2011; Harvey, 2011; Hunter *et al*., 2008; Conti and O'Neil, 2007). The interviews I have

undertaken are no exception to this and the reality is that judges are difficult to reach, are protected, as demonstrated by the Judicial Office's decision to decline my formal request for support to interview judges. As a means of establishing trust, a virtue judges' respect, I was open about the stance the Judicial Office had taken and gave judges an opportunity to withdraw at this point. A fuller account of my approach to laying ethical foundations prior to interview is found in Chapter Four.

Case Study: District Judge G. Winter (from here on in Judge G)

Having observed this judge perform on the front stage of the criminal court, I was invited into what is his offstage and emotional background area. The interview or more accurately the offstage judicial performance, is conducted in a small room with a table and two chairs. I assume this is a space reserved for client interviews and consultation. The judge has been provided with my standard set of documents, explaining the purpose of the research prior to my attendance at his court. The judge had already taken the opportunity in court to remind me of the ethical issues my research presents, a positioning of his power and higher status in relation to my role as a researcher (Fielding, 2002). I make a conscious effort not to push this judge too far and to let him tell me what he is comfortable with. I follow Bolton's (2003) guidance that unmanaged spaces may provide more insight than formal arrangements where emotions are often highly guarded.

The Interview as a Performance

The interview does not quite go as I anticipated, and I feel inconsequential, a prop lost in the judge's own narrative. It seems that this off-stage meeting served to provide a talking and a rehearsal platform for the judge and any compulsion to offer philanthropic or professional support to my research and to the wider knowledge base is soon forgotten. It is logical to suggest that judges need to have some investment in the research, either because the

organisation sees it as valuable or because it holds some personal interest to the willing participant. As the Judicial Office has said, it sees no value in this research, then it can only be a personal motivation or stress which has initiated District Judge G. Winter to volunteer. Although having inferred this, counselling services for judges are introduced for the first time in 2018 as a recognition that judges are under a heavy emotional burden (MA, 2018).

The Off-Stage Performance

I sit at the small table, but the judge does not join me preferring to stand and move about the room as he talks. Had I sat near to the door, he would have had no option but to sit in front of me with his back to the wall, with less space to move about. I could have engineered a bit more control by doing this, but I focused on giving him the freedom he seemed to want, with the aim of encouraging him to talk. This is the right strategy, as he had the physical performance space he needed, the stage. I cannot always attract his attention as he turns his body away from me. He frequently 'dances' about the room using his arms as he moves, talking without breaks, looking at the floor, then the ceiling, occasionally glancing at me. This is unexpected and feels unconventional and is certainly not a traditional interview. He occasionally pauses to stand before me placing his hands on the table, bending over towards me giving me very direct eye contact. This feels slightly uncomfortable for me. I soon realise he is performing, and he is asserting his control of this interview. I may need to find ways to keep the topics and conversation relevant to my agenda, but I have little choice but to go along with his flow. Given that the observational research demonstrates that judges' consistently aim to be in control I sense I need to respect this.

Impression Management

I ask the judge about his professional background, how and why he became a judge. He is eager to discuss his newly appointed status, and this may explain his enthusiastic and

performative manner. District Judge G. Winters, newness implies he needs to practice his craft (Tata, 2007). He seems uncertain in his new role and may wish to manage and sculpt a particular impression. Personal presentation and particularly emotional characterisation are clearly important to this judge at least in this moment in time. Self-presentation, as dramaturgical theorists such as Goffman (1959), Hochschild (1983) and Bauchmann (2010) argue plays a major role in everyday life and in the everyday life of this judge. How it is Judge G. wants to be perceived may be his main priority. Victims, offenders, counsel, the public, media, and politicians, all place competing demands on the judge and in how he delivers and justifies decisions particularly at the sentencing stage. The judge must comply with the law, but he is under pressure to balance this with expectations from others, and to contend with his own inner preferences or conflicts (Bolton, 2010; Hochschild 1983). For example, this very judge in a case involving rape and sexual assault, decided to show leniency in sentencing a sixteen-year-old offender. In his comments Judge G. advised the convicted rapist to go for 'long walks' with his social worker, making a referral order instead of imposing custody (DJGWinter20). This created both positive and negative responses, with victim groups demanding a review and organisations supporting youth rehabilitation praising the judge's foresight and compassion. There is always a balancing act to be had, and this judge may be aware that his balance is sometimes swayed towards one set of emotions over others but which ones? There was no problem in getting this judge to discuss and express emotions, as he is focused on what he wants his reputation as a judge to look like. He says, "I want to be known as a pleasant judge but also one who gets the right points across." I assumed at this point that he meant points of law and policy. There are no silences as the judge is in full flow. "I cope with the pressures of the job by being upbeat." At this point he stops again, hands on the table leaning towards me, close to my face, eyes screwed and says, "I'm not one of those judges who comes across as being fierce and angry," while coming across as fierce and angry.

This is an intimidating experience for me, and I feel uneasy. He insists he is the 'pleasant' judge but the signals he is sending suggest otherwise. If he is indeed a pleasant judge, why then is he so anxious about his judicial portrayal?

Rehearsing Backstage Emotions for Frontstage Performances

Judge G. seems to be trying to reconstruct and refine his performance as a judge focusing on the particular 'self' he wishes to portray. I presented him with an opportunity to reflect on both his outward persona and his inward emotions and a chance to practice his desired performance in a safe space. Though it is not immediately apparent to me, it becomes clear that the judge is analysing his onstage character and through rehearsal is considering, indeed packaging, his emotional portrayal as a judge. The rehearsal phase for front stage performances is a key dramaturgical concept (Bergman Blix, 2010) but one which appears to be neglected specifically in judicial emotion research and literature. As I observe this rehearsal, I reflect that it may be a way of enabling a more believable judicial performance. Theory suggests this involves the moral manipulation of audiences (Kurth, 2020; Mason, 2013; Semple, 1990) using a mix of genuine and contrived emotions to produce a certain narrative. The narrative is one of moral justice but also one of judicial individualism as judges want to build reputations (Posner, 2008). I think about the dramaturgical concept of the actor on stage and move from an interpretation of the judge as merely playing a role to one where he is trying to 'manifest' himself into the role (Goffman, 1961:100); to feel the role, to become the role (Bergman Blix, 2010). As a judge the office extends beyond the courtroom, beyond the trial and offender and the role as a symbol of justice is embedded into community life. Judges should not 'stand apart from society' even though they are independent of Parliament and the Executive they are not independent of society (HoL, JAC, 2012). The self-image judge G. is trying to construct will encompass the other roles he has had and continues to have. It is completely conceivable that Judge G. is weighing up his new role obligations and

expectations, alongside other commitments within a wider societal structure. This involves a range of emotions, some of which are traditionally shunned by the judicial system.

My analysis of this one interview brings to light the need for rehearsal spaces as a place for judges "to take care of their emotions" (Kivisto, 2013: 280). Tensions and struggles regarding inner passions are highlighted particularly when a judicial image is being created and cultivated. Judge G., like many judges, operates alone on a daily basis through fleeting conversations with clerks of the court and barristers and is pressurised by reviewing documents in isolation. At the time of this performance, he has no team to reinforce or moderate his thinking and emotions, although Goffman (1959) would say that in order to pull off an authentic performance the judge does need a team. If rehearsal space for emotion management is limited within the organisational structure the judicial system provides, every other rehearsal is critical, which is why Judge G. may have jumped at the opportunity to be interviewed. Pressures, stress, and the fallibility of being human emerge throughout his communications with me, "I think I am aware of my emotions and do try to control them, but we are only human. I have to show defendants and the public that I can control my emotions as often they are not in control of theirs."

Conflicts and tensions are not always about the inner self, versus the outer self-presentation but rather a straightforward consequence of dealing with the mechanics of a difficult job. Judge G. emphasises this when saying, "This job already feels like a conveyer belt with pressures of cost and having to get through large numbers of cases. It can be stressful." But Judge G. is not without alternative professional experiences and brings these along with his own personality, individuality, and conventions to the role of judging.

From a theoretical point of view, Judge G. may be torn between what his legal role dictates regarding crime and punishment and what his social conscience pushes him to consider. He may be reluctant to support punitive policies and sanctions, preferring to stay on the axis of

mercy, compassion and leniency but is nonetheless obliged to make sometimes punitive decisions, based on rules and policies he has to work with. If he has an external agenda this can only be pursued within his authority as a judge and emotions driving this need to be controlled (King, 2008). I manage to ask him if he ever regrets a decision or thinks that he has made the wrong decision based on his emotions or because of the rules. His response is thoughtful: "Mostly I feel I am right, but some cases do play on my mind. No matter how hard you try to be fair and neutral we are human at the end of the day. My mood and my emotions may shift some judgements a little."

It is not clear how Judge G.'s emotions shift his decision-making as he states, nor in which direction. I surmise, based on his own self-assessment that he is attempting to be more lenient than punitive, kind rather than cruel but that he is restrained by the law. For example, I had previously observed Judge G. dealing with a women offender who entered the courtroom from the cells. On questioning him as to why the offender was in the cells he replies: "She is on the breadline, has a disabled child and is on a very low income. But the law is the law she failed to appear, and I have to follow it regardless, but this makes me sad."

Although Judge G says he must follow the law, at this point I get a strong sense from his smiles and nods that he would be flexible, where he could or wanted to be. After all, he is permitted to go outside the sentencing guidelines and for some crimes there is an inbuilt generous range from low to high tariffs. As Judge G. has come to the judicial role later in life and career, he has an already established set of beliefs, principles: in effect, he has an emotional character.

My suggestion is that Judge G.'s human agency with its particular emotional character, has the potential to influence his judicial decision-making depending on the specific circumstances and the strength of his emotions at the time. Judge G. admits that he is swayed by his emotions. These are personal and just "like the cases they decide judges are unique"

(Capurso, 1998: 14. As Lange (2002) also recognises, Judge G. confirms that as a judge he feels constrained by the official demands of his role. Such emotions are conflicting: he reveals that he has an urge to act compassionately sometimes in conflict with the law, although in other instances he chooses not to succumb. Judge G. has joined an elite group with its privileges and status (Scarduzio, 2015[a]) and may understandably comply with the rules on emotional expression (Fielding, 2002). But is possible that in the performances I am witnessing, Judge G. is not just concerned with being the pleasant judge he aspires to be, but that he is also testing out his capacity to be an aspiring activist, a somewhat deviant judge (Scarduzio, 2015[a]).

Compassion as a judicial emotion is less apparent than anger and is in short supply on stage in the courtroom. Rather than compassion being central to this judge's aspirations he could be trying to determine how far he can push an unpopular approach by capitalising on the emotional concepts of social forgiveness, kindness, and charity in his decision-making. In other words, it is his status and power needs which are his immediate priority, and these appear to be driven by the emotion of ambition. However, it does not have to be equality and concern for people over power ambitions, it can be both that occupy Judge G. Compassion and empathy as part of the human persona are platforms for equality, but they are also tools to convey status and power (Scarduzio, 2015[b]:304). In a judge who is new to the role it is conceivable that he is finding his feet professionally and asserting himself using emotions to build status, power, and reputation. Kemper (2011: 27) says "status seeking is a perpetual aspect of relational interaction. I would add that in new situations this is particularly relevant (Goffman, 1956). Whatever drives an activist judge, according to Fielding (2011: 98) they use non legal, non-precedent criteria such as emotion in their thinking which can influence decision-making. Judge G.'s individualism, his building of confidence through self-reflection and his developing brand of judicial agency is visible, as he performs, but so is his vulnerability.

I am still brought back to the question of why the judge appears so insecure and the extent to which he is analysing his own self-image. Judge G. was recruited from the solicitor profession. The appointment of solicitors to the judicial bench is becoming more common and a Solicitor Judges Division (SJD) was created by the Law Society in 2012 in order to encourage this route. The main purpose was to improve social mobility and equality within the judicial profession (Baski, 2012). However judicial posts and promotions are occupied in the main by those from a barrister background. Judge G. is likely to be aware that moving from a career as a solicitor to being a judge is difficult and that there is recognised bias in the recruitment system (JDFR, 2019) while it would no doubt be a challenge to be accepted by trained barrister judges. To become a judge as a solicitor is an achievement but this may carry with it a sense of vulnerability and perhaps insecurity for someone newly appointed, affecting their sense of status and power. Judge G.'s orientation is therefore, perhaps, an inevitably emotional one.

Professional History and Integrity

It is important to note that at the time I was collecting my data, Judge G. was under investigation by the Judicial Office for potential misconduct with a stream of complaints having been submitted against him. These included accusations that his sentencing was based on personal prejudice; that he was excessive, vindictive, and overly punitive whilst being lenient with convicted sexual offenders; that there was a conflict of interest from him being in a previous role as a solicitor; that he lacked neutrality and integrity as a judge. These complaints are registered with the Judicial Conduct Investigations Office (JCIO) but to include more information could breach research ethics and confidentiality. In the end, the complaints were dismissed by the JC1O on the basis that the allegations of misconduct were insufficiently evidenced. This situation was contemporaneous with the observations I made in court, and as reinforced by the interview. It would follow then, that a certain degree of

stress and anxiety depending on individual resolve and character might ensue. Judge G has yet to secure his desired public persona and has come to the attention of the judicial hierarchy. He is potentially disadvantaged by being a solicitor judge and along come complaints suggesting that he is indeed the angry judge, not always the pleasant one he prefers to portray. There may well thus be a degree of emotional vulnerability which has led to Judge G.'s offstage rehearsal.

During the courtroom observation I did see another emotional side to Judge G. when he became irritated with a group of young men, who appeared to be friends of a defendant. Judge G. was obviously frustrated, not just with the incident but with my questioning of this and does not want to be drawn into discussing his angrier emotions. He snaps a little saying,

"They are not helping their friend in the dock with their constant chatter. This could have affected him." Judge G. adds, "But he made an effort. He was dressed well enough."

This was a clear indication that the judge was engaging in demeanour assessment which as Rossmanith (2015) argues an experiential way, for judges to form impressions about an offender. I seize on this statement as a means to change tack, and of opening the discussion up, as I realise Judge G. will bring the meeting to a close if I focus on his irritation with the friends of the offender. I seem to have hit an emotional nerve.

Respect, Status, and Power

Judge G. responds to my question about whether the demeanour of the defendant/offender is important and agrees that it is something which draws the attention of judges, and this begins as soon as the defendant or offender comes into court. "It is natural," he explains but does not necessary influence his thoughts, adding, "that depends." Judge G.'s mood lightens, and I have him back as he enthuses about respect in the courtroom, respect for his role and respect for himself. "Absolutely; I like it if someone makes an effort. This shows respect. I did

my best to be lenient with him, but some young people have little chance, and I feel bad for them." The judge is again revealing his tendency towards wanting to be compassionate. He recognises the disadvantages faced by some offenders but the need for respect is more important for this judge and can facilitate the kind of judge he wishes to be. Although not always categorised as an emotion the need for respect produces emotions and is emotional. Kemper (2011:19) however uses a translation of Durkheim's work saying that, "Respect is the emotion which we experience when we feel this interior and wholly spiritual pressure operating on us."

Offenders are often morally denounced within the trial process and specifically by the judge. But by showing respect small rewards such as positive comments can be earned which fuel the hope for leniency. This raises the judge's status. If one of the judge's goals is about establishing power and status in his new role, then commanding respect is an essential component to achieving this as Harris (2015) notes. If he does not feel respected, particularly by the offender or those associated, this emotional need may indeed influence his judgements.

The interview has lasted an hour and is ending, with Judge G. bringing the discussion abruptly to a close. Judge G. offers passionate perspectives into his own emotional experiences of the role. But is Judge G. something of a unique character or does he offer glimpses into how other judges may feel or how they deal with emotions? An analysis of the Judge G. offers the following insights: judicial awareness of emotion is situated, and emotional vulnerabilities are contextual; time and place matter, suggesting emotions are changeable and volatile; judges need a safe place to manage their own emotions particularly at times of stress, with off-stage rehearsal spaces required to practice for front stage performances; judges are in the business of impression management; judges try to suppress unfavourable emotions but also cultivate certain emotions for a purpose; goals include, establishing power and status to build reputations; some judges become activists to establish a judicial presence; being respected

is critical to being valued, which reinforces power but is also self-reinforcing; whilst a judge is an institutional figure he/she is not without emotion.

Backstage and Off Script: Interviews with the Judiciary

The purpose of the above case study was to provide a platform from which I could undertake additional interviews with judges, to include magistrates. To this end, by this stage I had in my sights the suggestion that structure was important in framing the next round of judicial interactions. Judges are renowned for being difficult to interview (Fielding, 2002) and in order to get the most out of the limited supply of judges that were willing to participate I was obliged to acknowledge their need to feel in control of discussions, albeit it with my background preparations and questions readily at hand. Following the Judge G. experience, I gained access to several other judges and magistrates and conducted one-to-one and group interviews. In analysing these interviews, patterns emerged regarding judicial emotions some of which were in tandem with the outcomes from the District Judge G. Winter interview.

Generally, all the judges concurred that emotions feature strongly in their judicial work and the suggestion that judges can operate without emotions is regarded as fiction, with some judges laughing at this proposition. One judge summarised this saying, “Courts are a hot bed of emotions. Courts are highly charged. There are big variations in emotions depending on your experience and who you are. There are more emotions on show in the last 10 years than ever and that includes us, Magistrates/judges.” There is, indeed, overwhelming evidence here that emotions cannot be left out of the judicial role and more than this, emotions are actively needed in order to fulfil that role. As stated by Magistrate Wagner, “I think emotions aid logical conclusions; they are a good indicator of logic. My gut tells me this” (**Magistrate.**Wager21316).

Common emotion themes also transfer across to include the role emotions have in highlighting judicial stress and the need for organisational support. There are also distinctions

between the case study and the supplementary interviews where for example, gender differences tended to occupy conversations. It is also noted that the other judges I interviewed were much longer serving than District Judge G. Winter and one may anticipate that they do not have the same level of anxiety attached to how they are perceived. This, in fact, did not quite materialise as these longer serving judges also had concerns about their role status and power as women judges and they were clearly irritated by a perceived lack of respect between paid judges and lay magistrates. As women outnumber men in the Magistrate courts – running at 58% - 42% (GOV.UK, 2020; MoJ, 2020) the issues raised by the participants did not include a focus on numbers but was more tuned into how the judicial role of the magistrate is regarded between the different courts. Respect for their roles as they see it is determined by the level of power and status held as women, not numerical occupancy. The female judges and magistrates participating believe that men dominate and control the three-panel arrangement, as Chairs and most district judges who serve alone in magistrate courts are mostly male. Their male equivalents thus have a higher 'natural' status than most women magistrate or judges. The group interviews provided wide ranging and rich insights as the judges knew each other and had a level of trust, already established. This created a feeling of security with ideas and comments flowing naturally between participants (Klein, 2015). In the singular interviews there was a degree of suspicion and awkwardness between me and the interviewees, perhaps a lack of judicial preparedness on their part, as questions on emotion came to the surface. For example, a female judge on being asked about her emotions in court replies with some agitation: "Just because I am a woman doesn't mean that I descend into a quivering wreck, crying and wailing. No, I can be as angry as any man" (**J**Parks,T12215).

The above felt like a defensive response to a somewhat neutral question about emotion. I asked this participant about her role as a judge not as a woman judge, but as a judge full stop, and as such her response demonstrates some sensitivity around gender in relation to her

emotional profile as a judge. Underpinning this is a general fear that prejudice about women persist in the profession, and they may still be seen archaically as being "hysterical" in their nature something a women judge wants to avoid as Williams and Bendelow (1998) note. The response also points to a narrow view of emotions as being something which will hamper rather than help women. Nonetheless the comment is interesting and reflects Maroney's (2011) contention that some women judges assimilate into male roles in order to be accepted (Rackley, 2013), thus displaying male type emotions associated with the angry judge. This can be a risk for women judges as they be criticised for this (Maroney, 2015). In a recent example, much publicised, Judge Lynch ended up appearing before the Judicial Complaints Investigation board (JCIO, 2017: Judge Lynch) assisted by the media for using language, unbecoming of a judge. Few cases of a similar nature reach the press or end up in judicial hearings, so it is possible to surmise that this was due to the fact the judge was a woman. In another one-to-one interview, judicial cautiousness overtook initial enthusiasm to take part in interviews and the judge withdrew, unsettled by lack of official support; but I suspect would not have done so if he had been part of a wider judicial group (**QCJ**L, email 12th April, 2016).

The Interviews

I start with group interviews, a mix of Magistrates and judges brought together by Magistrate Wagner who is well known to the judicial community. After preliminaries I show a court artist's drawing of Judge Dingman apparently crying (Cook, 2015). This is a good tactic and engages the judges in a lively discussion about the act of crying, as opposed to the act of appearing angry.

"Showing offenders, you are angry is sometimes necessary to help them change their view of the world and to feel shame and remorse for what they have done. If crying helps this, then I am all for it. Judge Dingeman did more for justice by crying than we have done in years by being angry. The powers that be don't like this, but they are now listening. For the first time ever, we have a counselling service." **M**Wagner21316

Stress is a key theme in all the interviews and judges articulate this with energy and passion,

"There are rising cancer rates; depression, sick leave and we have explosive outbursts. These are lonely roles, and we are dependent on our gut instinct and intuition. We are overworked and its bloody hard work to understand other judges and magistrates' decisions." **J**Rose21216

"Being on the bench is a lonely role even when you are with colleagues. There are different personalities, and we won't always think alike. Emotions run high. There is a high incidence of illness, cancer, and mental health problems amongst judges. My guts work overtime. That's why I had an operation." **J**Rose21316

"More and more judges are off with stress even the strong personalities going off sick." **J**Lyman21316

"There are piles of cases, standards have dropped. Now you want emotions! The changes and closures of courts, you are left on your own to work out what to do with someone's life.' We are angry." **J**Rose21316

"Emotions are building and more so over the last ten years." **J**Dunn21316

These judges are indeed angry judges, but this is not expressed as anger towards offenders but, rather, as anger towards the profession. In an impassioned and somewhat erratic debate, the judges contribute saying:

"Now you want emotions, let's talk about the changes!" "We are angry about the courts closing, heavy workloads, digital changes, lack of pay. Courts are closing in areas where the sexual abuse issues need to be tackled. What message does this send out?" **M**Wagner21316

"Civil servants are making these decisions. Some defendants have to travel long distances to attend regional courts, and they have no money. What kind of decision-making is this?"

"Fifty magistrates have resigned over court charges, bail conditions and sentencing restraints. Resigning to make a point doesn't help. It's better to challenge from the inside."

Blame for this is levied at the judicial office, for what the judges see as their historical failure to recognise serious stress levels and in their lack of attention paid to judicial emotions on

both a personal and professional level, “We are not robots, but we are expected to be unfeeling.” **M**Hovick21316

In giving a case example, one judge describes her real desire to be compassionate in sentencing but feels restrained by the rules. In a tearful account the judge says,

“I was really upset that he [offender] could not cope, and I felt incredibly sad. I could feel my voice wavering. I had no choice. I felt I had failed. I still feel bad about this as he had mental health problems.” **M**Asher21316

Judges emphasise the fact that they are *only human,* suggesting they are subject to their emotions and that this is viewed by the organisation as a weakness rather than a strength. Alternatively, some of the judges use the phrase only human to call for a change in expectations. Such changes in attitude towards emotion in law were expressed by the U.S. President, Barack Obama (Bandes, 2009: 134) when Supreme Court Judge Souter retired. Obama is reported as wanting to appoint an empathic judge who would embrace emotions. The legal and political reaction to this proposition fiercely opposes any such move as being tantamount to abandoning the rule of law (Bandes, 2009: 134).

The need to follow the rule of law, whether this is through statutory interpretation, keeping within the sentencing guidelines, or adhering to the general principles of neutrality and impartiality, is essential practice. This is the benchmark of a good judge and where success is partially measured in terms of organisational compliance and team loyalty (Goffman, 1959: 218) but also loyalty to the law (Flower, 2020). But there are tensions if the rules seem unjust, even to the judge. All judges recognise the need to respect the law through its rules (Hunter *et al*., 2015; Westerman, 2011). In dramaturgical terms, this is referred to as “rules of significance” (Viser *et al.,* 2017) demonstrating respect for power hierarchies, codified within the norms of the chosen profession. As Hotho, (2008: 727) puts it, “Compliance with the rules is the basis for organisational reputation but not necessarily what the public want to see.”

Emotion must be buried, excluded and is an unwelcomed challenge to legal proceedings and decision-making but the public needs emotion to understand if justice is fair. Judges, try to follow rules even when they don't want to as individual beliefs "are trumped by deeply acculturated set of norms and traditions of judicial decision making to which all judges tend to adhere" (Hunter, 2015a, p. 126). In the end most judges try to follow the law but when the law is unclear this opens up opportunities for emotions to influence decision-making (Wistrich *et a*l., 2015: pg. 261). In legal circles there is on one level an almost unquestionable duty to respect the rule of law, and this notion is often used to deter questions and challenges about the laws sense of equity and fairness. It is also true, as that from trial to trial there is repetition of discursive frameworks, narrative strategies, and language use (Tessuto, *et al*., 2018) aimed at creating the illusion of the law's stability.

But the trial is a performative event which may also challenge normative rules. For example, feminist scholars point out that the rules are pre-established to be biased towards men (Hunter, 2015; Abrams and Keren, 2010; Jagger, 1989). See also page 49, of the Literature Review, Chapter Three for a range of literature exploring feminist research and emotions. The challenging or breaking of rules may thus have particular consequences for women judges, their careers, and their reputations (Hunter, 2015). There is a strongly articulated view from my research participants, that women judges bring something special and positive to the judicial role. As women judges they feel that they are more intuitive, more understanding and more informed about the lives of women and families. These judges say they know their clientele, particularly the offender base and there is a strong claim of knowing the broader family, community, and society context. Themes of mental health, disability, poverty, lack of education, drug addiction, youth offending, domestic abuse, and female vulnerabilities are deeply considered, with judges highlighting how they can empathise with families and women's experiences. Hunter (2015[a]: 124) supports the view saying that women judges bring a different perspective to the courtroom, to the extent that, "women judges bring a gendered

sensibility to decision-making." Lady Hale, retired President of the Supreme Cout, reflects on her first case (R v SSWP [2017] UKSC72) stating, that, "The basic truth is that women and men do indeed lead different lives… and women, have bitterly resented and fought against the roles which society has assigned to their gender".

The above statement is magnified by the media coverage of Lady Hale's judgement on the prorogation of Parliament for five weeks on September 24th 2019, by the then Prime Minister, Boris Johnson. This action was taken during a critical stage of Brexit discussions and voting in parliament and was referred to the Supreme Court for adjudication. Lady Hale ruled that it was unlawful and ordered parliament to resume its business the following day. However, it was not the serious impacts of such actions on the British constitution or the excessive powers of the state which took the media's attention. It was the symbolism conveyed by the spider brooch that Lady Hale wore with suggestions she had caught Boris in her spider's web (Williams, 2021). This unintended message took hold in the media further popularising the first female chair of the Supreme Court but was couched in potentially biased gender terms (Youde, 2022). On the one hand Lady Hale is seen as a trailblazer, an advocate for women's rights, on the other she says judges should use the emotion of courage to recognise and conquer emotions which lead to biased decision-making (Bowcott, 2017). In recognising these conscious or unconscious sympathies for one side or the other, there is a compliance to the masculine dictates of the rule of law and at what point can what is claimed as emotional bias be in fact a version of the truth. But Hunter (2015[a]: 128) is realistic in pointing out that most judges, regardless of their beliefs and experiences tend in the end to conform to the rules. She also says that "the notion that whatever a judge's background or beliefs may be, they are trumped by a deeply acculturated set of norms and traditions of judicial decision-making, to which all judges tend to adhere" (Hunter, 2015[a:] 126).

In light of the above, judges must apparently learn to act in ways which "conceal and repackage" their emotions, and where they attempt to hide all traces of emotionality,' particularly when the desire to be compassionate is engaged (Avgoustinos, 2007: 38). Like a "shameful secret" such selective emotions must be kept hidden below the surface, to portray the judge's "cold state of mind." Avgoustinos describes judges, as "ludicrous contortionists" but if the judicial role demands scripted acting, and as Goffman (1959) contends, we are all actors on life's stage, then this is a somewhat superficial, analysis. But what it does do is draw attention to the different worlds we inhabit, the private, the professional, the informal and formal and how we adapt to these situations, using multiple selves as management tools (Goffman, 1967).

Judge Park, takes the above debate full circle, back to the restrictions imposed on the role, and the dictum that emotions are not to be encouraged, and rules of dispassion must be followed, "Judge's hands are tied by the rules, and this adds to stress, it is frustrating at times. I sometimes feel like giving up." **J.**Parks21316

Such attitudes persist in most western legal domains, as Maroney (2011) points out, and this is a major barrier to an open evaluation of emotions and to an understanding of the effects that emotions have in the everyday work of judges. In its current guise, at least, judicial training does not appear to be an avenue to resolving such tensions (Goodman, 2021). These judges are pessimistic about progress, relating dilemmas of emotion to a lack of official training "…training and support are completely inadequate. Emotions are just ignored. This needs serious attention as our personal lives affect court…we are only human." **M.** Penn N27

Being part of a team and the need for safe spaces to manage emotion is a high priority for these judges, particularly in dealing with stress. There is less emphasis in these interviews on using rehearsal spaces as a means to practice impression management, although this is an area which is given some attention, particularly through a gendered perspective, "The

impressions you make are really important for your reputation, but female judges need to work harder to achieve this and that means not showing emotions. Men get away with being angry, we can't" (**J**Bow21316).

The ability to come across as non-emotional needs to be practiced in order to comply with the normative rules of dispassion and these judges say they deploy tactics, to protect themselves from being exposed as 'weak emotional women.' Such strategies include, according to one judge, "placing your tongue on the roof of your mouth this restricts facial expressions and movement." Having testing this personally and with groups of students, it surprisingly works. Other strategies to regain what may feel like, a loss of control include taking a break or consulting the Clerk of the court for advice, even if it is not needed. The creation of personal methods to supress and control emotion are not just a female activity and this is reflected across gender boundaries. However, these women judges do feel vulnerable, as their career paths are more challenging, in their view, than in the case of their male counterparts. This is felt acutely by one judge who in response to Judge Dingeman's tears says: "…if I had cried openly as a female judge I would have been reprimanded not praised, but good on him" (**M.**Wagner21316). The same judge then declares that she will continue to be emotional and if she feels the urge to be compassionate, she will be. There is an air of defiance, but she counters this and adds: "…. You can disguise this and show compassion without looking emotional."

So, judges who seem stern, cold, and dispassionate create such an impression or put on such a mask whilst at the same time they are involved in problem-solving manoeuvres to produce the justice they desire. This is performance management, but emotions are not supressed, they are self-evident, and the judges concerned are largely in control of them. The audience is not necessarily unaware of this as judges want them to believe the right decisions have been made. This has implications for observer research as it indicates one should not always

believe what one sees on the surface and should reflect on whether judges manipulate audiences or whether there is just good sense in judgments but calls for punitiveness can be softened by compassionate emotions. Other judges have also resolved not to give in official pressure or to give up on their emotional character and sense of being and agency (Prosser, 2015; Lange, 2002). Judge Bow is passionate about this and retorts in an activist tone:

"As a serving judge of twenty years compassion is part of who I am; part of my conviction. I will not set that aside. I may be accused of being soft, but justice needs to have hope and the public need to see this too. I spend time considering how to get this across in my speeches even when we have nowhere to go. Not only are we human, but we must also continue to be human. We should not lose this." **J.**Bow21316

Senior Magistrate Wagner declares that her devout religious convictions influence her decision-making, bringing into the debate an area which does not receive much formal attention. As a Buddhist she believes in compassion as central to her 'existence' and in her decision-making, and this is what she says she looks for first. There are undoubtable challenges when there is conflict between the law and personal emotions, so why be a judge or magistrate? The senior Magistrate answers this question by saying that the gap between law and emotions can be bridged particularly when young people are involved in crime.

"The youth justice system allows me in most cases to give second chances. I really like the youth courts because you can always find something good in a young person, letting them hear their own voice in court, letting them speak and helping them turn their lives around. This gives me a deep sense of satisfaction and pleasure. That's why I am a judge." **M.** Wagner

Again, the judges call for more training and for that training to embrace emotion management, stress reduction, and to recognise emotions as part of the judicial role. There is in this wish list a contradiction, as judges also state that they refrain from showing their emotions in fear of the repercussions. They recognise that training as it stands will not fully address their needs or their views on emotion and may only serve to standardise their

performances as judges, while running the risk of perpetuating a male-driven model of justice in the process.

Conclusion

In summarising the above, often passionate, debates, a whole range of information and issues on emotion emerge. Many of the conversations I had with judges, were spontaneous, as if judges were, for the first time thinking aloud and the jumping between topics to do with emotions was frequent, and propelled by their characters, personal interests, and the enthusiasm of my respondents. This chapter does not sit in isolation from the previous chapter which outlined key themes emerging from the observations of judges. Themes are repeated and there is a consistency in this. The data chapters provide accumulative knowledge and understanding of judicial emotions, like a jigsaw puzzle I have pieced together through evidence gleaned from judges' working lives: the in-court and onstage performances. In this chapter, I have accessed the backstage region, where judges are offstage and where they have time to evaluate their own roles, to think reflexively about their emotions, while also preparing for publicly scrutinised decision-making. Similar themes connect these two chapters: for example, emotion's role in the handling power, the skills and anxieties involved in controlling participants and the pursuit of respect, not just for the law but for judges own self-esteem and feelings of self-worth. Judges consistently refer to the impacts of suppressing emotions and the resultant stresses caused, but the overwhelming consensus appears to be that emotions are part of the judicial psyche, something to be acknowledged, but also wary of, something to be regulated and managed, but something of added value, something to be utilised as a tool for decision-making, an anchor for logic not irrationality.

There is no single situation experienced and acted upon by all judges, but in their reflections, there are shared experiences: a lack of emotional support, the lack of training around the

emotional implications of justice and the impact on individual lives of such momentous decisions, particularly on those of the victim and the offender but also as felt by the decision-makers themselves. There are added tensions brought about by the official requirement to actively deny emotions, a part of human nature which makes judges who they are. The case study of District Judge G. Winter provides a wealth of rich data given that he appears to rehearse his judicial performances, sculpting an improved and more acceptable judicial persona, perhaps in an effort to offset the complaints made against him. His reputation is at stake, as it is with all the judges who took part in this research. But this is, of course, a daily preoccupation for all judges.

All of the judges I interviewed seem, perhaps understandably, self-interested, and concerned with their personal positions. There is, however, a marked difference in how this is approached and discussed, not least between the genders. The women judges tell a story of having to continually prove themselves as being worthy of the judicial role and where they have no choice but to conform to the rules regardless of any personal opposition. There is a distinct belief voiced by these judges, that they feel discriminated against, as they discuss the barriers which they have experienced when trying to move up the career ladder. They also believe they bring something quite different to the role as compared to their male counterparts; sensitivity, kindness, a deep desire to change outcomes for those who have offended and a disappointment even a sense of failure when they are let down. There is an irony here as the judges' expressed that they did not want their roles to be assessed on the basis of their gender, yet there are qualities brought by women which enrich the role of the judge (McCormick, 1993). Their reputations are not obviously built around power, but these interviews and conversations are platforms for storytelling, opportunities to recognise and reflect on their positions. Earlier I asked a question about whether Judge G., in his rehearsals, was a unique or maverick character. I conclude that he is not, as all the judges reported here,

given the same dramatic space, perform theatrically, with their own unique emotion scripts and versions of their role.

As McKenzie (2015) suggests, it is understood that self-knowledge can be prone to inaccuracies, but these offer rich and genuine insights into the everyday work of judging. I met with these judges at a time when they are dismayed with organisational changes, courtrooms closures, with demands on their time, rising stress levels. Such context may well have influenced their contributions. What is clear from all my interview participants, is that they accept the role of emotions in law and that emotions should not be denied or rejected. To them emotion is a rational component of their roles and is part of decision-making, enabling them to make judgements but it is also something which needs management and support. If one gateway to embracing emotions is through judicial stress management and support, then such an acknowledgement may in time lead to other more enlightened and honest debates, particularly if these and other strong judicial characters are given a voice. However, if training and stress management continues to be nothing more than a mechanism for organisational conformity and suppression, then judges will continue to be sceptical and are perhaps more likely to be activist, deviant, or secretive in their personal courtroom narratives. Incidences of unexpected or controversial judicial emotion will undoubtedly bring more attention from the media, where access to what judges say may be more readily available for scrutiny, providing a valuable and untapped source of data. The difference between the frontstage scripts involving emotion, those that surround and often infect the criminal trial and those of the backstage, that is the scripts in play during judicial interviews is notable. The next chapter will look at these judicial scripts in more detail, exploring the emotive language used in the justification of sentencing decisions.

Chapter Seven

Judicial Speeches: Emotional Scripts

"The script of dispassion complicates the study of judicial emotion, as the stigma it creates for those judges who do admit to experiencing emotion discourages transparency."

Posner, 2006: 10

Introduction

Goffman's (1959) dramaturgical concepts which frame the three empirical chapters privileges scripts as being the key to understanding human interactions and associated behaviours. Judicial words are often crafted formally through the preparation of a written script, but can also be naturally occurring as judges speak, and as such this may constitute evidence of unintentional or even subversive, emotional responses. Chapters Five and Six confirmed that emotional features lie embedded within judicial scripts, and that these are used to enhance judicial performances, on and off stage, while informing judicial decision-making in the process. Chapter Seven extends and adds to what has been gleaned from the previous chapters by accessing a wider set of data and sources for analysis. Some of these were available through official routes but primarily via the media, particularly the press, where judges are frequently observed and subsequently quoted by court reporters. Access to an extensive repository of judicial quotations, provided me with an opportunity to scrutinise large scale secondary data. In this chapter I investigate the language, words, and phrasing that judges are reported as using in their trial speeches and in court dialogue, pinpointing, and documenting any emotional and emotive content to create themes and patterns. Although it has to be said that when one starts to look for emotional content, one is likely to find it, given that emotions are natural. Keeping an open mind and trying to be as objective as is possible about which emotions are present at any particular time is the aim.

But as already declared, this research is embedded in subjective perceptions. As argued by Becker (1967) researchers need to accept that it is not possible to be fully objective in research and that it is inevitable that we will take sides and impose our own values. There is no easy solution to this, and perhaps one should not be sought as subjectivity offers valuable and realistic human insights. Becker does offer advice to make the limits of the research clear and to be explicit about whose vantage point is being described.

As the specific context of each trial is relevant, with a multitude of situations which can determine the direction of emotions, I consider the timing of emotional interjections and linguistic patterns, within oral and written scripts.

To the above end, I continue with the dramaturgical framework, evaluating the specific language and words of judicial scripts often theatrical, as they are performed. I compare similarities and differences in emotional content between the frontstage, the officially directed judicial performances, and the unofficial backstage deliveries, where opportunities for more cogent discussions on emotions were possible. Furthermore, I identify and analyse pivotal points; those places within the various performances where the words indicate that judges were following organisational rules and policies but also appraise those incidents where scripts go 'off message,' potentially allowing the private and personal to control judicial thinking, dialogue, and decision-making. The role of judicial tears is examined in terms of indications of stress but also as a function of securing the judicial performances required. Thus, the chapter pivots between what is natural and understandable human behaviour, i.e. emotions and what is essentially judicial manipulation of courtroom audiences. The mix of the private and professional domains is not clear cut, but judges may use emotions strategically to achieve both goals. Whether this is driven consciously by organisational interests or deliberately by judges is to be determined as the evidence available within the scripts is analysed and presented.

Tensions build during trials and the emotional atmosphere mounts as audiences anxiously anticipate the articulation of decisions, which are intended to demonstrate the ultimate power of the courts (Neuberger, 2018; Scarduzio, 2015[a]). The judge is seemingly, emotionally contained but as the data from previous chapters reveal, judges are far from passive. In line with the other empirical chapters a key case is used as a platform from which to explore and analyse emergent themes.

Data in Context

As I pointed out in Chapter Four, my data was collected from over five hundred cases, across three hundred and eight judges primarily through print journalism, newspaper tabloid, broadsheet hardcopy and online versions. This complements the other data collection methods, namely direct observation, and judicial interview. In Chapter Four I discuss the rationale for using press and media data as sources with a review of justifications, criticisms, benefits, limitations, and controls. In summary the main reasons for opting for this type of data, stems from what media tells us about how the public are informed and influenced about law (Moran, 2014; Schulz, 2009). It is acknowledged that the judicial story is framed by the press and media (Sedley, 2018; Moran, 2014[b]; Berry *et al*., 2012) as judges are labelled and presented in specific ways to attract public attention. In accessing the words of judges, the data does provide evidence that emotions or at least emotive words dominate judicial speeches; and that emotions operate with numerous functions in the delivery of justice but also as human responses to the impacts of crime. This story is therefore about more than the captured words of judges it is also about the wider context, how words connect together to deliver messages, how words are prepared, reported and how as the text is read it can be visualised and felt albeit subjectively, according to the judge's intentions both conscious and unconscious. What jumps out in an overview of the judicial quotations is that this data is saturated with emotive words, phrasing and language giving rise to emotion-based themes.

Due to the sheer volume concerned it is not beneficial to replicate all the data collected so quotations are themed, and a representative selection is presented as evidence.

Theoretical Context

As this thesis is located within a dramaturgical framework associated theory and literature is drawn on as discussed in Chapter Three. In preparation for interpreting the data I highlight some background theories helpful for questioning and interpreting information. For example judges may, during the acting process portray multiple selves/characters (Goffman, 1967), organisations can impose feeling and display rules where compliance may require degrees of emotional labour (Hochschild, 1983). Indeed, there may be a difference between the judicial expression of emotions and the internal personal experience of any given emotion (Anleu Mack *et al*., 2015) and ultimately that the foundations of justice are human and emotional, with every behaviour and decision underpinned by an emotional driver (Collins, 2004; Solomon,1995). The work of Adam Smith (1759) [1976] discussed in Chapter Three, adds a legal philosophical dimension which encourages questions as to how emotions can potentially be both professional and private. Do judges breach these rules, or do they maintain the known, but hidden professional rules of emotion? Are there particular pressure points which lead to the private taking over the professional or is there a merging of the two emotional states? At what point, if at all, do judges cross a professional line and how does this affect decision making? Could it be that the emotional judge, is under more self-control than is obvious?

The Case of the Crying Judge: Crown Court

Justice Dingeman (**CC Judge** D.) who presided at the trial and sentencing of Nathan Mathews and Shauna Hoare for the murder of Becky Watts in 2015. This case stimulated much debate and controversy about judicial emotions not just amongst the legal profession but amongst the wider public. Emergent themes from the Judge D. case are used below as a catalyst for

analysing and evaluating the other data, highlighting patterns with the aim of establishing the strength and importance of a particular emotion phenomenon in the context of justice.

On the 11th of November 2015 Nathan Williams 28 was convicted of the sexually motivated murder of Becky Watts aged 16 who was his stepsister (Hayhurst, 2015). His pregnant partner and accomplice Shauna Hoare 17 was convicted of manslaughter (Morris, 2015). Other charges included: kidnap, perverting the course of justice and preventing a lawful burial. The trial, which lasted five weeks, heard how Mathews visited his mother's home where Becky was a carer telling the court he wanted to confront her about the quality of service she was providing. He argued that kidnap equipment found in his car was used to frighten her and he did not intend to kill her but there had been a struggle. The jury rejected this claim and held her murder was planned, calculated, and premediated. Mathews, a former soldier, was said to be fascinated with pornography and to have a sexual interest in young girls. Visual evidence found on his computer was presented to the judge and jury including photographs of her dismembered body and hundreds of images of young women dressed as school children. Forensic evidence showed Becky had been strangled, mutilated, and stabbed fifteen times after her death sustaining a total of forty injuries. Her body was dismembered, cut into eight pieces with a circular saw which Mathews purchased on the day of her death. Her body parts were wrapped in cling film and initially placed in plastic bags then later in a suitcase. This was hidden in a neighbours shed. A missing person's appeal was launched on the 24th of February 2015 and Becky Watts' remains were discovered by police on the 3rd of March. Mathews was sentenced to a minimum of thirty-three years for murder (but not a whole life tariff) and Hoare to 17 years for manslaughter (Hoare & Anor v Regina [2016] EWCA Crim 886).

The Impact of Judicial Tears

The Mathews and Hoare trial drew unprecedented media attention and national press coverage but not purely because it was a shocking murder. The trial was notable for the way that the judge cried when passing sentence. Why did these judicial tears provoke such a reaction? A range of descriptions are used by the press and subsequent television coverage to describe the judge's emotional state 'sobbing,' 'tearful' and 'crying,' being the most frequent terms used. Other reporters refer to the judge looking distressed and upset. Judge D. himself makes reference to such difficulties noting that, "hearing the evidence during the trial has been difficult for anyone but it is plain it has been an immense burden on the family."

It is also suggested that the case placed a significant emotional burden on Judge D. (**LCJ** Thomas, 2015). In a subsequent book Becky's father (Galsworthy, 2016) merely says, "the judge had tears in his eyes; eyes filled with tears; his voice was trembling." This seemingly fleeting lapse of emotional control by a judge was so controversial that the judge and his 'tears' became a national story. Judge D.'s tears add a different dimension to the usual criminal trial which the press used to engage the public audience. The public are not accustomed to judges crying, but whatever the reason this emotional display became the catalyst for a renewed debate about the role of emotions in justice providing challenge and support for what some academics call the pretence of emotionless judging (Maroney, 2016, 2011; Bandes and Blumenthal, 2012). The case itself had all the usual ingredients necessary to capture media interest and public attention, murder, violence, graphic images, risk, sexual dimensions, violation of societies moral values, predictability, and simplicity (Jewkes, 2015; 2011). Yet it is the judge who captivates and momentarily changes the direction of the story and the judicial script. The rarity and novelty of such an event is so powerful that it is elevated above the story of the murder itself, with reporters gathering comments from those leaving the court on the tears of the judge.

Role of Tears in Judicial Performance

It would appear that public incidences of tearful and crying judges are not that common or at least the reporting of them is not. In over one thousand cases, I only witnessed tears on two occasions. The press/media data collected here only records three other cases of judges who have cried out of five hundred cases reviewed although, of course legal cases where this may happen are not always reported as not every trial is attended by the press. Whilst incidents of actual crying and tears are rare, these are likely, in terms of intensity, to be located at the extreme end of an emotion scale (Fischer, 2013; Dixon, 2012). Various levels of emotional distress are clearly conveyed by judges within this large data set through their own words and as observed and reported by the media. It would therefore be inaccurate to say that these visual events are infrequent. The evidence shows the opposite, and judges do not need to actually cry to be considered emotional or distressed. The emotional volume of each display is different, with some judges demonstrating more intensity through their words and actions than others. It is clear however that tears have a variety of roles, some of which are performative, and are intended to send clear messages to the public that justice in the form of the judge, understands the distress, fear, and anger which some crimes cause. Tears and crying may also indicate less of the strategic and professional and more of the personal, showing the judge as a human being, who can suffer from the stresses of the role (Burgess, 2017).

The Stress Factor

In response to claims that Justice Dingeman shed tears, during the sentencing of those found guilty of the murder of Becky Watts, Lord Chief Justice Thomas infers that the production of tears and crying is an indicator of judicial stress (King, 2016). During his speech at the 2015 annual press conference, only four days later, the Lord Chief Justice said, answering a direct question on this incident,

"I think that few people have any idea of the sheer depravity to which people can sink, and a judge often has material in front of him which cannot but distress people" (Lord Thomas of Cwmgiedd, 2015).

This explanation for judicial emotion is borne out in the data evidence available in Chapter Five in which judges express this as a concern. In Chapter Six, the interviews judges articulated that stress was rising and a problem still to be addressed. The data here produce substantial evidence of potential stress and distress, both directly as acknowledged by judges and indirectly through third parties as the following representative quotes suggest:

Child Grooming:

"I decided I had had enough. One listens not just to accounts of what happened, but you also see the terrible consequences upon the lives of the young victims. Their lives are destroyed and that's quite distressing to observe at close quarters." **CC**PRO20

Murder:

"It's been a distressing, extremely difficult case for anyone to do." **CC**JSW**1**6

Death by Dangerous Driving:

"This is a case which has caused me anxiety." **CC**LWH19

Attack on an elderly women:

"This is another depressing event from the streets." **CC**MKSA18

When judges refer to the evidence as deeply disturbing, troubling, sickening, unpleasant, and so on, this sets an emotional tone which is heightened when the judge adds the 'I,' first person focus.

"I found this difficult; I found this shocking; I found this distressing."

This is not a passive address, but one which emphasises the personal narrative, promotes transparency, invites trust, giving some access to the inner world of the speaker (Schiavo,

2021). This discourse is directed towards the personal and gives some insight even if only temporarily, into the judge's emotions at the pivotal point of sentencing. Although such descriptive words may point to levels of stress, how an individual judge experiences and handles this will inevitably vary. There is no doubt that judicial stress is a consideration, and high levels of sick leave are reported amongst judges. In 2018 the judicial office reported that judges take an average of 17.7 days off sick (JO, 2018) as compared to 4.4 days in the general population for the same year (ONS.2018); twenty-two judges are recorded as taking an average of seventy-eight days off due to stress. Nevertheless, there are other explanations as to why tears, crying, intense emotions, emotive words and actions feature so often as an occurrence within judicial speeches. The data show that judicial tears and other such emotional conduct is usually accompanied by emotive words indicating anger, rage, sadness, disgust, hostility, fear, even hatred, but also love and empathy. There are strong indications that judges plan and perform their speeches to strategically include the emotional. So, whilst stress induced judicial emotion is a feature in some reported criminal trials, it is not necessarily the only explanation for the use of an emotionally loaded linguistic framework.

Emotional Behaviours, Emotive words, and Phrasing

The quality and significance of judicial words and language made available through quotations taken from media sources, demonstrates not just a continuum of emotions with low to high intensity, but also point to a judicial trend of mixing the emotional with the moral and the legal. These patterns suggest that there is a planned approach or at least a collective approach to the use of words within the speech for strategic purpose. Such strategic purpose involves the theoretical relationship between law and power and power and emotion. Of course, the words used by judges matter, given they have the ultimate say on sentencing. If, as suggested, law is power then it is also underpinned by emotion and the emotional. The emotional force of the judicial word serves to legitimise the power of the law, and this can

be regarded as the main function of many judgements (Wall *et al*., 2021). The quotations below indicate that judges use their power to convey legal but also social and moral boundaries (Visser *et al.*, 2017; Manning, 1991). For example, within this data set, judges often refer to how "right minded people" react to certain crimes.

"I am satisfied that any right-minded person would look on your behaviour with utter revulsion." **CC**JRI18

Such statements indicate that judges, as right-minded people are not neutral participants. They can be persuasive and skilled manipulators (Manning, 1991), who use familiar contexts such as family and social life to further enhance social and moral messages which are embedded into their speeches and discourse. For example:

Judge PW reportedly "sobbed" when sentencing a lorry driver for the death of a motor cyclist:

"'The judge sobbed in a faltering voice trying to hold back tears as he spoke' saying 'I am, like the victim the father of two little children. I would have liked to have met your son. I am a family man." **CC**JPW61

Mixing the speech format with tears and strong emotional and familial words, the judge manipulates social bonds, aligning himself to the victim, creating a perception of empathy, and in doing so reinforces family values, distancing the offender in the process. Judicial words require an emotional energy in order to communicate effectively and at times, in order to make clear to audiences what is right and wrong. Moral judgements and comments by the judge are often used as a precursor to explaining the legal basis of sentencing. In the following quoted case, the defendant is assessed as having no morals, following a serious attack on a man where he then had consensual public sex with the victim's girlfriend. This operated as an aggravating factor when the sentence was decided and demonstrates how moral assessments are used to explain the legal rationale but also can contribute to outcomes.

"I have been a lawyer and judge for more than 35 years. Rarely have I come across someone as morally bankrupt as you. You have all the morals of a tom cat." **CC**SEL15

Themes of morality such as empathy, disgust, family life, humanity, truth, forgiveness, remorse, atonement, and penance (Maslen 2017; Karstedt, 2002), occupy a position in most of these judicial speeches co-existing alongside emotive words and legal analysis. A pattern emerges within the speeches where the legal analysis plays second fiddle to the moral dialogue and rarely precedes, the moral and emotional context of the crime. This indicates that the law needs the force and security of moral emotions, as legal judgements are emotionally bound and serve to prepare the public and of course the offender and victims for the final process of sentencing. These assessments also help the judge to structure their speech to include justifications for the sentencing decision but may also contribute to their inner emotional management building confidence in their decisions and averting challenges to their judgments.

"Your behaviour displays a level of medieval barbarism that is appalling. You used a weapon that was pernicious and evil. You planned for this, which adds to the culpability." **CC**LCJ17

"The most disturbing case I have ever encountered. I take into account his guilty pleas and the fact he has been seriously disadvantaged in his home environment and had been corrupted morally which was not his fault. But the case is so serious that I have no alternative but to impose an extended prison sentence to protect the public." **CC**NPM17

"This was a merciless, sustained, and savage onslaught. It was an unrelenting avalanche of exceptionally serious violence visited upon a defenceless woman. Not a shred of mercy was exhibited at the scene. You left her for dead in the street. This warrants a long sentence; you will be jailed for life." **CC**JRS20

The use of selected emotive words in speeches seems to be consciously strategic, particularly as there an emerging pattern of usage amongst all of the data judges. This does not mean there is no judicial stress or personal involvement but that there is a structure to judicial speeches, where the regular use of emotive words seems a standard part of professional

practice. When crying or tears or even the threat of this is interspersed between the judicial words and gestures, a powerful signal is sent to the guilty, the innocent, to the audience and to broader society. With different combinations of intensity and passion combinations of all sorts of emotions from rage and anger to disgust and distress are voiced and used by judges to magnify inhumanity and morally unacceptable behaviours of offenders. The use of specific emotive words such as *abuse, callous, chilling, cold, courageous, depravity, despicable, devil related, dreadful, evil, filth, grotesque, incarnate, love, monster, repugnant, revulsion, revolting, sadistic, sinister, shocking, sickening, terror, unpleasant, wicked*, occupy a prominent position in the judicial speeches as identified in the quotations. These emotive words indicate how the judge may feel about the morality of the crime, contributing to assessments regarding the offender's lack of morality and humanity (Cane, 2020). So, at some level whether performed or natural, conscious, or unconscious, judges are emotionally active and certainly not neutral or impartial.

*"*I hold my hands up in terror, an appalling crime. Your behaviour displays a level of medieval barbarism that is appalling." **CCJ**PR16

The Deprecatory Nature of Judicial Speeches

There is nothing emotionally neutral about many judicial communications and whilst the specific emotion may not always be used by the judge, one can easily allocate groups of words, to groups of emotions to include anger, rage, sadness, disgust, fear, empathy, and kindness. The quoted words are recognisable as being in common usage and within ordinary discourse, even within a judicial context. This may be just the point, as judges know how to use such words to communicate with the public by way of reinforcing the general agreement about society's moral rules and codes of conduct. However, the scripts are also peppered with words which may have deeper connotations. The use of certain words such as 'evil,'

'devil incarnate,' 'wicked' raise particular questions as to their significance in the context of a contemporary court setting.

"The pain and terror [E] must have suffered in her last moments as your frenzied knife attack continued is beyond imagining, beyond evil." JG91119B

"You are the devil incarnate. Your behaviour…most serious degrading and humiliating abuse was sheer evil.' **CC**JCG1218

"The term sadistic is not an over exaggeration or overstatement for you." **CC**SJB15

"This crime is one of chilling depravity. The degree of premeditation is utterly wicked. You are a monster." **CC**JD16318

"These were evil and repulsive offences which right minded people can barely comprehend." **MCD**JG17

"You downloaded many indecent images of children, the worst form of this depraved filth." **CCJ**PL18

"Your conduct plumbs the depths of evil hypocrisy." **CCJ**FV14

"He is the devil for whom you sold your soul for sex, for luxury trips." **CCJ**MS17

"The offence involving the baby was a vile, evil thing to do, sickening." **MC**TC17

"This was despicable, cruel, criminality motivated by pure greed, and you must be severely punished. This is wicked." **MC**JPA18

"Your thoughts and deeds are beyond human instinct and reason and are evil beyond rational understanding." **CC**JLB15

It could be said that, in theory at least, judges are neutral during trial proceedings, pending a decision, that is, if they are not directly involved in the deciding of innocence or guilt. But they can be, if the case is heard in Magistrates Court where a jury is not required. In any case, sentencing is also supposed to be an impartial exercise based on prescriptive sentencing guidelines but within the ranges available there are harsher penalties which can be applied. The quotations above, open up the possibility that judges could maximise the sentencing

tariff if so minded to do so, embedding their decisions in emotive explanations (Roberts, 2011; Sentencing Guidelines, 2009; Coroners and Justice Act, 2009).

Given that the law and judges in particular are claimed as being neutral and dispassionate and assuming that judicial speeches are planned to an extent, why do judges use these deprecatory terms so freely? Such terms are commonplace as the small sample of judicial quotations above indicate. A simple explanation is that words such as 'evil' are just a potent extension of other descriptive words which are effective in expressing judicial and societal disapproval. A more complicated explanation is that these types of judicial scripts are a means of labelling offenders or at least offenders' crimes. Describing someone as inherently evil, inhumane, or as a demon, dehumanises and stigmatises and suggests they will be outcasts, reducing the offenders' social standing and rank within society (Tracy *et al.*, 2015). So, on top of the legal punishment this ritual appears to introduce a form of moral punishment into the trial affiliated to a 'just deserts' policy (Baren *et al.*, 2015; Starkweather, 1992). As a drama the criminal trial operates within a theatrical but also a ritualistic framework from start to finish (Scott *et al.*, Maroney, 2011; 2011; Turner, 2009; Collins, 2004). The words a judge uses is part of the ceremonial process, where the narrative is, good meets evil and where respect for the rule of law is absolute. However, Kemper (2011) reminds us that the trial is not just about the ritual performance, but that emotion is a consequence of actual relationships. The most powerful relationship is the one the judge has with court attendees and in particular with the offender. In these encounters judges are tasked with reinforcing their power, the power of the courts and in doing so they set moral boundaries. This is partly achieved through ritual and language plays a key part in this. It is still somewhat controversial given that the Court system and the trial is now supposed to be a secular process (Rivers, 2012; Taylor, 2007). References to religious beliefs, and practices such as taking the Oath (Silving, 1959) and 'Acts of Contrition' still exist in modern courtrooms (Scheffer, 2009). Their historical meaning may long have disappeared, but the

emotional underpinning of such messages is still clear and symbolic as criminal courts operate as places of truth telling and morality (Scheffer *et al.*, 2009) and when violated the force of the law will respond. Emotions facilitate this, and judges use emotions to instil fear in the guilty in attempts to deter others, in order to prevent the unsettling of the moral foundations of society (Canton, 2015).

"Those caught at any level, peddling misery which destroys lives and communities can expect prison sentences which set out to deter. Those out there had better watch out... There's no final chance coming to you. If we meet again, I will make your sentence longer." **CC**GWS19

Just Deserts and Punitive Sentencing

Expressions of emotions by judges potentially encourage feelings of societal outrage, especially if there are no pleas for forgiveness on the part of the offender. This is significant for some types of offences particularly as being branded an evil sex predator may have consequences in prison beyond the judicial sentence. Nathan Mathews and Shauna Hoare, as discussed above, for example, both claim to have suffered a number of violent attacks in prison since their convictions. Judges are, in effect, either consciously or unconsciously, managing the offender's onward identity, and as such are capable of creating impressions and reputations for some, which won't easily disappear post a court appearance. The judge may be subtle in this, but there is evidence in my data of a more direct intention or at least the opportunity is available for judges to add to the formal sentence, particularly when the judge is frustrated by the law itself. This can be seen as an extension of social justice, a desire to punish beyond the courtroom "fuelled by a resentment fuelled public" (Hörnqvist, 2021: 573). Whatever the intention is, the press tend to report on the most heinous of crimes and these details are accessible, even to those in prison. It is not a stretch to think that judicial comments matter to more than those in court.

"Whatever sentence I can give this defendant will not be reflected by the maximum available and I wish to get that message back to those responsible for charging, but prison will not be a pleasant experience for you." **CC**JSH18

"My hands are tied. I am frustrated and it is up to the government to change the law which is unjust." **CC** JGL18

"I consider my hands tied. I wish I could do otherwise." **CCJ**TB17

Clues in what judges say point to a language of punishment, retribution, and revenge with concepts of just desert threaded through.

"If the sentence that is passed results in you dying in prison, then that's no more than you deserve." **CCJ**PH16

"You richly deserve to go to jail for this particularly mean and wicked fraud." **CC**SHY18

"You are shaking your head, but I am nodding mine. You are going to prison for a very long time. I have grave concerns for you; you should fear the worst in custody." **CC**SDM18

"This is the worst kind of abuse…almost impossible to find an appropriate punishment." **CCR**GL15

Judges also often add comments which are not legally necessary, as the sentence should speak for itself in terms of adequacy, but many judges seem compelled to say more:

"Let's be crystal clear. I am going to send you to prison." "I hope this fine really hurts you." "…justifiable outrage if you are not given a suitable punishment…" "Your days are numbered." **CC**JL19

The purpose of these additional communications can be varied, but the tone and threats implied in the words suggest that judges want the final word and that these words and phrases should instil fear. The undertones echo of judicial satisfaction in the demonstration of power, with retribution and punitive objectives achieved.

Leniency and Compassion

It would be inaccurate to suggest that every judge is emotionally driven to inflict the maximum sentence or add to the offender's reputation as being *beyond evil*. In fact, there are many examples in which judges show leniency. It is not always clear whether a lenient approach is adopted for process or policy reasons or whether a judge feels compassion towards the offender or their family at the time of decision making. In reality it is likely to be a combination of these states of thinking and feeling that result in a lesser sentence. Gender, family impacts, children, mental health, and perceived intellectual deficiencies are considerations and sheer pressures on the cost and population of the prison system do sometimes sway the judge.

"You would be sent straight to jail if you were a man." **CC**MLN17

"Sending him to jail might cause him more damage than good." **CC**MSN18

"I was going to send you to jail but by a whisker I am able to suspend this due to the wholly exceptional circumstances. He knew how sensitive and vulnerable you were and yet you were badly treated. You were distressed." **CC**BLM19

"I hate sending to prison women who have not been to prison before." **CC**ODIL17

"You have driven your family to despair. By not imposing a custodial sentence I am helping you look for employment and helping your family. I am giving you a chance." **CCC**NP19

"You may not have given thought to your family or employees, but I do." **MC**TLC17

Judges do show leniency and compassion and attempt to understand why some people are driven to do wrong. As Maroney (2016) points out, using the words of Judge Devitt, she concludes some judges have kind and understanding hearts:

"If we judges could possess but one attribute, it should be a kind and understanding heart." (Devitt, 1961).

Being kind and compassionate, the judicial emotions much maligned, may perhaps be perceived as ethical judgements made by humane decision-makers. These judges have a keen interest in social justice and human rights, and this infers that judicial attributes include being compassionate (Mason, 2013: 76).

"The humanitarian crisis in Syria is 'dire' and you took what you believed to be a merciful course. This is different to those who exploit refugees for cash, truly wicked." **CC**JRH17

There are judges identified in the data that take social justice principles to what may be considered to be an extreme, but they are driven by feelings of compassion and concern.

For example, magistrate of fifteen years pays the defendant's court fines as the asylum seeker can't afford the charges then resigns (Elgot, 2015):

"The Ministry of justice would have me sent to traitor's gate. I was deeply affected by … I was doing my duty as an ordinary British person." **MC**JPN

The judge considers what drives his decision, pragmatism, or compassion:

"No purpose served by making orders for costs which are not in reality going to be paid. Compassion or reality but this stirs emotion in me when homeless people are fined and can't pay." **Old Bailey**JB15

The Judge orders an absolute discharge for couple who admitted the theft of food from store:

"How are they supposed to live? I cannot impose the penalty in such a case because they are clearly struggling." **MC**RES15

Some judges are recognised for their humanity and compassion and building reputations and legacies to this end. One such judge on his death, Judge Elgan Edwards received high recognition for these qualities when tributes were made (Bellis, 2016, 28th Jan).

"He was formidable, decisive and could be firm; but above all he was kind, and he was fair."

The assumption that more lenient or less punitive sentencing is usually underpinned by the emotions of kindness, humanity and so on is a plausible concept. Judges are, however,

required to follow legal process regardless of their feelings so their emotions or the emotions of others may not be feature. For example, policies such as restorative justice can compel a judge to delay sentencing (RJA, 2004, 2013) enabling dialogue between the victim and offender. This process is based in law not in judicial emotions. Nonetheless, the assessment of success is within the judge's sentencing remit and emotions if they are evaluative tools may still be engaged (Hamer, 2013). Emotions may not always be active and can sit in the background at low volume until they are needed. It is of note that despite examining hundreds of cases the data does not find any, where the judge has spoken directly about restorative justice or rehabilitation. This may be a reporting weakness on the part of the press and limits the opportunity to explore ideologies, policies, and the role of emotion. The point, however, remains: some legal processes do not require the engagement of emotions although judges do add this in.

Moral Scripts as Strategy

Whilst the emotional language and scripts of compassion and kindness are not absent from judicial speeches these take second place to the sheer volume of reports where judges deliver their summaries with passionate and charged moral words, often conveying punitive emotions. Perhaps this is unsurprising given that for a crime to reach the courts the CPS have already evaluated the chances of successful conviction as being high in evidential terms. There is a legal, social, and moral narrative already in place if this threshold has been reached as the two-stage test involves an assessment of public interest, harm done to the victim and impact on communities (CPS, 2020). Judges do not always support the CPS and can be overly critical if they fail in their duties and while there is no suggestion that judges are overly influenced by this, pre-screening for trial success is a fact. This, however, does not explain why judicial language is still so passionately emotive. Gross (2012:70) argues that the use of emotive terms constitutes an attempt to avoid reducing harrowing events and morally

reprehensible actions to 'mere crimes.' If so, emotive, and emotional language is not necessarily personal to the judge even though it can seem to be. When judges are cognisant of the need to impress on people the seriousness of a crime, they are likely to be acting strategically. They may make deliberate attempts to demonstrate to victims and audiences that attention has been paid to the human, emotional and moral elements of crime not just to the letter of the law. From this point of view, these kinds of encounters need emotion, and this makes some logical sense as so many judges embark on this kind of linguistic narrative. Judges are authors of their own scripts which they use to emphasise what they feel needs emphasising. Sentencing remarks could, of course, be limited to the clinical and judges could just state which laws have been broken but this would be like a damp firework, powerless and inert. Solomon (1985) argues that for law to exist and to be followed it needs the power of emotions and it is precisely this that is filtered into the judicial speech. Habermas (2019) argues that emotions are not just reactions to events but are used to evaluate events and the offender. This has implications for judicial decision-making particularly if the emotional cues that the judge is attempting to read are inaccurate. Nowhere is this more strongly visible than in the concept and practice of mercy and in the assessment of offender remorse (Lippke, 2021). Both these issues feature strongly within the data and will be considered separately as they are not the same (Maslen, 2017) but are nonetheless linked in the sense that both activities engage emotions with mercy being judge led and remorse being offender centred.

Power, Mercy, and Remorse

This chapter started with a reference to the role of power, emotions, and the law: how it is that the judge is the most powerful actor reinforcing legal and moral laws. The power to show mercy and the power to recognise or reject remorseful claims comes to a head at this juncture. The ability to show mercy through compassionate sentencing generates an even

stronger suggestion of judicial power as the decisions are not always popular and can lead to claims that the judge is unduly lenient and soft (Canton, 2015). The softer emotions of compassion, kindness and sympathy are seen in mercy judgements with feelings of concern for offenders' exceptional circumstances and plight.

An offender without a gender recognition certificate who is identified as female to be sent to a male prison:

"Having reflected an immediate custodial sentence would have difficulties here and intractable problems in the prison service. It is merciful to show you some compassion." **CC**SML20

A husband of 62 years kills' his wife after a promise not to admit her to a nursing home:

"This was an act of mercy, a spur of the moment act. This is an exceptional case; you are a devoted man who had shown nothing but love and affection.' His remorse is profound and genuine." **MC**DJS18

If showing mercy to an offender is something unique or exceptional then the act of giving it or not, may relate to feelings incorporated in having ultimate power, the power of law to do or not do. There may also be personal benefits to be gained by the judge for showing such compassion. Shapira and Mongrain (2010) demonstrate that as the result of a kind act of compassion feelings of happiness and self-worth are also stimulated. This may provide balance and relief to a role which can cause stress and depression as the worst of humanity is on show. As the Bard said in 1596/7, "The quality of mercy is not strained…. It blesseth him that gives and him that takes" (Shakespeare, circa 1596, p 91). Rather than mercy only springing from judicial compassion it can equally be conceptualised differently involving notions of pride, reputation, desire, and respect. Whether a judge feels compassion or not in order for them to be merciful, the offender must comply with certain rules. Compliance must be voluntary, and the recipient of mercy must be within the judges' span of power and control; physically, psychologically, and emotionally. If they are not, mercy is unlikely to be

the outcome unless death is inevitable. In the following case a woman concealed the birth and death of her baby for career reasons, hiding it in a drain where the body was found three years later. She still denied it was hers angering the judge for her lack of honesty and acceptance for what she had done. She is not compliant; she is deemed to be disrespectful to the judge and therefore not respecting the law.

"You are the architect of this situation, and you must be punished. Your conduct is so dreadful it almost defies description. I was prepared to show some mercy, but you do not deserve this." **CC**JRG17

Judges are often short on mercy, when it comes to defendants and offenders who do not or cannot attend court. This is seen as a threat to judicial power as it shows a lack of respect for the law, engendering responses of anger, rage, and revenge.

"You are a coward as you are unable to face your accusers and have chosen to hide yourself in your cell. You are entirely obsessed with yourself and believe you are entitled to use other people in any way you want." **OB**AE19

"He will languish forever more if he does not come to court. In days gone by, he would have been dragged to court in chains."

Judges' have power to act and the authority to decide. This involves more than chastising and punishing offenders for wrongdoings, it incorporates the power to show humanity and mercy and the power to invite others to plead for mercy.

A victim's family ask the Judge to show mercy to the offender, in a case of death by dangerous driving:

"You (Mr W) are remorseful, and this has caused you distress and I do not see why you should not keep your liberty." **CCJ**R18

Maslen (2017: 122) suggests that mercy and remorse should be detached and that the only exceptional place for mercy is in for example, cases of terminal illness and not as a

consequence of an offender simply demonstrating remorse. This may be an ideological position but there is evidence in the data that mercy and remorse are interlinked and that to show mercy in most cases the judge must also see remorse.

"You will understand that you have admitted a serious matter. I cannot ignore that you're aged seventy-one, currently suffering from cancer and who have suffered two heart attacks. The court could properly in the circumstances extended mercy and the public would understand that." **CC**NPS16

Pleas for mercy have however little standing with judges in the finding of remorse:

"Sentencing cannot be entirely determined by pleas for mercy. I know you never intended to cause harm and have shown remorse, but the courts need to remind the public of the terrible consequences of drink- driving." **CCJ**BN17

Decisions on granting mercy do not happen often and this is clearly supported by the data. The UK legal system after all is not in the territory of considering the death penalty. When a mercy component is apparent there are factors relating to context. This is particularly the case in the arena of mercy killings and offender acts aimed at relieving the suffering of others such as assisted suicide even if this is against the law.

"Your acts of assistance were acts of pure compassion and mercy…going to heaven to see his wife and being put out of her misery. You are free to go and start the process of rebuilding your life." **CC**JGG17

Based on the available reports, mercy can be seen to be given in recognition of family suffering if the offender is sentenced to go to prison. Mercy when determined is how the judge sees, accepts, and/or feels about the offender's situation based on contextual circumstances and information. Family pleas for mercy do not appear to influence the judge unless children are seriously impacted. This is assessed in conjunction with other factors such as seriousness, risk, and remorse. Pleas for mercy do not feature structurally within the criminal trial, so it is possible for the judge who feels impassioned or compromised

emotionally, to avoid this. The same cannot be said of remorse hearings as a formal part of the criminal trial and a planned component of sentencing. In both mercy situations and remorse hearings the judge somehow has to believe in what he is being told. In mercy cases terminal illness is not easy to fabricate although weighing up the impact of prison on children is less clear cut. So, what are judges looking for when they assess remorse in the courtroom? When theorists say emotions are evaluative tools what does this actually mean? How much does the seriousness of the crime interfere with judgement?

Finding Remorse

As the English and Welsh legal system incorporates remorse findings into its sentencing process it is of no surprise that this data contain reference to features of remorse in every reported case. To produce examples only serves to reflect what is already standard in criminal sentencing, however some accounts shed light on the judicial role and insights into their potential emotions. Within this collection of data, it is the stories demonstrating a lack of remorse which occupy the scripts. This is not just media preference as the other data chapters confirm through court observation and interviews that the reality of the courtroom is one where the offender often struggles to express remorse, refuses to do so or where the judge cannot or will not acknowledge atonement when balanced against the crime. While a finding of no remorse does not necessarily mean increased sentences this outcome could affect reductions available, so remorse certainly does matter. Remorse assessment although fraught with issues of interpretation and credibility, is still a judicial task and one can only assume judges wish to do this as professionally as they can. Rossmanith (2018: 366) confirms what many academics and legal players recognise, that remorse is important in the criminal trial but how it is assessed is "matched by its mystery". The literature on this subject demonstrates that there is no one way to assess remorse and, indeed, that there are wide variations in how remorse is interpreted (Bandes, 2016[b]; Maslen, 2013; Posner, 1999). In my

data, judges do not reveal how they have actually assessed remorse other than that they attach certain emotional labels, either positive to the remorseful or negative to the remorseless (Zhong, 2014). Attempts have been made by Maslen (2017) to identify what judges are looking for in terms of evidence. The author outlines five key characteristics: 1. Offenders must acknowledge and express their wrongdoing; 2. They must express blameworthiness accompanied by self-condemnation; 3. They must focus on the victim; 4. They must articulate a desire to atone; 5. They must express an intention not to repeat the harm. These characteristics could certainly be used in the construction of a check list but are still subject to judicial opinion and variations in interpretation. The data indicate that judges are more likely to be convinced of remorse if the offender pleads guilty early and does not prolong the trial saving costs and limiting trauma to the victim.

"A fully rational person …would have appreciated the only course of action is to plead guilty. You have never expressed a word of regret, concern for your victims, you are a coward."

OBAE19

"As there have been a rise in defendants going to prison there is a drain on resources and staff. You have also pleaded guilty and accept you want help for your genuine real issues, namely your attraction to underage children." **CCJ**PL19

There are also instances where a crime is planned and not spontaneous and this has likely led to the judge rejecting remorseful pleads.

"This is a sentence of last resort as it had been a carefully planned assault, and he has shown little remorse." **CC**SCT16

"This was cruelty of a high degree; Cold, calculated, and chilling cruelty. You plotted and you planned…. Only a life sentenced is justified." **CCJ**AW18

Other accounts suggest that judges require visible proof that the offender is remorseful. Perhaps this reflects what Rossmanith (2018: 366) says about judges being "confident that

they know it [remorse] when they see it." Remorse involves some kind of demonstration of emotional pain and personal trauma as the result of wrongdoings, a form of ritual penance and self-punishment witnessed and felt by the judge. There is, however, a two-way channel of communication opened between the judge and the offender, at least in theory. It is clear that judges want to see something, as the word "shown" and variants for example: "indicated; expressed, detected, flicker of, trace of," consistently appear as part of the judicial discourse. Judges, however, do not usually explain what it is they are expecting to be shown if they are to accept remorsefulness, so there is often vagueness in their words.

"[H]e may well die in prison. He has shown no remorse whatsoever." **CC**GL18

"You have caused immeasurable suffering and far-reaching harm. You have shown no remorse." **CC**SWS18

"There was absolutely no trace of contrition." **CC**RRM17

"'You are a cold and ruthless killer and have shown no remorse." **CC**RMW18

At times, the judge's assessment of remorse is made easier particularly where an offender does not seem to cooperate.

"I detect not a shred of evidence of remorse but rather belligerent arrogance." **OB**JC20

"You showed not a single lot of remorse on the contrary you sought to justify these eye watering sums as being entirely deserved." **CC**JGN13

It seems that judges want to see some sort of live emotional and physical demonstration of remorse in order to assess the credibility of the offender's claim. Seeing and hearing the offender's contrition is not always enough as judges compare the victims' moral and emotional status with that of the offender which in their oft-used words comes from a place of depravity and evil. As the judge has already connected emotionally with the victim what kind of remorseful display can make up for the harm done in some cases? There are suggestions by opponents of the remorse hearing that as the offender cannot morally or

legally compete with the victim that the process is just another way to humiliate the wrongdoer in public (Posner, 1999).

"These murders were brutal; you have destroyed the generous and loving family who took you off the streets. You have exploited the extraordinary kindness shown. You have shown no remorse – indeed only regret that he survived his injuries and at times satisfaction in what you did achieve. You betrayed their trust. They showed you love and respect which you had not enjoyed before. You knew you were destroying the family." **CC**JC17

"The killer has shown no remorse or given any explanation for the murder. The motive for the attack was sexual. This was truly shocking and wicked offence of the utmost gravity. Anyone who could do what you did must be regarded as extremely dangerous. What a dreadful way for …a decent, hardworking young woman to die." **OB**RM17

The combination of remorseful words alongside moral indicators of seriousness is still not the whole story as some judges are still reluctant to believe the offender. Within my data there are many examples where no remorse is shown and these out-number those which do. Once an offender has been found guilty the onus is on them to persuade the judge that they are truly remorseful. Offenders may not be able to articulate their feelings or may have been advised not to make comment as legal counsel know judges are in the business of demeanour assessment and that the evaluation of remorse is vulnerable to bias (Bandes, 2013). Weisman (2014) adds that there is no such thing as a non-performance as silence is damning. To perform remorse for the judge is a difficult task as courtrooms are not conducive to "heart felt expressions of contrition" (Hanan, 2018: 328) but this may be what ultimately convinces a judge. Judges are looking for something more than words. They want a performance but often reject the offender drama for being insincere. In some cases, judges are moved and do "experience heart wrenching evidence" (**CC**Recorder17). Whether they seek this or whether this just happens is unclear. Remorse is not just a legal process it is an emotional process characterised by multiple emotions. Favourable judicial assessment is dependent on the presence of certain emotions to demonstrate true attrition: grief, sadness,

sorrow, shame, self-anger. So, for the judge to believe in the offender it seems plausible that as a human being there is a level of emotional communication involved. Rossmanith (2015:167) argues based on her interviews with judges that they may need to somehow feel the offender's remorse, to believe in it.

"When it comes to offenders getting into the witness box and speaking of their remorse, it seems that sometimes something gets felt by judges at the level of embodied affect that then enables them to declare: "This person is remorseful.' Judges share the same space as offenders."

There are challenges to Rossmanith's theory that judges know remorse when they see it or more accurately when they feel it. Many commentators argue that remorse is such an 'interior state of mind' that the judge can never have much confidence that the offender is remorseful (Bandes, 1999; Posner, 1999). Intuition and emotional affect are unreliable as judges do make mistakes as the following case shows. Offenders are given reductions for remorse are returned to court after they abuse judge online, only forty minutes after they persuaded the judge, they were remorseful:

"The question I have to ask myself is this, if I had known their real feelings at being in court would I have accepted their remorse and contrition and suspended the sentence. And the answer is of course not." **CCJ**BL16

In the limited number of cases where remorse is found judges use positive emotional language to describe the offender or/and the situation*: love, affection, compassion, being moved, devotion, and mercy.* In the majority of cases where remorse is not found there are only words which convey a negative emotional experience.

"C's crime has caused revulsion and disbelief. You are a cold, callous, calculating, remorseless and dangerous individual who showed a lack of victim empathy. Your testimony is a cruel travesty of the truth; staggering lack of remorse, not once did I detect a flicker of emotion from you. You committed some of the wickedest and most evil crimes this court has ever seen. A was a sweet angelic little girl. You stole her life." **CC**JHC319

There are ample examples represented above to indicate that judges, are indeed, emotionally engaged. Judges do accept that they can be emotional, and they do say this openly, albeit, mostly from the victim perspective or in response to a lack of offender remorse.

"The case should make us all feel ashamed. I feel shame and embarrassment." **HC**JM17

Crossing Professional Lines

To this point the media quotations provide a picture of what could be seen on the whole as judges operating within professional lines, even if these are stretched at times, perhaps by judicial stress, or by the extreme nature of some crimes. Judges admit to being 'only human' in their evaluation of their roles but is there a point when they cross the professional line and veer into the personal. Judges are autonomous, free-thinking people (Rossmanith, 2015) and some are activists wanting change and are openly critical of the justice system (Paterson, 2015). They often comment passionately on being restricted in their roles particularly when they are not able to sentence as they feel they need to. This may verge on disloyalty, but a judge is rarely taken to task for making such commentary.

"I wanted to jail killer driver. That restriction on the court sentencing powers may well be said by many right-thinking people to be adding a gross insult to the incalculable injury suffered by the grieving family." **CCJ**GL18

"The reputation of our justice system is in great danger; years of neglect means the entire system is crumbling." **CCJ**RR19

"Something is going to go horribly wrong in the justice system if cases are approached in this way."

There are some judges who clearly take the personal into court, but if deemed suitably serious this is usually dealt with by the judicial conduct board. Such incidences are small in relation to the overall data but can create this impression of judicial emotions as being 'out

of control.' A judge presiding over a case involving British Airways (BA) diverts from the case in hand to discuss his missing luggage (Law Society Gazette, 2016). The transcript of the case reveals the judge asked about his luggage on thirty-three occasions, demanding a resolution from BA. The judge retires before his conduct hearing takes place (Legal Cheek, 2017). The same judge in the famous copyright case involving the Da Vinci Code, buried his own code within the text of the court transcript. The third case involves a judge who oversteps the mark when freeing a teacher who rammed an airport worker with his car over a £3 drop-off fee. The judge spends almost the entirety of his sentencing speech making comments about how he is incensed by parking charges (BLMCC18). While such cases are extreme, they do highlight how judges are human, subject to emotional imbalance and that emotions can be volatile. That said, on balance the data produce a picture where judges appear to have more strategic motives than personal intentions which is unexpected given the volume of emotive language mostly of a negative variety embedded into judicial speeches. This reflects the possibility as Adam Smith (2002, 1880) contends, that judges operate on two emotional, inter-connecting, dimensions, one which is private and another which is professional.

Conclusion

This chapter provides a third empirical axis, with judicial speeches and discourse evidence made available through media sources in the form of judicial quotations. I deal with criticisms aimed at the use of media as an unreliable source in Chapter Four, but this is outweighed by the fact that society learns about law through the media and judges use the media to talk to the public. Judges know that the media may report so there must be some acceptance that judges control their own narratives and perform to and for their audiences. Findings in this chapter complement the findings in the preceding two, with themes of power and control, judicial reputation and vulnerability being played out through their own words. Patterns emerge which lead to a conclusion that judges aim to be strategic in their use of emotions,

although the personal can align with professional emotions or can remain hidden and undercover. The giving of mercy and the finding or not of remorse are useful zones within the trial to focus on judicial emotions. Although it is not always clear how judges reach their decisions except that emotions are ever present and play a key role in trials.

Emotions enable cognitive decisions to be made (Roberts, 2010; Solomon, 1995) and are evaluative tools, but there is a lack of knowledge as to how this is undertaken in practice. The sheer act of judges describing someone as callous, cruel, and repulsive and for judges to reveal they feel physically sickened by another's action, surely indicates an emotional response, whether that be natural or performed. For some crimes, any expression of remorse cannot absolve the harm done (Weisman, 2014). This may explain the use of deprecatory concepts, words, and phrasing in order to label the offender, thereby justifying the sentence but also as a way to incite the audience and perhaps the judge themselves into feelings of anger, rage, disgust and so on. This does not mean that all judges act on these emotions to the extreme, but they can and do operate within the legal boundaries to punish and they will reject claims of remorse. In those situations where there are mitigating factors, judges can fine tune their emotions adopting alternative emotions of compassion and forgiveness, in order to make or be seen as making, ethical judgements. In light of these conclusions, Chapter Eight will bring the data findings together for a fuller discussion, identifying the key themes that emerge from the three sources in combination. This accumulation of findings will then shape my recommendations, in turn setting an agenda for an area of research that demands further interrogation.

Chapter Eight

Discussion: The Story of Emotion in Judicial Decision-Making

"When the law provides us with decisional leeway, we do well to recognize that our intuition, emotion, and conscience are appropriate factors in the jurisprudential calculus. Our human qualities may cause us to make mistakes; after all, judges are not infallible. But these same human qualities may also prevent our making the worst error of all: creating a schism between a formalistic legal order and commonly held notions of social justice."

Kaufman, 1984: 16

Introduction

In this chapter, and as a means of shedding further light on the story of emotion in judicial decision-making, I will discuss the cumulative insights provided by the findings presented in Chapters Five to Seven. In order to present a coherent story from these results and to thus avoid an overlap of outcomes, findings are filtered into selected interpretive themes, some of which were established early on in the preparatory research phase and while being added to as part of an iterative approach. As I stated in Chapter One, there is continuing disparity, conflicting claims and uneasiness in the literature regarding the role that emotions play in judicial decision-making with contradictory views that emotions are anarchic, uncontrolled and dangerous (Lange, 2002) but also necessary in a civilized society (Scherer, 2004) that aspires to judge with empathy, remorse, mercy, forgiveness and hope (Weisman, 2009) being fundamentally a sign of a civilized society (Scherer, 2004). So, on one hand, emotions are officially denied as being of any relevance or value in judicial decision-making, their existence is shunned as being pernicious. On the other hand, the law, its structures, legal policies and practices are undeniably imbued with emotions and counter claims insist that law without emotion is a violation of justice (Solomon, 1995). This creates a confusing paradox for judges who are the central arbiters of the law (Moorhead, 2015) and who must either follow the

rules of law or risk being judged themselves for failing in their role, to do justice without fear or favour (Shetreet and Turenne, 2013). In addition, the everyday practice of law and decision-making may lead to judges engaging in a cover up, where emotions are concealed as neutral processes, for example under the umbrella of judicial discretion (Tata, 2020). This is the dilemma that I shall seek to shed light upon throughout the remainder of this chapter.

Key Question, Themes and Scope

The main themes I address below are presented in a narrative format, with dialogue which extends and debates what the findings add up to. So, what is the role of emotion in judicial decision-making? This is the key question, but embedded within it are a multitude of concerns and unresolved queries. Early questions produced the contextual themes, and these provide the overarching structure for this chapter to include: 1. Context; 2. Emotion leakage; 3. Influences; 4. Consequences; 5. Managing the pretence of dispassion and 6. The role of power. Themes are then used to construct specific role categories. A summary of questions is found in the Appendix section A, and a fuller methodological discussion and detail is found in Chapter Four.

Judicial decision-making does not sit protected in a quiet social or legal vacuum as judges are influenced by the wider beliefs, knowledge and experiences of their own and other people's lives, which are powered by emotion. The role of emotion in judicial decision-making, therefore, cannot be evaluated without reference to the world which circulates the judge.

The Story of Emotion in Judicial Decision-Making

Judicial testimony and actions demonstrate that emotions have a number of functions, simple and complex, which interplay with and influence judicial decision-making. As this story unfolds these functions will become clearer as they operate within contexts which need to be evaluated in order to understand the corollary of emotions as an integral part of judicial

decision-making. Emotions cannot be looked at in the abstract and every situation a judge faces at trial has a myriad of potential combinations involving; people, characters, crimes, judicial qualities, vulnerabilities, and intricacies of the law which alter the narratives, giving each their own uniqueness. It is, therefore, fair to say that there is no singular role played by emotions in judicial decision-making, but multiple roles which are contextually bound. However, It has been possible to narrow these possibilities down, partly because human beings react predictably to certain events and environments (Scheve *et al.*, 2005). Even so the official rehearsed response to judicial emotions, is that they are just flaws in the machinery of law, emotion leakages which need to be repaired and expunged.

The dichotomy of dispassion is problematic as judges attempt to adhere to the rules, concealing their emotions and some do this, at least on the surface, successfully (Hochschild, 1983). From this perspective judicial emotions are seen by the judicial hierarchy as a problem of leakage, a failure in suppression, in emotion management and a failure of role (Bandes *et al.*, 2012). Another and more credible perspective is the concept of emotions as necessary and valuable judicial attributes which are required and are essential to reasoned and logical decision-making (Bandes, 2016[a]; Damasio, 1964). Negative portrayals can be misguided state sponsored ideologies aimed at encouraging policy relevant behaviours (Baum, 2010). The overwhelming evidence is that emotions infuse the courtroom process, they are not leakages but are natural tools to be harnessed and regulated for effective professional practice, and for judicial wellbeing as Patulny (2015) suggests. Judges are part of this human experience, this human system. Such enlightened models of judicial emotion recognise law and decision-making as more malleable, context-initiated processes, where emotions are to be nurtured but also managed (Izard, 2010). This infers that judges, rather than the system, should take the end decisions as to which emotions best fit the situation (Maroney and Gross, 2014). Attempts to disable emotion, using official models of legal rationality (Maroney, 2015) can have the opposite effect and can increase their intensity, thus forming an appearance of

emotional leakage (Wegner, 2009). If emotions are not incorporated into daily life, these so-called spillages can turn into emotion overload for some. As the result of enforced suppression, there can be an explosion of natural or contrived responses, in a judicial show in which suppression and avoidance does not work (Roach Anleu and Mack, 2005). Emotions then operate as expressive tools, a medium by which judges can voice their dissatisfaction in demonstrations of limited rebellion in order to protect their own status, power, and self-esteem (Fielding, 2013). These moments although powerful, sometimes memorable, subside quickly as my observational findings indicate, as judges revert back to the norms which govern their profession (Hotho, 2008). Research and theory specifically relating to this is thin on the ground but there is an argument, as Patterson (2013) points out, that in the interest of protecting public confidence in the justice system, judges temper these activist temptations.

The argument that emotions leak out and are therefore just undesirable failings of human nature is also wrapped up in the rhetoric that judges are human after all. Judges regularly express that they are "only" human, and this is often at points where their own emotions are clearly manifest, but they seem compelled to explain or justify their behaviour in this way. Justification seems aligned to the more retributive emotions as if there is also an acknowledgement that these are excusable when they leak out, whereas kindness, compassion, and forgiveness, particularly towards an offender, require further explanation. There is just something about the words which is almost apologetic, an excuse for being weak and not following the rules of dispassion. Although the findings indicate that most judges present their humanness as weakness, as imperfections and flaws, other judges recognise that being human is also at the core of justice (Solomon, 1995). In Chapter Six, the interviews, a group of judges discussed the absolute need to retain their sense of humanness and to portray these qualities and vulnerabilities. They maintained this is needed to offset inhumane

treatment and to promote better societies but also to enable them to feel fulfilled. Judge Edward John Devitt (1961) captured this in the following,

"The Bench is no place for a cruel or callous man regardless of his other qualities and abilities."

Such benevolent emotions operate in order to protect society, bringing humanity and restraint into decision-making thus dissuading society from becoming more uncivilised, vengeful, and dehumanised (Diamond, 2008). There are a growing number of judges who recognise that emotions are necessary tools of their judge craft which serve to restrain, balance and moderate. Those who do, also understand that emotions can be both beneficial and troublesome, a virtue but also a vice, as human instincts are part of their working lives (Maroney, 2020). Officialdom, laws regulators and the law itself may well suggest dispassionate judging, but it is not just official quarters who need to change the profile of emotion. Indeed, as Lady Hale (2019) points out, it is judges themselves who need to reverse their stance on being *only* human and therefore weak, to being *wisely* and proudly human, showing a strength of determination and courage. Emotions have protective and humanitarian functions, a major role in the restraining of human desires to be overly vindictive and vengeful. For example, in Chapter Seven, I detail a number of cases where judges seek to protect the human rights of asylum seekers, those who cannot pay fines and those who are vulnerable and need support. They do this while drawing on emotions to persuade their audiences that justice must be compassionate. This protective role also encourages hope that the worst aspects of criminal behaviour and human nature can be controlled, managed, and resolved. Judges often signal a pessimistic view of the justice system, their place within and the impacts of emotions on their emotional stability. Hope, is missing from these dialogues. It is glaringly noticeable that within the findings there are very few judicial references to rehabilitation, restorative justice, or other ways of diverting people from reoffending. Thus, it should be of no surprise that the tendency towards punitive and

retributive measures and emotions dominate judicial decision-making and will do so until other options are available. It is therefore even more important that a key role of emotion in decision-making should be to inhibit brutal punishments until new solutions can be found as hope is in short supply.

Influences

The question of fear is a consistent thread, evident throughout this inquiry articulated by judges as a 'fear of', a multitude of challenges and 'fear for' self, for others and for society in general. There are innumerable fears which can come into play depending on the context but in relation to judges, fears are expressed as being related to fear of failure, fear of losing reputations and fear of making the wrong decisions. This points to fear as being the driving force behind judicial power ambitions. The role of emotion then becomes about the capacity of judges to instill fear in others, to reduce fear in oneself, with the end objective of achieving and retaining power over others. Although judicial motives seem to be power-based, fear provides the stimulus for actions and interactions, demonstrating the dependence of power on emotions as Thagard (2016) points out. While fear is often seen as a negative emotion or an undesired emotional state, I have found that fear provides judges with a means to evaluate the risks and challenges embedded within their role and that this enables judges to deliver justice as they see it. The influence of fear, far from being negative, facilitates judges in activating complementary emotions such as anger, hatred, threat, disgust and shame using them as protective shields but also as evaluative tools. For example, in evaluating the level of remorse, judges attempt to understand what circumstances may have led to the crime. If there is regret and the judge experiences this emotionally, then the evaluation of intent, dangerousness or further risk to others is then aided by the emotions stimulated. An example of this is found in the case of a man who killed his wife, fulfilling a promise not to have her committed to a care home. The judge says, "This was an act of mercy, a spur of the moment

act. This is an exceptional case; you are a devoted man who had shown nothing but love and affection. His remorse is profound and genuine." **CCM**DS18

In many cases however, anger is at the centre of judicial evaluations and the more anger, the more likely the judge will show contempt for the offender. Anger also conceals judicial fear, and this may just explain the reason why anger is positioned as the most common judicial emotion. Maroney (2012: 1209) said Judge Richard A insightfully commented, "beware the angry judge".

The value of anger as a protective shield to disguise judicial fear should not be overlooked as judges face difficult and challenging decisions and they need to demonstrate to the public that they hold the authority of the Judicial Office. Power needs fear to operate successfully particularly in environments which are subversive and potentially dangerous. Fear connects judges to the hierarchy, to the people they serve and to those who are subject to their decisions. Essentially, fear enables power and one way of ensuring this message gets to its targets is through the use of language which is designed to incite fear particularly when delivered verbally in the courtroom by judges. I refer to this as severe deprecatory language, terms which are no longer necessary in a modern justice system. Chapter Seven investigates this phenomenon in detail, and it is curious that contemporary courts and their judges still frequently resort to the use of archaic, primeval language, which is saturated with fears of evil and demonism. Such inferences which define criminals as abnormal degenerates, became the mainstay of criminology for many years (Bedoya and Portnoy, 2023). One would think they still are if the language within the judicial scripts is to be taken literally. Although the use of such language is more likely done for effect and to communicate where judges' position themselves with regard to some crimes, particularly those of a sexual nature. But this points to the need for judges to consider their scripts in line with the oath they have taken.

Judicial Language

It is clear that the central script of dispassion is not a credible reflection of contemporary judicial practice, but it is still tolerated perhaps because the mantra and symbolism of dispassion demands a cautionary approach to the emotional. The sustainability of the language of dispassion serves as a warning to judges not to let their emotions get out of control. Dispassion is therefore an aspirational goal but perhaps better described as judges having a balance of emotions, as Aristotle advised, not too much, not too little and the right emotion for the right situation (Maroney, 2011). This compromise is however discredited when the words and phrases of judges in this research are analysed. The severe deprecatory tone of judicial language seems considerably out-of-step with the judicial oath as judges are required to do right to all manner of people, including defendants and offenders. Yet there is a substantial lexicon of dehumanising, demonising terms and labels affixed to offenders, sentenced for particular crimes. Such judicial words are not rare in the criminal courtroom.

There is also an inclination for judges to use such forceful language in relatively low-level crimes. The guilty are punished twice with additional moral and pernicious attributes to their already deviant characters. These scathing attacks are carried out with tenacity as to render some offenders beyond hope, beyond rehabilitation. The scale of these insults are not low as the evidence in Chapter Seven indicates, and it may be the case that some people are beyond redemption but there still needs to be hope, but also professional restraint. The statement of expected behaviour, judicial conduct could not be clearer that everyone deserves respect and to be aware that judicial words and behaviour can impact others (C&TJ, 2023; Jagger, 1989). Judges claim that this may be part of the drama but also a strategy to instil fear, to deter and to appease victims. Crime is overwhelmingly structured as bad, even evil, and immoral (Fielding, 2006), not as a result of poverty, lack of education or limited opportunities in a society where others flourish, and wealth is denied (Maslen, 2017). Some judges do

recognize this but still need to repackage kindness, compassion and leniency using remorse, guilt and mercy to do so for fear of losing public confidence. There are codes of behaviour which judges recognise and respect and these are built into professional practice and codes of judicial conduct (Judiciary, 2019). These have been constructed using legal frameworks which engender the legal rights of all citizens and are sewn together with moral principles which others are expected to comply with.

Moral Decision-Making

Judges do show professional curtesy and tolerance towards offenders, and I recall a case documented in Chapter Five, where a judges was being very civil towards a group of men found guilty of historical sexual abuse. At the time I noted this, but it seemed unusual as in the previous case the female defendant was not given the same treatment. I suspect the judge was more influenced by the media presence who were following this case than any official guidance on expected behaviour. To what extent therefore do judges change their behaviour and presentation of self if they are aware of media attention and for that matter the presence of victims or indeed the research observer. There is the potential that judges may modify their emotions, but this would assume more control not less, more emotions are then potentially undercover. With the rise in social media tools the potential for live communications raise concerns but also raises questions about their influence on the judge (HMC&TS, 2024; Flower *et al.,* 2021). Media attention is one aspect which may influence how judges present themselves, how they endeavour to control their own emotions and tied into this are the evaluations judges make based on societies moral frameworks (Fielding, 2011: 101). The speed at which judges often make decisions either regarding innocence, guilt, or punishment, suggests that judges already have an established baseline of knowledge and experience from which to make evaluations of those involved in a legal case. This may point to an innate, intuitive ability on the part of judges, assisted by experience and knowledge to channel their

moral feelings, their professional instincts, and emotions quickly into what looks like spontaneous evaluations, (Bandes, 2021) even fixed immutable judgements (Capurso, 1998). These instant evaluations are however constructed over a longer time frame than is at first recognised. Emotions aid the collection of indicative information about the crime and the offender, the level of their remorse, and act as ongoing evaluative tools which then create the end decision. Judges can therefore start the decision-making process at the point of initial contact with the defendant , at the beginning of trials and even before. I draw evidence for this from interviews and conversations with judges and magistrates who related that many defendants were already known to them by reputation and previous appearances. In particular one experienced magistrate recalled how disappointed she was to find the same person back in front of her. Decision-making is not just based on the evidence presented in court at a certain time or from the documents considered in advance. Judgements are also likely to be influenced by the judge's life experiences, their education, training, and their own social and moral parameters. Emanating from this mixture of human narratives are emotions which assist judges to make necessary but rational short cuts in decision-making and thus emotions have an essential but practical function. For example, in Chapter Five, I suggested that the judge in the Traveller case, with fourteen accused men in the dock, used humour and laughter, instead of the more expected tactics of anger and fear. This was done in order to process this plea hearing quickly and therefore avoiding potential disruption with the courtroom where security was not visible. In fulfilling their role and to make the most of emotions, judges need benchmarks, and sentencing speeches indicate judges look to the social and moral codes already laid down by society (Posner, 1999) more broadly.

The process of emotional engagement begins immediately as judges evaluate the characters, the crimes and the harms involved, assessing the level of infringement against standard moral codes. The protection of society is central to this but even more so if the victim is vulnerable. The more vulnerable the victim, the more likely that the judge is swayed emotionally and

according to those victims who deserve more consideration than others namely the elderly, disabled people and women, there does appear to be a notional hierarchy of victimhood (Fohring, 2018). Some judges still react more emotionally than others and often expand on this, interpreting their responses as being related to their own life circumstances; the judge who talks about being a father of young children, (Chapter 7), the judge who has religious convictions (Chapter 6) and the judge who knows what it is like to live in poverty. Although that said, victim susceptibility to crime, is embedded within the law as being an aggravating factor (CJA, 2003, s143). It can therefore be inferred that the law is not as dispassionate as suggested, as there is room to recognise victim vulnerability. This enables judges to show some emotional latitude, but judicial power can be unsettled as victims also emerge as a potential threat to such power through expectations of judicial sympathy and higher sentences (Davies and Cook, 2020). This is an area which has received no empirical attention, probably due to how victims are positioned within the criminal trial and within society

Victims as Threats

I raise a controversial possibility that victims are as much, if not more, an influence and a threat to judicial power than offenders. Judges are already tuned into and primed to deliver the retributive and punitive emotional responses and overall, they give the impression that they are more comfortable with these emotions. In contrast, victim-based experiences of crime draw out and ignite those emotions in judges which they seem to fear the most in the context of legal decision-making. The range of emotions is wide and variable, from feelings of distress, pity, sadness, compassion to feelings of hatred and disgust towards those who commit crimes. Victim support groups claim that victims are not treated well in the courtroom as their victim status in relation to the defendant has to be proven (Victim Commissioner, 2021; Hunter *et al*., 2013). Judges recognize people who have been harmed as witnesses at trial, not yet victims, at least until the case is decided and, as Davies *et al.*

(2020) suggest must not give the impression of bias. However, at sentencing, judges have the opportunity to involve victims more, but my findings suggest victims are still left out. Evidence for this is found in the fact that some judges block the reading of the victim personal statement (VIP) by victims themselves, preferring to undertake this in a reductive form or passing the statement to the prosecutor to read. It could be suggested here that judges are vulnerable to or fear losing their composure if victims are present and active. Judges have no problem with articulating their sympathies for victims, but this is usually in the abstract, as victims stay away from the sentencing stage, some doing so because they feel the trial process has further assaulted them and the judge was part of this (Jacobson *et al*., 2015). In over a thousand cases, most of which included sentencing, victims were invisible and there is a sense that judges prefer this to being drawn further into difficult emotional territory. It is the absence of any strategy by judges to include victims which also supports this conclusion. Whatever it is that triggers judicial emotions there are always consequences, for judges, for justice and for wider society.

Consequences

A justice system which aims at being emotionless is not realistic (Maroney, 2011) as judges resist controls being placed on them, particularly those which interfere with their power positions (Barry, 2021). Emotion leakage is a consequence, a symptom of excessive suppression, not a failure of judges but a failure of the justice system which refuses to acknowledge the inevitability of emotions in judicial practice (Cardoza, 1921). In this sense emotions have a practical, expressive, and protective role in curtailing the level of controls placed on judges, acting as circuit brakers to enable negotiation and a rebalancing of judicial power. It is clear that there are consequences for judges as attempts to secure even the impression of an emotionless justice system, unintentionally creates more emotions, not less. Frustration, annoyance, irritation and even a degree of despondency are voiced either

directly towards authority whilst they speak publicly and perhaps indirectly when they sentence offenders. This can work for or against the offender depending on the judge and the circumstances but as evidenced in their scripts, stress, loss of power and control, loss of face can invoke a harsher side as they attempt to regain their status and this can be taken out on those who are in the immediate vicinity, offenders but also, at times counsel (Chapter Five).

Judges speak of their self-worth, self-esteem, and respect, and of being diminished by civil servants who make decisions without enough consultation (Chapter 6). As a consequence, this promotes mainly off-stage activism amongst a small number of judges. On occasions judges may criticise the lack of sentencing options and express frustration, even shame in the justice system. Judicial attention is momentarily diverted away from the trial details, with blame levied at both the system and law makers for inadequate resources and solutions. This leaves judges, in their words, feeling guilty at not being able to do more for victims but also offenders. An indication of the strength of feeling is found in the retention statistics for judges and magistrates which is a mounting issue for the Judicial Office and for courtroom administration. Resignations are rising and this seems to be part of a collective response to judicial unrest, particularly among magistrates (Parliament Committee, 2019). However, as a number of Magistrates I interviewed pointed out, it is better to voice one's passions and frustrations from within the system, because you can do nothing to effect change from outside. Yet other judicial comments counter this to an extent, as judges also voice that they have had enough and that the system is not supporting them as it should, that it is crumbling and in danger of collapse.

Judicial reactions are not just contained to words of dissension but can arise as forms of individual activism, for example, a judge who fined a couple for stealing sandwiches from a Tesco skip, paid the fine himself. He was encouraged to step down after this incident so there

are serious consequences. Another judge voices the concern that it is morally unfair and inhumane to fine people who are homeless, whether this is fact or compassion, he says it stirs emotions in him. Such examples have an air of political objection to unworkable rules and emotional frustration, but judges are caught in a political culture which requires their cooperation in this context (Manko, 2021). These sharp political stabs at the system can be detected even in the mundane and while they do not represent long term judicial activism, they point to judicial unease at the system's lack of compassion, humanity, and common sense. Many judges make a point of saying they have no choice but to follow the law and that this makes them feel sad.

The trial space gives judges an emotional platform from which to vent, and these comments are recorded, not just by the courts, but by the media who wait for these moments as their interest in judges has increased (HMC&TJ, 2020[a]). According to Schulz (2000) judges know this and use the media, knowing that their words and their emotions could stimulate actions for change and may even radicalise some judicial thinking. This state of affairs goes beyond leakage, beyond moderation but can be harmful to judges and justice. Such harm emerges as judges grapple with the daily consequences of crime which spill into their courtrooms and the repercussions of doing 'dirty work' in the cleaning up of other people's messes (Scarduzio, 2011; MacLachlan, 2024: pg.2). A state of affairs which cannot be easily articulated as emotions in law are taboo. Yet judges are expected to cope with this as if they are unfeeling robots and as emotion does not officially exist in decision-making there are few outlets for judicial expression. Stress and mental health issues can then become the norm:

Losing Control

The last accusation a judge wants to hear is that they cannot control their own courtroom, this has a detrimental effect on their reputations, the cases they oversee and is an obvious priority, and as Sedley (2018) suggests, the media is quick to present the judge as ineffectual.

Some judges have though developed the ability to use alternative emotions to anger, for example, in order to minimize risks in their court rooms as clearly demonstrated by the Traveller Case and the use of humour (see Chapter Five). Even though the judge in this particular case took a risk and shelved anger, the use of humour achieved his objective, and he succeeded in diffusing and controlling a potentially dangerous situation, reducing the fear of failure and potential mayhem in the process. Some judges have thus recognised that although anger is the most prevalent of the emotion scripts, it is not the only valuable emotion in the judicial toolkit, and this demonstrates a deliberate, strategic and considered approach to using emotions. This is clever and conscious manipulation of people and the environment and demonstrates the strategic value of emotions in decision-making. It also promotes humour as a means to diffuse tensions, offsetting the real risk that judges will become overstressed.

The Stress Factor

Without doubt judges are feeling the constant pressure of their roles and express this clearly in emotional terms citing that in their job they see the worst of humanity, experience feelings of "terror" and are appalled (Chapter 7). Whilst no direct references are made to judicial tasks as being 'dirty work', comments are made as to the distasteful and unpleasant nature of the job. Distress is the most common adjective used along with emotions of rage and anger, sadness and disgust, emotions which engender hostility and hate towards perpetrators of crime. One can understand how difficult it is for judges to put their emotions aside and with the ordinary pressures of workload, judges can reach breaking point, potentially making biased, overly punitive and emotional decisions. Tears may provide a diversionary release from negative emotions and the tears of Judge Dingman are an example of how a way for more compassion and tolerance in the law might be paved. But tears along with other perceived weaker emotions are still viewed suspiciously regardless of judicial gender. Being

uncontrollably stressed is harmful to judicial health but also harmful to the capacity of judges to function moderately and with emotional composure. There is a crisis in retention and recruitment but there is on the personal level a crisis in self-esteem amongst judges (LJH, 2018). Even though power can be a force which may be overused and unjust, judges need a professional level of power to persuade the public that they can keep them safe, and that the system can be trusted. Court closures and a claimed lack of consultation have depleted judges' morale and self-worth, but it is the requirement to be dispassionate which is the major culprit in rising stress levels (Chapter 6; see also Bandes, 2021). Until it is formally recognised that the suppression of emotion is harmful, judges will not get the support they need, nor will they seek it but still judges do find ways to navigate these conflicts. The structure of the criminal trial itself provides a solution, a mechanism, through which judges can separate their human, emotional self, by stepping out of the personal, into the role of the judge as acted. Thus, the theatre of the criminal trial provides the arena where the pretense of dispassion is legitimised and where the obligation of persuasion is realised as judges attempt to play out the official script.

Managing the Pretence of Dispassion

Through the Theatre of the Criminal Trial

There is, as Leader (2008) suggests, a cosmetic resemblance between theatre and the criminal trial. As I sat in the audience of over a thousand criminal cases, experiencing the theatrical environment of the modern courtroom, I was immediately drawn into the expectations of the dramas to ensue. The trial set mirrors that of the traditional theatre, even those which are more contemporary have the same shape and design. The drama of the occasion is enhanced by the costumes of judges and counsel and unfolds when the defendant or offender goes into the witness box. There is drama in the language of the dialogue and the arguments put by each counsel; drama produced by having an audience and heightened

drama at the point of the sentencing. Having these features of drama does not make the trial or the judge's decision-making, performative. The dramatic and the performative are distinct. What makes the trial performative is the very presence of emotion and what makes the judge's decisions performative are the emotions selected, real or otherwise, which are used, or which emerge spontaneously to make and explain the judgements reached. It has already been established, particularly in Chapter Six, that judges rehearse their speeches and establish their general approach prior to making decisions in the courtroom. Some judges may well be experienced enough to act out emotions, particularly anger, and will be able to convey even false moments of irritation as real, but portraying the deeper more challenging emotions of sadness, distress and empathy requires more; it requires judges to connect with their own emotions.

Many of the judicial speeches presented in this thesis contain words and phrasing which cannot be said flatly, without the skills and passion of performance, judges need convincing emotions to accomplish this well. Observing these cases and reading the depth of the words involved I am left with little doubt that those examples I have chosen were felt as displays of genuine emotion. So, the trial as a performative event may give the impression that judges are acting out the rituals of their role, and that emotional content is rehearsed and for effect, this can be an illusion. For some performances there is an emotional reality: 'authentic' emotions becoming part of the judicial script. How much judges are influenced by their own emotions is debatable, but there are some cases, which are beyond uncertainty, and like the finding of remorse, one just knows (Rossmanith, 2015, 2014).

Through Performances

In order to manage the conflict that is created between role obligations to conform and the reality that judging is far from dispassionate, judges oversee and take part in trials which are highly performative, but which are also strikingly and sincerely emotional. These two

manifestations do not need to be exclusive as performances can operate to permit judges to reveal their real emotions under the illusion that they are acting. Emotions enable a double bluff to take place, and it is only judges who know which part of their performance is truly real. When onlookers are convinced that the judge is genuinely distressed, or angry enough, then it is not a leap to suggest that their decisions were also influenced by these emotions. Whether judicial performances are merely displays of acting using emotions to convince audiences or whether they are performances which ignite genuine emotion, is a quandary which this thesis can only partially resolve. Every trial follows the same ritualistic pattern. Yes, some have more content and dramatic interest than others but all from the outset, involve emotional elements, tensions, raised anxieties, atmospheric conditions created by anticipation, controlled by marked silence and whispering. The stage is set for the judicial performance, but this must wait as the dramatical form that criminal trials take is designed, initially, to showcase the other participants. These actors have no major restrictions on their emotional characters, but the trial and the judge must respect preordained and sacred ritualised legal conventions (Jacobson *et al*., 2015). As part of staged authenticity (Larson, 2009), judges are expected to sit back in silence and to avoid any participation which would reveal their sentencing intentions. This backseat role enables judges to perform to the official script of dispassion and to demonstrate neutrality in ensuring both sides play fairly. But close observations of judges, prior to sentencing tell a different story of emotion. The judge with the stern face and furrowed brow, with piercing eyes which move deliberately towards offenders are engaging emotionally, albeit with subtlety but nonetheless, with effective and strong indications of power.

The criminal courts are ritual places of confrontation, and it is therefore unsurprising that judges are emotionally charged (Fielding, 2006). Quieter moments of judicial behaviour, of which I noted many, are still emotionally saturated and rather than demonstrating dispassion they signal judicial emotions are active behind the scenes and are announcing what is to

come. While the audience's eyes are on the defendant/offender, counsels, and witnesses, my eyes are on judges, taking in their reactions and interpretating the clues of emotion they transmit.

Through Rehearsal

In order to sustain the authenticity of the performance, judges need to rehearse and sharpen their stagecraft. Judges are not trained actors, so they need their own emotions to sell their performances as genuine. In Chapter Six, I outlined the importance of rehearsal as a strategy to prevent and disguise judicial emotions on the courtroom stage. Judges know that they can minimise the risk of being exposed as emotional if they put effort into practicing the messages they want to convey. This, however, is judge dependent, and success in portraying the role as dispassionate can be subject to varying factors, such as mood, temperament, experience, politics or simply sincerity. Rehearsals are vital to shaping chosen judicial performances, but they also provide evidence that judges fear losing control and risk being drawn into real emotional territory.

Judicial Inclinations

It has to be acknowledged though that there are some judges who just simply thrive on the opportunity to perform on the stage provided by the criminal courts. This I observed in the extreme case of one judge who was particularly performative and apparently deriving shock value from his audiences, by making pronouncements in Latin (Chapter Five). Judges are individuals who bring their own personalities, experiences and emotions to the courtroom (Blanck, 1996 [1919]) but the appearance of neutral justice must override this truth, in order to protect the authority and security of the law. Surprisingly, the taking of pleasure in punishment is more commonly expressed than I had anticipated as this I assumed would be the emotion most concealed by judges.

Far from covering up these emotions, judges proudly announce the sense of satisfaction they get in sentencing. Satisfaction, pleasure and just deserts infiltrate judicial speeches, words which do not need to be said in order to pass sentence, so they must have a purpose to serve. On one level, words of pleasure add to the performance, they convey outrage and enable judges to empathise with those who seek restitution or even retribution. The emotions of punishment from this perspective persuade society to trust in justice, thus avoiding public unrest, promoting civil order (Hume, 1998). On another level, emotive words are completely convincing as judicial insights and demonstrate that in human beings there is a natural desire to punish as we are emotionally motivated or hardwired to seek revenge (Carvalho *et al*., 2018; Sherman, 2011). The role of emotion in this context may be to provide an emotional release but also emotional closure. This is not just a desired result for some victims, but judges have the enormous responsibility of ensuring cases can be resolved fairly and they need to feel they have done a public good (Hume, 1998). Judges feel a sense of public duty, a sense of achievement, and satisfaction when someone is punished. However, a sense of pleasure may not lie in punishment itself, but in securing the admiration of victims and the public by seemingly doing the right thing as punishment serves to appease (Persak, 2019; Carvalho *et al.*, 2018). The performance on the stage of the criminal court is critical to this.

Lasing Power of Words and Rhetoric

The story so far is building a mixed picture, of judges who are performing, using emotions to embellish the drama of their role and at the same time risking that they may cross the official line into actually experiencing real emotions. What is not yet resolved is why it is judges knowingly engage with the ideas of dispassionate judging when the realities of their daily tasks tell them emotions are active. The persistence of this open falsehood by officialdom is intriguing and facilitated by the clever use and manipulation of the rhetoric which

demonstrates their ability of judges to create an illusion or appearance of dispassion through the persistent power of words.

Judges harness the power of words with skill and elegance, although also occasionally with clumsy and ill, thought-out candor. Though when it comes to standing up for the contribution emotion makes to their decision-making, they are somewhat mute on the topic. This, unlike the construction of legal doctrine and official policy, signals that although judicial voices have become stronger, they are still reluctant to be associated with some types of emotion. The question is not why the legal structures cling to the script of dispassion but why is it that judges conspire in maintaining this? The attraction to power and in its maintenance is central to judicial life and it is through emotions that power is secured.

Role of Power

Judicial reputations are built on retributive and punitive policies and, as such, damage can be done to reputations when a judge is seen as too lenient, too compassionate and too soft on crime (Canton, 2015). It is clear that even though the official script of judicial dispassion is central to the oath, punitive and retributive judgements are encouraged, not just permissible, and their associated emotions are acceptable, providing they complement what it is that justice needs to achieve. There is undoubted stigma attached to the more compassionate emotions involved in showing leniency, kindness, sadness, hope and charity. Judges are not without compassion, but this is usually reserved for victims and families of victims, showing society that judges care, but to care for offenders, risks public and political disapproval. It is not often that judges show compassion for offenders, but this does not mean that judges are simply determined to be punitive. What it does mean is that they are protective of their power and that where they want to establish hope by being compassionate, they need to disguise it as their status and reputations may suffer. A lack of remorse can influence sentences and can mean that judges will endeavour to apply maximum penalties. A constant

in judicial speeches is the evaluation that offenders have shown no remorse and that this will 'be taken into account' (see Chapter Seven). It is also fair to say that judges want offenders to realise the impact of their crimes on others. The role of emotion goes beyond justifying the punishment but attempts to change thinking by shaming offenders drawing on moral codes of conduct to create feelings of guilt in others. Through shaming techniques and remorse procedures emotions can operate with a dual purpose, one which attempts to condemn the crime and chastise the wrongdoer, appeasing public morality and another which permits more benevolent emotions towards offenders, to be engaged. Although the context of the crime itself and the harm done to victims can influence this.

Power, Control and Status

Power and control may operate to maintain the official invention of emotionless judging, but judges also crave having personal power and control in the pursuit of personal gain, ambition, and self-esteem (Manning, 1991). They articulate and use the emotions of anger and vengeance to achieve this as compassion is still seen as a weakness. Emotion is used by judges and by laws' regulators, as a tool to demonstrate the official power of the law but also by judges to establish their own power base for reputational purposes using the visible consequences of sentencing for breaches of law's rules. Participants rarely discussed why they were drawn to the role of judge. Magistrates who are unpaid and some, although not all who had already left their previous professions did discuss the utility of being a Magistrate in terms of being needed, being respected, and that they were doing a public good (Hume, 1998). What comes through is that judges desire the status of the role and the power that it proffers them. Fear and power are also deeply intwined as judges must not be seen as losing control of their courtrooms and they use anger as a safeguard against this (Drakulich *et al*., 2021). Power is built into the judicial role, and it is one of the attractions for undertaking the

role of judge, providing a level of status not offered in many other roles within the legal professions

Second chances are given to offenders but when this fails judges tend to see this as a personal failure rather than as society's failure or as a result of the criminal justice system's inability to invest resources to turn lives around. The expectation that an offender will repay judicial kindness by keeping out of trouble is somewhat unrealistic and naïve, but judges feel that their respect, even their power has been damaged when this happens (see Chapter Six).

The perceived lack of serious options to prison creates a dilemma for some judges who aspire to changing the way offenders are dealt with. Fears for judicial reputations are a central factor in decision-making as less punitive measures involve risk taking and public criticism if a release or suspended prison sentence goes wrong. Without the resources and political will to undertake effective rehabilitation where society is also protected, these risks are real. As Chapter Two indicated, prison places have been decreasing for the last ten years or more (Cuthbertson, 2018). This puts pressure on judges to apply shorter sentences or community service, even granting a full discharge to those who should, under the rules, be sent to prison (Dyett, 2019; Padfield, 2013). Judges have to manage and justify such decisions knowing that they have limited power with regards to resources and that they could be personally blamed if an offender commits further crimes whilst on bail or on community orders. For judges the stakes are high not just reputationally but also emotionally as decisions to send people to prison or into the community have risks.

Conclusion

In this concluding section I emphasise the multiple influences of emotion in judicial decision-making, some of which I have touched on in this chapter as particularly relevant, but I recognise the potential for highlighting many more nuanced aspects. There is a plethora of

emotions which arise as part of the judicial role, generated by both personal and professional responses to the legal situations encountered. In a highly complex and fluid interchange between the personal and the professional; the conscious and unconscious; the combination of mind and the body; there is no one role that emotion plays, but there are identifiable and numerous functions which engage emotion, particularly when judges make life-changing decisions. Looking across the findings it is possible to tease out a variety of functions that the use of emotions perform in judicial decision making. Drawing these together presents a framework to advance studies of judicial decision making which can be built on and adjusted. In order to do so I categorise the findings as follows into eight main functions judges are compelled to operate by: 1) Practical, getting the job done; 2) Protective, protecting society from being harmed and from harming others; 3) Evaluative, to arrive at balanced and moderate judgements; 4) Justificatory, to persuade through performances; 5) Power focused, to maintain status, to sell justice regimes to the public; 6) Control, to manage the worst of human behaviour to prevent social unrest; 7) Political, to maintain the security and authority of the law; and 8) Change, to promote better justice. A summative chart in is provided in Appendix H, but it needs to be reiterated that judges experience emotions in the context of the specific situations they are in, their ability to cope and their own personalities and experiences which will have an impact on how they make decisions.

Judges and magistrates are vulnerable participants in a justice system which is full of contradictions and unrealistic expectations when it comes to what the ideal judge should look like. This chapter has sought to amalgamate the findings from Chapters Five to Seven and in doing so provides a narrative that argues that far from being an emotionless process, the role of the judge actually needs emotion to be effective, even though this is not without significant difficulties. It would appear that there is an imbalance, with a lean in decision-making towards the more punitive, retributive types of emotion and these are cultivated as part of the role to the detriment of more compassionate options.

A move away from the dictate of emotionless judging to a more realistic and balanced approach is not easily achieved as conforming to organisational etiquette is important to judges and to their careers. Judges attempt to behave in ways which best protect their reputations and relationships with the judicial hierarchy. Many resort to known and rehearsed models which emphasise the punitive nature of sentencing. The influence of policy aspirations and political motives which drive the justice system are certainly a major factor in how judges try to portray themselves. There are though other triggers and influences which emerge from the findings which are markers to watch for, in the evaluation of judicial emotions. These include the emotion of fear which is a consistent aspect in judicial communications, and other influences which mask more strategic and personal motives around power.

In the next chapter I will evaluate the extent to which my original aims and objectives were achieved. I will undertake this by reflecting on the research process, by addressing limitations, identifying unanswered questions and gaps in knowledge and by comparing my outcomes to previous studies highlighted within the literature section. Finally, I will outline the key recommendations and contribution made to this field of research, providing guidance for future research.

Chapter Nine

Conclusion

"The judge's compassion, like a shameful secret, must stay below the surface. This highlights the ludicrous contortions a judge must go through to appease the law's insistence on a 'cold' state of mind." Avgoustinos, 2007: 38

Introduction

By way of conclusion this chapter reviews the extent to which my original aims and objectives have been achieved and in doing so seeks clarification on the role that emotion plays in judicial decision-making. I will undertake this review by comparing the initial research aims, objectives and questions posed, to, the summative outcomes as presented in Chapter Eight. As a reflection on my research, I will review how my findings relate and provide contrast to existing research, emphasising in particular, any successes in addressing gaps as highlighted in the literature Chapter Three. I also outline my contribution to new knowledge and to the construction of new theoretical concepts, with the creation of a model of emotion in judicial decision-making relevant to this particular field of research. In particular I acknowledge the contribution of Goffman's (1959) work to my thesis, design, structure and content. I deliberate on the research process and challenges, providing insights which enable me to address the limitations of this study and to consider how these may be resolved in relation to future research. I clearly outline key recommendations which are specific and attainable within the current structure of the judicial role and provide some guidance for future research studies.

Attempts to overturn long held beliefs that punishment is the only effective response to crime are overwhelmed by the persistent rhetoric of judicial dispassion. This combination is a recipe for potential unjust decision-making. Such claims are made without obvious empirical input

or are at best, based on selective anecdotal references and historical ideals of the perfect judge (Hobbes, 1661). It is not clear why such thinking has persisted given that emotion and law are so interconnected and given that judges expose their emotional characters publicly in their everyday legal decision-making. Emotion would seem to operate within judicial decision-making but the role it plays is vague and vehemently denied, not in the main by judges, but by law's governors. This thesis started out with a suggestion that every human action, thought, and behaviour requires an emotional driver (Collins, 2004; Gilbert, 2000). Judicial decision-making is no exception to this position. If as Maroney (2018) and Anleu *et al.* (2017) claim, the legal system is fundamentally based on emotional considerations, thinking, reactions and choices, then it is not feasible that judges can be immune. With the key question of, 'what is the role of emotion in judicial decision-making,' established, I aimed to explore this enigma, and to examine what it is about judicial emotion, particularly those of a kinder nature, which is so objectionable, prejudicial, and irrational (Bandes, 2021). My own research confirms this entrenched position, as retributive emotions dominate the law while judicial dialogues, see judges back away from expressing hope, charity, and compassion for those who commit crime.

Addressing Gaps in Research

The Judicial Voice

It is clear, as my literature review demonstrates that theorising on emotions and judicial decision-making is still only in its infancy. This coupled with a dearth of empirical data makes for an area of research which has numerous possibilities and opportunities for exploration but also one which lacks the benefits of having firm scholastic foundations upon which to build new perspectives. The lack of research which directly engages judges, is claimed as being due to the belief that judges, as elites, are a hard-to-reach group (Fielding, 2002). The key message taken from a range of sources as outlined in Chapter Three, is a call to encourage

more real-life, empirical analysis of the judicial role, within the criminal courtrooms, as there is a need for urgent development of the emotional work judges do and this can go unnoticed (Moran, 2022). The inclusion of the judicial voice in research which is examining *their* emotions, and *their* associated behaviours is fundamentally important, if not essential. This is not just with regards to the collection of deeper and richer evidence but is necessary in order to gain validation of the research findings. This is important, as in the end, judges and magistrates may resist or reject interpretive attempts by outsiders, who apply their explanations without consideration for the persons involved.

A lack of consultation, and opportunities for judges to participate, could constitute a setback for future research but regardless gaining some form of judicial perspective and challenge is good practice and ethically responsible (Agee, 2009). The judicial voice is distinguishable from general rhetoric as it performs an analytical function and can operate as a tool for logic, reason, and persuasion, using emotions to affirm moral boundaries which then makes judicial opinion more acceptable (McArdle, 2015). In referencing the judicial voice, other voices are illuminated, those of the victim, the offender, their families, and society. The judicial voice is then a conduit for the expressions of others and offers a representation of the law, not as seen solely by judges, but as authored by society (Kahn, 2016). Importantly though, within judicial presentations, the judicial voice gives clues to emotion, as it also conveys identity and empathy with those who suffer or are wronged. Essentially, in using judicial voices, by directly quoting what they have said and written, I have aimed to tell the story of emotion and judicial decision-making through their first-person narratives. This conveys respect but also authenticity and is more likely to attract judicial interest and support alongside my own interpretations and conclusions.

While I managed to resolve some access issues and yes, judges are hard to reach elites, protected from public scrutiny, there is much more to be done in order to address the gap

between theory and practice. To be clear this thesis is not about theory informing practice, but practice creating and informing theory in a reciprocal relationship, something which is often neglected in research. My ambition is that this research will demonstrate that there are ways to gain access to the judicial world. Judges as human beings react well to being asked about what they do and how they feel if they are convinced about the genuine nature of such enquiries. So, efforts to build trust can make some barriers less arduous as judges are also people who respond to professional interests. This is where I began, by accessing judges and magistrates I already knew, and who trusted me and seemed willing to provide me with their views and opinions. Accessing the judicial voice is not always about direct involvement and was also achieved through careful, extensive, and well-planned observations and through analysis of the judicial speeches. These were in oral and written form and provided a different form of access to judges but were direct, nonetheless. My onus on the official and unofficial judicial voice has, I hope, shed new light on the roles of emotions in judges working lives, not least in regard to the role of power in this relationship.

Power and Status

During a conference in Sweden, organised by a group of European emotion researchers this aspect and gap in research was brought to my attention by Dr Jonathon G. Heaney (2019),. In following up his work on power, status, and emotion, I recognised his contention that the relationship between emotion and power had been neglected, within most theories of power and certainly within the judicial context (Heaney, 2011). It was unclear why this should be the case as judges wield and seek levels of power and status which not only reflect their societal positions, but which are dependent, as Scheffer *et al*. (2009) note, on emotions for personal and strategic success. Not only is the power element underplayed in emotion theory relating to judges, it is almost non-existent when it comes to empirical efforts to understand

emotion and judges in the courtroom. This constitutes a major gap in current emotion research.

Efforts to explore power dynamics within the judicial role have started to achieve some results as seen in the work of Bergman Blix and Wettergren (2019:27), but this is confined to Sweden's "domestic nuances". The researchers suggest this limits the theoretical application of power to other country or culturally different judicial systems. Their work is influenced by Kemper's (2011) view that power is linked to security, guilt and fear and played out in an uneven hierarchical relationships between judge and defendant/offender and judge and victim. They also indicate that structural theories help to provide a way in which to predict which emotions will be engaged when power/status relations are examined regardless of which jurisdiction is the focus. To this end, I used Thagard's (2016) classifications as background, rather than as a rigid framework, to assess judicial power and emotions. I endeavoured not to over predict specific elements of emotion but rather to let emotions of interest, such as fear, reveal their relationship to judicial power and status through the empirical evidence. In interpreting my findings, I moved this aspect of emotion research forward in highlighting the need for more nuanced attention and expansion. The story of emotion and judicial decision-making cannot be fully progressed until these complementary elements are integrated and examined, as a whole, within the judicial context.

Sentencing Outcomes

This study provides a qualitative account of emotions and judicial decision-making. References are made to the sentencing guidelines and to the extensive range of tariffs available where conclusions are able to be drawn about judicial inclinations towards levels of punishment. There is no attempt as part of this research to make a quantitative analysis of sentencing decisions, as measured against, judicial expressions of emotion or taking in to account penal populism (Annison, 2021), but that does not mean such research should not

take place. Although penal excess can refer to a wide range of punitive sanctions both custodial and non-custodial imposed on the guilty but also as Hayes (2019) points out disproportionately on the poorest, it is increasing incarceration rates which have caused concern (Sturge, 2024). If as suggested prisons are not places of reform (Bullock, 2020) why then do judges send so many offenders to prison? Judges within this research have expressed feeling fear and anxiety relating to their sentencing decisions and reveal that they may have no choice but to imprison as rehabilitation is not well developed nor effective. Taking pleasure in punishment is also revealed through the judicial quotes presented in this thesis and it would seem these are not isolated revelations. The relationship between severe sentencing decisions, their resulting penal excess and judicial emotions needs further research. However qualitative evidence presented here is suggestive of a causal link between these factors as judicial emotions and responses to perceived populist demands for higher sentencing have consequences. Quantitative approaches may well yield some supporting evidence, and new research opportunities will now present themselves as Magistrates have been given new powers of sentencing from between 6 months to 12 months. It will be interesting to see if the rate of incarceration increases as a result of this change in powers. This kind of research could enhance qualitative data if results are compatible. If they are not, findings may still provide alternative perspectives through comparisons of quantitative sentencing to specific judicial decisions, their speeches, justifications, and emotive content. This is possible (Wistrich *et al*., 2015) but to date such research is stalled by the lack of an efficient and comprehensive data base which could capture trends and disparities in sentencing (Roberts, 2015). The new Digital Common Platform (DCP) is a centralised data and case management hub, aimed at enhancing how the criminal justice systems deals with offenders, from case initiation to sentencing and release (HMCTS, DCP, 2021). Theoretically this system should be able to highlight sentencing discrepancies, those decisions made at the bottom, top or outside the sentencing range. As a relatively new system it is designed for

collaboration, and it is unlikely to be used to assess the impact of emotion on judicial decision-making but there are future possibilities. In terms of filling current gaps in research, I have made progress in gathering empirical data, providing analytical insights and options, particularly in ensuring that the judicial voice is strong within the narratives. I have identified, analysed, and discussed how power and emotion works as a core component in judicial-decision-making, something previously neglected. The qualitative links between emotion and sentencing decisions has been strengthened, opening up more of an opportunity to fortify this with quantitative details.

Addressing Limitations

Judicial Hierarchy

There is no doubt that the institutional structures of the CJS system and the judicial office in particular, show little enthusiasm for exploring the value of emotion as a vision, a key quality or skill of judgeship. In fact, organisational processes, attitudes, and bias operate against the concept of emotion as having any role or value in judicial decision-making. This research has aspired to push the boundaries in this respect. This is despite the judicial office placing an official moratorium on interviewing judges for the purposes of emotion research. As outlined in their letter of response to my request for support (Appendix F) there is, as Mindus (2021) suggests, a somewhat irrational, perhaps fearful approach to emotion, although the judicial office are not alone in this. However, in order to achieve a complete and comprehensive understanding of the impacts of emotion in decision-making, for better or worse, ways need to be found to persuade officialdom that such research is beneficial. In order to make such a breakthrough, this endeavour requires energy, time, and sensitive handling.

As judges were willing to speak to me voluntarily and given, I also had access to them through courtroom observations, the need at this stage to win over the judicial office was not a

priority for my research. Nevertheless, activities to encourage a change of position on emotions, and to make an impact on policy should continue through research and other efforts, such as visible measures to show-case findings and recommendations beyond academia. For now, through this research, I have concentrated on this aspect by focusing on the power and leverage of judges to change the message on emotion. Ambitiously, I wished to include all judges in working towards this objective, but this commitment to such coverage had its own limitations, particularly in reaching diverse groups of judges. Ultimately, however, I contend that the research worked with such limitations and in doing so has produced meaningful results that the constituent part of the justice system can learn from.

Gender and Minority Judges

Sample size was not an issue in this research, but the low percentage of female and other minority judges who appeared, shaped the design of this research. During the pre-design test phrase, the lack of female and minority participants was obviously noticeable. Although the percentage of female judges has increased to 49% (MoJ, 2023) access was not particularly assisted due to the fact that many female judges worked part-time, often due to caring responsibilities (Rackley, 2013). Accessing judges from ethnic minority backgrounds proved more problematic (Khan, 2014). Of those occupying judicial roles in 2022, only 9% of judges and 14% of magistrates were described as being from an ethnic minority group (MoJ, 2023). These figures have only marginally improved since 2014 and represent a lack of progress in terms of diversity within the judiciary (MoJ, 2021; Judicial Diversity Statistics, 2018, 2023; Gibbs, 2014). As a result, I had to make a decision as to whether I would target courtrooms which had more diversity of judges and magistrates, although access would still not have been guaranteed. In the end I decided not to influence the shape of the judicial cohort and conducted random interactions.

It is notable that in this research, which covered four hundred and eight judges, including magistrates, I did not obviously encounter any judge from an ethnic minority background. Perhaps this says more about our justice system than it does about this research. It is nonetheless something that needs attention in future research. Even so, I was more successful where it came to accessing woman judges. I did manage to interview a group of experienced female magistrates and have in Chapter Six represented their views on the relationship between emotion and their roles. This data however would not be sufficient to create a pattern with regards to individual differences, although the evidence produced signals a need for more targeted gender-based research.

Courtroom Personnel

The success of my project is hinged partially on the cooperation not just of judges, but also other courtroom personnel, particularly Clerks of the Court and Courtroom Managers. People holding these key positions made it easier for me to access judges and to be positioned in areas of the courtroom generally reserved for counsel, media, and professional witnesses. In the earlier days of courtroom observations, my ability to move around and integrate was limited to being part of the audience. In many courtrooms the seating positions restricted my view of the dock, of those giving testimony but also interfered with the hearing of proceedings. Better positioning resolved these impediments and as I got to know those in charge of courtroom arrangements, I was able to negotiate improved access. Building and securing such relationships was advantageous, if not essential, and although each differed by courtroom, personnel, and levels of goodwill, these limitations were managed.

The extent to which clerks and managers had influence over the judge and the courtroom, was interesting and more strategically informative than I had initially considered. Once I had established the level of power concentrated in these roles, I made it my priority to build a professional rapport. This was not just to gain a better vantage point, but to learn about

judges as people, from those closest to them. In doing so I gained additional information, and insights into judicial personalities, their likes and dislikes, their emotions, their capacity for kindness, their tolerance of offenders and their reputations for justice. I encourage researchers aiming to access the world of judges to incorporate those around them. This can be a means to access judges but can also help to reduce the problems encountered by being on the outside as a researcher.

Insider/outside

In addressing the limitations of this research, it is important to acknowledge its insider/outsider dimension and the significance of the researcher's own emotions (Fitzpatrick, 2015). This is not fully resolved even if the researcher is part of the audience, as the drama of the courtroom is designed to convince or even manipulate and control its onlookers. As the researcher I was subject to these forms of manipulation, with my interpretation of events susceptible to the camouflage of the scripted drama. The judicial script maintains boundaries between those inside and those outside the group, securing the desired message with the loyalty and teamwork of those on the inside (Goffman, 1959, p. 212 – 218; Hope and Le Coure, 2012). I cannot claim to be a judicial insider although through the nature of my previous work roles I would argue that I am close. In an attempt to, at least in part, bridge the gap I joined the Magistrates Association on the 5th of July 2015 as an associate researcher. As discussed earlier, this provided me with pseudo membership of the judicial group particularly when attending events and conferences, as judicial members assumed I was one of them. These positive experiences led me to immerse myself in the judicial environment and, in the data, to the point of saturation. In doing so, I reached a level of desensitisation as judges inevitably do, which enabled me to replicate to an extent how judges handled the 'dirty work' implicit in the job (MacLachlan, 2024). Although MacLachlan suggests that as judges are more distanced from the defendants and their 'messy' lives that

they may not experience the same level of stigma associated with supporting defendants/offenders (p. 2).

Emotions and Decision-Making

On a broader note, it is fair to say that the subject of the thesis presented its own issues in terms of the perception that emotion, combined with another intangible, the process of decision-making, are difficult and seemingly abstract concepts to grasp and pin down. This is a reasonable assumption but in terms of what research can achieve, it is somewhat wrongheaded and obstructive. Both emotions and decision-making processes, can be visibly communicated, intuitively experienced, and understood by others (Canton, 2015). As personal states, both of which involve internal agencies, they are then transmittable externally but are subject to a high level of subjectivity. What is needed and what I achieved, was to manage these impediments establishing a firm grounding for research, with models of analysis and practical methods of investigation which were applied in an ordered, logical, and reasoned way. This helped to produce a coherent narrative which satisfied the research objectives and enabled the research to flow with less interruptions and problems. It is in this planning with attention to methodology, methods, and research design that I established a way forward towards a more comprehensive and agile understanding of emotion in judicial decision-making.

Contributions

To Practice

This research aspired to a number of significant achievements, while also creating future research possibilities. To this end, in assessing gaps and limitations, I have undertaken empirical research which has enabled me to offer practical and theoretical solutions and advice in an area devoid of consistent and forward pushing research attention. I have sought

to close a gap in terms of a lack of judicial input and have found ways through creative methodologies to access judges, to evaluate their emotional and decision-making behaviours within real life situations, improving and combining theory and practice as complimentary not separate activities (see Appendix G; Wrenn and Wrenn, 2009). This partnership culminates to produce an initial set of recommendations, for judges, justice, and future research.

To Methodology

Given a lack of theoretical modelling and very limited systematic ways to explore, analyse and give expression to judicial emotions and their effects on the working role, I sought to devise a suitable methodological and theoretical framework. I did this through the use of Goffman's (1959) dramaturgical model, fusing this with reflexive and embodied principles (see Chapters Three and Four). This construction then provided the grounding and impetus for, the operationalisation of the selected research methods. By framing the judge as the key actor, on and off the stage of the criminal court, I was able to construct a more complete narrative and one that can hopefully inform future research in the area.

To Theory

At the end of Chapter Eight I present a summative framework for emotions in judicial decision-making. This contribution to theory has no equivalency in current research. The framework has been designed to be flexible and to be reshaped as new knowledge is brought to the fore but represents the cumulative findings of my research through core themes. These concepts provide a degree of clarity, cohesion and depth to a complex assortment of findings enabling this unique story of emotions and judicial decision-making to be conveyed to the academic community and to judges who have participated and shown interest. However, lying beneath these classifications there are multiple nuanced theories which emerge and

extend beyond the key headlines here and what is now known about judges and their work. These include theories relating to:

- Fear: The fear factor, a hidden emotion, obscured by other emotions such as anger and sadness, even moments of courage, to protect judicial reputations and maintain confidence in the law.
- Illusionary nature of performances: a double bluff, acting or real, or a mix of both.
- Deprecatory Language: The cautionary and advisory nature of language used to protect judicial power and deter society from offending.
- Judicial Vulnerability: The need for judges to be rescued and to have escape strategies to manage their own emotions.
- Team Support: The role of the wider court teams in supporting judges to retain dignity and respect through emotional support.
- Victims: as threats to judicial power and to emotional stability.

Implications and Recommendations

Chapter Eight discussed the consequences of attempting to sustain an emotionless justice system which has implications for judicial health and wellbeing, for victims and their inclusion, for individual justice and for societies' ability to engender hope and compassion in a culture of retribution and punishment. Other implications relate to the possibilities of a more enlightened justice system, which incorporates the best of emotions, values them and strategises them. This kind of ideology may enhance the role of rehabilitation and restorative justice (CPS, 2023[a]), instilling hope rather than fear, though both have fallen out of favour in practice and in policy terms and the value these can provide, needs to be reinstated. In an inclusive approach to emotions in law, the implication is that the worst aspects of emotion also need to be managed and regulated in order to embrace a balanced and realistic understanding. The implications for policy are significant and resource intensive but offer optimism that emotions can be better managed, and perhaps should be encouraged, within the justice system. This does not imply that judges should gush unfettered emotions at every

turn but in understanding how they affect decision-making they can be harnessed for good practice and good health.

The implications of my findings for research are varied and hold significant messages and solutions for judges, for their well-being and for their long term reputations. For Justice, the misnomer that there are no emotions in decision-making is challenged, and this can encourage more public engagement with the justice system as the myth of dispassion dissipates and persuasion is more honest and made more acceptable. An acknowledgement of the significance of judicial emotion will importantly assist in the early detection of potentially unfair judgements and can limit costly and embarrassing legal appeals. Until we reach a point where research delivers a more rounded understanding of court-related emotions, recommendations need to be tempered and sensitive.

The possibilities here go beyond local boundaries and investigations should extend beyond the national, even to the global, as Country distinctions and different legal jurisdictions, have variations in their legal, political, economic, social and cultural structures, and this creates endless possibilities for new knowledge, new theories, new methods and new solutions. While implications are reasoned and articulated, recommendations are the other side of this coin and need to follow. In doing so I take a pragmatic approach. I am conscious that although some judges participated directly and had fully consented to their opinions being used in this thesis, some of the findings were also generated from judicial activities in the criminal courts where the public have open access and where consent is unnecessary. Even so, I took measures to inform and encourage judges to participate and relayed as much information as I could to gain cooperation. Ethically and for the sake of future research relationships with the judiciary, I am careful to respect the judicial role and acknowledge their skills and the demands implicit in this and I thank those who took part in this research (Fielding, 2011).

Changes are better recommended from those who have authority and who can make a difference to working practices, and this, I conclude, has to be judges themselves. They are the ones who will continue to feel the effects of judicial stress when they are exposed to the worst of human nature. They are also instruments for change and they have a powerful position from which to push for alternative sanctions to prisons, to call for effective rehabilitation and to continue to shout for more resources and personal support. My recommendation here is simple, I call on judges to be more proactive and direct when it comes to discussion on emotions, whether this is on or off-stage. In the courtroom and its surroundings, the simple is also complex and it is then a case of how the implications and recommendations can reach judicial ears and make an impact on their own thinking and rhetoric regarding emotions in decision-making. Obviously as stressed, opening up and encouraging face-to-face academic and official research that recognises the dual benefits from academic and legal professionals alike is vital. As more information circulates, more knowledge can be made available.

Some judges who took part in interviews asked if I would share the finished thesis with them and I will indeed do so. Alongside this kind of distribution there is the possibility of publications which can stimulate judicial interest and may help to move the agenda forward and these will be developed. It is also a plausible and attainable ambition to agree a short publication spot within the Magistrates Association Magazine. Apart from deliberate and public judicial oratories at sentencing, other opportunities to change the message and the rhetoric have hopefully been made available by this research, and I urge those judges who believe that emotions matter, to infiltrate their training and support mechanisms and to reposition emotions as part of the official agenda. Building on existing opportunities is a way to bring emotions into legal debates. For example, it is known that very few judges have ever visited a prison but now this is part of their training (MA, 2023) and represents a significant step in the right direction. If any activity can open doorways to emotion, it is this kind of

exposure to the realities and impacts of their decision-making. I would recommend this as a training requirement for the judicial office itself.

Judges need to have the insight and courage to seek help when needed. Help, however, needs to be available alongside training and open discussion about aspects of the role which are challenging and yet not currently spoken about. Progress has been made with the introduction of counselling services and support materials (MA, 2021, 2018) but there is little public record of how successful this has been. Knee-jerk reactions by officials to events which draw attention to judicial emotion should be replaced by a regular and continuous programme of support for judges, with mentors in place for those judges who have less experience. The future for emotion and law is positive, but with small progressive steps significant progress is possible.

Inspired by Goffman (1959)

I cannot conclude this chapter without further acknowledging the contribution that Goffman's work has made to my thesis. I discuss this in Chapter Three but feel that he deserves a final word. Although Goffman (1959) did not explicitly discuss emotions, the contribution that his theories and methods have made to this thesis need to be acknowledged. Emotions as intangible objects, existing and visible but difficult to touch, presented me with a research challenge as to how I would capture and accurately describe their manifestation and application. Goffman, and those who followed him but who took his work in different directions (Hochschild, 1983), provided me with a flexible theoretical model, and a methodological framework as found in his concept of dramaturgy (Martin *et al*, 2002). I was able to adapt dramaturgy to suit my own plans and thinking without requiring to imitate Goffman's work (Inglis and Thorpe, 2023). I utilised a range of Goffman's theatrical metaphors, the stage, front and backstage, the play, the actor, the audience and the language of the theatre. I embraced the centrality of scripts, judicial scripts from which I could observe

and analyse emotions through a dramaturgical lens. The assertion that judges do impression management, that they wear different masks for each occasion, that they use emotions strategically is strongly argued and evidenced in this thesis but yet judges also leak emotions either consciously or unconsciously as their real selves emerge under pressure (Roach Anleu and Mack, 2005). Power narratives dominated as judges sought to operationalise emotions to benefit their objectives both personal and organizational, as they are tied into institutional rules. To assist my understanding of power dynamics in the modern courtroom and in judicial practices I drew on the concept of ritual practice which arises from Goffman's work.

These perspectives enabled me to express what I saw and interpreted in a logical and coherent manner. There is no doubt that by engaging with using a Goffman's work approach I was able to enhance my own work in its entirety, bringing clarity to the design, structure and content of my project. The outcome of which has been to establish the role of emotions not just as part of the judicial persona, but as tools for research. Goffman's theories and ideas endure despite their limitations (Inglis *et al*, 2023). They inspired me to produce judicial stories, focusing on their emotional content and role in the delivery of justice. Judges need the stage of the criminal court to do justice and to be seen doing justice (Arendt, 1994).

Concluding Comment

My primary and overarching purpose in undertaking this research was to move the story of emotions and judicial decision-making forward, to avoid the trappings of repeating what is already known about the relationship between emotions and judges. The aspiration here is and continues to be about discovering new knowledge which might enable new theories to be constructed and considered, thus inviting more proactive interest in this area of emotion, by academics, researchers, judges, and the judiciary alike. By proactive, I refer to participation, engagement, and access to concrete evidence via judges who are dealing with the tensions, conflicts and emotions involved in legal and sentencing decisions on a daily

basis. In formulating these aims I have deliberately not articulated a broader ambition to achieve substantive change in the justice system itself, through policy or in the judiciary's awareness of emotion in decision-making. Some of the above insights may help to generate some degree of adjustment in how professionals and elites consider their own emotions, not as something to hide but as something to harness for the good of their decision-making. Ultimately, it is through judges and magistrates themselves that policy changes will come about and where positive shifts in beliefs and attitudes about emotions become easier to embed within the justice system. In particular I suggest paying attention to the issues of penal excess and populism as an important area of legal debate but enhanced and enriched by discussions involving judicial temperament and emotions which have been traditionally avoided. In the end, the achievement of a more effective emotionally informed courtroom, is surely, a common uniting goal.

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Criminal Justice & Policing Act 2001
Data Protection Act 2018

Domestic Violence, Crime and Victims Act 2004, s33

Equality Act 2010

Human Rights Act 1998

Mental Health Act 2007

Police Reform and Social Responsibility Act 2011

Prisons Act 1952, s14

Protection from Harassment Act (PHA) 1997

Sentencing Act 2020, Part 4, Chapter 2

Sentencing Act 2020, s 5

APPENDICES

APPENDIX A

Sample Research Questions and Themes

Themes	Questions
Emotions as Virtues	Why is the study of emotion important? What value can emotions offer to judicial practice?
Emotions as Vice	Do emotions damage justice?
Judges as actors Trials as theatre	Are judges just good at hiding their emotions? Do they act out this role during the drama of the trial? Do judges disguise their emotions in acceptable language and actions? Do scripts operate to manipulate the play? When judges do display emotional behaviour is it for effect? Is the trial performative? Could it be that the emotional judge, is under more self-control than is obvious?
Contradictions	If one accepts Durkheim's view of the significance of emotions in social life what does this infer about claims that judges are unemotional in their legal decisions?
Emotion Leakage	How often do judicial emotions leak out in the court and why? Why did these judicial tears provoke such a reaction? (Dingeman) Are there particular pressure points which lead to the private taking over the professional or is there a merging of the two emotional states? In what circumstances do judges' personal emotions leak out and what happens when they do?
Judicial Vulnerability	Power, and risk taking are still a reality within all judicial roles: but who will rescue the lone judge? How much stress and ill health is related to the requirement to suppress emotion? In the absence of a visible team who can help to moderate and influence the judge's choice of emotional strategy, where do judges get their support. Do judges find support from other quarters, clerks, and advocates for example? What happens when victims are in court; does their presence change the dynamics, the interactions, and the nature of the emotion-based strategy deployed? Does the presence or testimonies of victims make judges feel vulnerable to emotions?

	How do judges resist the urge to use their personal emotions in the legal decision-making process?
Triggers and Influences	If justice is driven by negative emotions does this in turn create more negative societal perceptions, responses, and criminal behaviour? (and vice versa) How much does the seriousness of the crime interfere with judgement? To what extent do judges display a natural desire to punish and do they admit to experiencing pleasure in this. Is the age of male, elderly offenders a factor in cases of historical sexual abuse? Do judges feel sadness and compassion for elderly offenders, disabled offenders, or mothers? Why should one method of abuse with similar outcomes rank higher than another in the victim hierarchy and do judicial emotions expose this lack of parity?
Strategies to control and resist emotions	Do judges willingly take on the actor role? Can judges learn the craft of acting out the role? How do some judges reach their conclusions so quickly and is this a way to avoid emotions? Do judges conform to protect their reputations or are they coerced? Do judges find rational explanations to cover up their emotions for fear of criticism? Do judges hide emotions under legitimate sentencing processes such as judicial discretion?
Emotions as tools for judges	Why do judges use deprecatory terms so freely? Are they tools? The use of certain words such as 'evil,' 'devil incarnate,' 'wicked' raise particular questions as to their significance in the context of a contemporary court setting. What kind of remorseful displays can make up for the harm done in some cases? Are Remorse and mercy key to analysing judicial emotions. So, what are judges looking for when they assess remorse in the courtroom? When theorists say emotions are evaluative tools what does this actually mean? Are judges swayed towards one set of emotions over others but which ones and why? Does the strategy of involving humour invoking lighter emotions make it more difficult for the judge to impose bail restrictions or does humour serve to diffuse dangerous situations? Are emotions tools of manipulation or are judges just subject to them?
Private versus Strategic	Why is the study of judicial decision-making and emotion confined to how they manage the emotion of others' but not their own? Can judicial emotions be professionalised and if so, how?

deployment of emotion	Are there particular pressure points which lead to the private taking over the professional or is there a merging of the two emotional states? At what point, if at all, do judges' cross a professional line and how does this affect decision making? Why do judges avoid expressing some emotions over others and what happens if they do deviate from the expected judicial norms? Can judges legitimately express their emotions without this then influencing their ultimate decisions and if so, is this understood by those who are subject to the law? Can there be cross over between the private and the professional?
Consequences for victims, judges, and justice	What are the consequences for judges who adopt a different persona to their natural one? What kind of risk takers are judges? Emotion matters to justice (Solomon, 1995) but how? An emotional transformation may be going on with respect to judges in the UK criminal courtrooms and if so, is this a transient response to the strains of the judicial role or a more permanent cultural change? If judicial decision-making is still distinctly punitive and retributive does the acceptance and encouragement of wider judicial emotions in decision-making raise further concerns about justice? Through the signing of the judicial oath, do judges sign away their right to being emotional?
The Role of Power and need for Status Control Misuse Retributive emotions are feared.	Does criminal justice succeed in transforming emotions? Why does the rhetoric of dispassion persist? Why is there an unquestionable duty to respect the rule of law and why is this phrase often used to deter questions and challenges about the laws sense of equity and fairness? Are power, and risk taking a reality within the judicial role and if so, how does this impact on decision-making: but who will rescue the lone judge? Is risk-taking associated with judicial power ambitions and status and if so what range of emotions does this involve? Do institutional obligations and strategic purpose override personal emotions? Through the signing of the judicial oath, do judges sign away their right to being emotional?

APPENDIX B Ethics Approval

Faculty of Humanities, Languages and Social Sciences

Manchester Metropolitan University

Prof Steve Miles
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27 May 2015

Dear Prof Miles,

Application for Ethical Approval: Joan RICHARDSON
Project Title: Role of emotions in judicial decision making

I am pleased to inform you that the above's Application for Ethical Approval has been granted unconditionally. This part of the research can now begin.

I would be grateful if you could inform the other member(s) of the supervisory team.
Yours sincerely

Katherine Walthall
Research Group Officer

Tel: +44 (0)161 247 6673
Email: k.walthall@mmu.acuk
Research and Knowledge Exchange Office
Room 212 Geoffrey Manton Building

cc. Departmental Research Degrees Co-ordinator
HLSS Research Degrees Administrator
Applicant

APPENDIX C Participant Information

1. Study Title

1.1 Emotions in Judicial Decision Making

2. Invitation

2.1 I would like to invite you to take part in a research study. Before you decide you need to understand why the research is being done and what it would involve for you. Please take time to read the following information carefully. Ask questions if anything you read is not clear or you would like more information. Take time to decide whether or not to take part.

3. What is the purpose of the study?

3.1 This study is part of PhD research within the Humanities department of Manchester Metropolitan University (MMU). To inform inquiry into judicial emotions which is under-researched and under-theorised (Grossi, 2015) with empirical judge-based studies lacking despite the return of emotions to the courtroom for example through the delivery of victim impact statements.

4. Research Aims

4.1 Endeavour to understand the nature of the criminal trial as emotional performance, examining the methods judges deploy to retain the visible dominance of objectivity in courtroom management and process

4.2 Identify and develop tools to evaluate how these dramatic and emotional elements are played out in court.

4.3 Examine the extent to which certain emotions influence judicial decisions, identifying potential impacts on participants including judges.

4.4 Evaluate whether the management of emotions, rather than their dismissal, could enhance judicial decision-making practice being a resource rather than a threat; and,

4.5 Consider new theoretical sentencing models or innovative policy.

5 Do I have to take part?

5.1 There is no obligation to participate in interviews or group work. Observations will be undertaken as part of public access to courts but my presence in court will be made know to court officials as I observe court cases. Permission will be requested to take notes and sit in an appropriate location to prevent my notes from being visible.

6. What will happen to me if I take part?

6.1 In the region of 100 plus judges and magistrates will be observed nationally. Judges may be selected to reflect diversity across gender, race, culture, or physical characteristics such as age or disability. Case content and profile of defendants may determine which cases are observed and which judges are asked to participant at interview or in group work. A selection of retired judges and magistrates will be asked to participate in discussion and interview.

6.2 The research interviews /meetings will be undertaken between Jan June 2016

6.2 Up to 2 interviews will be requested of approximately 45 minutes each

6.3 Group work using vignettes (case studies) may be arranged

6.4 These activities may last up to an hour

6.5 Participation is likely to be restricted to one session per judge

6.6 All personal interview records will be available to participants on request at a suitable stage where information has been collated and analysed

6.7 Clarification of content and issues arising will be undertaken through agreed process, telephone, or face to face means

6.8 Interview records will be totally anonymised

6.9 Group work will establish confidentially principles

6.10 Written notes and records will be held securely

6.11 Data imputed electronically using academic software will be secured with individual passwords and content protected. Individual participants, court cases and locations will be allocated a code to protect identity

6.12 Data will be destroyed in line with MMU policy and data protection

6.13 You can withdraw at any stage without explanation

7. Research Methods

7.1 Observations: researcher will take written notes in court

7.2 Interview; discussion or other direct communication: researcher will request to take written notes and/or record interviews. Questions will be prepared and added to if an observation has taken place

7.3 Vignettes: Researcher may use prepared cases to illicit responses or views

8. Expectations of Participants

8.1 Participants will be expected to agree by signing the consent form, having read information provided by the researcher, attend activities as agreed and abide by confidentiality particularly within group work.

9. What are the possible disadvantages and risks of taking part?

9.1 A full risk assessment has been undertaken to identify risks including security of data, breaches of confidentially, impacts on participants and others including the risk of Appeal.

10. What are the possible benefits of taking part?

10.1 I/We cannot promise the study will help you personally, but the information gained from the study may help to inform and improve future recruitment, training of judges and magistrates; will inform discussion on sentencing procedures, sentencing outcomes and support sentencing reforms; improve public confidence in judicial process and/or sentencing and will challenge traditional concepts of the disimpassioned judge.

11. What if there is a problem?

11.1 If you have a concern about any aspect of this study, you should ask to speak to the researcher who will do their best to answer your questions on 01948 830039 or by email to make arrangements for discussion JOAN.P.RICHARDSON@stu.mmu.ac.uk or by contacting the judicial office mentor (pending).

11.2 If you remain unhappy and wish to complain formally you can do this through University and Judicial Office complaints procedures.

MMU Ethics Committee
Registrar & Clerk to the Board of Governors
Head of Governance and Secretariat Team
Manchester Metropolitan University
All Saints Building, All Saints
Manchester M15 6BH
Tel: 0161 247 1390

12. Will my taking part in the study be kept confidential?

12.1 The Data Protection Act 1998 and codes of practice will be adhered to.

12.2 Specifically

- data will be collected manually and imputed into academic software such as NVIVO
- This will be stored safely and securely in locked cabinets, within a secure area
- individual participant research data, such questionnaires/interviews/discussion notes, observation notes will be anonymous and given a research code, known only to the researcher
- A master list identifying participants, venues, cases and other potential identifying features will be allocated to the research codes; data will be held on a password protected computer accessed only by the researcher

- hard paper/taped data will be stored in a locked cabinet, within a locked office, accessed only by researcher
- electronic data will be stored on a password protected computer known only by researcher
- where a participant agrees to be identified this will be risk assessed

12.3 All information which is collected about you during the course of the research will be kept strictly confidential, and any information about you which leaves the University or storage area will have your name and address, court venue and case name removed so that you cannot be recognised or identified.

13. What will happen if I don't carry on with the study?

13.1 If you withdraw from the study all your identifiable samples/ tape recorded interviews, written interview records will be destroyed but I may request to use the data collected up to your withdrawal. Observation data will be kept for the researchers use as this contains researcher views, opinions, and analysis. This will be anonymised and subject to data protection and ethical considerations.

14. What will happen to the results of the research study?

14.1 This research, its processes and findings will be published as part of PhD research and will be made externally available via the MMU library, website, and other information systems as is normal for such research. In addition, abstracts or papers emerging from the study may be published in journals or used to stimulate future research.

15. Who is organising or sponsoring the research?

15.1 This research is sponsored and supported by the Manchester Metropolitan University and the Judicial Office (details to be inserted)

16. Further information and contact details:

16.1 Researcher: Joan Richardson JOAN.P.RICHARDSON@stu.mmu.ac.uk

16.2 Supervisors:

Professor Steve Miles s.miles@mmu.ac.uk

Professor Jon Bannister jon.bannister@mmu.ac.uk 0161 2473083

Dr Kate Cook k.cook@mmu.ac.uk 0161 2472799

16.3

17. Finally

17.1 Thank you for considering this request

APPENDIX D RESEACRH CONSENT FORM

Name of Researcher	Joan Richardson
Title of Study	Emotions in Judicial Decision Making
Name of Participant	

Please read this information carefully and complete the form. Ring the appropriate responses, sign, and date the declaration. If you require more information or clarification, please ask.

- The research has been fully explained to me in verbal and written form Including the limits of confidentiality **YES/NO**

- I understand the research will involve up to 2 interviews and or group Work using vignettes or short case studies. **YES/NO**

- I agree to data collected as the result of the above being used in anonymised format within the finalised PhD thesis and other related publications such as short journal papers. **YES/NO**

- I understand that all information about me will be treated in strictest confidence and that I will not be identified in any manner arising from this study, written or verbal. This includes anonymising other identifying features such as location, defendant, victim, witness, or any other court member. **YES/NO**

- I understand that any written notes, audio, digital materials will be used solely for research purposes and will be destroyed after research or by personal request subject to University guidelines. **YES/NO**

- I understand you will be discussing the progress of your research with approved others including supervisors at MMU and agree to this. **YES/NO**

- I understand that I am a volunteer and may withdraw from this study at any time without having to give explanation. **YES/NO**

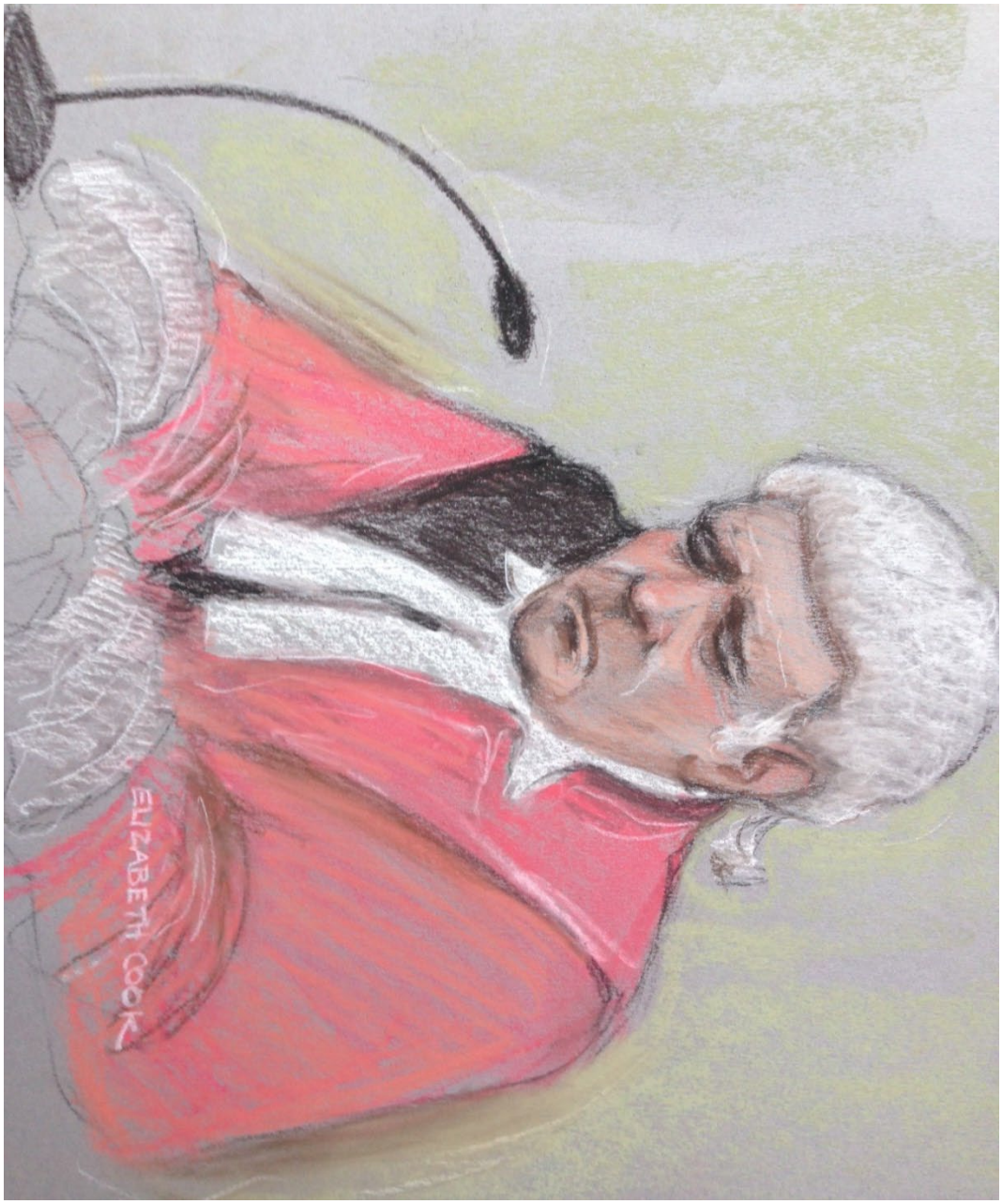
Please indicate special requests or other information to support participation

I freely give my consent to participate in this research study and have been given a copy of this form for my own information.

Name of Participant	Date	Signature
_____	_____	_____

Name of Person Taking Consent	Date	Signature
_____	_____	_____

APPENDIX E Judge Dingeman



With the Permission of Elizabeth Cook

APPENDIX F Judicial Office Response

Ms Joan Richardson

Manchester Metropolitan University

By email

08 September 2015

Dear Ms Richardson,

Request for Judicial Participation in Research - Role of Emotions in Judicial Decision Making

Having carefully considered your request I regret to inform you that the Senior Presiding Judge will not agree to judicial participation in this project.

Your research topic is the role of emotions in judicial decision making. You have requested permission to conduct interviews to test how judges felt, how they dealt with and utilised emotions and whether emotions had the potential to influence their decision making. Having given careful consideration to this, I am sorry to say that this could not be recommended for judicial participation. Judges administer law in accordance with the oath taken when they are appointed and base their decisions solely on arguments and evidence presented to them in court.

In addition, approval will only be granted if participation will not impose an undue burden on members of the judiciary. There are multiple elements to your methodology and the ones that involve judicial participation would place great demand on the limited time of the judiciary.

I know that this will be very disappointing news for you and I am sorry that we are unable to agree to your request.

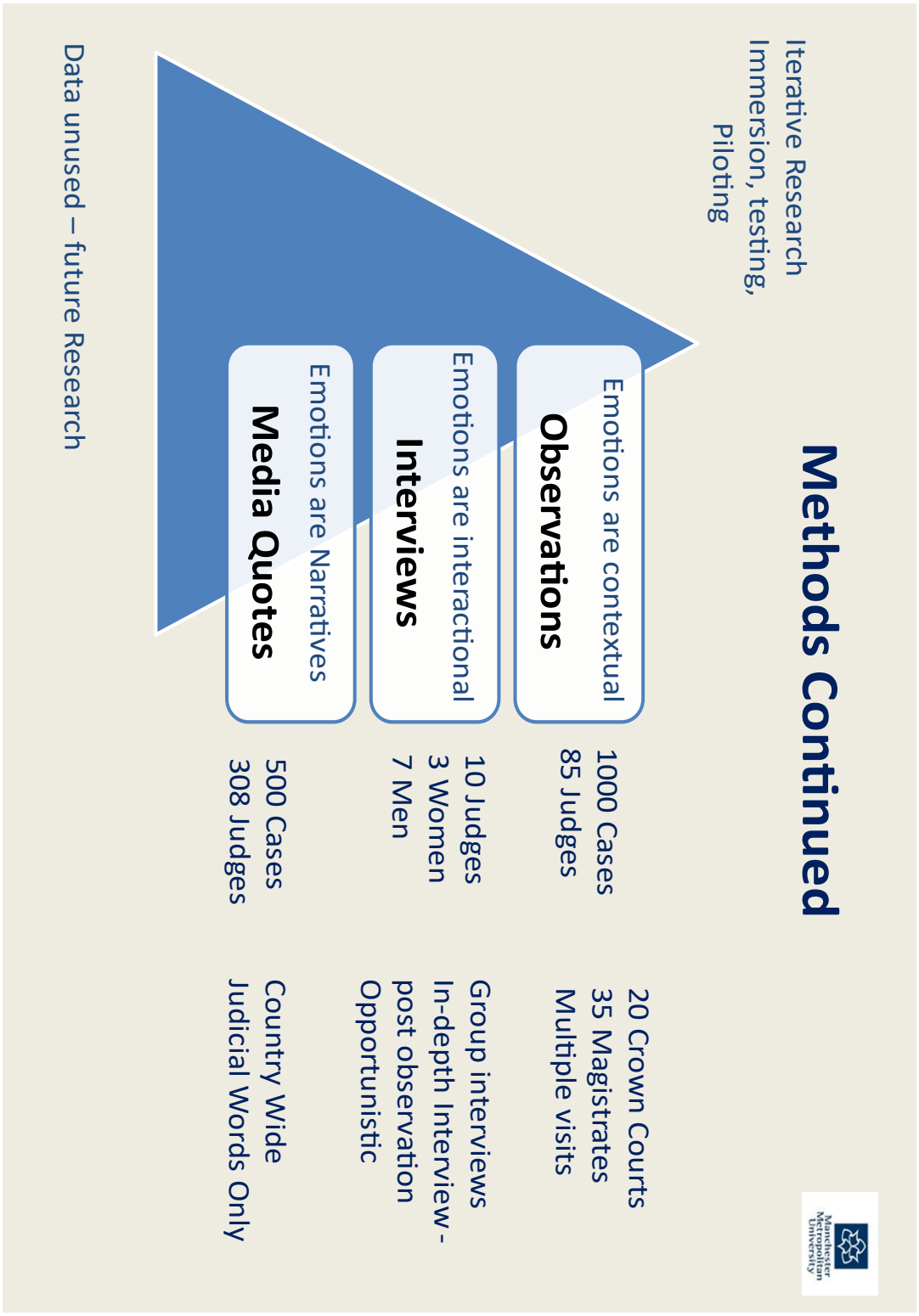
Yours sincerely,

Martina Petronio

Assistant Private Secretary to the Lord Chief Justice (Criminal Team) | Judicial Office | Room C115 | Royal Courts of Justice | Strand | London | WC2A 2LL | 020 7947 7378 | www.judiciary.gov.uk

APPENDIX G **Summary of Research Activities**

To Note: Court room venues held multiple courts



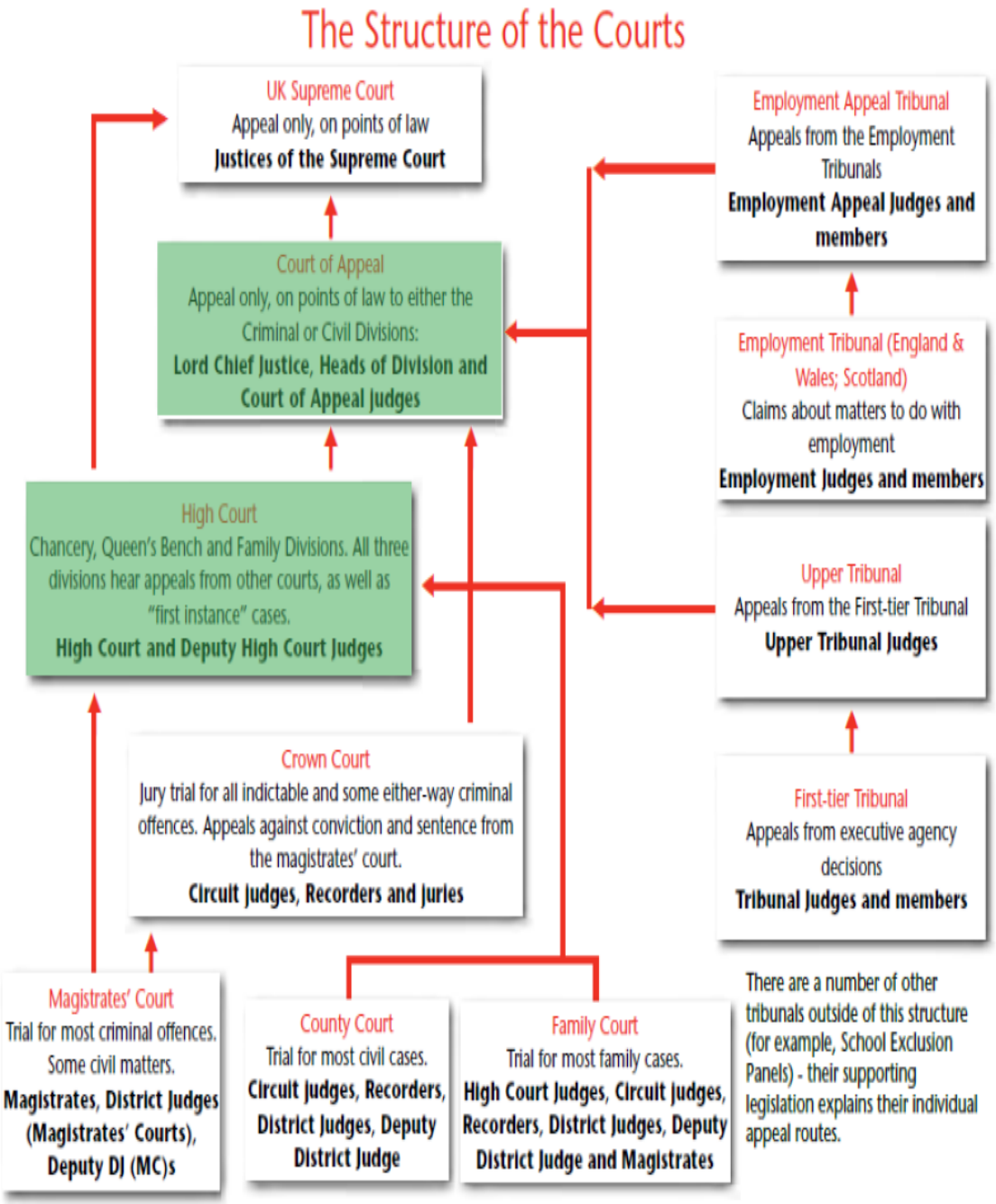
APPENDIX H

Role of Emotion in Judicial Decision-Making: A Framework

Role Type	Purpose of Emotions	Why
Practical	To Motivate Action Aid Collection of Information Categorisation Decision-Making Short Cut	To Avoid Passivity To Resolve Questions To Simplify, Order and Find meaning To Speed up the Process, Save Time Create Confidence and Trust
Protective	Protect Society & Judges Humanitarian Principles Social and Moral Codes Punishment Self-Protection Techniques Preparatory Cathartic	From Harm and Harming. To Rescue To Restrain Cruelty and Avoid Revenge Forgiveness, Compassion and Kindness To Deter and Alter Behaviour Avoidance to Prevent Emotion Overload Advance warning of Unpalatable Decisions Relieve Stress, Anxiety, Reduce Damage
Evaluative	To Assess Situations and People to Form Intelligent Conclusions	To Enhance Cognitive Thinking To Raise Awareness of Self and Others Improve Emotion Regulation To Make Decisions Effectively To Balance and Moderate Judgements
Justificatory	Persuade through Words and Performance	To Gain Public Acceptance To Avoid Challenge To Engender Trust in the Justice System To Cover Real Emotions
Power Focused	To Maintain Status and Control	To Sell Justice Structures and Regimes To Create Reputations To Fulfil the Desire to be Needed To Gain Admiration, Respect, Social Standing To Feel a Sense of Achievement, Satisfaction To Counter Threats to Power
Control	To Manage Worst aspects of Human Nature	To Prevent Civil Unrest To Control the Message To Appease and Pacify Victims and Society
Political	To Maintain Security and Authority of the Law	Social and Civil Stability By Dissuasion and Deterrence
Change	Activism and Rebellion	Better Justice, Moral Justice and Hope Question Tradition To Reestablish Status and Power To Widen Decision-making Options

APPENDIX I

Source: MoJ Statistics 2023



APPENDIX J

Magistrates Courts Visited between 2015 and 2019

1. Birmingham Magistrates Court at the Victoria Law Courts
2. Blackpool Magistrates' Court
3. Bradford and Keighley Magistrates' Court -Multiple attendance
4. Bristol Magistrates' Court
5. Cambridge Magistrates' Court
6. Cardiff Magistrates' Court -Multiple attendance
7. Chester Magistrates' Court -Multiple attendance
8. City of London Magistrates' Court -Multiple attendance
9. Coventry Magistrates' Court
10. Crewe Magistrates and County Court -Multiple attendance
11. Derby Justice Centre – Multiple attendance
12. Doncaster Justice Centre North (Doncaster Magistrates' Court)-Multiple
13. Harrogate Justice Centre
14. Hull and Holderness Magistrates' Court
15. Ipswich Magistrates' Court
16. Leeds Magistrates' Court – Multiple attendance
17. Leicester Magistrates' Court
18. Liverpool Magistrates Courts – Multiple attendance
19. Llandudno Magistrates' Court – Multiple attendance
20. Manchester Magistrates' Court – Multiple attendance
21. Mold Justice Centre (Mold Law Courts) – Multiple attendance
22. Newport (South Wales) Magistrates' Court
23. North Staffordshire Justice Centre / Newcastle-Under-Lyme Magistrates Court - Multiple
24. Northampton Magistrates' Court
25. Nottingham Magistrates Court – Multiple attendance
26. Sheffield Magistrates' Court – Multiple attendance
27. Stockport Magistrates Court – Multiple attendance
28. Telford Justice Centre – Multiple attendance
29. Walsall Magistrates' Court
30. Warrington Crown and Magistrates' Court -Multiple attendance
31. Welshpool Magistrates' Court
32. Wirral Magistrates' Court- Multiple attendance
33. Wolverhampton Magistrates' Court – Multiple attendance
34. Wrexham Law Courts – Multiple attendance
35. York Magistrates' Court – Multiple attendance

APPENDIX K

Crown Courts Attended 2015-2020

To Note: Not all court visits produced usable data due to delays, cancellations, and length of court hearing.

1. Birmingham (Queen Elizabeth 11) Law Courts
2. Bradford Law Courts – Multiple visits
3. Cambridge Crown Court
4. Cardiff Crown Court – Multiple visits
5. Chester Crown Court – Multiple visits
6. Derby Combined Court Centre – Multiple visits
7. Doncaster Justice Centre – Multiple visits
8. Hereford Crown Court
9. Preston Crown Court
10. Leeds Crown Court- Multiple visits
11. Leicester Law Courts
12. Liverpool (Queen Elizabeth 11) Law Courts- Multiple visits
13. Manchester Crown Court (Crown Sq) - Multiple visits
14. Manchester Crown Court (Minshull St) – Multiple visits
15. Mold Crown Court – Multiple visits
16. Northampton Crown Court
17. Oxford Combined Court Centre
18. Sheffield Law Courts- Multiple visits
19. Shrewsbury Justice Centre -Multiple visits
20. Stafford Combined Court Centre – Multiple visits

APPENDIX L: Sampling Chart

Method	Decisions based on	Locations Crown Court	Locations Magistrate Courts	Time Frames	Frequency	Volume of Data Total
Observations	Geography: Distance to home and University base	Mold CC Chester CC Liverpool CC Shrewsbury JC Stafford Manchester Crown Sq Manchester Minshull Cardiff	Mold JC Chester MC Liverpool MC Crewe MA Llandudno MC Manchester & Salford Stockport MC Cardiff MC Wrexham LC Bradford & Keighley MC	2014 – 2018 2015 – 2019	Multiple 2 days per week Multiple 2-3 days	1000 Cases
	Support Networks further afield Friends, Family & Colleagues	Bradford LC Derby Combined CC Doncaster Hereford Leeds CC Leicester CC Northampton Preston Sheffield Oxford Com CC	Derby JC Doncaster JC North Blackpool Leeds MC Leicester MC Nottingham MC Northampton MC Sheffield MC Cambridge MC Coventry MC Harrogate JC Hull & Holderness MC York MC			
	Opportunistic: Events and Conference Locations	Birmingham (QE11) LC Cambridge	Birmingham MC VLC Bristol MC Newport SW MC Cardiff MC City of London MC Ipswich MC Telford MC	2015 – 2019		
	Personal Interest & Familiarity		Newport SW MC North Staffordshire JC Walsall MC Warrington MC Wolverhampton MC			

Criteria	Decision based on	Judicial Location	Judicial Pseudonyms	Time Frame	Court Type	Volume 10 Interviews
Interviews	Opportunistic Relationships By Referral	Mold Manchester London Doncaster Sheffield	District Judge G Winter Judge Parks Judge Lyman Judge Rose Judge Dunn Judge Bow Magistrate Wagner Magistrate Asher Magistrate Hovick Magistrate Penn	July 2015 to May 2016	Magistrates Crown Court Crown Court Crown Court Crown Court Crown Court Magistrates Magistrates Magistrates Magistrate	Individual Individual Individual Group & Ind Group Group Individual Individual Group & Ind Group
Criteria	Decision Based on	Location	Time Frame	Frequency	Volume	Other
Media Quotes	Range of tabloid and broadsheet newspapers Available Interest and story line	Hard Copy Online	2014 - 2020	Daily and Weekly Collections	500 Cases 308 Judges	Ad hoc Access News items