

OPPORTUNITIES FOR NEW APPROACHES TO JUDGING IN A CONVENTIONAL CONTEXT: ATTITUDES, SKILLS AND PRACTICES[†]

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In Australia, magistrates and their courts have undertaken steps to make the disposition of cases more appropriate and more sensitive to the varied needs of defendants. One development is more engaged approaches to judging, which entails direct judicial interaction with court users, requiring judicial communication skills and perhaps greater emotional capacities such as empathy. Careful analysis of empirical evidence of judicial attitudes and practices in court identifies important links between conventional judging values, skills and actions and some elements of the newer forms of judging. This research identifies magistrates' commitment to core judicial values such as impartiality, their views about skills and practices associated with more engaged judging, such as listening and empathy and their orientation to the social value of their work. The article then examines in-court behaviours, including the demeanours magistrates display towards defendants and the circumstances in which they look at and speak directly to defendants. The findings suggest apparent tensions between legitimacy based on a conventional judicial role in an adversary process and the legitimacy of more engaged, active judging. This research finds ways in which values and practices of less-adversarial judging can be incorporated within a relatively conventional understanding and performance of the judicial role.

I INTRODUCTION

The current turn towards newer forms of judging draws together a number of developments in judging, such as therapeutic jurisprudence ('TJ'), problem-oriented courts, solution-focused judging and managerial judging, as well as alternative processes in and out of court, including restorative justice ('RJ') and appropriate dispute resolution ('ADR') and links to developments in legal practice, for example, collaborative lawyering, holistic lawyering and preventative lawyering.¹ The key element in these more engaged approaches to

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¹ See generally Michael King et al, *Non-Adversarial Justice* (Federation Press, 2009); Michael King, *Solution-Focused Judging Bench Book* (Australasian Institute of Judicial Administration, 2009).

judging is more direct judicial interaction with court users, requiring judicial communication skills and perhaps greater emotional capacities such as empathy.² These features appear to set up a tension between conventional adversarial judging and newer forms of less-adversarial judging, both in the practices used and in the underlying principles sustaining judicial legitimacy.³ Nevertheless, there is considerable interest in and support for incorporating newer judging philosophies and practices into mainstream courts.⁴

Careful analysis of judicial attitudes and concrete examination of judicial practices in court identify important links between conventional judging values, skills and actions and some elements of the newer forms of judging. This empirical research investigates several dimensions of the attitudes of judicial officers presiding in the lower courts of Australia:⁵ their commitment to core judicial values such as

- 2 Lorana Bartels, 'Challenges in Mainstreaming Specialty Courts' (Trends & Issues in Crime and Criminal Justice Paper No 383, Australian Institute of Criminology, 2009); Donald J Farole et al, 'Applying the Problem-Solving Model Outside of Problem-Solving Courts' (2005) 89 *Judicature* 40; Arie Freiberg, 'Non-Adversarial Approaches to Criminal Justice' (2007) 16 *Journal of Judicial Administration* 205, 217; Susan Goldberg, 'Judging for the 21st Century: A Problem-Solving Approach' (Report, National Judicial Institute (Canada), 2005) 9–10, 18, 23; Michael King, 'The Therapeutic Dimensions of Judging: The Example of Sentencing' (2006) 16 *Journal of Judicial Administration* 92, 95, 102, 105; King et al, above n 1, 37, 191, 220; King, above n 1; Michael King and Julie Wager, 'Therapeutic Jurisprudence and Problem-Solving Judicial Case Management' (2005) 15 *Journal of Judicial Administration* 28, 34–5; Jelena Popovic, 'Judicial Officers: Complementing Conventional Law and Changing the Culture of the Judiciary' (2002) 20 *Law In Context* 121; Sally L Satel, 'Observational Study of Courtroom Dynamics in Selected Drug Courts' (1998) 1 *National Drug Court Institute Review* 56.
- 3 Greg Berman, "'What Is a Traditional Judge Anyway?'" Problem Solving in the State Courts' (2000) 84 *Judicature* 78, 82, quoting Richard Cappalli, Chief Judge Judith S Kaye (NY Ct App) and Administrative Judge Judy Harris Kluger (NY City Criminal Ct); Greg Berman and John Feinblatt, 'Problem-Solving Courts: A Brief Primer' (2001) 23 *Law & Policy* 125, 134; Arie Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8, 23; Michael King, 'Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education' (2006) 15 *Journal of Judicial Administration* 129, 134; King et al, above n 1, 16–17, 32, 87, 167, 184, 193, 210, 220.
- 4 Bartels, above n 2; Greg E Dear, 'Therapeutic Communications from the Bench: A Psychological View' (2006) 1 *eLaw Journal: Murdoch University Electronic Journal of Law (Special Series)* 147, 159 <<https://elaw.murdoch.edu.au/archives/issues/special/therapeutic.pdf>>; Farole et al, above n 2; Donald J Farole, 'Problem Solving and the American Bench: A National Survey of Trial Court Judges' (2009) 30 *Justice System Journal* 50, 51, 59; King, above n 2, 101–2, 105; King et al, above n 1, 37, 221–2, 226, 227; King and Wager, above n 2, 28; Popovic, above n 2, 121; See also King, above n 2, 98 for an example in Western Australia; Popovic, above n 2, 190 for details on Victorian programs.
- 5 Each Australian state and territory has a magistrates' or local court. Magistrates' courts in the Australian states and territories are first instance courts of general criminal and civil jurisdiction. Magistrates conduct trials without juries and have virtually no appellate jurisdiction. They sit in regional and remote areas as well as in capital cities. The volume and pace of work is substantial; 90 per cent of all civil and criminal cases are initiated and finalised in the lower courts. See Kathy Mack and Sharyn Roach Anleu, "'Getting through the List": Judgecraft and Legitimacy in the Lower Courts' (2007) 16(3) *Social & Legal Studies* 341; Sharyn Roach Anleu and Kathy Mack, 'Magistrates' Everyday Work and Emotional Labour' (2005) 32 *Journal of Law & Society* 590. Australian magistrates are paid judicial officers, nearly always full-time, with legal qualifications, appointed until a fixed retirement age, usually 65: see Kathy Mack and Sharyn Roach Anleu, 'Who Are Magistrates Today?' (2004) 26(7) *Bulletin (Law Society of SA)* 32. This is a change from the previous practice in some Australian jurisdictions, in which magistrates were part of the public service, often promoted from the ranks of the clerks of the court and sometimes did not have legal qualifications. The formal statutory requirement of legal qualification and separation from the public service is fairly recent, from 1969 in Tasmania to 1991 in Queensland: see Sharyn Roach Anleu and Kathy Mack, 'Magistrates, Magistrates' Courts, and Social Change' (2007) 29(2) *Law & Policy* 183; Sharyn Roach Anleu and Kathy Mack, 'The Professionalization of Australian Magistrates: Autonomy, Credentials and Prestige' (2008) 44 *Journal of Sociology* 185.

impartiality, their views about skills and practices associated with more engaged judging such as listening and empathy, and their orientation to the social value of their work. Next, the article examines in-court behaviours including the demeanours magistrates display towards defendants and the circumstances in which they look at and speak directly to defendants. This leads to an analysis of some obstacles to using more engaged judicial practices, in particular, the apparent tensions between legitimacy based on a conventional judicial role in an adversary process and the legitimacy of more engaged, active judging. This research finds ways in which the values and practices of less-adversarial judging can be incorporated within a relatively conventional understanding and performance of the judicial role.

II JUDICIAL ROLES

The conventional positivist or formalist framework of the judicial role is usually understood to limit the ability of a judicial officer to address the wider social needs of those coming before a court.⁶ As Chief Justice John Doyle of the South Australian Supreme Court has stated, the judicial role: ‘is to decide disputes [and to] administer justice according to law ... [and to] decide cases on the material presented. ... It is not for us to pursue social policies, or to press for social change. We have no charter to remedy social problems’.⁷

One of the claimed advantages of this limited approach to the judicial role is to insulate the legal actor from personal responsibility, as explained by Candace McCoy:

there is little to nothing the criminal justice system can do to alleviate poverty or the conditions that breed it. ... Economic structure and social attitudes cause inequality, and the justice system simply reacts to what is already there. ... [S]uch orthodoxy has the relieving effect of providing an ethic of nonresponsibility [sic] to the police, prosecutors, judges, and correctional managers who punish offenders ... [T]hey might say, ‘but it’s not our job to do anything about that; our job is only to impose the rule of law carefully. We go home at night with clear consciences. We can do little more, because we can’t change the world.’⁸

This consolation is increasingly insufficient for many judicial officers who have been active in leading change in judicial practices.⁹ Frustration with a limited

6 Farole et al, above n 2, 42; King et al, above n 1, 2–5.

7 John Doyle, ‘The Judicial Role in a New Millennium’ (2001) 10 *Journal of Judicial Administration* 133, 136–7 (emphasis altered).

8 Candace McCoy, ‘Sentencing (and) the Underclass’ (1997) 31 *Law & Society Review* 589, 591–2.

9 Berman, above n 3, 81, quoting Chief Judge Judith Kaye (NY Ct App), Judge Judy Kluger (NY City Criminal Court) and Judge Truman Morrison III (District of Columbia Sup Ct); Andrew Cannon, ‘Therapeutic Jurisprudence in the Magistrates Court: Some Issues of Practice and Principle’ in Greg Reinhardt and Andrew Cannon (eds), *Transforming Legal Processes in Court and Beyond* (Australasian Institute of Judicial Administration, 2007) 129; Peggy Fulton Hora, ‘The Synergy between Therapeutic Jurisprudence and Drug Treatment Courts’ in Greg Reinhardt and Andrew Cannon (eds), *Transforming Legal Processes in Court and Beyond* (Australasian Institute of Judicial Administration, 2007) 155, 157; Popovic, above n 2, 188–9.

judicial role is particularly acute for judges in the lower courts, where there is more direct contact with defendants, victims, debtors and others who are brought before the courts.¹⁰

This experience is described by an Australian magistrate:

I clearly accept that my function is that of a judicial officer, I'm here to enforce the law and I do that in accordance with whatever law happens to be set down. But I don't believe that you can divorce that from the social aspects of the cases that you deal with and I find it very stressful. There's the stresses of knowing that there's nothing you can do to help ... you know from the social side of things that you can't help; there's housing difficulties, there's welfare difficulties, there's employment difficulties, all of which may assist them to stop offending but it's impossible to address. So there's the frustration of 'I know what I want to do but we can't do it' and until this changes nothing's going to change for this child, and I think anybody who is interested in their work so that it means something to them can't but help feel those stresses on them ... I have a problem in walking away from what I've heard, and as much as I try to ignore it you can't ignore what's happening to some of these children ... So there's a whole lot of things and emotions to manage, apart from just the paperwork, the evidence and the decision ... the having to deal with the social and welfare issues that are so acutely tied up with what we do but having to put them aside and pretend they don't exist and just deal with them more or less as a crime, and, you know, 'that's the way I've got to deal with it' ... We're being asked to deal with a whole lot of social and welfare issues through the criminal law which just doesn't work.¹¹

This magistrate articulates acceptance of a formally limited judicial role, the impossibility of emotional detachment from the social harms experienced by those coming before the court, especially when the cases involve children, and the stress caused by this tension.

Some judicial officers are seeking different approaches to judging to find a way out of this dilemma.¹² This is especially the case in the lower courts of

10 King et al, above n 1, 18; Roach Anleu and Mack, 'Magistrates' Everyday Work and Emotional Labour', above n 5; Sharyn Roach Anleu and Kathy Mack, 'Australian Magistrates, Therapeutic Jurisprudence and Social Change' in Greg Reinhardt and Andrew Cannon (eds), *Transforming Legal Processes in Court and Beyond* (Australasian Institute of Judicial Administration, 2007) 173; Chief Magistrate of Victoria Ian L Gray, 'The People's Court — Into the Future' (Speech delivered at the Twelfth AIJA Oration in Judicial Administration, Supreme Court of Queensland, Brisbane, 22 June 2002) <<http://www.ajia.org.au/online/GrayOrat.pdf>>.

11 Interviews were conducted with 46 magistrates (29 men and 17 women) in every Australian state and mainland territory between December 2000 and March 2001. To ensure interviews included magistrates of varying age, gender, years on the bench and geographic jurisdiction, we did not construct a systematic random sample. Participants were identified by eliciting suggestions from key people. Those who were mentioned more than once and met the distribution requirements were invited to participate. The interviews utilised a qualitative approach. They were open-ended, to enable magistrates to identify areas they regarded as important.

12 Berman and Feinblatt, above n 3, 127; King, above n 3, 141.

Australia.¹³ New judging processes and philosophies are most visibly practised in formal problem-solving courts, such as drug courts, where the judicial officer works directly with a team that includes probation, corrections or other social welfare providers and interacts directly with the defendant on a frequent basis while monitoring program progress. These judging approaches involve some differences in judicial philosophy as well as different judicial practices,¹⁴ including an express concern for the wellbeing of those affected by court processes¹⁵ and a concern to not do harm.¹⁶ Common goals are to 'address the whole person, not simply a depersonalised offender'¹⁷ and to 'consider the effects ... [of the legal process] on people in court'.¹⁸ A longer term goal, perhaps, is to reduce future offending.¹⁹ Other developments which also entail a different judicial role include more active case management in criminal and civil matters,²⁰ an inquisitorial role, especially in small claims or minor civil actions,²¹ or even judicial mediation.²²

An active judicial officer is central to the implementation of more engaged judging. Judicial officers using new approaches will be more interested in the welfare of litigants, actively interact with and listen to participants, engage in direct dialogue and be less formal and impersonal than their more traditional counterparts.²³

A formal or express therapeutic jurisprudence orientation, or presiding over a successful problem-solving court, may require skills and training beyond those thought to be important for conventional judicial work,²⁴ but all judicial officers have the opportunity to engage in some aspects of non-traditional judging:²⁵ 'Every judicial officer is able to minimise negative effects and to promote positive effects on participant wellbeing through the nature of the interaction that takes place between the bench and the party involved'.²⁶

13 King et al, above n 1, 18, 36.

14 Ibid 227.

15 Roach Anleu and Mack, above n 10, 174.

16 King et al, above n 1, 26.

17 Ibid 83.

18 Goldberg, above n 2, 3.

19 King et al, above n 1, 5.

20 Ibid 184–200.

21 See, eg, *Magistrates Court Act 1991* (SA) s 38.

22 King et al, above n 1, 191.

23 Ibid 5, 16, 29–31; Freiberg, above n 2; Michael King, 'Applying Therapeutic Jurisprudence from the Bench: Challenges and Opportunities' (2003) 28 *Alternative Law Journal* 172; King, above n 1; Michael King and Kate Auty (eds), 'The Therapeutic Role of Magistrates' Courts' (2006) 1 *eLaw Journal: Murdoch University Electronic Journal of Law (Special Series)* <<https://elaw.murdoch.edu.au/archives/issues/special/TJELAW2.pdf>>; Michael King and Steve Ford, 'Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The Example of the Geraldton Alternative Sentencing Regime' (2006) 1 *eLaw Journal: Murdoch University Electronic Journal of Law (Special Series)* 9 <<https://elaw.murdoch.edu.au/archives/issues/special/exploring.pdf>>; King and Wager, above n 2; Marilyn McMahon and David Wexler, 'Therapeutic Jurisprudence: Developments and Applications in Australia and New Zealand' (2002) 20 *Law in Context* 1; David B Wexler, 'Therapeutic Jurisprudence: An Overview' (2000) 17 *Thomas M Cooley Law Review* 125.

24 See, eg, Farole et al, above n 2, 42; King, above n 1, 135–82.

25 See generally Farole et al, above n 2; Farole, above n 4; Goldberg, above n 2, 8.

26 King, above n 23, 172.

This focus on the nature and quality of the interaction between judicial officers and the individuals appearing before them, emphasises the significance of communication, especially listening, empathy and direct personal engagement. A more engaged judicial practice requires recognising and addressing emotions of those involved in the court process.²⁷ These developments draw on and parallel an increased awareness of the proper and important role of judicial emotion in judging, both within the judiciary and in academic writing.²⁸

An important question raised by these newer forms of judging is their legitimacy as a use of judicial authority.²⁹ Calling it non-adversarial judging raises this question quite sharply. Adversary ideology constructs a distinct role for the judge — a particular form of detached impartiality, requiring and allowing only reactive judicial participation, when called on by the parties.³⁰ Conventional adversarial judging is valued for its commitment to ‘the justice value of due process’,³¹ to protect legal rights and to limit the ‘scope for accusations of bias and favouritism’.³²

A proactive, engaged judge, implementing therapeutic jurisprudence values or even strong case management, can be regarded as disrupting this adversary paradigm and risking a loss of legitimacy.³³ ‘Proactive judging ... threatens some of the core judicial values such as impartiality, fairness, certainty and the separation of powers between the judiciary and the executive’.³⁴ There is a risk that ‘the informality and the immediacy of the judge’s relationship with the defendant

27 Goldberg, above n 2, 9–11; King, above n 2; King et al, above n 1; King, above n 1; Popovic, above n 2, 129; Satel, above n 2.

28 Terry A Maroney, ‘Law and Emotion: A Proposed Taxonomy of an Emerging Field’ (2006) 30 *Law and Human Behavior* 119; Martha C Nussbaum, ‘Emotion in the Language of Judging’ (1996) 70 *St John’s Law Review* 23; Richard A Posner, ‘Emotion Versus Emotionalism in Law’ in Susan A Bandes (ed), *The Passions of Law* (New York University Press, 2001) 309, 321–4; Roach Anleu and Mack, ‘Magistrates’ Everyday Work and Emotional Labour’, above n 5; Dave Cowan and Emma Hitchings, ‘“Pretty Boring Stuff”: District Judges and Housing Possession Proceedings’ (2007) 16(3) *Social & Legal Studies* 363.

29 Popovic, above n 2, 121.

30 Berman, above n 3, 82, quoting Richard Cappalli, Chief Judge Judith S Kaye (NY Ct App) and Administrative Judge Judy Harris Kluger (NY City Criminal Ct); Farole, above n 4, 52; King et al, above n 1, 2–5; Jeffrey M Shaman, ‘The Impartial Judge: Detachment or Passion?’ (1996) 45 *DePaul Law Review* 605; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) [1.143].

31 James Chriss, ‘The Drug Court Movement: An Analysis of Tacit Assumptions’ in James L Nolan (ed), *Drug Courts in Theory and in Practice* (Aldine de Gruyter, 2002) 189, 207.

32 Philip Bean, ‘Drug Courts, the Judge, and the Rehabilitative Ideal’ in James L Nolan (ed), *Drug Courts in Theory and in Practice* (Aldine de Gruyter, 2002) 235, 249.

33 Berman, above n 3, 82 quoting Richard Cappalli, Chief Judge Judith S Kaye (NY Ct App) and Administrative Judge Judy Harris Kluger (NY City Criminal Ct); Berman and Feinblatt, above n 3, 134; Freiberg, above n 3, 23; King, above n 3, 134; King et al, above n 1, 16–17, 32, 37, 87, 167, 184, 193, 210, 220; Daniel McGlone, ‘Drug Courts — A Departure from Adversarial Justice’ (2003) 28(3) *Alternative Law Journal* 136, 139.

34 Freiberg, above n 3, 23; Morris Hoffman, ‘The Denver Drug Court and its Unintended Consequences’ in James L Nolan (ed), *Drug Courts in Theory and in Practice* (Aldine de Gruyter, 2002) 67, 78–82; See, eg, *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146, 154 (Dawson, Gaudron and McHugh JJ); *Halsey v Milton Keynes General NHS Trust* [2004] 1 WLR 3002, 3007 (Dyson LJ).

confers a potentially ungovernable discretion³⁵. Such loss of legitimacy would undermine the very authority that these different forms of judging may depend on for their effectiveness or success.³⁶ On the other hand, as public confidence in the courts and legal system is low,³⁷ it may be that new forms of judging can draw legitimacy from different sources or values, such as an understanding of the ways court users experience procedural justice as developed by Tyler and others. This entails treating defendants with respect and dignity, acknowledging them as individuals rather than as a type — the defendant.³⁸ More engaged judging may increase public confidence in the courts and enhance judicial authority.³⁹

The analysis in this article is based on findings from extensive systematic national empirical research, conducted over several years, including national surveys of the Australian judiciary and a national court observation study of the lower courts in Australia.⁴⁰ The focus is on the attitudes and practices of magistrates in the lower courts, as that is where the most apparent opportunities and needs for new forms of judging are found and also where the judiciary has shown the greatest leadership and innovation.⁴¹

- 35 Richard Boldt, 'The Adversary System and Attorney Role in the Drug Treatment Court Movement' in James L Nolan (ed), *Drug Courts in Theory and in Practice* (Aldine de Gruyter, 2002) 115, 125; Bean, above n 32, 248–51.
- 36 Bartels mentions 'the benefit of the gravitas which accompanies the judicial officer's standing': Bartels, above n 2, 5; Boldt, above n 35; Popovic, above n 2.
- 37 Lynn Roberts and David Indermaur, 'What Australians Think about Crime and Justice: Results from the 2007 Survey of Social Attitudes' (Research and Public Policy Series No 101, Australian Institute of Criminology, 2009) 18; See also Sharyn Roach Anleu and Kathy Mack, 'The Work of the Australian Judiciary: Public and Judicial Attitudes' (2010) 20 *Journal of Judicial Administration* 3, 8.
- 38 Gill McIvor, 'Therapeutic Jurisprudence and Procedural Justice in Scottish Drug Courts' (2009) 9 *Criminology & Criminal Justice* 29; Edgar Allan Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, 1988); Tom R Tyler, 'Procedural Justice, Legitimacy and the Effective Rule of Law' (2003) 30 *Crime and Justice* 283; See also Tom R Tyler, 'The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience' (1984) 18 *Law & Society Review* 51; Tom R Tyler, 'What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 *Law & Society Review* 103.
- 39 Kathy Mack and Sharyn Roach Anleu, 'Performing Impartiality: Judicial Demeanor and Legitimacy' (2010) 35(1) *Law & Social Inquiry* 137; Mack and Roach Anleu, "'Getting through the List'", above n 5.
- 40 The *Magistrates Research Project* was funded initially by a University-Industry Research Collaborative Grant in 2001, with Flinders University and the Association of Australian Magistrates ('AAM') as the partners, and received financial support from the Australasian Institute of Judicial Administration ('AIJA'). From 2002 until 2005, it was funded by an Australian Research Council ('ARC') Linkage Project Grant (LP210306), 2002–05, with AAM and all Chief Magistrates and their courts as industry partners and with support from Flinders University as the host institution. From 2006, the *Judicial Research Project* has been funded by an ARC Discovery Grant (DP0665198), 2006–08. All phases of these research projects involving human subjects have been approved by the Social and Behavioural Research Ethics Committee of Flinders University. We are grateful to Russell Brewer, Carolyn Corkindale, Colleen deLaine, Elizabeth Edwards, Ruth Harris, Julie Henderson, John Horrocks, Lilian Jacobs, Leigh Kennedy, Lisa Kennedy, Mary McKenna, Rose Polkinghorne, Wendy Reimens, Mavis Sansom, Chia-Lung Tai, Carla Welsh, Rae Wood and David Wootton for research and administrative assistance in connection with this project.
- 41 Penny Darbyshire, 'An Essay on the Importance and Neglect of the Magistracy' (1997) *Criminal Law Review* 627; Jennie Cooke, 'Innovation and Transformation within Australian Courts: A Court Administrator's Perspective' (2006) 15 *Journal of Judicial Administration* 174; King et al, above n 1, 18; Popovic, above n 2, 123.

Examining the orientations which the judiciary bring to their everyday judging practices in a busy criminal court reveals qualities which are emphasised in the new forms of judging. Linking these empirical findings with policy initiatives may create opportunities for a better practical and emotional experience for those who appear within a conventional court context, in ways envisaged by the newer forms of judging. It may limit occasions for insensitive judging which can fuel public disrespect for courts and the legal system⁴² and it may improve job satisfaction for the judiciary.⁴³ This investigation also suggests ways in which newer forms of judging can be grounded in a better understanding of legitimacy of judicial authority.

III POSSIBILITIES FOR MORE ENGAGED JUDGING WITHIN THE AUSTRALIAN LOWER COURTS

The bulk of the work of lower courts in Australia, as in many other countries, involves criminal cases. In responses to the *National Survey of Australian Magistrates 2007*,⁴⁴ nearly all magistrates (91 per cent) report they sit in the criminal jurisdiction always (54 per cent) or often (37 per cent). Similar proportions report always or often sitting on family or domestic violence matters. Presiding at trial takes up a considerable proportion of magistrate and court time; 60 per cent of the typical days described by magistrates in the survey involve presiding at trial, taking an average of 234 minutes per day. However, the vast bulk of cases processed in magistrates' courts are resolved by guilty plea and entail court appearances for matters such as bail, pre-trial conferences, adjournments, guilty pleas and sentencing. Nearly two-thirds of magistrates' typical days (65 per cent) involve presiding at criminal non-trial proceedings, averaging 178 minutes per day.⁴⁵

Nearly all the specialist problem-solving courts in Australia with an explicit therapeutic jurisprudence orientation are part of the magistrates' courts. These

42 King et al, above n 1, 27.

43 Lynne A Barnes and Patrizia Poletti, *MERIT: Magistrates Early Referral into Treatment Program: A Survey of Magistrates* (Judicial Commission of New South Wales, 2000) 51; Deborah J Chase and Peggy Fulton Hora, 'The Implications of Therapeutic Jurisprudence for Judicial Satisfaction' (2000) 37 *Court Review* 12; Fulton Hora, above n 9.

44 The 2007 *National Survey of Australian Magistrates* was sent to all 457 magistrates throughout Australia in late May 2007. The survey was printed as a booklet with a heavy bright orange cover to distinguish it from an earlier magistrates' survey in 2002 and from the judges' survey. Two hundred and forty two surveys were returned, giving a response rate of 52.9 per cent. The magistrates who responded are generally representative of the magistracy as a whole, in terms of gender, age and time on the bench. There is some variation in terms of jurisdiction, with a slight overrepresentation of magistrates from New South Wales, compared with magistrates from other jurisdictions. The surveys were conducted as mail-back questionnaires. Participation was entirely voluntary. The research has been approved by the Social and Behavioural Research Ethics Committee of Flinders University. Because of very strong concerns from the judiciary about confidentiality of the data, no tracking or identification was used on the surveys, so the identity of those who returned the surveys and those who did not is unknown. All completed surveys are anonymous.

45 Mack and Roach Anleu, "'Getting through the List'", above n 5.

are mainly drug courts, but also include some mental health courts and domestic violence courts.⁴⁶ Specialist sentencing courts for Indigenous Australians also exist in several Australian jurisdictions; these often operate on principles and processes which are distinctive to their location, drawing on therapeutic jurisprudence and sometimes on restorative justice principles as well.⁴⁷ Magistrates' experience of judging within specially created and staffed problem-oriented courts is limited. Nearly half of Australian magistrates report that they had not sat in this type of court in the past year, whilst only three in ten (29 per cent), always (9 per cent) or often (20 per cent), do. The percentages who report sitting in specialised Indigenous courts, such as the Koori Court, Nunga Court or Murri Court, are similar.

This data suggests that relatively few judicial officers presiding in lower courts will have extensive opportunities to implement more engaged forms of judging in specialist courts. However, there is considerable potential for incorporating different approaches to judging in the general criminal courts, including family violence lists that do not operate as problem-oriented courts.⁴⁸ To explore this potential, this paper examines several different indicia or measures of engagement in relation to magistrates' judicial work. These include:

- Magistrates' attitudes towards core judicial values of impartiality, integrity and a sense of fairness.
- Magistrates' views about communication, being a good listener, compassion, empathy and managing the emotions of court users as essential skills for their everyday work.
- Magistrates' orientation to the social value of their work and improving the court system.
- The demeanours magistrates display towards different court users.
- The extent to which magistrates look at and speak to defendants when delivering decisions.

A Skills and Qualities Needed for Judicial Work

The views of Australian magistrates and judges about qualities and skills which are essential or important for their work is shown by their responses to a question in the *National Survey of Australian Magistrates 2007*, asking them to assess a list of qualities or skills in terms of their relative importance in the performance of daily tasks: 'In your view, how important are the following qualities or skills in the performance of daily tasks?' The response categories were: essential, very important, important, somewhat important and not important.

46 King et al, above n 1.

47 Ibid.

48 Farole et al, above n 2; Farole, above n 4; King and Wager, above n 2; Popovic, above n 2.

The most important type or category of qualities are what could be called legal or judicial values. Magistrates overwhelmingly agree that these values are central in the performance of daily tasks, more so than any other kinds of qualities. Nearly all respondents (98 per cent) identify integrity/high ethical standards as essential or very important, while almost all respondents (99 per cent) report that impartiality is essential or very important to their everyday work. Similarly, almost all (95 per cent) report that a sense of fairness is essential or very important. While these values are not unique or exclusive to legal or judicial work, they are understood and accepted as core principles for an independent judiciary in a common law adversary system.⁴⁹

This intense emphasis on impartiality may indicate a general acceptance of the conventional understanding of neutrality as emotionally detached and objective. According to conventional concepts, a judge is a 'passive arbiter';⁵⁰ the neutral, impartial judge is disembodied, detached, unemotional and impersonal.⁵¹ Judicial decisions are compelled by law, fact and reason and are not a personal choice of an individual judge.⁵² As Judge Sonia Sotomayor stated during the Senate hearings on her nomination to the US Supreme Court, '[i]t's not the heart that compels conclusions in cases, it's the law'.⁵³

There have been considerable challenges to the belief that neutrality and impartiality require disengagement and that lack of emotion is inevitably and essentially linked with impartiality. Maroney argues that the cultural script for judicial dispassion and emotional distancing is implausible, impossible and does not always serve good judging.⁵⁴ Our research finds that impartiality demands some kinds of personal or emotional engagement and some kinds of positive interaction.⁵⁵ The extent to which qualities necessary for this positive engagement are recognised as essential by the judiciary may suggest the extent to which newer forms of judging have a role to play within even conventional judging contexts.

49 Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (2nd ed, 2007) 3–7; King et al, above n 1, 167; Australian Law Reform Commission, above n 30, [1.143].

50 Richard Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge to Neutrality' (2007) 16(3) *Social & Legal Studies* 405, 406.

51 Susan A Bandes, 'Introduction' in Susan A Bandes (ed), *The Passions of Law* (New York University Press, 2001) 6; Susan A Bandes, 'Empathetic Judging and the Rule of Law' (2009) *Cardozo Law Review De Novo* 133 <http://www.cardozolawreview.com/content/denovo/BANDES_2009_133.pdf>; Bean, above n 32, 249; Terry A Maroney, 'The Persistent Cultural Script of Judicial Dispassion' (Unpublished Paper presented at the Annual Meeting of the Law and Society Association, Chicago, Illinois, 30 May 2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1656102>; Nussbaum, above n 28, 23; Shaman, above n 30.

52 Bandes, above n 51; Anne Boigeol, 'Male Strategies in the Face of the Feminisation of a Profession: The Case of the French Judiciary' in Gisela Shaw and Ulrike Schultz (eds), *Women in the World's Legal Professions* (Hart Publishing, 2003) 401, 416; Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism* (Dartmouth Publishing, 1999); Richard Moorhead and Dave Cowan, 'Judgecraft: An Introduction' (2007) 16(3) *Social & Legal Studies* 315.

53 Dahlia Lithwick, *What a Waste. The Sotomayor Hearings Were a Mass of Missed Opportunities for Republicans and Democrats Alike* (2011) Slate <<http://www.slate.com/id/2222936/pagenum/all/#p2>>.

54 Maroney, above n 51.

55 Mack and Roach Anleu, 'Performing Impartiality', above n 39.

Seven qualities from the survey data have been selected as having particular importance for more engaged judging values and practices: communication, being a good listener, courtesy, patience, compassion, empathy and managing emotions of court users. These qualities link to positive engagement and a recognition of some emotional aspects to judging.⁵⁶ They are not necessarily unique to newer forms of judging, nor do magistrates and judges who value these skills necessarily have a non-traditional orientation. In addition, other values or skills may be needed for more engaged judging, such as cultural awareness, which could be associated with good conventional judging as well.

Positive judicial attitudes towards the skills analysed indicate that there may be a platform or base on which to build a more explicitly engaged orientation for judicial officers or courts. Findings in relation to these qualities also suggest areas where judges may wish to develop or improve their abilities in order to take on a more engaged judicial practice or to implement therapeutic jurisprudence values. The findings also suggest directions for professional development or judicial education programs.

Table 1: Magistrates’ Attitudes Towards Selected Skills/Qualities (n=238–242*)

	Essential	Essential and Very Important
Communication	81%	97%
Being a good listener	61%	91%
Courtesy	56%	91%
Patience	50%	86%
Compassion	38%	70%
Empathy	32%	63%
Managing emotions of court users	25%	65%

**The number of respondents is given as a range. This indicates that not all magistrates who completed the survey responded to this question or to each part of it. Percentages are calculated on the basis of respondents who answered the particular component of the question.*

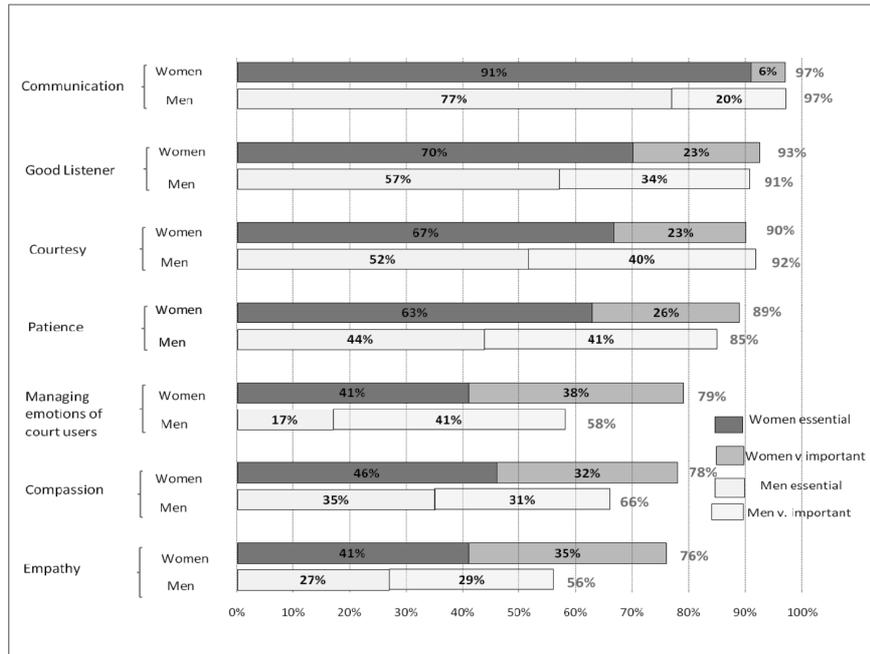
‘Communication’ and ‘being a good listener’ seem to be the core of the newer judging practices, especially therapeutic jurisprudence.⁵⁷ The positive attitudes magistrates express toward these qualities indicate a potential link to newer forms of judging.

Nearly all magistrates (97 per cent) consider communication to be essential (81 per cent) or very important in their daily work. There is some difference in the intensity of views of women compared to that of men ie whether they regard communication as essential or merely very important. Nine in ten female magistrates in the study (91 per cent) agree that communication is essential for the performance of daily work, compared with less than eight in ten (77 per cent) of male magistrates.

56 Ibid; Australasian Institute of Judicial Administration, above n 49, 17.

57 King, above n 2, 105.

Figure 1: Magistrates' Assessment of the Importance of Specific Interpersonal Qualities in the Performance of Daily Tasks (women n= 79–81*, men n=157–160*)



*The number of respondents is given as a range. This indicates that not all magistrates who completed the survey responded to this question or to each part of it. Percentages are calculated on the basis of respondents who answered the particular component of the question.

This finding suggests that female magistrates place a higher value on this ability than their male colleagues. However, this gap closes entirely when the essential and very important response categories are combined: 97 per cent of both men and women assess communication as very important or essential, so that any gender difference mainly reflects intensity of importance, rather than regarding something as important or not important.

The views expressed about the importance of being a good listener follow a similar pattern, though overall this quality is regarded as essential by smaller proportions of respondents. A clear majority of magistrates overall (61 per cent) consider being a good listener to be essential in their daily work, while 91 per cent of all magistrates consider listening to be essential or very important in their daily work. The 70 per cent of female magistrates who agreed that being a good listener is essential for the performance of daily work contrasts with 57 per cent of male magistrates. However, this gap closes entirely when the essential and very important response categories are combined: 91 per cent of male and 93 per cent of female magistrates assess being a good listener as very important or essential.

The gender differences that do exist may reflect a difference in orientation, perhaps based on women's and men's lived experiences or previous legal practice

roles and experience, or it may be linked to other characteristics women in the magistracy share. As a group they are younger and more recently appointed than their male colleagues. The average (and median) age for female magistrates is 50 compared with 57 for men in the magistracy. A stronger indication of age differences is that nearly all magistrates aged 58 and over are men (89 per cent); magistrates younger than 58 are about equally divided between men and women. A similar pattern exists for time on the bench. Of magistrates who have served at least 14 years, nearly all (91 per cent) are men, while those serving for less than 14 years are about equally divided between men and women.⁵⁸

Magistrates' endorsement of communication and being a good listener reflects values associated with newer forms of judging. Of course, communication and listening have a role to play in all forms of judging and these particular skills may not be understood in this survey in exactly the same way as in therapeutic jurisprudence analysis and practice. Nonetheless, there is a strong commitment within the Australian magistracy to these core elements of positive interaction, though more intensely expressed by the women, who are often younger and more recently appointed.

Views about courtesy and patience follow a similar pattern to attitudes regarding communication and being a good listener. Overall, around 9 in 10 magistrates regard these qualities as essential or very important in their daily work. A greater proportion of female magistrates identify courtesy and patience as essential, compared with male magistrates, but these gender differences disappear when the essential and very important categories are combined. As with communication, courtesy and patience are often needed in conventional judging, especially in the high volume, time-pressured lower courts. However, a commitment to these qualities is also a key element in newer judging practices and can provide an important link, as will be seen in the findings of the *National Court Observation Study* discussed below.

Two qualities often associated with more engaged forms of judging are empathy and compassion. Henderson describes empathy as an intellectual and emotional understanding of another's experience and circumstances, deriving from common experience or deliberate effort to generate insight or perception.⁵⁹ Bandes suggests that empathy is a capacity while compassion is an emotion.⁶⁰ Another writer suggests that compassion and empathy have similar qualities of shared humanity and sensitivity to the experiences and feelings of another, but compassion may involve an element of distance towards the other who is regarded with compassion.⁶¹

58 While it would be possible to compare younger women and younger men in the magistracy and recently appointed women and recently appointed men, the numbers in each cohort would be too small to draw helpful conclusions.

59 Lynne N Henderson, 'Legality and Empathy' (1987) 85(7) *Michigan Law Review* 1574, 1579; See also Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (UBC Press, 2004) 121–6.

60 Bandes, 'Empathic Judging and the Rule of Law', above n 51, 136.

61 Costa Avgoustinos, 'The Compassionate Judge' (2007)(1) *The Journal of Law and Social Justice* 1, 6–8.

Neither empathy nor compassion are regarded as essential qualities by the Australian magistracy generally; only 38 per cent regard empathy as essential for everyday work and only 32 per cent regard compassion as essential. This lesser regard for these qualities may reflect a larger ‘cultural script’ in which emotions are to play no role in judging.⁶² In Bandes’ description, the judiciary is ‘the last bastion of emotionless reason ... the judge is expected to be impartial, distant and detached and to let passion play no part in his [sic] decision making’.⁶³

Shaman articulates the tension differently: while much of the jurisprudence of judicial formalism, especially in its extreme form, has been ‘thoroughly discredited’,⁶⁴ there is still a ‘never-ending quest to make the law objective and devoid of human value judgments’.⁶⁵ This objectivity is seen as a means of limiting unbridled discretion, bias and paternalistic intrusion.⁶⁶

Increasingly, writers within and outside the judiciary point out that emotions are and should be an inevitable aspect of the act or process of judgment itself.⁶⁷ Shaman states that ‘making decisions about other people’s lives is a serious responsibility that engages both intellect and emotion’.⁶⁸ Nussbaum argues that judges must ‘perceiv[e] the individual humanity’⁶⁹ of those who appear before them, a process which is ‘rich in emotion’.⁷⁰ Mills argues this point even more strongly: ‘judging is expression, not repression, emotional engagement not detached distance’.⁷¹ However, not all emotional responses are seen as appropriate to judging⁷² and there are recent critiques of the modern emphasis on emotional expression, especially as an American phenomenon.⁷³

Male and female magistrates express different views about empathy and compassion. A larger proportion of female magistrates (41 per cent) regard empathy as essential, compared with only 27 per cent of male magistrates, and a similar gender difference is seen in relation to compassion, which 46 per cent of female magistrates regard as essential, compared with only 35 per cent of male magistrates. This difference does not vanish when the essential and very important response categories are combined: over three-quarters of female

62 Maroney, above n 51, 22.

63 Bandes, *The Passions of Law*, above n 51, 6.

64 Shaman, above n 30, 615.

65 Ibid.

66 Chriss, above n 31.

67 Maroney, above n 28, 121.

68 Shaman, above n 30, 632.

69 Nussbaum, above n 28, 24.

70 Ibid.

71 Linda G Mills, *A Penchant for Prejudice: Unraveling Bias in Judicial Decision Making* (The University of Michigan Press, 1999) 9.

72 Toni Massaro, ‘Show (Some) Emotions’ in Susan A Bandes (ed), *The Passions of Law* (New York University Press, 2001) 80; Richard A Posner, ‘Emotion Versus Emotionalism in Law’ in Susan A Bandes (ed), *The Passions of Law* (New York University Press, 2001) 309.

73 Frank Furedi, ‘Drug Control and the Ascendancy of Britain’s Therapeutic Culture’ in James L Nolan (ed), *Drug Courts in Theory and in Practice* (Aldine de Gruyter, 2002) 215, 221–5; James L Nolan, ‘Separated by an Uncommon Law: Drug Courts in Great Britain and America’ in James L Nolan (ed), *Drug Courts in Theory and in Practice* (Aldine de Gruyter, 2002) 89, 102–8.

magistrates (78 per cent) regard compassion as essential or very important, compared to two-thirds (66 per cent) of male magistrates. The gap is even larger with empathy: three-quarters of female magistrates (76 per cent) regard empathy as essential or very important, a view expressed by just over half (56 per cent) of men in the magistracy. This is more than a difference of intensity; it reflects a difference in the importance of these qualities to their work as judges and may indicate a greater affinity among female magistrates for newer forms of judging, such as therapeutic jurisprudence, which depend more on these qualities. It is also interesting that male magistrates substantially favour compassion over empathy, while female magistrates' views of the two are more similar, given that compassion may be a more distanced quality and perhaps more familiar to legal process, as a form of mercy.⁷⁴

Of the seven qualities in the survey which are most closely related to newer forms of judging, the one least valued is 'managing the emotions of court users'. Overall, only one-quarter of magistrates (25 per cent) regard this as essential, while two-thirds (65 per cent) view it as essential or very important. There is, however, a considerable gender difference. Only 17 per cent of male magistrates regard this as essential compared with 41 per cent of female magistrates; a contrast that persists with 79 per cent of female magistrates regarding this quality as essential or very important, compared with only 58 per cent of male magistrates. This finding is consistent with their views in relation to compassion and empathy, suggesting that some female magistrates may bring greater emotional engagement to their work and towards those appearing before them than some of their male colleagues. It is important to emphasise, however, that there is a proportion of male magistrates who value these qualities also, though less intensely than female magistrates. Interestingly, the male magistrates who value these qualities are not disproportionately younger or more recently appointed than other male magistrates, as might be expected.

Placing a lesser value on managing emotions as an essential skill for judicial work, conforms very closely to the adversary ideal of the judicial officer as above the fray, with no responsibility to be proactive in relation to the personal human needs of those appearing in court.⁷⁵ However, in first instance courts, where parties are often unrepresented by lawyers, the judicial officer must deal directly, and often quickly, with diverse members of the public and their emotions, as well as the legal issues they present.⁷⁶ However, this emotional work is rarely acknowledged as essential by the magistracy, as reflected in the survey responses; though considerably higher proportions of female magistrates regard managing emotions as more important than their male colleagues do.

The relative values magistrates place on these five skills and qualities gives an insight into the potential for a more engaged approach to judging in their courts. A core element of newer forms of judging, whether in a problem-solving court

⁷⁴ Avgoustinos, above n 61.

⁷⁵ King, above n 3, 134.

⁷⁶ Roach Anleu and Mack, 'Magistrates' Everyday Work and Emotional Labour', above n 5.

or a criminal court more generally, is the nature of the interaction between the judicial officer and those appearing in court. While all five qualities discussed will enhance the respectful interactions which are essential for non-traditional judging, not all are valued to the same extent by Australian magistrates.

B Orientation to Improving the Court System

Another way to assess the potential for magistrates to undertake newer forms of judging, or to bring a therapeutic approach to their everyday work, outside of specialist problem-solving courts, is to consider whether they have a positive orientation toward change within the courts, by wanting to undertake work that is of value to society and to improve the court system. These issues were raised in a question in the *National Survey of Australian Magistrates 2007* which asked respondents to indicate the degree of importance of possible factors contributing to their decision to become a magistrate. Response choices were: very important, important, somewhat important, not very important, not important. Magistrates who regard value to society as important and who are oriented toward improving the court system, may be more sympathetic to newer forms of judging which hold the promise of being better for court users.

For the magistracy as a whole, over two-thirds (68 per cent) identify value to society as an important (40 per cent) or very important (28 per cent) reason to become a magistrate. The proportions of female magistrates are notably higher: 42 per cent of female magistrates regard this as a very important reason for undertaking the role, compared with 21 per cent of their male colleagues, and this difference persists when considering the very important and important categories combined: 83 per cent of female magistrates express this view compared with 61 per cent of their male colleagues, suggesting a contrast in orientation to the role, rather than just a difference of intensity. Equally high proportions of male and female magistrates, eight in ten, indicate they are satisfied or very satisfied with the importance to society of their work, with a slightly higher proportion of female magistrates (30 per cent) indicating they are very satisfied, compared with 20 per cent of male magistrates. The views expressed in responses to the 2007 survey are similar to those expressed in a similar survey conducted in 2002.⁷⁷

These findings suggest that women are more strongly motivated to become magistrates in order to do work that will benefit society. This may be consistent with their greater endorsement of qualities such as empathy and compassion, suggesting a greater interest in the needs of those appearing before the court and a better understanding of how judging can be of value to society.

Views about improving the court system are more varied, perhaps in part because there may be different views about whether this is an appropriate role for a judicial officer. This has implications for the potential for judicial officers to implement

⁷⁷ Roach Anleu and Mack, above n 10, 173; Roach Anleu and Mack, 'Magistrates, Magistrates' Courts and Social Change, above n 5.

newer forms of judging.⁷⁸ Therapeutic jurisprudence and other less adversarial forms of judging seem to have arisen within the judiciary from those who see the need for improvement and accept that the judiciary has an obligation to provide leadership to make changes.⁷⁹

Relatively few magistrates indicate that a desire to improve the court system was important (18 per cent) or very important (26 per cent) in their decision to become a magistrate, though views of women and men differ strongly. Only 12 per cent of male magistrates regard this as a very important reason, compared with nearly one-third of female magistrates (31 per cent), while over half the female magistrates (56 per cent) regard this as important or very important compared with only 38 per cent of male magistrates. This suggests that women who enter the magistracy have a stronger orientation towards changes which will improve the court system compared with their male colleagues, though it is not especially strong in either group.

Views about satisfaction with scope for improving the court system are somewhat harder to interpret. About four in ten male and female magistrates are neutral on this point, perhaps indicating that they are neither satisfied nor dissatisfied, or this may be a way of indicating that it is not a role they see as available or appropriate. Similar proportions of male and female magistrates, around three in ten, indicate satisfaction with this aspect of their work, while slightly higher proportions of women (33 per cent) indicate that they are either very dissatisfied or dissatisfied, compared with 23 per cent of their male colleagues. Female magistrates' slightly greater dissatisfaction may be, in part, a product of greater expectations in this regard.

Magistrates overall display a very strong commitment to doing work that is valuable to society. If newer forms of judging can be persuasively shown to provide greater value, this would be an important way of generating interest among the magistracy as a whole, including among male magistrates. Arguments for newer forms of judging that rest more narrowly in improving the court system may get more traction with female magistrates in the lower courts than with male magistrates.

To sum up, the most direct link between magistrates' attitudes and newer forms of judging is the very high value magistrates place on communication and listening, qualities which are necessary for positive interaction between the judicial officer and court users. Magistrates endorse compassion and empathy as essential to a lesser extent and generally do not regard managing the emotions of court users as particularly important, perhaps reflecting the view that emotions have no place in judging. Magistrates also exhibit a very strong commitment to doing work that is valuable to society, while a smaller proportion are motivated to improve the court system. All these qualities are regarded as more important by female magistrates rather than male magistrates, especially those related to emotions, suggesting that newer groups of judges may be more oriented or attracted to newer forms of judging.

78 Popovic, above n 2.

79 Berman, above n 3, 80, quoting Chief Justice Kathleen Blatz (Minn Sup Ct); Cannon, above n 9; Fulton Hora, above n 9; *ibid.*

The values which magistrates place on qualities of engagement, value to society or desire to improve the court system, are always expressed within the bounds of magistrates' commitment to core legal values. The importance of communication and listening and the moderate value placed on empathy and compassion, may implicitly reflect an orientation towards engaged judging. Overwhelmingly, magistrates and judges consider three legal values — impartiality, integrity/high ethical standards and a sense of fairness — to be essential in their daily work and there is a very high level of agreement in this regard. While these values are not inherently inconsistent with greater engagement, they are often regarded as opposing active involvement, especially conflicting with anything which entails an express emotional component. This tension is one source of concern about the legitimacy of the newer forms of judging, as discussed more fully below.

C Judicial Behaviour in Court

The survey responses are important in indicating the attitudes and values which magistrates express about engagement or interaction in court. Actions and behaviours of magistrates in court provide insight into the extent to which such values are or can be acted on.

The *National Court Observation Study* identifies and analyses the actual behaviour of magistrates in a busy criminal court context. Structured observations were made of magistrates presiding in general criminal lists, in 30 different court sessions in different locations throughout Australia.⁸⁰ The criminal list includes people charged with a crime making their first appearances in court after summons or arrest, people making second or further appearances as part of preliminary procedures before trial and matters set for guilty pleas or sentencing and bail applications. It does not include trials. Those appearing in the criminal lists may be in custody or on bail and either legally represented or not.

The criminal list is an occasion with considerable opportunities and need for more engaged judging, as well as substantial barriers to such judging because of time and case pressure.⁸¹ Three forms of judicial behaviour are considered here as possible indicia of engagement: the demeanours magistrates display towards others in court and whether the magistrate looks at or speaks to the defendant when communicating decisions. As Goldberg points out — ‘words, actions and demeanour will invariably have an impact on the people ... in the courtroom’.⁸²

1 Demeanour

Magistrates' demeanours were categorised in five ways:

- Welcoming, good natured.

⁸⁰ Mack and Roach Anleu, “Getting through the List”, above n 5; Mack and Roach Anleu, above n 55.

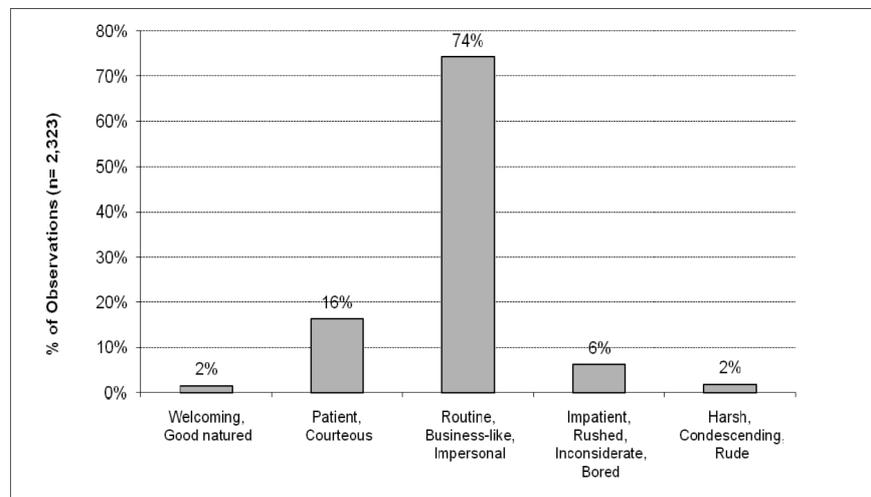
⁸¹ Bartels, above n 2; Farole et al, above n 2, 41.

⁸² Goldberg, above n 2, 4.

- Patient, courteous.
- Routine, business-like, or impersonal.
- Inconsiderate, impatient, rushed or bored.
- Harsh, condescending, or rude.⁸³

These categories are based on our preliminary observations and on other research measuring or describing judicial demeanour.⁸⁴

Figure 2: Demeanour as a Percentage of Observed Interactions⁸⁵



In three-quarters of interactions, magistrates displayed a routine demeanour. As discussed above, magistrates place an extremely high value on impartiality as an essential quality in their everyday work. The predominance of the routine demeanour indicates that magistrates, on the whole, accept the conventional view that impartiality should be expressed in a detached or impersonal manner.⁸⁶

Magistrates also displayed other demeanours, especially patience and courtesy, suggesting more engagement. In particular, the patterns of demeanours

⁸³ Mack and Roach Anleu, above n 55, 148.

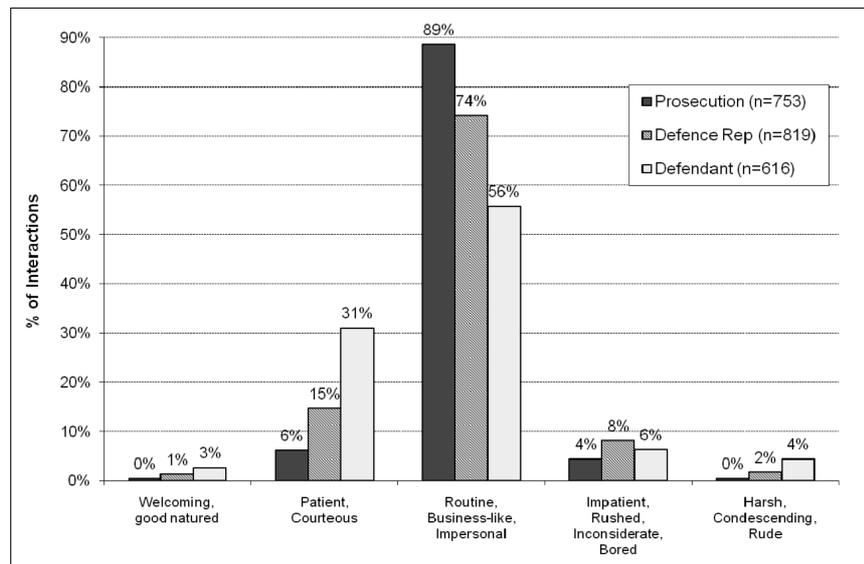
⁸⁴ John M Conley and William M O’Barr, *Rules Versus Relationships: The Ethnography of Legal Discourse* (University of Chicago Press, 1990) 30; Rosemary Hunter, ‘Styles of Judging: How Magistrates Deal with Applications for Intervention Orders’ (2005) 30(5) *Alternative Law Journal* 231, 233; Maureen Mileski, ‘Courtroom Encounters: An Observational Study of a Lower Criminal Court’ (1971) 5(4) *Law & Society Review* 473, 523–5; James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (Northeastern University Press, 1999) 97–111. More specifically, emotionally oriented qualities such as empathy, compassion or managing emotions were not specifically coded. These qualities will be investigated in future analysis of transcripts of the matters observed.

⁸⁵ Often, a magistrate would display multiple demeanours in a particular matter, with different demeanours towards different participants, for example, routine towards the prosecution and patient towards the defendant. Or, the magistrate might have more than one attitude towards a participant, perhaps beginning with a business-like manner then becoming impatient. To account for this, we recorded both primary and secondary demeanours for 20% of interactions. All are included in Figure 2.

⁸⁶ Popovic, above n 2, 129.

magistrates displayed to the prosecution, to defence representatives and to the defendants were somewhat different, as shown in Figure 3 below.

Figure 3: Demeanour Toward Different Participants



By showing patience most often towards defendants and a routine demeanour most often toward prosecutors, magistrates indicate an implicit understanding that impartiality can be shown in different ways. Using detachment more for prosecutors and patience more for defendants reflects the different needs and formal roles of these court users in an adversary system. This contrast indicates that magistrates accept the need to display greater engagement in some circumstances. These variations in magistrate behaviour also suggest a potential for a more engaged, newer form of judging.

2 Magistrates Speaking to and Looking at Defendants

Two other indicators of engagement, apart from demeanour, are considered here: whether the magistrate speaks directly to defendants or looks at defendants, for more than a brief glance, when communicating decisions and whether the kind of decision or the presence of a defence representative makes a difference to this behaviour.⁸⁷

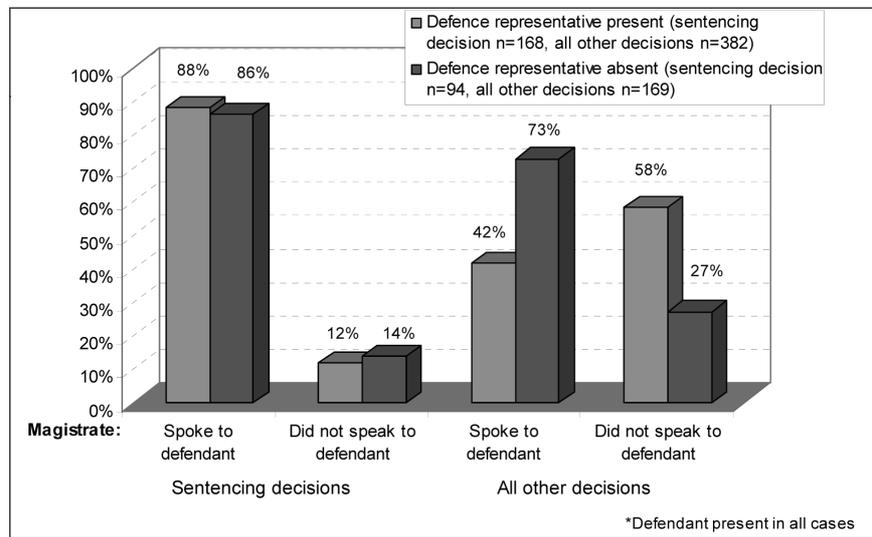
Perhaps the most important occasion for direct engagement, emotion and emotion management in court is sentencing. Conventionally, magistrates can seek to elicit a wide range of emotions from defendants during sentencing: remorse, guilt,

⁸⁷ Sharyn Roach Anleu and Kathy Mack, 'Sentencing as an Instance of News Delivery: A View from the Magistrates Court' in Tim Marjoribanks et al (eds), *Re-imagining Sociology, Conference Proceedings of the Annual Conference of The Australian Sociological Association* (TASA, 2008).

shame, perhaps relief or gratitude and fear of the consequences of re-offending.⁸⁸ Alternatively, speaking directly to defendants and looking at them when imposing a sentence is a central opportunity to display the direct engagement of the newer forms of judging.

In nearly nine out of ten matters when the defendant was being sentenced, the magistrate spoke directly to the defendant, whether or not a defence representative was present (Figure 4). Similarly, the magistrate looked at the defendant for more than a brief glance in eight out of ten sentencing decisions, whether a defence representative was present or not.

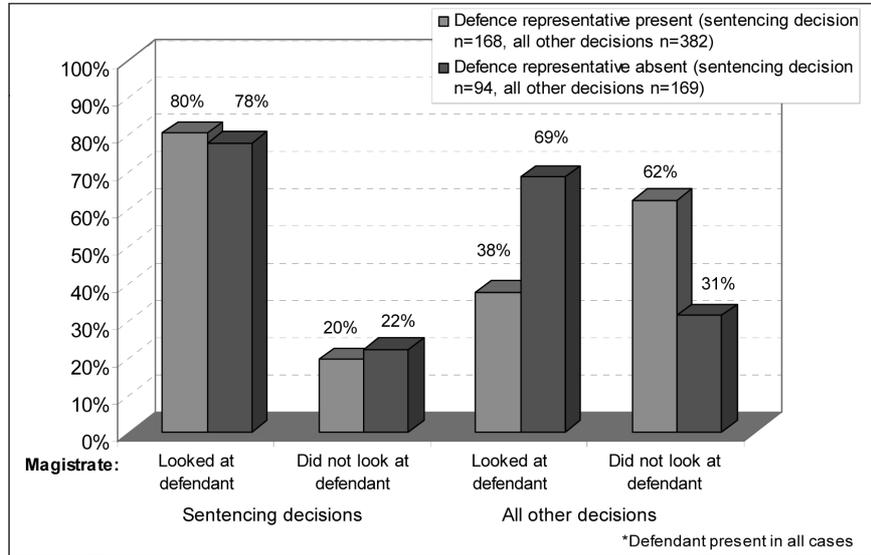
Figure 4: Magistrate Speaking to Defendants by Presence of Defence Representative



This behaviour suggests considerable engagement, especially in light of all the other demands on the magistrate's attention in a busy list court. Magistrates are often required to read, write or enter information into a computer as well as to listen to oral presentations, while formulating an appropriate judicial decision or comment. These pressures can result in sentencing without the magistrate looking at the defendant at all, as described by Administrative Judge Kluger.⁸⁹

88 Maroney, above n 28; Roach Anleu and Mack, 'Magistrates' Everyday Work and Emotional Labour', above n 5.

89 Berman, above n 3, 81.

Figure 5: Magistrate Looking at Defendants by Presence of Defence Representative

Under conventional adversary principles, it would be expected that the magistrate might not engage directly with a defendant who has a legal representative in court. It would also be expected that the magistrate would not speak directly to a represented defendant, but would speak to the defence representative instead.⁹⁰ The behaviour identified in this study shows that magistrates display much greater direct engagement with defendants when sentencing: magistrates look at or speak to defendants in nearly all matters, whether the defendant was legally represented or unrepresented.

In contrast, when communicating other kinds of decisions, such as bail, adjournments or scheduling the case for another procedure, magistrates display less direct engagement and do not speak directly to or look at defendants as often when they are legally represented. In over half of the non-sentencing matters (58 per cent) the magistrate did not speak directly to the defendant, if the defendant was legally represented. Similarly, in a majority (62 per cent) of non-sentencing matters, the magistrate did not look at the defendant if there was a legal representative present. However, if the defendant was unrepresented, the magistrate spoke directly to the defendant in nearly three-quarters (73 per cent) of matters, and looked at an unrepresented defendant, in seven in ten matters.

These findings suggest that unrepresented defendants may present particular challenges for magistrates.⁹¹ This is confirmed by other data from the survey, where 57 per cent of magistrates indicated that their time is always or often taken

90 Roger Neil Douglas and Kathy Laster, 'Reforming the People's Court: Victorian Magistrates' Reactions to Change' (Report, Criminology Research Council, 1992) 35; Freiberg, above n 2, 217; King, above n 2; King et al, above n 1, 16; Popovic, above n 2, 129.

91 Moorhead, above n 50.

up explaining things to unrepresented litigants. Unrepresented defendants also create opportunities for more direct engagement on the part of the magistrate, which might not be available if a legal representative is present. Magistrates respond to these circumstances by looking at and speaking directly to unrepresented defendants in relation to all kinds of decisions.

It is important not to overstate these findings, however. Much of the literature on more engaged judging emphasises the need for interaction and for listening to what the defendant says and responding appropriately, including active listening or motivational interviewing.⁹² The *National Court Observation Study* data reported here does not include findings on whether the magistrate was looking at the defendant when the defendant was speaking, or when the magistrate was speaking, or in both circumstances. However, future research, including analysis of transcripts, will enable a greater insight into these aspects of magistrates' behaviour, investigating the occurrence of turn-taking and the responsive dialogue seen as essential to more engaged judging.⁹³

These findings show that magistrates demonstrate particular engagement, speaking to and looking at all defendants when sentencing and also with unrepresented defendants in all kinds of decisions. This confirms sentencing as a situation with potential for more engaged judging to be implemented.⁹⁴ This finding also links to the conclusions of Farole et al, that the aspect of problem-solving judicial practice which is the easiest to apply in conventional courts is direct engagement.⁹⁵ Further, it shows that magistrates, while maintaining strong commitment to impartiality and acting within a conventional criminal court context, can provide different ways of engaging with defendants in different circumstances.

These findings also have significant implications for understanding the legitimacy of newer forms of judging. When magistrates convey the sentence by looking at and speaking directly to the defendant, in line with ordinary, everyday conversational convention, regardless of the presence of defence representatives, it entails a direct, personal encounter or engagement with the defendant. These actions help convey respect, which is a key part of more engaged judging.⁹⁶ Engaging with the defendant suggests that the magistrate regards him or her as a person worthy of direct communication. This kind of direct engagement and the respect it implies are key elements of the values of procedural justice as articulated by Tyler and

92 Goldberg, above n 2, citing Bruce Winick, 'Therapeutic Jurisprudence and Problem Solving Courts' (2003) 30 *Fordham Urban Law Journal* 1055; King, above n 2, 97; King et al, above n 1, 5, 16, 29, 31; King, above n 1.

93 King, above n 2, 102.

94 Ibid 101.

95 Farole et al, above n 2, 41.

96 King, above n 2, 95.

others.⁹⁷ The defendant's acceptance of the outcome, especially if it is regarded as bad news, may be facilitated by this direct communication and engagement and may have a more helpful than harmful impact, as envisaged by newer forms of judging.

The findings of the *National Court Observation Study* indicate that magistrates acting within a very conventional and high pressured judicial environment can find time and space for more engaged behaviour, through their demeanour and by looking at and speaking directly to defendants, especially in relation to communicating the crucial sentencing decision. The demeanours magistrates display and the time management they undertake, reflect important features of procedural fairness, as articulated by Tyler and others, which is a key element in the acceptance of judicial authority as legitimate and as worthy of being obeyed.⁹⁸

D Capacity to Act on More Engaged Judging Values and Practices

Even if an individual magistrate or a court wishes to implement a more proactive, engaged approach in a conventional court context, there are considerable practical and jurisprudential constraints to doing so. These include:⁹⁹

- The pressure of time and the volume of work, especially in criminal lists.
- Bureaucratic performance measures.
- Concern about limited judicial skills, training and competence.
- The link between judicial legitimacy and a limited adversarial judicial role, especially impartiality and judicial independence.

An important aspect of criminal lists in Australian magistrates' courts is time. Data from the *National Court Observation Study* shows that magistrates must deal with individual matters very quickly to get through the list. Five percent of the matters observed took 15 seconds or less.¹⁰⁰ One quarter (25 per cent) of all matters were dealt with in less than one minute.¹⁰¹ Half of all matters observed were completed in only two minutes and 20 seconds per matter or less.¹⁰² Ninety five percent of all matters observed were dealt with in less than 15 minutes.¹⁰³

97 Mack and Roach Anleu, "Getting through the List", above n 5; Mack and Roach Anleu, above n 55; Lind and Tyler, above n 38, 81; Tyler, 'Procedural Justice, Legitimacy and the Effective Rule of Law', above n 38; Tyler, 'The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experiences', above n 38; Tyler, 'What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures', above n 38.

98 Mack and Roach Anleu, "Getting through the List", above n 5; Mack and Roach Anleu, above n 55, 139; Tyler, 'Procedural Justice, Legitimacy and the Effective Rule of Law', above n 38, 350–1.

99 Bartels, above n 2; Farole et al, above n 2, 41; Farole, above n 4, 63–5; Goldberg, above n 2, 12; Popovic, above n 2, 90.

100 Mack and Roach Anleu, "Getting through the List", above n 5, 349–50.

101 Ibid.

102 Ibid.

103 Ibid.

Magistrates are conscious of the time pressures of their work. In the *National Survey of Australian Magistrates 2007*, nearly three-quarters agreed or strongly agreed that the volume of cases is unrelenting.¹⁰⁴ Other lower court research reports similar findings about the rapid pace of case processing.¹⁰⁵

Ironically, time and case pressure have been described as motives for introducing more engaged judging as a way to reduce the revolving door quality so often experienced in the lower courts.¹⁰⁶ A US survey identifies lack of support staff and services and heavy caseload as the main obstacles to undertaking problem-solving practice.¹⁰⁷ These same time and case pressures may affect Australian magistrates' capacity to provide the engagement which is necessary for newer forms of judging, even for those judicial officers who wish to judge differently.

A different constraint is bureaucratic performance measures. One development that has occurred along with managerial judging is greater emphasis on measures of outputs or case processing time and volume.¹⁰⁸ In the 2002 Survey, an older (aged 60), long-serving (17+ years on the bench) male magistrate observes:

In general the position has enabled me to serve the community in a manner that gives ongoing satisfaction. However, the structure being imposed is meaning that decisions, as opposed to listening to the defendants and clients, is [sic] paramount.

This magistrate appears to regard listening to the defendant, a key element in more engaged judging and central to norms of procedural fairness, as a core aspect of judicial work. This magistrate also feels that administrative structures require the production of 'decisions' regardless of process. He attributes this to the need for government and court administrators to quantify outputs or to speed case processing times, as key components of court efficiency measures.¹⁰⁹ However, any move to a more engaged judicial orientation, whether in dedicated problem-solving courts or more widely, must be developed within a framework of limited resources and large caseloads.¹¹⁰

Judicial training, starting with law school, emphasises specific legal skills and legal analysis within an adversary context.¹¹¹ Certainly, a problem-solving court using therapeutic jurisprudence principles in an extended way, requires particular expertise and training which not all the judiciary possess.¹¹² More

104 Roach Anleu and Mack, above n 10, 173.

105 Roy B Flemming, Peter F Nardulli and James Eisenstein, *The Craft of Justice: Politics and Work in Criminal Court Communities* (University of Pennsylvania Press, 1992); Hunter, above n 84; Mileski, above n 84.

106 Berman, above n 3, 80, referring to the comments of Chief Judge Judith S Kaye (NY Ct App).

107 Farole et al, above n 2, 41; Farole, above n 4, 63–5.

108 King et al, above n 1, 38, 184–94.

109 Roach Anleu and Mack, above n 10, 182.

110 King et al, above n 1, 168; Charlotte Stockwell, 'Managing the Transition from the Adversarial to the Non-Adversarial Court: A Court Administrator's Perspective' (Paper presented at the Non-Adversarial Justice: Implications for the Legal System and Society Conference, Melbourne, 4–7 May 2010).

111 King et al, above n 1, 240–53.

112 Ibid 167; King, above n 1.

subtly, concerns about lack of competence may deter some in the judiciary from attempting more engaged judging even in a conventional context.¹¹³ There are no guides, such as precedent or readily available ‘best practice’ models.¹¹⁴ Judicial training in interpersonal skills may emphasise courtroom control rather than engagement or non-adversarial practices.¹¹⁵ Nonetheless, the research here has shown that, in a limited way, more engaged practices are possible by utilising ordinary human interactive behaviours rather than relying on restrictive conventional adversarial judicial conduct. As Dear points out, such conduct need not be regarded as uniquely therapeutic: it is simply ‘human decency’.¹¹⁶

Perhaps the greatest obstacle is the concern that judicial legitimacy is and must be based on a limited adversarial judicial role. There are at least two aspects to this concern: judicial independence and judicial impartiality.

A teamwork approach, as used in problem-solving courts, is said to threaten judicial independence from the executive.¹¹⁷ The judiciary may take or appear to take on executive roles, or the executive may appear to have too much influence on judicial decisions or individual cases.¹¹⁸ This may also raise constitutional concerns about limitations on judicial power.¹¹⁹ However, this problem only occurs in specialist problem-solving courts, not in more interactive judging in conventional courts and must therefore be addressed within the context of those specialist problem-solving courts. A similar concern is raised by possible *ex parte* communications or team meetings in courts where the defendant is not present.¹²⁰ These must be addressed as part of the practice within such courts.¹²¹

Of more concern in a conventional context is the frequent assertion in literature that more engaged judging threatens or undermines impartiality.¹²² When the claimed tension with impartiality is examined closely, it turns out to have distinct elements, turning on the role of emotion. One is a concern that the emotional engagement involved in newer forms of judging, especially judicial monitoring of success and failure in a treatment program, may conflict with neutrality. As Chriss points out, while conventional, high volume lower courts may be ‘routinized, impersonal, and anonymous [they are] also much less intrusive and paternalistic’.¹²³ A related suggestion is that more individualised treatment can

113 Farole et al, above n 2, 42; Farole, above n 4, 63; King et al, above n 1, 220.

114 King et al, above n 1, 168.

115 Ibid 210.

116 Dear, above n 4, 159.

117 Farole, above n 4, 55.

118 Ibid; Lorraine C Arkfeld, ‘Ethics for the Problem-Solving Court Judge: The New ABA Model Code’ (2007) 28(3) *The Justice System Journal* 317; Bartels, above n 2; Berman and Feinblatt, above n 3, 134–5; King et al, above n 1.

119 King et al, above n 1, 221–7.

120 Arkfeld, above n 118.

121 Greg Berman and John Feinblatt, *Good Courts: The Case for Problem-Solving Justice* (New Press, 2005) 117–22.

122 Ibid 173–88; Arkfeld, above n 118; Bartels, above n 2, 4; Berman and Feinblatt, above n 3, 134; Farole, above n 4, 66; Goldberg, above n 2, 12; Satel, above n 2; Christopher Slobogin, ‘Therapeutic Jurisprudence: Five Dilemmas to Ponder’ (1995) 1 *Psychology, Public Policy, and Law* 193.

123 Chriss, above n 31, 199.

give too much power and discretion to an individual judge and is not consistent with the rule of law.¹²⁴ Both concerns rest, in part, on a particular understanding of impartiality as detachment and neutrality as lack of emotion in judging, linked to a belief that recognising the defendant as a person, with human qualities, is somehow inconsistent with the appropriate application of law. This image of judging as essentially and necessarily lacking in emotion has been effectively challenged from a range of perspectives.¹²⁵

It is neither accurate nor appropriate as a judicial philosophy or method to deny all individualised judging and all emotion in judging. One of the great achievements of the newer forms of judging is to show that the emperor of judicial emotionless has no clothes.

King states that ‘judging is not static’.¹²⁶ Technology in many forms and active judicial case management are now widely accepted within a conventional adversary framework of legitimacy. An important tenet of the new judging philosophy is to draw on social science.¹²⁷ Using research on emotions and on the ways litigants experience the legal process allows judges today to draw on procedural fairness as an additional source of legitimacy for more engaged judging, as well as a richer understanding of neutrality in adversarial judging.¹²⁸

IV CONCLUSION

When the attitudes and actions of the judiciary presiding in Australian lower courts are investigated in depth, several findings significant to the potential of more engaged judging emerge:

- Core judicial values, especially impartiality, integrity and a sense of fairness are the most highly valued qualities for magistrates’ everyday work.
- Qualities associated with a more engaged approach — communication and being a good listener, as well as patience and courtesy — are also identified as essential aspects of judicial work. Other qualities with a more explicit emotional component, compassion and empathy, are less widely regarded as essential, though still identified as at least very important. Managing emotions of court users is somewhat less valued.
- Two aspects of orientation to change might support development of new forms of judging. Desire to do work of value to society is very important to many magistrates’ decision to become a magistrate and satisfaction with

124 Bean, above n 32, 235; Chriss, above n 31; Slobogin, above n 122, 210.

125 Bandes, above n 51; Maroney, above n 51.

126 King, above n 2, 94.

127 Ibid; Slobogin, above n 122, 198.

128 Lind and Tyler, above n 38; Maroney, above n 51; Tyler, ‘Procedural Justice, Legitimacy and the Effective Rule of Law’, above n 38; Tom R Tyler et al, ‘Reintegrative Shaming, Procedural Justice, and Recidivism: The Engagement of Offenders’ Psychological Mechanisms in the Canberra Rise Drinking-and-Driving Experiment’ (2007) 41(3) *Law & Society Review* 553.

this aspect of their work is high. Fewer were motivated to enter the judiciary by a desire to improve the court system and satisfaction with this aspect of work is mixed.

- Judicial behaviour when conducting a busy criminal list court demonstrates direct engagement in several ways: variations in demeanour to different participants, reflecting their different roles and needs, and looking at and speaking directly to defendants in particular contexts. Other aspects of in-court conduct emphasise limited judicial engagement, especially limited emotional expression.

A core element of more engaged judicial practice, whether in a problem-solving court or a criminal court more generally, is the nature of the interaction between the judicial officer and those appearing in court. Magistrates, especially women, generally place a very high value on communication and a high value on being a good listener as essential skills. Observational research also finds that magistrates sometimes display considerable direct and often positive engagement with defendants through their demeanour and by looking and speaking directly to defendants, when delivering sentencing decisions, and to unrepresented defendants in all decisions.

Magistrates who display positive engagement as part of their daily work in the criminal courts are implicitly promoting the values of less adversarial judging and perhaps moving towards a goal of generating a positive impact from the criminal justice process itself, or at least reducing any harm created by the legal process. These attitudes and practices tend to support Popovic's observation that 'many judicial officers practise elements of therapeutic jurisprudence without being aware that that's what they are doing'.¹²⁹ For example, it is routine for some US judges to address defendants directly.¹³⁰ More generally, Farole suggests that US judges use some forms of problem-solving practice but only in limited or occasional ways.¹³¹ Cannon puts the case more strongly: 'Therapeutic jurisprudence has been practised by many magistrates for many decades but without a label. Calling it [therapeutic jurisprudence] recognises and legitimises an attitude to judging that is desirable'.¹³²

However, other survey responses and court observation findings suggest that few magistrates might acknowledge a commitment to or even acceptance of a new approach to judging. The high value which magistrates place on qualities of interpersonal interaction is still less than magistrates' commitment to core legal values. Although there is a strong commitment to the importance of communication and listening, which may implicitly reflect more engaged values, overwhelmingly magistrates consider three legal values — impartiality, integrity

129 Popovic, above n 2, 128.

130 Farole et al, above n 2, 41.

131 Farole, above n 4, 59.

132 Cannon, above n 9, 129, 132; Hugh Dillon, 'The Law and Social Change — A Magistrate's Perspective' (2006) 7 *Judicial Review (Judicial Commission of NSW)* 345, 355–6.

and high ethical standards, and a sense of fairness — to be essential in their daily work and there is a very high level of agreement on this point.

Impartiality and integrity are, of course, essential to all forms of judging and many professional practices such as mediation. However, it appears that magistrates endorse a particular conventional understanding of impartiality as unemotional and detached, which may limit the potential for newer forms of judging. The attitude that judging is not emotional is reflected most strongly in magistrates' frequent use of a routine, impersonal and business-like demeanour, which confirms the primacy of this relatively conventional understanding of the judicial role among magistrates. The lesser — though still high — importance magistrates place on empathy and compassion as part of their everyday work, suggests that there is some commitment to engagement through these human qualities, tempered perhaps by the conventional concept that emotion is not part of judging. This limited view shows up strongly in the lack of support for managing emotions of court users as an essential quality for judicial work.

Magistrates, women and men, are first and foremost judicial officers, with a confined job to do. However, within the limitations of the conventional role and the practical limits of everyday work in the court, some magistrates, who strongly value interactive qualities and skills, can find space for practices that can foster a more positive interaction, which resonates with an orientation to different forms of judging. As Chase and Hora point out, 'judges ... remain social and human, even while on the bench'.¹³³

This research shows that elements of newer forms of judging can be practiced within a conventional context, leaving intact the sources of legitimacy that operate for all adversarial courts. Direct interaction is the aspect of engaged problem-solving judging most transferable to a conventional context.¹³⁴ More engaged judging also has the potential to attract other sources of legitimacy such as the procedural values identified by the research analysis of Tyler.¹³⁵

While not demonstrating explicit commitments to newer forms of judging, the attitudes and practices revealed in this research can form a basis for individual magistrates to develop a more engaged orientation and for magistrates' courts to develop more humane court processes. In particular, female magistrates, who comprise about half the magistrates appointed in the last 15 years, may be more willing to consider newer forms of judging, as it resonates with attitudes some female magistrates hold more strongly, including placing higher value on being a good listener, empathy and compassion, and improving the court system.

133 Chase and Fulton Hora, above n 43, 18.

134 Farole et al, above n 2; Goldberg, above n 2, 16.

135 Tyler, 'Procedural Justice, Legitimacy and the Effective Rule of Law', above n 38, 288; Mack and Roach Anleu, above n 55, 141.