

# Judicial Temperament, Explained



BY TERRY A. MARONEY

**[I]t seems to me that temperament is the key to everything else that one does on the bench.<sup>1</sup>**

**Elusive as it is important, judicial temperament is notoriously hard to define.<sup>2</sup>**

### **JUDICIAL TEMPERAMENT IS SOMETHING WE THINK ALL JUDGES MUST HAVE:**

We assess it at all critical junctures of a judge's career.<sup>3</sup> At the same time, judicial temperament is something no one can quite put a finger on. Most often, we simply list desirable qualities and behaviors without articulating what, if anything, unifies them.<sup>4</sup> Most lists include courtesy, patience, and compassion, but no two lists are the same — and, at the extreme, they capture virtually all aspects of a judge's personal makeup (e.g., “personality, character, upbringing and education, formative career experiences, work habits, and behavior when interacting with others”).<sup>5</sup>

The other approach is to treat judicial temperament as a fundamentally mysterious quality that one does or doesn't have. For example, when asked whether there was an ideal judicial temperament, the late Justice Antonin Scalia (in his characteristically pithy manner) replied, “If there is one, I don't have it.”<sup>6</sup> His successor Neil Gorsuch got the opposite — but equally conclusive — assessment, at one point being dubbed “Scalia without the scowl.”<sup>7</sup>

Both approaches — laundry list and cipher — do a deep disservice to a critical measure of judicial fitness. Temperament is not everything we look for; we also value intellect, integrity, and adequate legal training. But if we place temperament among our core criteria, we cannot leave its meaning indeterminate.

Because judicial temperament is essentially a psychological construct, I propose that we ought to use psychology to understand it. In psychology, temperament refers to relatively stable, trait-level individual differences in emotional habits that underlie the ways in which different people react to, and cope with, similar situations.<sup>8</sup> This way of thinking about human temperament is the key to understanding judicial temperament.

Here, in a nutshell, is what psychology suggests about judicial temperament. If it does not all click immediately, don't worry: The remainder of this article will walk through the underlying ideas and their implications for judges.

By the time they are old enough to take the bench, judges will have a relatively coherent, stable set of strengths and weaknesses in core temperamental traits. Those traits revolve around two factors: habitual patterns of emotional *experience* (say, tendencies toward positive emotions like satisfaction and compassion, or negative ones like fear or anger) and of emotional *regulation* (say, tendencies toward thinking and talking things through, stuffing feelings down, or lashing out). The most generally advantageous temperamental profiles will reflect moderate to high levels of positive emotionality, combined with moderate to high levels of self-regulatory capacity. Such traits would be predicted to help judges meet the job's many challenges with resilience, and to support consistent displays of patience, compassion, respect, level-headedness, and openness. The most generally disadvantageous profiles will reflect high levels of negative emotionality, coupled with low levels of regulatory capacity. Such traits would be predicted to lead judges to cope poorly over time,

and to support displays of impatience, disrespect, disdain, volatility, and defensiveness (and, in some instances, indecision and a lack of courage). There is no fixed template, but ideally all judges ought to clear the baseline of having at least some trait positivity (particularly kindness) and at least moderate self-regulatory capacity, and avoiding the extremes of negative emotionality (particularly anger).

Judges can improve on aspects of their temperaments but cannot be expected to fundamentally reorient or transcend them. Temperament will be an important determinant of a judge's behavior, its relative importance varying from relatively weak where

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environmental constraints are high (say, immediate and salient rewards for desired behaviors, even those that are inconsistent with one's own temperament, and consequences for undesired behaviors, even those consistent with one's temperament) and stress low, to very strong when constraints are weak and stress high. Rather than think of someone having or not having a judicial temperament, we should ask which, if any, specific judicial positions are a good fit with his or her temperament. We also should develop sound methods for helping all judges maximize advantageous aspects of their ►

temperaments, and for creating courts that incentivize and support desired behaviors in light of the predictable range of judges' temperaments.

Temperament is not everything. Judges will bring to the bench other personality traits, habits, qualities, and characteristics, including diverse levels of intellect, integrity, and legal training. Judges also will bring differing declarative beliefs, such as levels of commitment to diversity and equality. A judge's abilities and beliefs are vitally important to maintaining the perceived and actual fairness of the courts, but they are not rooted in temperament.

Judicial temperament thus should be understood to refer to a deep-seated, relatively stable set of specific personal traits — separable from intellect, training, and ideology — that, in dialectic with specific judicial environments and the predictable demands of judging, drive behaviors that affect how justice is delivered and perceived.

Now, let's back up.

### LAYING THE FOUNDATION

Why do we care about judicial temperament? The basic logic is that temperament is an underlying factor that produces behaviors, some desired and some not. The behaviors most often cited as evidence of a good temperament — displays of courtesy, patience, level-headedness, and caring — are desirable because they advance procedural justice.<sup>9</sup> They make litigants, attorneys, and the public feel heard and understood, foster respect for the courts, and — when displayed to fellow judges — advance collegiality. In contrast, the behaviors most often cited as evidence of a poor temperament — outsized or misplaced anger displays, discourtesy, impatience, and callousness — foster feelings of alien-

ation from and distrust of the courts, and create acrimony within them. One underlying principle, then, is that judicial temperament — whatever it is — is a causal force driving productive or destructive behaviors in the daily work of judging.

The daily work of judging, for its part, is broad and varied. Judges interpret the law and what it requires, exercise discretion, credit versions of reality, and accord deference to other institutional actors; these aspects of judging are widely studied. However, judges also interact with the public, lawyers, litigants, jurors, witnesses, clerks, court staff, and one another. They are colleagues, employees, employers, subordinates, and supervisors; some are court managers, civic role models, and public intellectuals. Temperament is relevant to the full sweep of what judges do, including the under-studied parts — like how they handle the job's inherent challenges and how they treat people along the way.

We care about judicial temperament, then, because it captures some cluster of personal attributes that make certain behaviors more or less likely in a wide variety of work tasks. Desired behaviors involve qualities of *presence*, *connection*, and *caring*, as the actions they promote communicate the proper role of courts in a democracy and enable their smooth functioning. Undesired behaviors involve qualities of *distance*, *disconnection*, and *aversion*, as the actions they promote damage the courts' image and operation. The search for judicial temperament is a search for the underlying factors that make one judge display the former and another the latter.

### A CRASH COURSE IN HUMAN TEMPERAMENT

Core principles of human temperament, summarized here, provide the compass for that search.

Let's start by thinking of a family that has two biological children, close in age and raised in a similar home environment. These children are, from birth, extremely different in how they tend to act in and react to the world. These patterns of action and reaction are *traits*, and each child's bundle of traits is their *temperament*. Temperament is divided along two trait axes. The first is *emotional reactivity* (also called "trait emotionality"), which refers to early-appearing, durable patterns of emotional attitudes, experiences, and reactions. The second is *self-regulation* (also called "effortful control"), which refers to similarly deep and durable patterns of managing emotions, impulses, and behavior. One child, for example, may startle easily when encountering something new (e.g., a clown at a birthday party) and have difficulty self-soothing, while the other reacts with curiosity and easily calms when upset. Traits are like dimmer switches: Every person sits somewhere on a continuum for every trait. The poor self-soother, for example, is not utterly incapable of self-regulation; she just sits low on the regulatory continuum.

The combination of one's positions on trait continua creates a relatively stable, distinct temperamental profile, which then interacts with situations to produce behavior. The line between temperament and behavior is particularly direct when the person is under stress, and where there are few salient constraints to motivate acting differently. Thus, both children are capable of a wide variety of behaviors, depending on the situation, but their parents

know which form each child's center of gravity. Those are the ones most rooted in temperament.

These reactivity and regulation traits are the “building blocks that underlie development of individual differences in personality” as an adult.<sup>10</sup> Environment plays a crucial role: “different life histories create different personalities” even “in children born with the same temperament.”<sup>11</sup> Over time, temperament both shapes and is shaped by many factors — culture; family dynamics; friendships; financial security; differential expectations according to variables such as gender and race; exposure to illness and violence; and so on. Some early-appearing traits will persist through the forge of our formative years and others will not, and how they persist will vary. However, the range of change is not infinite:

[O]ne's temperament imposes a restraint on the possible outcomes. A low-reactive infant might become a trial lawyer, investment banker, navy pilot, or criminal, but it is unlikely that he will become a frightened recluse. Condensed water vapor can, depending on local conditions, form a white billowy cloud, a mackerel sky, or a dense ground fog, but it cannot become an asteroid.<sup>12</sup>

Temperament “eliminates many more possibilities than it determines,” creating an “envelope of possibility” within which we all, by adulthood, will have developed.<sup>13</sup>

The grown-up iteration of our temperament will be just one aspect (if a particularly important one) of a complex, varied personality.<sup>14</sup> Further, that temperamental aspect can continue to grow and change within our remaining envelope of possibility. However,

growth curves will have flattened significantly, particularly by middle age; certain types of change will be easier and more predictable than others (for example, emotional regulation skill tends to tick upward in older adults); and dramatic change will be just as unlikely as it ever was. Finally, many of our distinguishing qualities are not part of temperament and personality at all, such as intelligence, learned skills, “acquired knowledge, opinions, [and] beliefs.”<sup>15</sup> When our hypothetical siblings (now in middle age) argue over partisan politics at the Thanksgiving table, the content of that argument is not temperamental. How they argue, however, and how each recovers from the argument, is.

Here is where our crash course in human temperament leaves us as we prepare to turn our attention squarely back to its implications for judges.

We (fortunately) do not need to examine judges' childhoods to understand judicial temperament. We have both the luxury and the necessity of looking at the person who either wants to be a judge or already is one, and that person is likely approaching, in, or past middle age. That person will come with a relatively stable temperamental profile, seen through “individual differences in the tendency to behave, think, and feel in certain ways,”<sup>16</sup> which has emerged through their life experiences, as bounded by their envelope of possibility. A judge's temperament might change somewhat over a judicial career but cannot be expected to change fundamentally.

Each judge's temperament will interact with a distinct judicial environment — the specific parameters of their job, the sorts of situations that

typify it, and the cultures (both courthouse and community) within which it is embedded — to produce behaviors. Temperament's behavioral influence is likely to be particularly visible when judges are in stressful situations with few salient constraints on behavior.

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Finally, judges are more than their temperaments. They have particular levels of intellect and legal training, political and judicial philosophies, career goals, spiritual beliefs, moral commitments, and family lives. When we look at a judge as a whole package, that whole package matters. But when we look to his or her judicial temperament, we are looking at the part of the package that maps onto psychological concepts of temperament. That part is real, it is predictive of behavior, and it is only imperfectly malleable.

#### **JUDICIAL TEMPERAMENT, EXPLAINED**

The importance of judicial temperament has not eluded us — but its precise nature has, because we haven't used the appropriate tools to understand it. Let's now dig deeper, focusing on the specific traits that would be predicted to be most and least likely to produce desired behaviors in judging environments. ►

Imagine that the two children have grown up and become judges. One day they are in their respective courtrooms, each interacting with a lawyer who makes an argument after being instructed not to. One judge, furious at being disobeyed, barks sharply, startling everyone, then quickly feels embarrassed and mumbles at the

## Strength in positivity traits would be expected to buffer against judicial cynicism and despair.

lawyer to continue with a different argument. The other judge, mildly disappointed in the lawyer's ineptitude, calmly halts the proceeding, talks quietly but firmly in a sidebar, and waits to see if the behavior repeats. In both courtrooms, court staff exchange knowing looks: This is how their judge usually acts when things like that happen. Their predictably contrasting reactions to, and handling of, similar situations likely reflect temperamental differences in both reactivity and self-regulation.

### **Emotional reactivity traits**

Recall that one temperamental axis is emotional reactivity, capturing both the speed and intensity with which one reacts to stimuli — for example, something novel or frightening — and the content of those reactions — for instance, feelings of anger, sadness, fear, or joy. Certain emotionality traits are likely to promote desired judicial behaviors, while others are likely to do the opposite.

**Positive emotionality is a plus.** Judges with strength in the “positive emotionality” family of traits would be predicted to display desirable judicial behaviors — expressions of compassion, patience, humility, respect, and open-mindedness — most consistently and in the greatest variety of work settings.

Persons high in positive emotionality tend with relative ease to connect with feelings such as pleasure, joy, interest, and excitement. They may gravitate toward lower-intensity versions (e.g., calm satisfaction) or higher-intensity ones (e.g., exuberance and sensation-seeking). In either iteration, positivity buffers against depression, promotes resilience and longevity, and enhances social competence.

Further, dispositionally positive persons tend to have a broadened perspective on their own thoughts and actions, as well as those of others, in contrast to the “narrowed mindsets sparked by negative emotions.”<sup>17</sup>

Kindness is part of this trait family. Trait kindness refers not to specific acts, which may not be appropriate in any given situation, but rather to a deep-seated “constellation of positive attitudes, feelings, and behaviors toward others,” including compassion, “empathy, prosocial behavior, generosity, and altruism.”<sup>18</sup> One might think of this trait as measuring differential tendencies to approach the world with *agape*, or love for humanity.

Moderate to high levels of temperamental positivity, including kindness, should be understood as critical determinants of a good judicial temperament. High-positivity judges will not feel happy, hopeful, and generous at all times, nor should they. These would be abnormal reactions to many situations — particularly in judging, which usually

requires mucking about in some sort of unhappiness or acrimony, ranging from broken families to broken contracts. Positivity will not bathe sad or conflictual realities in golden sunshine.

However, strength in positivity traits would be expected to buffer against judicial cynicism and despair. The work of judging often shows humanity at its worst. To perform that work well over time requires a fundamental disposition to believe in humanity's essential decency, and a propensity to care about the public being served. Indeed, tributes to great judges typically praise their benevolence. One much-beloved judge wrote that “[i]f we judges could possess but one attribute, it should be a kind and understanding heart. The bench is no place for cruel or callous people regardless of their other qualities and abilities.”<sup>19</sup> In the words of another, “a judge is more likely to reach a just answer if he or she cares.”<sup>20</sup>

Caring does not mean giving everyone what they want (seldom possible), or giving the most sympathetic party what they want. A caring judge will identify and take more opportunities to act prosocially than would judges with lesser levels of this trait, but salient environmental constraints always impose limits. A high-kindness judge will forego certain kind acts — such as forgiving a poor family's crushing debt — if doing so would violate their sense of legal obligation, fairness, and ethics. However, that judge is likely still to treat the parties with respect, express compassion for the debtor, and explain why she cannot grant that relief. Those actions also are kind, and they benefit both the debtor and the courts. The procedural-justice values we hope a good judicial temperament will promote have a home in this set of traits.

Positivity also would be expected to heighten a judge's work satisfac-

tion and self-care. This judge is likely to take pleasure where he or she can, from days that feel like a triumph — persuading appellate colleagues to adopt a cherished position, or reuniting a child with a family — to ordinary ones involving the smallest of victories — clearing one’s six-month list, say, or closing a case after a basically fair settlement. When things are hard and the judge falls short, he may still be able to think, “well, I did my best, and tomorrow’s another day.” Frustrations, sadness, and conflict abound in judging, and positivity and caring build a precious commodity: resilience.

In selecting, evaluating, and supporting judges, we therefore should value dispositional positivity, including kindness. Strength in these traits will help the judge withstand the impact of the job, find available opportunities to do good, and treat people well in the process.

**Negative emotionality is a minus.** In contrast, judges who are moderate to high in the “negative emotionality” family of traits would be predicted to display *undesirable* judicial behaviors — expressions of disdain, impatience, closed-mindedness, and anger — most consistently and in the greatest variety of judicial work settings.<sup>21</sup>

Dispositional anger is likely the biggest worry. It consists of a stable tendency “to attribute hostile intent in others’ actions, to perceive frustration in a variety of situations, and to engage in continuous conscious pondering and rumination over one’s own anger, as well as the perceived provocations of others”; such a profile also entails greater frequency and intensity of mood changes.<sup>22</sup> These temperamentally “hostile and argumentative” persons “tend to be vigilant for potential provocation from others, to initiate and sustain arguments when provoca-

tion is perceived, and to react angrily when others’ behaviors are viewed as hostile or rejecting.”<sup>23</sup> Their behaviors may beget a downward, self-justifying spiral. By expressing less warmth, escalating, and engaging in “toxic interpersonal behaviors” like use of “contempt and sarcasm,” such persons create conflictual situations, to which they will then have characteristically exaggerated responses.<sup>24</sup>

No clever argument is required to drive home this temperamental profile’s destructive potential.<sup>25</sup> Judges who regularly indulge in over-the-top anger displays are the frequent-flyers of disciplinary complaints, as are those who use insults, sarcasm, and humiliation to cement their power over lawyers and parties. These behaviors erode faith in the courts, and the damage does not stop there. Negativity can close minds as surely as positivity can open them. Left unchecked, anger can curtail deliberation and increase punitive behavior, regardless of whether it is relevant or justified — a particular danger for judges who feel it with greater frequency and less justification. Moreover, high trait anger (that is, being highly prone to anger) is bad for judges’ health and increases substance abuse, affecting both work performance and longevity.

Just like the high-kindness judge who denies relief to the sympathetic debtor, the high-anger judge may have internalized reasons why she should act in a manner inconsistent with her own temperament (or “temperament-inconsistent”)—particularly if she is high in self-regulation (on that, more anon). However, trait anger will likely show itself more than we might hope. First, this profile generally entails increased stress reactivity. Stress, which heightens temperament’s impact on behavior, is a recurrent feature of judging; those

most affected by it would be expected to act more regularly in a temperament-consistent manner. Second, anger tends to spur fast, unreflective action. This property is a virtue when the anger is well-placed, proportional, and effective in redressing a harm, but damaging otherwise. Third, anger is an emotion of power. Persons with power (like judges) generally feel more free to express it, particularly when directed against those with less power (like lawyers, parties, and the public). Anger displays also tend to elevate one’s perceived power, though this is more true for men than women.<sup>26</sup> Judges inclined toward anger may find that judging gives them particular license to express it, and (particularly if they are men) may come to enjoy the authority bump it confers. Finally, constraints on even frequent and extreme expressions of anger, frustration, and disdain are few and far between. Disciplinary proceedings remain rare, and their outcomes often are mild; appellate courts generally are loathe to overturn cases on this basis; and parties are expected to accord judges deference even when they act unreasonably.

Temperamental anger, then, represents a strongly negative mark on a judge’s profile, certainly at high levels of anger and likely even at moderate ones. While this is unlikely to come as a surprise, psychology highlights the extent to which such a profile in judges in particular may be both entrenched and dangerous.

Psychology also illuminates a less visible, less appreciated temperamental danger zone: high trait fear. This profile involves stable tendencies toward “repressive or inhibitive” emotions such as anxiety, “submissiveness, fear, sorrow, tenderness, and disgust.”<sup>27</sup> None of these feelings is inherently problematic, though they ►

are distressing. A judge who is not disgusted by child pornography is profoundly out of touch; a healthy fear of retaliatory violence can prompt needed precautions; and some modicum of motivational anxiety is arguably a job requirement.<sup>28</sup> The problems come at high, perhaps only the highest, levels of this trait, and that is because a highly fearful profile hinders development of courage.

## Self-regulation is necessary because emotions and the behaviors they motivate are not always in line with our goals.

Although tributes to great judges often laud their courage (like their kindness), courage is not generally thought of as a temperamental quality. This is a serious oversight. Judicial independence requires that judges be willing to rule in ways that make enemies, and that may anger, disappoint, or alienate professional and social peers, powerful constituencies, and fellow government actors. Lower-court judges should take the possibility of reversal into account, but fearing reversal can stifle the insight and industry that propel law's development and that give a sense of agency and purpose. Extreme anxiety can paralyze judges when they need to reach decisions and move on. Fearlessness is not the goal: Courage is the ability to act consistent with one's goals and values despite reasonable fears. Chronic fearfulness and anxiety can overwhelm that capacity. As Chief Justice Roberts has observed,

judging is no job for "timid . . . souls."<sup>29</sup> Judging requires courage, and courage is temperamental.

In selecting, evaluating, and supporting judges, therefore, we should be particularly concerned with dispositional negativity. High levels of trait fearfulness threaten something desired just as surely as high levels of trait anger promise something undesired.

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Let's take stock. To possess a generally good judicial temperament means, in part, to have a relatively high propensity to experience the emotional states likely to express in desirable behaviors, and a relatively low propensity to experience the emotional states likely to express in undesirable ones. Judges high in trait positivity are best positioned in this regard.

They are more likely to exhibit resilience and open-mindedness; to both feel and project calm and patience; to treat others with respect, understanding, and compassion; and to derive pleasure from accomplishments both large and small. In contrast, judges high in trait anger are more likely to feel and project anger, irritation, frustration, and contempt; to perceive situations as personally arousing and offensive; and to engage in aggressive and disrespectful behaviors. Those very high in trait fearfulness are less likely to maintain the courage necessary to make difficult decisions and may find it difficult to handle the position's demands over time.

### *Emotional regulation traits*

Having dug deeper into the implications of trait emotionality, let us now examine self-regulation, just as critical to judicial temperament. This second

temperamental axis captures the wide variation in judges' ability to shape their emotional experiences, the thoughts underlying those experiences, and the actions those experiences motivate, in light of judges' constraints and in service of their objectives.<sup>30</sup> The most advantageous profile is simply stated: moderate to high levels of self-regulatory capacity are very good, and low ones are very bad.

Self-regulation is necessary because emotions and the behaviors they motivate are not always in line with our goals. For example, a judge may have to refrain from expressing impatience, amusement, or a host of other emotions in order to satisfy professional norms regarding a calm and impartial demeanor. Persons high in self-regulation do not invariably seek to tamp down emotion and its expression. Rather, they work flexibly to influence what emotions they have, when they have them, and how they experience and express them, using a variety of strategies — for example, biting one's tongue, thinking differently about a situation, changing something about that situation, or seeking guidance and support. Think of the sibling-judge who interpreted the lawyer's error as ineptitude rather than disrespect, masked his disappointment with a smile, and explained privately rather than barked publicly: These are choices about whether and how to self-regulate.

The challenges of judging require a deep bench of these kinds of regulatory choices and skill in their deployment. A judge may want to refrain from showing emotion in some situations (to prevent observers from seeing what she thinks) but show it in others (to encourage a defendant's progress in reentry court, or drive home the seriousness of a lawyer's missteps). A patient, slow, even-toned

response is often just what is needed to calm a tense interaction, but will not cut off an immediate danger, such as a lawyer starting to reference inadmissible material. A judge may want to adopt a caring, soothing tone with one person (a frightened child witness or overwhelmed clerk), but a clinical, cold one with another (an expert witness or appellate advocate who refuses to stay on task). A difficult telephone call with a colleague (requiring willpower to initiate) may de-escalate a conflict, whereas sending the sharply-worded email that was satisfying to draft may do the opposite.

Self-regulation is a sophisticated improvisational dance, not one performed by stepping in numbered outlines on the floor. Every judge needs a moderate to high level of regulatory skill to pull off this dance, and judges weak in this domain will find that regulatory needs outpace capacity. Such persons tend to rely unreflectively on a narrow set of responses, regardless of their goal-suitedness; to have greater difficulty overriding impulses; and to deploy suboptimal coping mechanisms such as suppression and avoidance. These differential regulatory patterns impact situational success, personal well-being, and adjustment to the demands of life and work — and those low in regulatory capacity fare worse on each measure.

Strength in self-regulation therefore should be prioritized in assessment of judicial temperament.

### **Putting reactivity and regulation together**

One may ask whether self-regulation is the more important temperament axis. Imagine our sibling-judge who stands at the ready to snap at perceived displays of disrespect. If she is sufficiently high in self-regulation, we

can imagine her noticing that she is about to snap, and instead breathing, deciding to interpret another's misstep as ineptitude rather than malice, putting on a calm smile, and engaging in the same behavior as her higher-positivity sibling the next courtroom over. If she is high enough on the regulatory continuum, not only will she in this instance look indistinguishable from her sibling, but her skill could make the difference between burnout and a long, distinguished career. Ultimately, skillful regulation is less effortful, and less costly, than poor regulation.

As trait negativity increases, we ideally would require a commensurately higher quantum of regulatory capacity. A sufficient regulatory counterweight could move an otherwise problematic judge into acceptable territory. But there are limits to what we can ask. Consider the common automotive analogy of reactivity as the accelerator and regulation the brake. More accurately, regulation in this analogy encompasses all the actions that determine a car's accelerated movements, including steering, downshifting, speeding up, and braking. Brakes wear out when overworked, and no amount of steering (by an amateur, at least) can get a speeding car safely around a tight curve in the rain. Heavy reliance on one half of the temperamental profile to cabin the tendencies of the other may get the job done in discrete instances, but over the course of a judicial career is an off-balance proposition. A judge with a generally advantageous emotional-reactivity profile will need to call on the most effortful forms of self-regulation somewhat less frequently. Further, the stakes will be lower. Every judge (indeed, every human) experiences regulatory failure when, predictably, stressors exceed coping capacity. For the judge already prone

to anger or fear, the negative behaviors that express in such moments of failure would be expected to be more pronounced than those of their temperamentally positive counterpart.

More, such a polarized temperament profile is likely to be relatively rare. Persons with lesser trait regulatory skill tend also to have particularly disadvantageous sorts of trait emotionality: those with "the highest levels of anger also have the lowest levels of cognitive self-regulation,"<sup>31</sup> as well as lesser ability to reduce hostile feelings and override impulses to express them. Strength in the kindness dimension, in contrast, is linked to strength in effortful control.

As advantageous reactivity tends to come clustered with advantageous levels of self-regulation, and as the opposite also is true, some judges will be temperamental slam dunks (very high positivity/very high regulatory skill) while others will be air balls (very high negativity/very low regulatory skill). Most judges will not fall at these extremes. We do not require perfection, and so long as the judge is not an air ball, we can tolerate more imperfection in reactivity when regulation is sufficient to pick up at least some of the slack.

### **MAKING THE MOST OF ONE'S TEMPERAMENT**

Thus far, we have focused on the temperament a judge brings to the bench. This makes sense, as by middle age what we see is (more or less) what we get. However, people can and do change. So can, and do, attributes of their workplace. For the great many judges who present with temperamental pluses and minuses, our approach can be twofold. We can help them maximize advantageous qualities, and we can sort them into the environments to which they are best suited. ►



### **Cultivating growth within the envelope of possibility**

Because we cannot hope for fundamental change, persons with stubbornly disastrous temperaments — our air balls — should not be judges at all. However, it is hard to know which currently sitting judges fit into the air ball category if we have not tried to find the limit of their envelopes of possibility. Similarly, we will never know how much better those with acceptable temperaments could do if we have not helped them stretch.

As between reactivity and regulation, regulation may be the better target. Regulatory skill often continues to grow over the life span, and regulatory-focused teaching interventions have shown promise in other professional populations in high-stress jobs, including doctors.<sup>32</sup> If high-negativity/low-regulation judges bring sufficient other value to the bench or are too difficult to remove, it is worth investing in strengthening whatever regulatory skill they have. Further, the demands of judging require even those with regulatory strength to become stronger. Efforts to increase regulatory skill always will add value.<sup>33</sup>

On the reactivity front, it is also possible that the worst aspects of negative emotionality could be mitigated, and the best aspects of positivity cultivated. Mindfulness practice, now gaining traction in judicial education circles, might help, as it can both reduce the speed and intensity of reactions and develop feelings of loving-kindness and gratitude.<sup>34</sup> Psychological interventions have shown promise in reducing both felt and expressed anger even among those high in that trait. Sufficient investment in regulatory strength might over time change the emotional tendencies being regulated. For example, if our high-negativity

judge consistently decides to interpret lawyers' missteps as poor skill rather than insubordination, the less emotionally triggering interpretation might start to come more naturally.

Any program designed to help judges find the most advantageous corners of their envelopes of possibility will need to be undertaken with care. Theories — including this one — need to be tested, tweaked, and sometimes fundamentally altered. Interventions can look promising but ultimately show no results. Programmatic fads come and go. Here I simply plant a flag in a principle: Because some aspects of judges' temperaments and how those temperaments express in behavior are at least somewhat malleable, we should invest in developing interventions that might move some judges toward greater harmony with their job demands.

### **Judge and job: goodness of fit**

In seeking that greater harmony, we have to look at both judge *and* job. The parameters of any given situation are as important in determining how people will behave as are the traits they bring to that situation. Borrowing another foundational concept from psychology, we need to think about the “goodness of fit” between a judge's temperamental constellation and his or her specific work environment.<sup>35</sup>

Judging is not a standardized profession. Judges might work in the federal, state, or municipal systems, be elected or appointed, enjoy life tenure or work under renewable contracts, earn relatively high or low salaries, hear trials or appeals, sit in urban or rural settings, enjoy shabby or well-appointed surroundings, have a general or specific jurisdiction, regularly or seldom interact with the public, wield greater or lesser docket control, and so on. The parameters of any given judicial posi-

tion — its cultural norms, repetitive tasks, recurrent stressors, mechanisms of oversight, decisional constraints, and daily rhythms — will interact with the judge's temperament with varying levels of harmony or discord. Some judges will be temperamentally suited to many sorts of judicial work, some suited only to particular sorts, and others ill-suited to most or all sorts. For example, a judge with strong trait exuberance may be a better fit with an active trial-court assignment than a cloistered appellate one. To withstand a child neglect and abuse docket, a judge will need particularly high levels of trait positivity; one with lesser levels may burn out quickly with that docket, but be perfectly fine handling patent cases. A judge with moderately high levels of trait anger and average regulatory skill might function well in a role that has tightly controlled contacts with the public, is buffered by a highly collegial bench-and-bar culture that reduces opportunities for conflict, and is embedded in a judicial system with clear and certain consequences for discourteous and abusive behavior.

Judge and job thus must be assessed interactionally. The lesser the distance between judges' dispositions and their jobs' demands for specific behaviors,



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the more likely judges are to satisfy those demands with greater consistency and less effort. Goodness of fit can also be enhanced by a court culture and rules that make norm compliance easier than its alternatives, and that provide judges with adequate constraints, feedback, and support.

## CONCLUSION

We long have been unable to think or speak coherently about judicial tem-

perament. The psychology of human temperament helps us construct a theoretically coherent account of judicial temperament and a common language with which to describe it. We are now in a position to test, refine, and potentially alter the theory itself, and then consider — with rigor — how to use it to transform processes of judicial selection, training, support, evaluation, discipline, and removal. There is no quick, easy test of a complicated

construct, but we should take advantage of a chance to do better. Judicial temperament is real. It deserves our closest attention as we carry out the high-stakes business of populating our courts and delivering justice.

- 1 *Confirmation Hearings on Federal Appointments: Confirmation of Appointees to the Federal Judiciary Before the S. Comm. on the Judiciary, 105th Cong.* 41 (1997) (statement of Hon. Jeremy Fogel, nominee for the U.S. District Court for the Northern District of California).
- 2 JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 6–7 (2006).
- 3 Thanks to Hon. Jeremy Fogel, Prof. Dan McAdams, and Elle Hashimoto. This article is adapted from Terry A. Maroney, *(What We Talk About When We Talk About) Judicial Temperament*, 61 B.C. L. REV. 2087 (2020), which contains a much fuller exploration and justification of the ideas reflected herein. The Berkeley Judicial Institute has hosted a multi-part webinar on this work, which can be viewed at <https://www.law.berkeley.edu/research/berkeley-judicial-institute/events>.
- 4 See, e.g., AM. BAR ASS'N, *ABA STANDING COMM. ON FED. JUDICIARY, WHAT IT IS AND HOW IT WORKS* 3 (2017); AM. BAR ASS'N, *STANDING COMM. ON FED. JUDICIAL INDEP., STANDARDS ON JUDICIAL STATE SELECTION* 7 (2000).
- 5 ROSEN, *supra* note 2, at 8.
- 6 Email from Alexander Boni-Saenz, Assistant Professor, Chicago-Kent College of Law, to author (Sept. 9, 2015, 6:48 PM) (on file with author).
- 7 Andrew Cohen, *Neil Gorsuch: Scalia Without the Scowl*, MARSHALL PROJECT (Jan. 31, 2017), <https://www.themarshallproject.org/2017/01/31/neil-gorsuch-scalia-without-the-scowl>.
- 8 Mary K. Rothbart, *Advances in Temperament: History, Concepts, and Measures*, in *HANDBOOK OF TEMPERAMENT* 3 (Marcel Zentner & Rebecca L. Shiner eds., 2012); Nicole B. Barenbaum & David G. Winter, *History of Modern Personality Theory and Research*, in *HANDBOOK OF PERSONALITY* 3, 7 (Oliver P. John et al. eds., 3d ed. 2008). The psychological assertions in this article are lightly footnoted, but are comprehensively so in Maroney, *supra* note 3. Support generally can be found in the two volumes cited above in this footnote, as well as in JEROME KAGAN, *GALEN'S PROPHECY: TEMPERAMENT IN HUMAN NATURE* (2018); *HANDBOOK OF EMOTIONS* (Lisa Feldman Barrett et al. eds., 4th ed. 2016); *OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES* (David Sanders & Klaus R. Scherer eds., 2009); *HANDBOOK OF EMOTIONS* (Michael Lewis et al. eds., 3d ed. 2008); *HANDBOOK OF EMOTION REGULATION* (James J. Gross ed., 1st ed. 2007); and *TEMPERAMENT IN CONTEXT* (Theodore D. Wachs & Gedolph A. Kohnstamm eds., 2001).
- 9 See generally Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4 (2008); Kristina Murphy & Tom Tyler, *PROCEDURAL JUSTICE AND COMPLIANCE BEHAVIOUR: THE MEDIATING ROLE OF EMOTIONS*, 38 EUR. J. SOC. PSYCHOL. 652 (2008).
- 10 See Rothbart, *supra* note 8, at 3, 12–14.
- 11 JEROME KAGAN & NANCY SNIDMAN, *THE LONG SHADOW OF TEMPERAMENT* 3 (2004).
- 12 *Id.*
- 13 *Id.* at 23, 197.
- 14 See Rothbart, *supra* note 8, at 3, 12–14; William Revelle & Klaus R. Scherer, *Personality and Emotion*, in *OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES*, *supra* note 8, at 304, 304–05. Precise demarcation of the boundary between temperament and personality remains contested. See Marvin Zuckerman, *Models of Adult Temperament*, in *HANDBOOK OF TEMPERAMENT*, *supra* note 8, at 41, 55–60. An important next step is to explore the extent to which the theory of judicial temperament set forth here maps onto relevant domains in the dominant Big Five personality model, such as agreeableness (which includes kindness) and neuroticism (which includes trait negativity).
- 15 KAGAN, *supra* note 8, at 77.
- 16 Jaap J.A. Denissen et al., *Personality Development Across the Life Span*, in *WILEY-BLACKWELL HANDBOOK OF INDIVIDUAL DIFFERENCES* 77, 77 (Tomas Chamorro-Premuzic et al. eds., 2011).
- 17 See Barbara L. Fredrickson, *Positive Emotions*, in *OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES*, *supra* note 8, at 310.
- 18 Ariel Knafo & Salomon Israel, *Empathy, Prosocial Behavior, and Other Aspects of Kindness*, in *HANDBOOK OF TEMPERAMENT*, *supra* note 8, at 168.
- 19 Edward J. Devitt, *Ten Commandments for the New Judge*, 65 AM. BAR ASS'N J. 574, 574 (1979).
- 20 Denny Chin, *Sentencing: A Role for Empathy*, 160 U. PA. L. REV. 1561, 1580 (2012).
- 21 See Alexander J. Shackman et al., *The Psychological and Neurobiological Bases of Dispositional Negativity*, in *THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS* 67 (Andrew S. Fox et al. eds., 2d ed. 2018).
- 22 Kirby Deater-Deckard & Zhe Wang, *Anger and Irritability*, in *HANDBOOK OF TEMPERAMENT*, *supra* note 8, at 126.
- 23 *Id.*
- 24 Shackman et al., *supra* note 21, at 68.
- 25 Individual instances of judicial anger are common and often forgivable; episodic feelings and expressions of “righteous judicial anger” are an element of good judging. Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207, 1250 (2012).
- 26 Jessica M. Salerno & Liana C. Peter-Hagene, *One Angry Woman: Anger Expression Increases Influence for Men, but Decreases Influence for Women, During Group Deliberation*, 39 L. & HUM. BEHAV. 581 (2015).
- 27 See Rothbart, *supra* note 8, at 7; Zentner & Shiner, *supra* note 8, at 678.
- 28 Juliane Strack et al., *Must We Suffer to Succeed?: When Anxiety Boosts Motivation and Performance*, 38 J. INDIVIDUAL DIFFERENCES 113, 113 (2017).
- 29 CHIEF JUSTICE JOHN G. ROBERTS, JR., 2016 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6 (2016).
- 30 I have explored regulation at length elsewhere and offer only an abbreviated account here. See Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485 (2011); Terry A. Maroney & James J. Gross, *The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective*, 6 EMOTION REV. 142 (2014).
- 31 See Deater-Deckard & Wang, *supra* note 22, at 129.
- 32 Maroney, *Emotional Regulation*, *supra* note 30, at 1521 (citing to, *inter alia*, Daisy Grewal & Heather A. Davidson, *Emotional Intelligence and Graduate Medical Education*, 300 J. AM. MED. ASS'N 1200 (2008)).
- 33 See ELEMENTS OF JUDICIAL EXCELLENCE: A FRAMEWORK TO SUPPORT THE PROFESSIONAL DEVELOPMENT OF STATE TRIAL COURT JUDGES 19–20 (2017) (reflecting view that judges need training in emotional regulation, on which they vary enormously). I and others have offered such workshops for some time, and judges receive them enthusiastically—though as of yet we have little data on whether they result in concrete skill improvement.
- 34 Jeremy D. Fogel, *Mindfulness and Judging*, FED. JUDICIAL CTR. (2016).
- 35 “Goodness of fit results when the properties of the environment and its expectations and demands are in accordance with the organism’s own capacities, characteristics and style of behaving.” Under conditions of poor fit (“discrepancies and dissonances between environmental opportunities and demands and the capacities and characteristics of the organism”), maladaptive functioning is likely. ALEXANDER THOMAS & STELLA CHESS, *TEMPERAMENT & DEVELOPMENT* 11 (1977).