

# Reassessing the Judicial Empathy Debate: How Empathy Can Distort and Improve Criminal Sentencing

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*The things that make a good Judge, or good Interpreter of the Laws, are, first, A right understanding of that principal Law of Nature called Equity; which depending not on the reading of other mens Writings, but on the goodness of a mans own natural Reason, and Meditation, is presumed to be in those most, that have had most leisure, and had the most inclination to meditate thereon. Secondly, Contempt of Unnecessary Riches, and Preferments. Thirdly, To be able in judgment to devest himself of all fear, anger, hatred, love, and compassion. Fourthly, and lastly, Patience to hear; diligent attention in hearing; and memory to retain, digest and apply what he hath heard.<sup>1</sup>*

– Thomas Hobbes, *Leviathan*, 1651

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1. THOMAS HOBBS, *LEVIATHAN* 146–47 (London, Andrew Crooke 1651).

## I. INTRODUCTION

Judges are supposed to be impartial arbiters of justice. They weigh the merits of cases and decide punishments for convicted defendants. With these responsibilities comes power over criminal defendants' lives. Yet because judges are human, their minds operate through similar cognitive processes as any other human mind. In practice, this means that their power is not always exercised impartially and may be subject to the same innocent, yet insidious, cognitive deficits and biases experienced by humanity at large.

To be a judge is, then, to be a human trying to relate facts to law while deciding cases and ambiguities in the most just manner. The case of judicial empathy in criminal sentencing is a particularly challenging issue, as it is an example of how human processing may affect another person's rights and freedoms. Empathy allows judges to more fully understand the situations of the parties in front of them, but it also introduces empathetic bias into the judicial process.

Assessing empathy's effects on judicial sentencing is important, as disparate empathy likely causes significant racial disparities within the criminal justice system.<sup>2</sup> Disparate empathy against Black Americans may change trial outcomes<sup>3</sup> and contribute to disparate levels of capital sentencing.<sup>4</sup> It also contributes to longer prison sentences for Black Americans.<sup>5</sup>

This paper investigates the role empathy plays in the judicial decision-making process, for better or worse. To do this, it first explores the judicial empathy debate and identifies what empathy is. It then explores connections between empathy, bias, and punishment, and relates these conclusions to judges and the sentencing process. Finally, it concludes with suggestions on how judges may improve their decision-making. Empathy is a

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2. Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887, 901–02 (1996) (“The low probability that white jurors will empathize with African-American defendants is not simply a function of race, but also of the linguistic, cultural, experiential, and economic differences that divide white and blacks in America.”).

3. *See id.* at 907 (describing the effects of *Batson v. Kentucky*, 476 U.S. 79 (1986)).

4. *Id.* at 908–10 (“The ability of white jurors to empathize more easily with white victims than black victims contributes to race-of-victim disparities.”).

5. M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1327 (2014) (stating that studies have generally shown “that prosecutors favor white defendants”).

near-universal human experience and judges can effectively regulate and employ it to positive ends, particularly when working within their wide sentencing discretion.

## II. EMPATHY AND BIAS: CLARIFYING TERMS AND COGNITIVE PROCESSES

This section first defines empathy, and then discusses how it works within the brain. Contemporary debates about empathy tend to employ varying definitions of empathy, so such clarification is important before discussing empathy's effects on the judicial system.

### A. THE CONTEMPORARY DEBATE CONFLATES EMPATHY WITH OTHER ISSUES

The debate as to whether empathy is valuable in the judicial decision-making process was reignited when President Barack Obama, shortly after Justice David Souter's retirement, said, "I view that quality of empathy, of understanding and identifying with people's hopes and struggles as an essential ingredient for arriving at just decisions and outcomes."<sup>6</sup> Since then, the debate reignites occasionally, such as when a Santa Clara County Superior Court judge issued a light sentence to a Stanford University student convicted of rape.<sup>7</sup> In 2018, the topic came up surrounding then-Judge Kavanaugh's Supreme Court confirmation hearings.<sup>8</sup> When these debates occur, some argue that judicial

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6. Jesse Lee, *The President's Remarks on Justice Souter*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA BLOG (May 1, 2009, 4:23 PM), <https://obamawhitehouse.archives.gov/blog/2009/05/01/presidents-remarks-justice-souter> (describing the elements that President Obama will consider in selecting a replacement for Justice Souter).

7. Jill Suttie, *Do We Need More Empathetic Judges?*, GREATER GOOD MAG. (June 22, 2016), [https://greatergood.berkeley.edu/article/item/do\\_we\\_need\\_more\\_empathic\\_judges](https://greatergood.berkeley.edu/article/item/do_we_need_more_empathic_judges) ("In pronouncing the sentence, the judge seemed to show more empathy for the perpetrator, who went to the same university as [the judge], than the rape victim, who didn't.").

8. Compare Steven Greenhouse, *SeaWorld's and Kavanaugh's Missing Empathy Gene*, AM. PROSPECT (Sept. 21, 2018) (criticizing one of then-judge Kavanaugh's dissents, where he argued that SeaWorld should not be subject to OSHA regulations, on empathy grounds), with Ruben Navarrette Jr., *Kavanaugh's Emotions Showed He's Human. That's a Good Thing in a Supreme Court Justice*, USA TODAY (Oct. 18, 2018) ("I like my judges with an emotional streak. It reminds me they're human. It's the robotic ones who terrify me. I want judges who show compassion and empathy when needed, but also anger and outrage when appropriate.").

decision-making requires impartiality and emotional distance, while others argue that empathy is a critical ingredient of just decision-making.<sup>9</sup>

One paper, for example, distills criticism of judicial empathy into four main arguments.<sup>10</sup> The first criticism is that empathy might blind a judge to the “formally logical” elements of the law.<sup>11</sup> The second argues in favor of a tranquil legal mind, claiming that empathy “may alter the dispassionate mental attitude necessary to formulate good judgments.”<sup>12</sup> The third argument criticizes moral sentimentalism, which might cause a judge to eschew the law in favor of sympathy or compassion.<sup>13</sup> The last argument contends that judges must favor the law over their own views or opinions.<sup>14</sup> For critics of empathy, judges must prevent empathy from shifting their determination of the law, as they should make impartial decisions based on empirical methods.<sup>15</sup> For example, an “anti-empathy” person might argue that if an ambiguous case arises, the judge must only consider their best approximation of the law, without relying upon empathy.<sup>16</sup>

Those in favor of empathy argue that judicial empathy towards minority populations enables judges to uphold minority

9. *Judicial Empathy*, BALLOTPEDIA, [https://ballotpedia.org/judicial\\_empathy](https://ballotpedia.org/judicial_empathy) (last visited May 2, 2020) (outlining the arguments for and against judicial empathy).

10. Lucia Corso, *Should Empathy Play any Role in the Interpretation of Constitutional Rights?*, 27 *RATIO JURIS*, 94, 100 (2014).

11. *Id.* at 100 (stating that determining “the largest possible number of major premises from which to infer conclusions for single cases” is clouded by “emotions, personal points of view, and personal memories of the individual judge”).

12. *Id.* at 100 (asserting that a tranquil mind allows “a certain degree of detachment and disinterest” necessary for impartiality).

13. *See id.* at 101.

14. *See id.* at 101–02.

15. *See* Ilya Somin, *Understanding the Point at Issue in the Judicial Empathy Debate*, VOLOKH CONSPIRACY (May 29, 2009), <http://volokh.com/2009/05/29/understanding-the-point-at-issue-in-the-judicial-empathy-debate/> (“When critics of the *Ledbetter* decision claim that the conservative justices lacked ‘empathy’ for the plaintiff, they mean not that the conservative justices were unaware of her feelings, but that they failed to identify with them sufficiently.”).

16. *See* Orin Kerr, *Legal Ambiguity, Empathy, and the Role of Judicial Power*, VOLOKH CONSPIRACY (May 13, 2009, 5:51 PM), <http://volokh.com/2009/05/13/legal-ambiguity-empathy-and-the-role-of-judicial-power/> (“To those who see legal ambiguity as inviting a careful judicial weighing—indeed, who think that the critical role of a judge is to engage in that careful judicial weighing—emphasizing the need for ‘empathy’ is an invitation to replace law with politics.”).

rights and understand the minority experience.<sup>17</sup> On this view, empathy enables judges to understand “all sides” of an issue.<sup>18</sup> Proponents of judicial diversity might argue that diverse benches better empathize with less privileged litigants.<sup>19</sup> Some in the pro-empathy camp acknowledge that empathy has positive and negative aspects in a judge’s ability to decide cases.<sup>20</sup>

The long-entrenched debate about judicial empathy may have staying power for several reasons. First, discussing emotions objectively is difficult. Emotional terminology changes over time and lacks fixed meaning in popular conversation.<sup>21</sup> Discourse among legal critics defines “empathy” in various ways, sometimes conflating it with bias and sometimes with justice.<sup>22</sup> The confusion may also occur because “empathy” has become

17. Erwin Chemerinsky, *Is There a Conflict Between Empathy and Good Judging?*, LA TIMES (May 28, 2009, 12:00 AM), <https://www.latimes.com/opinion/opinion-la/la-oe-w-chemerinsky-somin28-2009may28-story.html> (“In fact, all justices as human beings inevitably feel empathy. Most of today’s Supreme Court justices apparently feel it more for businesses than employees, and more for victims of crimes than criminal defendants. Obama’s wish that justices feel empathy for minorities and the poor should hardly be controversial, for the Constitution above all exists to protect minorities. The majority generally doesn’t need a constitution for its protection because it can control the political process.”).

18. See Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944, 1964–66 (2012) (describing how judges might use empathy to relate to multiple sides of litigation).

19. See *id.* at 2001–02 (“President Obama wants to make sure that he appoints judges who can also empathize with those whose experiences tend to be very far afield from those of most judges.”).

20. See Chemerinsky, *supra* note 17 (arguing that empathy can increase a judge’s ability to relate to those in the courtroom but may also impede accurate evaluation of cases).

21. Susan A. Bandes, *Compassion and the Rule of Law*, 13 INT’L. J.L. CONTEXT 184, 185 (2017).

22. Compare Somin, *supra* note 15 (“When critics of the *Ledbetter* decision claim that the conservative justices lacked ‘empathy’ for the plaintiff, they mean not that the conservative justices were unaware of her feelings, but that they failed to identify with them sufficiently.”), and Steven G. Calabresi, Op-Ed., *Obama’s “Redistribution” Constitution*, WALL ST. J., <https://www.wsj.com/articles/SB122515067227674187> (last updated Oct. 28, 2008, 12:01 AM) (“[Obama] believes—and he is quite open about this—that judges ought to decide cases in light of the empathy they ought to feel for the little guy in any lawsuit.”), with Colby, *supra* note 18, at 1958 (quoting *Empathy*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003)) (“Empathy is ‘the action of understanding, being aware of, being sensitive to, and vicariously experiencing the feelings, thoughts, and experience of another of either the past or present without having the feelings, thoughts, and experience fully communicated in an objectively explicit manner; also: the capacity for this.’”).

shorthand for political orientation, with some viewing “liberal” positions as ones that entail empathy, and “conservative” positions as ones that incorporate other moral foundations, such as loyalty, authority, or sanctity.<sup>23</sup> Still, this is likely a simplification of political discourse, as figures from across the political spectrum appeal to empathy to defend their positions, even if those positions are on different sides of the same issue.<sup>24</sup>

Recent accounts of judicial empathy primarily address common psychology, discussing prejudice and bias without addressing the neural correlates of empathy.<sup>25</sup> A full account of the effects of empathy on judges must first account for how human brains experience empathy.<sup>26</sup> Defining empathy before locating its role in judicial decision-making and sentencing can help refine the debate.

## B. WHAT IS EMPATHY?

Empathy may be conflated with compassion, perspective-taking, or informed experience.<sup>27</sup> The neuroscientific study of empathy refines the debate, providing insights into how empathy operates in the brain and its possible effects on people.

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23. See PAUL BLOOM, *AGAINST EMPATHY* 120 (Dec. 6, 2016) (discussing Jonathan Haidt’s proposal that liberals and conservatives operate from different moral foundations, as well as the relationship between political discourse and empathy).

24. See *id.* at 81–82 (“Political debates typically involve a disagreement not over whether we should empathize, but over who we should empathize with . . . [I]n late 2014, ex-vice-president Dick Cheney was asked to defend the United States’ record on torture. Now you might imagine that his argument would involve abstract appeals to security and safety. And yet when asked to define torture, Cheney gave this example: ‘an American citizen on a cell phone making a last call to his four young daughters shortly before he burns to death in the upper levels of the Trade Center in New York City on 9/11.’ This is an empathic argument, defending torture by talking about the suffering of a single identifiable individual.”); JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 160 (2013) (comparing political signs from different perspectives that appeal to fairness and equality).

25. See Susan A. Bandes, *Moral Imagination in Judging*, 51 *WASHBURN L.J.* 1, 1 (2011) (“The empathy debate has revealed a tenaciously hardy folk conception of judicial deliberation and the judicial role.”).

26. See, e.g., Gary Low, *Emphatic Plea for the Empathic Judge*, 30 *SINGAPORE ACAD. L. J.* 97, 97 (2018).

27. *Id.* at 105 (“Modern scholarship on the subject is confusing, contributed chiefly by divergent or overlapping meanings of empathy.”); see, e.g., Colby *supra* note 18, at 1952–54 (discussing the various ways in which people perceive empathy in judging).

Empathy is a complex, not fully understood, process. Scientists have broken empathy down into the capacity to feel for others, called “emotional empathy” or “affective empathy,”<sup>28</sup> and “cognitive empathy,” the ability to take another person’s perspective.<sup>29</sup>

Other frameworks discuss responses to the experience of empathy, including “compassionate empathy,” which is one’s response to experiencing of empathy,<sup>30</sup> and “emotional self-regulation,” which addresses the neural inhibition of empathy so people can function while experiencing empathy.<sup>31</sup> Emotional self-regulation helps contribute to the “self/other” divide, which keeps personal emotions separate from empathetically-experienced emotions.<sup>32</sup> Empathetic responses may also be categorized as “compassion,” which manifests as concern for the target, and “empathic distress,” which manifests as personal distress over feelings of empathy.<sup>33</sup> Note that “compassion” may be a response to feelings of empathy, but it is a separate experience,<sup>34</sup> with different affective responses and different neurological signatures.<sup>35</sup>

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28. Robert Eres & Pascal Molenberghs, *The Influence of Group Membership on the Neural Correlates Involved in Empathy*, 7 FRONTIERS IN HUMAN NEUROSCIENCE Art. 176 at 1 (2013).

29. Simone G. Shamay-Tsoory, Editorial, *Dynamic Functional Integration of Distinct Neural Empathy Systems*, 9 SOCIAL, COGNITIVE & AFFECTIVE NEUROSCIENCE 1–2 (2014).

30. Sandip Roy, *5 Dangers Of Empathy: How Can Empathy Hurt You Bad*, HAPPINESS INDIA PROJECT, <https://happyproject.in/empathy-hurts/> (last visited May 2, 2020).

31. Eres & Molenberghs *supra* note 28, at 3.

32. Kim Armstrong, *‘I Feel Your Pain’: The Neuroscience of Empathy*, 31 ASSOC. PSYCHOLOGICAL SCI. 29, 30 (2017) (describing studies associated with the self/other divide).

33. Tania Singer & Olga M. Klimecki, *Empathy and Compassion*, 24 CURRENT BIOLOGY R875, R875 (2014) (“[A]n empathic response to suffering can result in two kinds of reactions: empathic distress, which is also referred to as personal distress; and compassion, which is also referred to as empathic concern or sympathy.”).

34. Larry Stevens & Jasmine Benjamin, *The Brain that Longs to Care for Others: The Current Neuroscience of Compassion*, in THE NEUROSCIENCE OF EMPATHY, COMPASSION, AND SELF-COMPASSION 55 (Larry Stevens & C. Chad Woodruff, eds., Academic Press 2018) (“[Compassion] differs from Empathy in that empathy is the general vicarious experiencing or sharing of another person’s emotional state, not just their suffering. Empathy lacks the motivational component of compassion.”).

35. *Id.* at 56–62 (summarizing neurological studies on compassion, breaking down the neural correlates of compassion into nine affective regions).

When we see someone in a highly emotional situation, “mirror” neurons in our brain activate, reflecting the target’s perceived state in our own brain.<sup>36</sup> Scientists hypothesize that these mirror neurons “enable us to understand other people’s actions in terms of our own movements and goals . . . .”<sup>37</sup> Though the role of mirror neurons within systems of human empathy may have been over-hyped,<sup>38</sup> and once-expansive claims about their predominance have come into question in recent years,<sup>39</sup> social neuroscientists still acknowledge that various forms of empathy

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36. Jaime A Pineda, *Sensorimotor Cortex as a Critical Component of an ‘Extended’ Mirror Neuron System: Does it Solve the Development, Correspondence, and Control Problems in Mirroring?*, 4 BEHAVIORAL & BRAIN FUNCTIONS (Oct. 18, 2008), <https://behavioralandbrainfunctions.biomedcentral.com/articles/10.1186/1744-9081-4-47>.

37. Ben Thomas, *What’s So Special About Mirror Neurons?*, SCI. AM. GUEST BLOG (Nov. 6, 2012), <https://blogs.scientificamerican.com/guest-blog/whats-so-special-about-mirror-neurons/>.

38. See J.M. Kilner & R.N. Lemon, *What We Know Currently About Mirror Neurons*, 23 CURRENT BIOLOGY R1057, R1057 (2013) (“Indeed so much has been written about mirror neurons that last year they were referred to, rightly or wrongly, as ‘The most hyped concept in neuroscience’. Here we try to cut through some of this hyperbole and review what is currently known (and not known) about mirror neurons.”).

39. See Susan Lanzoni, *Empathetic Brains*, in EMPATHY: A HISTORY 251, 252 (Yale University Press 2018) (“[T]he expansive claims that mirror neurons subserve the understanding of actions, the capacity to empathize, and even the use of language have recently come under critique.”); see also GREGORY HICKOK, THE MYTH OF MIRROR NEURONS: THE REAL NEUROSCIENCE OF COMMUNICATION AND COGNITION (2014) (offering a comprehensive rebuttal of mirror neuron theory by one of its most prominent critics).



have automatically-triggered neural correlates.<sup>40</sup> Mirror neurons play a role in empathy,<sup>41</sup> as do other neurological systems.<sup>42</sup> Examples of other neural triggers for empathy include the limbic system and the neurotransmitter oxytocin.<sup>43</sup> The “insula, amygdala, and anterior cingulate cortex” also help regulate affective empathy.<sup>44</sup> Regardless as to which neurological correlate manifests empathy, highly emotional situations elicit neurological state-matching reactions.<sup>45</sup> Some of these brain systems create emotional contagion, which is when one’s mental state reflects that of the person they see.<sup>46</sup> As people become more empathetic,

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40. LANZONI, *supra* note 39, at 252 (“If the mirror neuron literature views empathy as an automatic neural simulation, other neuroscientific models characterize empathy as an emotionally regulated feeling response, sensitive to social context and dependent on an awareness of the difference between the self and the other. Different empathies have been found to possess different neural correlates: emotional contagion has neural patterns distinct from perspective taking, for instance. Some contend, however, that emotional contagion, as well as self-oriented perspective taking, is only pseudo-empathy and should not be called empathy at all.”).

41. John Mark Taylor, *Mirror Neurons After a Quarter Century: New Light, New Cracks*, HARVARD UNIVERSITY: THE GRADUATE SCHOOL OF ARTS AND SCIENCES: SCIENCE IN THE NEWS BLOG (July 25, 2016), <http://sitn.hms.harvard.edu/flash/2016/mirror-neurons-quarter-century-new-light-new-cracks/> (“[I]t is important to remember that despite recent criticism, [mirror neuron] activity may still play an important role in many behaviors.”).

42. Vera Flasbeck et al., *The Brain that Feels Into Others: Toward a Neuroscience of Empathy*, in THE NEUROSCIENCE OF EMPATHY, COMPASSION, AND SELF-COMPASSION 23, 34–35 (Larry Stevens & C. Chad Woodruff eds., 2018).

43. *Id.* at 35.

44. David D. Vachon, Donald R. Lynam & Jarrod A. Johnson, *The (Non)Relation Between Empathy and Aggression: Surprising Results From a Meta-Analysis*, 140 PSYC. BULL. 751, 752 (2014).

45. *See generally* Flasbeck et al., *supra* note 42 at 28 (“From a proximate perspective, perceiving the affective state of a target individual activates autonomic responses that may (or may not) result in empathy.”).

46. *See id.* at 24 (“Hence, [emotional contagion’s] behavioral correlate is restricted to the display of the same behavior as that perceived in the initiating individual.”); Simone G. Shamay-Tsoory, *Dynamic Functional Integration of Distinct Neural Empathy Systems*, 9 SOC., COGNITIVE & AFFECTIVE NEUROSCIENCE 1, 2 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3871737/pdf/nst107.pdf> (“The existence of mirror neurons related to emotional facial expressions in the human [inferior frontal gyrus] suggests that the human [mirror neurons system] may be used to convert observed facial expressions into a pattern of neural activity that would be suitable for producing similar facial expressions and would provide the neural basis for emotional contagion.”).

networks in the brain connecting theory of mind (conceptualization of other mental states) to embodied simulation (our ability to reflect a perceived action's goal-state) fire.<sup>47</sup>

In summary, our brains appear to automatically respond to highly emotional situations, reflecting the perceived neural state. This likely causes us to mimic the emotions we perceive. For the sake of scientific accuracy and clarity, this paper will therefore refer to “empathy” as embodied perspective-taking. It is an automatic process that all people experience.

### C. THE RELATIONSHIP BETWEEN EMPATHY AND BIAS

Empathy can lead to cognitive distortion in several ways. It can narrow a judge's perspective, cause a judge to over-value one perspective over others, can cause benevolence or aggression, and can result in disparate impact.

As discussed above, empathy is primarily a mechanism for perspective-taking. Because empathy often involves individual perspective-taking, it can draw the judge's attention away from the good of a collective.<sup>48</sup> This may actually be desirable if, for instance, it enables a judge to weigh the social value of punishment against the harm of such punishment to an individual. Still, it may cause the judge to overvalue an individual's perspective, or to reduce complex socio-legal considerations to a mere conflict between two parties. This may undermine the collective good and make judges take less prudent actions.<sup>49</sup> These effects occur even when participants believe their decision will be public.<sup>50</sup> For this reason, the publicity of judges' written decisions does not protect against the effects of empathy bias.

Another issue with empathy and bias is the possibility of “imaginative resistance,” a phenomenon in which people find it

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47. See Vittorio Gallese, *Mirror Neurons, Embodied Simulation, and the Neural Basis of Social Identification*, 19 INT'L J. RELATIONAL PERSPECTIVES 519, 524 (Oct. 15, 2009) (discussing how social identification is built and what neural mechanisms enable its emergence).

48. See C. Daniel Batson & Nadia Y. Ahmad, *Empathy-Induced Altruism: A Threat to the Collective Good*, 26 ADVANCES IN GROUP PROCESSES: ALTRUISM AND PROSOCIAL BEHAVIOR IN GROUPS 1, 18 (2009) (discussing the results of an experiment that introduces egotistic and altruistic motives separately and its impact on the collective good).

49. *Id.* at 14–15 (explaining the results of an experiment measuring empathic concern).

50. *Id.* at 16–17 (explaining the results of an experiment introducing egoistic and altruistic motives separately).

difficult to empathize with different moral frameworks from their own.<sup>51</sup> Understanding imaginative resistance might enable judges to engage in critical, neutral reflection on alternative moral perspectives by “plac[ing] rational demands on the viewpoints of the simulator and his target.”<sup>52</sup> Though some may argue that sentencing judges should not probe “into the motives that led the defendant to commit a crime,”<sup>53</sup> an understanding of such motives might be essential to assessing an offender’s mental state, and the correspondingly appropriate punishment.

Sometimes, empathy may have positive effects. For example, there is much support for the hypothesis that empathy causes altruism.<sup>54</sup> This altruism comes in the form of care for the other person’s welfare.<sup>55</sup> It often manifests as compassion, inclining people to treat the subject of their empathy with kindness.<sup>56</sup>

Empathy also has other, less intuitive effects. For example, empathy does not necessarily only flow to the disenfranchised side in litigation. Judges may empathize with corporate or government litigants, or may have empathy for all parties in a case.<sup>57</sup> Empathy also does not only cause prosocial behavior towards the target but can also facilitate aggression on behalf of the target’s interest.<sup>58</sup> It may also cause judges to identify with enraged aggressors, treating aggression more charitably as the

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51. Karsten R. Stueber, *Imagination, Empathy, and Moral Deliberation: The Case of Imaginative Resistance*, 49 SOUTHERN J. PHIL. 156, 160 (2011) (“The examples also reveal that imaginative resistance does point to some real limits and real difficulties in making sense of another person’s point of view, particularly in moral matters.”).

52. *Id.* at 175.

53. Corso, *supra* note 10, at 103 (defending empathy in the constitutional law context while dismissing it in the criminal context).

54. Batson & Ahmad, *supra* note 48, at 23.

55. *Id.* at 7 (defining altruism “as [a] motivational state with the ultimate goal of increasing another person’s welfare”).

56. *Id.*

57. Bandes, *supra* note 21, at 192 (discussing distinctions between empathy and compassion in the judicial process).

58. Anneke E. K. Buffone & Michael J. Poulin, *Empathy, Target Distress, and Neurohormone Genes Interact to Predict Aggression for Others—Even Without Provocation*, 40 PERSONALITY AND SOC. PSYCHOL. BULL. 1406, 1418 (2014) (“The present research found that assessed or elicited empathy predicted aggression to benefit a distressed empathy target, and that the effect of empathy may be partially explained by the empathy-linked neurohormones vasopressin and oxytocin.”).

target of empathy.<sup>59</sup> Finally, if someone feels overwhelming empathy, it may prevent them from acting altruistically.<sup>60</sup>

These aggression-triggering effects are important to note for the judicial sentencing context, as harsh facts in a violent trial may invite a judge to sentence a defendant harshly on a victim's behalf. Notably, more or broader empathy may not be the solution to combat empathy-induced aggression. A meta-analysis of affective empathy and aggression studies determined that empathy has minimal effect on the inhibition of aggression.<sup>61</sup>

Finally, empathy may result in racial disparities. Some studies focusing on this phenomenon measure amygdala activation to assess empathy levels.<sup>62</sup> The amygdala is a set of neurons involved in the limbic system, responsible for processing emotions and fear responses.<sup>63</sup> These studies have found that the brain distinguishes between in-group and out-group members, and greater amygdala activation occurs when people see fear in the faces of people of their own race.<sup>64</sup> Less activation occurs when seeing fear in a person of a different race's face.<sup>65</sup> When people see their own race experiencing physical pain, they experience more amygdala activation than when they see a different

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59. See, e.g., Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 376 (1996) (“Consider, for example, the dark underbelly of empathy, as illustrated in a recent notorious case. In that case, the defendant found his wife in bed with another man at midnight, chased the man away, drank and argued with his wife until four a.m., and then fatally shot her in the head with a hunting rifle. A Baltimore County Circuit Court judge sentenced the defendant to eighteen months in prison for voluntary manslaughter, saying ‘I seriously wonder how many men married five, four years would have the strength to walk away without inflicting some corporal punishment.’ The judge’s reaction was the one that came most easily—prereflective and self-reflexive.”).

60. Steve Taylor, *Negative Empathy*, PSYCH. TODAY (May 12, 2016), <https://www.psychologytoday.com/us/blog/out-the-darkness/201605/negative-empathy>.

61. See generally Vachon, Lynam & Johnson, *supra* note 44, at 754 (summarizing the meta-analysis).

62. See, e.g., Armstrong, *supra* note 32 (introducing the neuroscience of empathy).

63. *Amygdala*, SCIENCEDAILY, <https://www.sciencedaily.com/terms/amygdala.htm> (last visited Nov. 12, 2020).

64. See, e.g., Armstrong, *supra* note 32, at 29, 31 (“Cultural emphasis on ingroups and outgroups may create an ‘empathy gap’ between people of different races and nationalities . . . .” “People have been found to show greater activation in the amygdala when viewing fearful faces of their own race . . . .”).

65. *Id.* at 31.

race in physical pain.<sup>66</sup> The empathetic reactions to fear and pain may be amplified in more collectivist societies.<sup>67</sup> These findings are important to consider in the sentencing context, as it may be more difficult for typically white, male judges<sup>68</sup> to empathize with minority defendants than white,<sup>69</sup> well-educated prosecutors and victims of all stripes.<sup>70</sup>

Empathy entails emotional entanglement with the subject of the empathy. Colloquially, it is “putting oneself in another’s shoes.”<sup>71</sup> It can be compassionate, but it also can cause negative or antisocial consequences. For these reasons, empathy may properly be considered amoral, with positive and negative effects.<sup>72</sup>

#### D. HOW COGNITIVE PROCESS THEORIES ILLUMINATE SOLUTIONS

Given that human empathy is an automatic system that can affect decision-making in both positive and negative ways, it is important to discuss cognitive systems that may help mitigate its negative effects. Theories of cognitive processes divide human processing into two systems: System 1 and System 2.<sup>73</sup> System 1

66. *Id.*

67. *Id.* (“One study comparing the in-group/out-group bias in Korea, a more collectivist society, and the United States, a more individualistic society, found that more interdependent societies may foster a greater sense of in-group favoritism in the brain.”).

68. See Tracey E. George & Albert H. Yoon, *Am. Const. Soc’y, The Gavel Gap: Who Sits in Judgment on State Courts?* 7 (2016) (finding that more than half of state trial judges and state appellate judges are white men).

69. See Amita Kelly, *Does It Matter That 95 Percent of Elected Prosecutors Are White?*, NPR (July 8, 2015, 4:59 PM), <https://www.npr.org/sections/itsallpolitics/2015/07/08/420913118/does-it-matter-that-95-of-elected-prosecutors-are-white> (noting that 95 percent of the country’s elected prosecutors are white and 83 percent are men).

70. See generally BUREAU JUST. STAT., U.S. DEP’T JUST., CRIMINAL VICTIMIZATION, 2018: SUMMARY (Sept. 2018), [https://www.bjs.gov/content/pub/pdf/cv18\\_sum.pdf](https://www.bjs.gov/content/pub/pdf/cv18_sum.pdf) (illustrating a wide range of victim types).

71. See BLOOM, *supra* note 25, at 41 (“[R]egardless of how one describes it, we’ll see that there are many people who really do think morality is rooted in empathy in the sense that I am discussing here, people who talk about the importance of standing in another’s shoes, feeling their pain, and so on.”).

72. Batson & Ahmad, *supra* note 48, at 6–7.

73. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20–21 (2013) (“System 1 operates automatically and quickly, with little or no effort and no sense of voluntary control. System 2 allocates attention to the effortful mental activities that demand it, including complex computations. The operations of System 2 are often associated with the subjective experience of agency, choice, and concentration.”).

processes are rapid and autonomous, whereas System 2 processes are “higher order,” often entailing reasoning, hypothetical thinking, and working memory.<sup>74</sup> Much of our lives are spent using System 1 processes.<sup>75</sup> When someone thinks deeply, they engage System 2 processes.<sup>76</sup> System 2 processes can intervene in System 1 processes, overriding default responses.<sup>77</sup> Emotions and decisions often come before justifications,<sup>78</sup> and rational thought processes may play less of a role in our decision-making than it seems.<sup>79</sup>

Though these conclusions may become more nuanced over time,<sup>80</sup> it is likely that they form a framework by which people can modify and check their impulses and autonomic responses to stimuli.<sup>81</sup> For example, if a judge notices that their natural empathy is causing them to side in one direction, cognitive theories suggest that this judge might override their cognition, enabling reflective decision-making. At least one person has already appealed to dual-process systems to justify empathetic judging in general.<sup>82</sup> Empathy and its coextensive biases operate on an autonomous level, and higher-order thought may be able to counteract its more pro-aggressive effects.

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74. Jonathan St. B. T. Evans & Keith E. Stanovich, *Dual-Process Theories of Higher Cognition: Advancing the Debate*, 8 PERSP. PSYCHOL. SCI. 223, 223–24 (2013).

75. *Id.*

76. *Id.*

77. *Id.*

78. See, e.g., John A. Bargh & Ezequiel Marsella, *The Unconscious Mind*, 3 PERSP. PSYCHOL. SCI. 73, 75 (2008) (“The idea that action precedes reflection is not new . . . . [C]onscious processes kick in after a behavioral impulse has occurred in the brain—that is, the impulse is first generated unconsciously, and then consciousness claims (and experiences) it as its own.”).

79. See Antonio R. Damasio et al., *The Somatic Marker Hypothesis and the Possible Functions of the Prefrontal Cortex*, 351 PHIL. TRANSACTIONS: BIOLOGICAL SCI. 1413 (1996). See generally ANTONIO R. DAMASIO, *THE FEELING OF WHAT HAPPENS: BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS* 35–81 (1999) [hereinafter DAMASIO, *BODY AND EMOTION*].

80. See generally Aaron Sloman, *Damasio’s Error*, THE PHIL. MAG. 5 (2004), <https://www.cs.bham.ac.uk/research/projects/cogaff/phil-mag-emotions-slo-man.pdf> (critiquing Antonio Damasio’s theories and reasoning on emotional reactions).

81. See Evans & Stanovich, *supra* note 74, at 223–24.

82. Low, *supra* note 26, at 102–03 (applying dual-process theories to judicial reasoning and inhibition of System 1 processing).

Research suggests, however, that higher-order intervention may not be effective in every context.<sup>83</sup> When people make implicit, unconscious decision-making explicit, they may be less in accordance with experts and less satisfied with their decision.<sup>84</sup> Additionally, for basic decision-making, intuitive processes may be more effective at coming to better decisions.<sup>85</sup> This may be because the vast amount of decision-making comes from implicit processing.<sup>86</sup> Later, this paper will assess the effects of System 1 and System 2 processing on judges.

### III. EMPATHY IMPACTS JUDGES AND CRIMINAL SENTENCES

The empathetic distortions outlined above impact sentencing in various ways. First, this section addresses the contention that judges may be different from the average person, concluding that generally-applicable conclusions about cognition are also applicable to judges. Then, this section addresses federal criminal sentencing, analyzing empathy as a possible source of distortion through discussions of white-collar sentencing and victim impact statements.

#### A. STUDIES OF JUDGES SHOW THEY ARE SUBJECT TO SIMILAR PROCESSING AND BIASES AS ANYONE ELSE

There are some reasons to believe that judges have somewhat different attributes than the average person. Judges have been through law school. Legal scholarship values “abstract rationality,” devaluing emotion.<sup>87</sup> After discussion of the mechanisms of empathy and bias, however, it may come as no surprise

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83. Christian Keysers et al., *Explicit and Implicit Strategies in Decision Making*, in *BETTER THAN CONSCIOUS?: DECISION MAKING, THE HUMAN MIND, AND IMPLICATIONS FOR INSTITUTIONS* 225, 244 (Christoph Engel & Wolf Singer eds., 2008).

84. *Id.*

85. Marius Usher et al., *The Impact of the Mode of Thought in Complex Decisions: Intuitive Decisions Are Better*, 2 *FRONTIERS PSYCHOL.* 1, 9 (2011) (“The four experiments reported here provide support for the claim that intuitive–affective strategies can outperform deliberation/analytic strategies in value integration, an operation that is critical for complex decision-making.”).

86. See generally DAMASIO, *BODY AND EMOTION*, *supra* note 79 (discussing the role of implicit processing in decision-making).

87. See Angela P. Harris & Marjorie M. Shultz, *A(nother) Critique of Pure Reason: Toward Civic Virtue in Legal Education*, 45 *STAN. L. REV.* 1773, 1775, 1805 (1993).

to hear that judges do make systematic cognitive errors,<sup>88</sup> like most people. They also have the same amount of implicit bias as laypeople.<sup>89</sup> These effects occur even though the public's expectation is that judicial officers make only occasional mistakes.<sup>90</sup>

Judges are also subject to the same distortions and biases as an average person.<sup>91</sup> These include, in addition to empathetic distortions, anchoring biases, framing biases, hindsight bias, representativeness heuristics, and egocentric biases.<sup>92</sup> Each of these “cognitive illusions” distorts decision-making through the use of heuristics, or cognitive shortcuts.<sup>93</sup> Cognitive illusions are not the only way that judicial decision-making may be distorted. For example, judges issue significantly less favorable parole decisions as time passes since their last meal break.<sup>94</sup>

Whether through cognitive distortions or otherwise, identity biases play a systematic role in judicial decision-making.<sup>95</sup> For example, gender is relevant to judicial decisions. Though female judges rarely decide cases differently from male judges, they do decide sex discrimination disputes differently and can help shift

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88. See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 779 (2001) (“Empirical evidence suggests that even highly qualified judges inevitably rely on cognitive decision-making processes that can produce systematic errors in judgment.”).

89. Suja A. Thomas, *What Judges Can Do About Implicit Bias*, JOTWELL (May 22, 2017) (reviewing Andrew J. Wistrich & Jeffrey J. Rachlinski, *Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It*, in ENSURING JUSTICE: REDUCING BIAS 87 (Sarah Redfield ed., 2017)), <https://courtslaw.jotwell.com/what-judges-can-do-about-implicit-bias/>.

90. *Id.*

91. See Guthrie, Rachlinski, & Wistrich, *supra* note 88, at 784 (summarizing findings of judicial decision making studies conducted for various cognitive biases and influences).

92. *Id.*

93. *Id.*

94. Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. U.S. 6889, 6892 (2011).

95. Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37, 52–53 (2015) (“Third, this fact has broader implications for descriptive representation on the courts. Scholarship has demonstrated that female judges decide cases differently from men, and that African Americans also decide cases differently from whites. However, what we see here is that male judges who have daughters are more likely to vote in a liberal direction—despite not having those ascriptive characteristics that would otherwise be linked to more progressive views on women's rights issues.”) (internal citations omitted).



a panel's decision-making.<sup>96</sup> Similar effects also occur in sexual harassment cases.<sup>97</sup> When judges have daughters, they are more likely to vote in a more feminist fashion on gender issues.<sup>98</sup> Conversely, male judges may also side with rapists and domestic abusers more frequently than other defendants, as male judges find it easier to empathize with predominantly male defendants.<sup>99</sup>

Race also affects judicial decision-making. For cases brought under the Voting Rights Act, race plays a more prominent role in judicial decision-making than other factors, such as ideology.<sup>100</sup> Other studies show that white judges are less likely to believe that employees have "credible grievances of racial harassment," even though both African American and white judges agree on the relevant factual features of the cases.<sup>101</sup> Given race's prominent effect on judicial decision-making, and the already-present racial disparities in the criminal justice system,<sup>102</sup>

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96. See Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 406 (2010) (statistically analyzing the likelihood of a ruling in favor of the plaintiff based on the gender makeup of the panel of judges).

97. Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005) (analyzing a data set to find that for Title VII sex discrimination and sexual harassment cases, "female judges were significantly more likely than male judges to find for plaintiffs").

98. Glynn & Sen, *supra* note 95, at 52 ("[A]cross cases involving gender issues, judges who parent daughters as opposed to sons are more likely to reach liberal decisions . . .").

99. Susan Bandes, *supra* note 59, at 376–77 ("[E]asy identification for the judge . . . is more often true in cases of rape and domestic violence, in which predominantly male judges find it easier to make the empathetic link with male defendants, than in cases of other crimes.").

100. See Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 53 (2008) (providing statistical analysis demonstrating that "a judge's race and partisan affiliation are important determinants of liability in [Voting Rights Act] section 2 cases").

101. Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1161 (2009).

102. See Radley Balko, *21 More Studies Showing Racial Disparities in the Criminal Justice System*, WASH. POST (Apr. 9, 2019, 6:00 AM), <https://www.washingtonpost.com/opinions/2019/04/09/more-studies-showing-racial-disparities-criminal-justice-system/> (providing summaries of twenty-one studies conducted between 2008 and 2018 quantifying current racial disparities in the United States criminal justice system).

solutions which mitigate empathy-sourced racial sentencing disparities are particularly important.

Studies show that politics can affect a judge's decision-making in limited ways,<sup>103</sup> but other studies question the significance of this, suggesting that political party affiliation does not change how judges rule on, for example, summary judgment in employment civil rights cases.<sup>104</sup> Overall, judges experience sufficient cognitive distortions to suggest that larger-scale cognitive processing findings which apply to the general public apply to them as well.

#### B. HOW DOES FEDERAL SENTENCING WORK?

An understanding of United States sentencing policy helps one understand how findings on empathy, cognitive heuristics, and bias affect judicial decision-making during punishment. In the current United States federal court system, sentencing guidelines set the standard sentences for a given charge, factoring in mitigating and aggravating factors to create a suggested sentence.<sup>105</sup> Since the passage of the Federal Sentencing Guidelines, downward departures have been gradually increasing.<sup>106</sup>

Several United States Supreme Court cases have affected how courts may apply the Federal Sentencing Guidelines.<sup>107</sup> *Blakely v. Washington* held that maximum sentences could not exceed the maximum sentence which could be imposed for a

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103. See generally CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006) (providing a high-level analysis of judicial appointees and their decision-making based on their political party, finding party affiliation highly predictive only on abortion and capital punishment).

104. Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 320–21 (2012).

105. Joshua B. Fischman & Max M. Schanzenbach, *Do Standards of Review Matter? The Case of Federal Criminal Sentencing*, 40 J. LEGAL STUD. 405, 405–06 (2011).

106. Becky Gregory & Traci Kenner, *A New Era in Federal Sentencing*, 68 TEX. B.J. 796, 798 (2005) (“[D]ownward departures steadily increase[d] from 20 percent to 35 percent during the previous eight years.”).

107. See Carol A. Pettit, *Writing the Book(er) on Blakely: The Challenge to the Federal Sentencing Guidelines*, 41 TULSA L. REV. 365 (2005) (covering legal challenges to Federal Sentencing Guidelines and how cases have impacted implementation of those guidelines).

crime without additional judicial findings.<sup>108</sup> In *United States v. Booker*, the Supreme Court then determined that sentences were unconstitutional when based on judge-found facts.<sup>109</sup> These decisions made Federal Sentencing Guidelines advisory, instead of mandatory.<sup>110</sup> After *Booker*, many federal courts further reduced the effect of the Guidelines.<sup>111</sup>

These decisions occurred in a landscape of difficult and changing sentencing issues. Prior to the Federal Guidelines, courts exercised indeterminate sentencing, which was almost unfettered discretion.<sup>112</sup> Now, the advisory Guidelines help judges come to decisions. These decisions do not need to follow proportionality standards,<sup>113</sup> and district courts may deviate from the ranges based on policy disagreement.<sup>114</sup> Decisions must merely be “reasonable.”<sup>115</sup>

During balancing tests, judges often have to weigh the balances of justice, and this necessarily implicates the exercise of

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108. See *Blakely v. Washington*, 542 U.S. 296, 304 (2004) (“The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea.”).

109. Pettit, *supra* note 107, at 366.

110. *Id.* at 369.

111. *Id.* at 366–67 (“Initially a number of federal district courts found the Guidelines unconstitutional. Some held the Federal Sentencing Guidelines wholly unconstitutional, while others found them salvageable through severability. Those holding the Guidelines unconstitutional, whether in whole or in part, disagreed about how sentences should be determined post-*Blakely*. Some preferred a return to indeterminate sentencing using the Federal Sentencing Guidelines as actual guidelines rather than as mandates. Others believed the Guidelines were still valid so long as the sentence imposed would not exceed the maximum presumptive sentence.”).

112. See generally Adam Shajnfeld, *The Eleventh Circuit’s Selective Assault on Sentencing Discretion*, 65 U. MIAMI L. REV. 1133, 1133–37 (2011) (discussing the evolution of federal sentencing law).

113. See *Gall v. United States*, 552 U.S. 38, 49–50 (2007) (“[Judges] may not presume that the Guidelines range is reasonable. [They] must make an individualized assessment based on the facts presented.”).

114. See *Kimbrough v. United States*, 552 U.S. 85, 93 (2007) (explaining that the Defendant’s sentence was shorter than the Guidelines recommended because the Court felt the crack cocaine Guidelines were “disproportionate and unjust”).

115. See generally Shajnfeld, *supra* note 112, 1137–38 (discussing different interpretations of “reasonableness” review).

empathy.<sup>116</sup> Judges are allowed discretion in, for example, compassionate release and asylum cases.<sup>117</sup> The federal sentencing guidelines create a unique situation, however, because outcomes are partially dictated by maximum and minimum penalties.<sup>118</sup> Though this system was intended to be more fair, some judges believe that the low limits of the federal guidelines are unfair when applied to certain cases.<sup>119</sup> Some of these judges have resigned or refused to comply with the guidelines.<sup>120</sup>

Proponents of the guidelines offer familiar retributive proportionality arguments. For example, they suggest that the guidelines enable judges to only punish charged conduct<sup>121</sup> and make punishments fairer.<sup>122</sup> The guidelines also prevent judges from imposing unjust consecutive sentences.<sup>123</sup>

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116. See Bandes, *supra* note 21, at 186 (discussing the Justices' application of empathy in a Supreme Court oral argument about the strip search of a thirteen-year-old).

117. See *id.* at 187 (discussing contexts where judicial compassion is explicitly permitted).

118. See *id.* at 187–88 (addressing compassion and federal sentencing guidelines).

119. See *id.* (“[T]he guidelines impose mandatory minimum sentences that have shocked the conscience of many judges—decades in prison for a first time, low-level drug offence . . .”).

120. See *id.* (addressing compassion's role as a “stopgap” for the federal sentencing guidelines—a role that empathy may also share).

121. See Pettit, *supra* note 107, at 403 (“Punishment for real conduct is something that Justice Breyer has maintained is an essential part of the Congress's goal for the Federal Sentencing Guidelines — so essential that in his view, Congress would have preferred that the Guidelines be only advisory rather than to have modified judges' ability to punish real conduct. ‘Real conduct’ is a euphemism for uncharged conduct that is not subject to the usual requirement of proof beyond a reasonable doubt.”).

122. See Sarah Hyser, *Two Steps Forward, One Step Back: How Federal Courts Took the “Fair” Out of the Fair Sentencing Act of 2010*, 117 PENN ST. L. REV. 503, 512 (2012) (“In April 2009, President Barack Obama's administration expressed a desire to end the sentencing disparity. The following month, the House of Representatives held a subcommittee hearing to discuss the issue of reforming crack sentencing and to consider five proposed bills.” (internal citation omitted)).

123. Jon O. Newman, *The Federal Sentencing Guidelines: A Good Idea Badly Implemented*, 46 HOFSTRA L. REV. 805, 813 (2018) (“The Guidelines curb abusive use of consecutive sentences by providing that sentences for defendants convicted of multiple counts should run concurrently, with just two exceptions.” (internal citation omitted)).

In the judicial process, the appellate system generally reduces the effects of an individual judge's personal preferences.<sup>124</sup> This may have less of an effect in sentencing, where judges may make decisions under a lenient standard of review. Under current law, the federal standard of appellate review for criminal sentences is a deferential "abuse of discretion" standard.<sup>125</sup> Evidence suggests that judges change their sentencing decisions based on the standard on which their decisions are reviewed.<sup>126</sup>

As addressed before, one of the primary concerns of those who reject empathy in the judiciary is that it might obscure the judge's ability to assess the balance of the law, as it might cause undue bias towards one side of the case. Given the wide discretion judges have in criminal sentencing, the important role of empathy in such proceedings is difficult to ignore, for people on all sides of the greater empathy debate.<sup>127</sup>

### C. A NOTE ON PROSECUTORS AND THE FEDERAL GUIDELINES

Important to any discussion of punishment is an acknowledgement of the realities of American sentencing. From 2006 to 2016, the "number of criminal trials declined by 47%, and the jury trial rate declined by almost 40%."<sup>128</sup> The Federal Sentencing Guidelines may contribute to this trend, as "[a]cceptance of responsibility and substantial assistance reductions are the two most common ways defendants can mitigate their sentences."<sup>129</sup> These "normally entail admissions of guilt and . . . follow guilty

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124. See Brandy A. Karl, *Why Judges' Personal Preferences Play A Role in Their Decisionmaking, and How the Appellate System Controls That Role*, FINDLAW (Jan. 8, 2003), <https://supreme.findlaw.com/legal-commentary/why-judges-personal-preferences-play-a-role-in-their-decisionmaking-and-how-the-appellate-system-controls-that-role.html>.

125. *Gall v. United States*, 552 U.S. 38, 56 (2007) ("[T]he appropriate standard of review was abuse of discretion.").

126. Joshua B. Fischman & Max M. Schanzenbach, *Do Standards of Review Matter? The Case of Federal Criminal Sentencing*, 40 J. LEGAL STUD. 405, 431 (2011) ("Changes to standards of review clearly have an impact on district judges' sentencing behavior.").

127. See Colby, *supra* note 18, at 1996 n.248 (describing a "limited" role of empathy as still encompassing criminal sentencing, and pointing out Justice Scalia's support for empathy in criminal sentencing).

128. The Honorable Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 105 (2018).

129. *Id.* at 122.

pleas.”<sup>130</sup> In fact, some argue that the “most glaring change imposed by” the shift to determinate sentencing is a “shift in sentencing discretion from the judge to the prosecutor.”<sup>131</sup> Many other factors also contribute to the plea deal trend, resulting in a system where defense attorneys accept pleas because those deals are in their client’s best interest.<sup>132</sup>

Due to the decline in criminal trials and rise in plea deals, prosecutors are often the people who are in charge of determining a defendant’s sentence.<sup>133</sup> Prosecutors likely face empathetic biases similar to judges, with added distortions caused by the adversarial system. Though an investigation of the role of empathy and bias in prosecutors is likely warranted, this paper addresses judicial bias, as likely trial sentences constrain the plea options that prosecutors may offer.<sup>134</sup>

#### D. COMBINING BIAS, PUNISHMENT, AND JUDGING: FAIRNESS AND WHITE-COLLAR CRIMINALS

White-collar criminal cases provide particularly interesting insights into the role of bias in sentencing. Judges generally share attributes with white-collar criminals, including race and employment status.<sup>135</sup> White-collar criminals can also often call

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130. *Id.*

131. AM. COLL. OF TRIAL LAWYERS, UNITED STATES SENTENCING GUIDELINES 2004: AN EXPERIMENT THAT HAS FAILED 14 (2004), [https://www.actl.com/docs/default-source/default-document-library/newsroom/united\\_states\\_sentencing\\_guidelines\\_2004\\_an\\_experiment\\_that\\_has\\_failed](https://www.actl.com/docs/default-source/default-document-library/newsroom/united_states_sentencing_guidelines_2004_an_experiment_that_has_failed).

132. *See generally* Conrad, Jr. & Clement, *supra* note 128 (2018) (explaining that in addition to the Federal Sentencing Guidelines, other factors such as mandatory minimum sentences, precedential United States Supreme Court cases, United States Attorneys General’s prosecutorial policies, stronger evidence due to technological advancement, expense, and overarching expectations directly contribute to the increase in plea deals).

133. *See* AM. COLL. OF TRIAL LAWYERS, *supra* note 131, at 14 (“The most glaring change imposed by this sentencing system over the last decade and a half has been the shift in sentencing discretion from the judge to the prosecutor.”).

134. *Cf.* Conrad, Jr. & Clement, *supra* note 128, at 119 (“[C]harging fewer [mandatory minimum penalties] could result in prosecutors offering more attractive plea terms . . .”).

135. *See* Peter J. Henning, *The Challenge of Sentencing White-Collar Criminals*, N.Y. TIMES (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/business/dealbook/sentencing-white-collar-criminals.html> (“White-collar defendants often have more in common with the federal judge who will sentence them than most criminals do.”); *see also* Paul M. Klenowski & Kimberly D. Dodson, *Who Commits White-Collar Crime, and What Do We Know About Them?*, in THE

on a network of people to vouch for their interests during sentencing,<sup>136</sup> which may cause a judge to weigh a sentence from the defendant's point of view. Perhaps unsurprisingly, given these facts and the above findings on judicial bias, judges often issue mitigated sentences to white-collar defendants.<sup>137</sup> Most white-collar defendants in a federal district known for prosecuting white-collar crimes receive sentences shorter than the federal guidelines recommend.<sup>138</sup>

White-collar criminals have caused unique sentencing issues for some time. The sentencing guidelines for white-collar criminals have shifted over the years.<sup>139</sup> These guidelines were designed, in part, to make the playing field between white-collar criminals and other criminals fairer.<sup>140</sup> The disparity in mitigated sentences between white collar and violent crime may be due to factors aside from bias. For example, white collar sentencing guidelines may be generally high<sup>141</sup> or may be primarily related to the amount of money lost.<sup>142</sup> Adhering to such guidelines

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OXFORD HANDBOOK OF WHITE-COLLAR CRIME 2–3 (Shanna R. Van Slyke et al. eds., 2016) (summarizing findings of various studies that describe the “demographic profile” of white-collar criminals).

136. See Henning, *supra* note 135 (“White-collar defendants . . . can generate letters from family and friends attesting to their generosity and good works—something that is not likely to come up in sentencing a drug trafficker.”).

137. See Jillian Hewitt, *Fifty Shades of Gray: Sentencing Trends in Major White-Collar Cases*, 125 YALE L.J. 1018, 1059–60 (2016) (writing that in white-collar cases, “the government . . . sponsor[s] below-range sentences on the basis of cooperation, and the court . . . frequently impos[es] below-range sentences in cases not involving cooperation . . .”).

138. See *id.* at 1060 (“Defendants in major white-collar cases in S.D.N.Y. are more likely than not to receive a sentence below the Guidelines range. Moreover, when a below-range sentence is imposed, it is generally vastly shorter than the sentence recommended by the Guidelines.”).

139. Mark W. Bennett, Justin D. Levinson & Koichi Hioki, *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 IOWA L. REV. 939, 942–43 (2017) (briefly detailing the changes the Federal Sentencing Guidelines have gone through since the 1980s).

140. *Id.* at 947–49.

141. See *id.* at 975 n.151 (“[S]ome defense advocacy groups[ ] feel that the guideline is fundamentally flawed, produces unduly high sentences for defendants across the loss spectrum, and needs to be completely rewritten.”) (quoting Frank O. Bowman, III, *Damp Squib: The Disappointing Denouement of the Sentencing Commission’s Economic Crime Project (and What They Should Do Now)*, 27 FED. SENT’G REP. 270, 271 (2015)).

142. Walter Pavlo, *Few Meaningful Changes Proposed on White Collar Crime Sentences*, FORBES (Apr. 15, 2015, 7:35 AM), <https://www.forbes.com/>

may prevent a judge from engaging in empathetic interest balancing. For example, a judge's degree of favor towards retributive philosophy does not generally affect the severity with which they sentence white-collar criminals.<sup>143</sup>

Empathy still likely has some impact on white collar sentencing, however. For example, philosophies of mercy affect the sentence length of white-collar criminals.<sup>144</sup> The presence of such mercy has been tested using empathy-triggering statements such as “[p]eople who commit serious crimes often should receive treatment instead of punishment,” and “[p]eople who commit serious crimes sometimes deserve leniency.”<sup>145</sup>

There is a perfect storm in favor of empathy towards white-collar criminals. On top of their often-similar identities, white-collar criminals such as fraudsters and corporate criminals engage in financial crimes. Such crimes lack tangible violence that might otherwise arouse empathetic violence within judges. Remember, strong emotional experiences are more likely to arouse empathetic reactions. Without empathetic triggers, judges may find it difficult to issue high sentences.

Note that this paper does not necessarily intend to argue that white-collar criminals should not receive mitigated sentences nor necessarily that violent criminals should be treated more leniently in comparison to white-collar criminals. Studying the sentencing of white-collar criminals illustrates how empathy during the sentencing process works and how it might contribute to disparity. The contributions of cognitive effects and empathy may help explain the difficulties that judges and legislatures have in comparing white collar sentences to sentences issued to violent offenders. Given that white collar criminal demographics align disproportionately with judicial demographics,<sup>146</sup> white-collar crime also provides an example of how unequally-applied

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sites/walterpavlo/2015/04/15/few-meaningful-changes-proposed-on-white-collar-crime-sentences/#6d8227ad6e70 (“The primary driver that determines a prison term in an economic crime is the dollar amount ‘lost’ in the crime.”).

143. See Bennett, Levinson, & Hioki, *supra* note 139 at 971 (“Despite the differences in retribution sentencing philosophy, the judges from . . . three groups [with different religious affiliations] did not sentence the defendant differently.”).

144. *Id.* (“The more the judges agreed with mercy punishment philosophies . . . the shorter they sentenced the defendant.”).

145. *Id.*

146. See Henning, *supra* note 135.



empathy could lead to racial disparity within the criminal justice system.

#### E. EMPATHY AND PUNISHMENT: VICTIM IMPACT STATEMENTS AND THE DISTORTIVE EFFECTS OF EMPATHY

In many contexts, judges are constrained by the law. This has been a central theme of those who argue against empathy in judicial decision making.<sup>147</sup> The federal sentencing rules and the cases that came thereafter, however, allow judges significant leeway in deciding sentences. Judges are even encouraged to exercise their empathetic impulses during sentencing. “[C]riminal law is one of the few areas of doctrine in which an examination or assessment of emotions . . . has been a standard feature of the doctrinal and adjudicative landscape.”<sup>148</sup> Empathy, then, plays a crucial role in criminal sentencing.<sup>149</sup> Still, empathy may foster both positive and negative effects. It can cause bias in favor of those who are similar to the judge,<sup>150</sup> but it might also reduce the amount of unjust punishment that a judge might be willing to inflict.<sup>151</sup>

In some ways, the criminal justice system is geared to elicit directed empathy in certain ways. Take, for example, victim impact statements. Such statements help “prime” a judge’s empathy, which could trigger the judge to have a narrow view of their sentencing decision. In this way, judicial empathy may focus on the victims of crime more than it focuses on defendants. If this happens, sentences would be more severe than merited. This paper does not address in detail whether judges should think about society in general or defendants and victims in particular during sentencing. Still, a perspective shift towards the victims of crime

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147. See Corso, *supra* note 10, at 100–01 (describing the main arguments against “the role of empathy in legal reasoning”).

148. Kathryn Abrams & Hila Keren, *Who’s Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2009 (2010).

149. See *Garner v. Jones*, 529 U.S. 244, 258 (2000) (Scalia, J., concurring in part in the judgment) (“Discretion to be compassionate or harsh is inherent in the sentencing scheme . . .”).

150. Bennett, Levinson, & Hioki, *supra* note 139, at 947 (“White-collar defendants received ‘special empathy’ because their position in society was more like the judge’s own position.”).

151. See Hewitt, *supra* note 137, at 1050 (“Non-government-sponsored below-range sentences, meanwhile, are imposed when the judge independently determines that the Guidelines sentencing range is inappropriately high relative to the defendant’s culpability.”).

may result in distortions during sentencing. Since high levels of emotions trigger empathy and crimes often entail very high levels of emotion, the judge may issue harsher rulings in cases with victim impact statements. This paper is not the first to discuss the possible distortive effects of such statements.<sup>152</sup> Another author who has written extensively on the effects of emotion in law has argued that “victim impact statements are narratives that should be suppressed because they evoke emotions inappropriate in the context of criminal sentencing [such as] hatred, . . . undifferentiated vengeance, and even bigotry.”<sup>153</sup>

Victim statements offer a valuable opportunity for victims to speak during the criminal justice process. When the State files criminal charges, the prosecutor makes the decisions and the agency of victims may be diminished. However, whether these statements should be presented before a sentencing judge, subject to the same cognitive biases as everyday people, is still an important question.

#### IV. HOW MIGHT JUDGES APPLY EMPATHY APPROPRIATELY DURING SENTENCING?

Crucial to the criminal sentencing process is the determination of the role of punishment.<sup>154</sup> Judges may choose to punish on utilitarian grounds to serve a purpose such as deterrence.<sup>155</sup> Alternatively, incapacitation would suggest that a person should be punished to separate them from society in order to prevent further harm.<sup>156</sup> Judges may also choose to punish on retributive grounds to give the criminal a deserved punishment.<sup>157</sup> Other punishment justifications exist in a vast literature, such as communitarian-focused punishment or educative punishment.<sup>158</sup> Each punishment justification has different implications for the role of empathy.

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152. See, e.g., Bandes, *supra* note 21, at 184 (proposing that compassion “aid[s] decision-makers in understanding what is at stake for the litigant.”); Bandes, *supra* note 59 (discussing the academic writing on narratives and victim impact statements).

153. Bandes, *supra* note 59, at 365.

154. See generally Hugo Adam Bedau & Erin Kelly, *Punishment*, STAN. ENCYCLOPEDIA PHIL., (July 31, 2015), <https://plato.stanford.edu/entries/punishment/>.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

For example, if a judge punishes a convicted person on purely incapacitative grounds, they may not need to employ empathy in their decision-making. Incapacitation would logically result from the likelihood of future harm. Empathy is unable to assess the factors associated with recidivism. Such harm could, however, be calculated without emotion. For example, assume that gender, age, crime severity, social support, and other factors correlate with a certain likelihood of re-offense. To embrace empathetic impulses under such a framework would be irrelevant to the calculation. Empathy for possible future victims may be triggered, but not to the point of changing the calculus.

For a retributivist, empathy helps the judge understand the mental state of the defendant, which can help the judge determine how deserving of punishment the person is. For an example, compare two cases of a baby's homicide. In the first, someone negligently leaves a baby in a car seat. In the second, someone intentionally and maliciously stabs a baby. The former person may be "deserving" of less punishment than the latter due to their less culpable mental state. Empathetic brain-states would help the judge consider each defendant's perspective, and may require the judge to reckon with each defendant's moral framework. This could enable a judge to come to a reasoned decision about punishment. Empathy for the victim may also be useful, as it might help the judge assess the severity of harm. Still, this type of retributive judge may want to be mindful of the vengeance-triggering effects of empathy.

Under some retributive frameworks, however, aggression on behalf of the victim may even be beneficial. An example of this framework comes from James Fitzjames Stephen, a retributivist who believes that punishment is morally justified because it gives satisfaction through the expression of hatred.<sup>159</sup> He has argued, "[i]t [is] highly desirable that criminals should be hated, and that punishments inflicted upon them should be so contrived as to give expression to that hatred . . ."<sup>160</sup> Under this retributive framework, the empathetic aggression of the judge may channel that of the victim and society, causing a just expression of criminal hatred. Judicial anger may have varying

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159. CYNDI BANKS, CRIMINAL JUSTICE ETHICS: THEORY AND PRACTICE 112 (1st ed. 2004).

160. *Id.* at 112; cf. Mike C. Materni, *Criminal Punishment and the Pursuit of Justice*, 2 BRIT. J. AM. LEGAL STUD. 263, 285 (2013) (arguing that retribution can often be reduced to revenge impulses).

effects, independent of those caused by empathy.<sup>161</sup> Still, unchecked empathetic aggression in these cases may cloud a judge's perspective, preventing a reasoned, moral sentence.

Some retributive punishment may not require empathy to decide punishments. Some retributivists might prefer a strict ordinal/cardinal sentencing structure,<sup>162</sup> focusing on a crime's effects more than the defendant's culpability. On this view, empathy may obscure an otherwise mechanical operation to decide the appropriate punishment. It might weigh towards the victim or the defendant unfairly, based on the judge's bias or identity.

For a utilitarian, empathy may play a number of different roles. General empathy for people in society may trigger a concern for the ideals of deterrence. Empathy for the criminal might trigger a utilitarian limit to punishment, causing the judge to not impose punishment on the person that does not serve a consequential purpose. It may also cause a judge to be better able to assess the effects of punishment on an individual and its benefits to society. Under some utilitarian conceptions, however, it would play no role. For example, a utilitarian might suggest that the balance of utility cannot be approximated through empathy. Under this account, the distortions of empathy outweigh its benefits, and mere calculated standards are preferable.

Rehabilitative theories could use judicial empathy for the better. If the purpose of the theory is to better an individual, empathy may be required to assess the individual's state and to tailor a program that would work with that person. Rehabilitative programs often focus on the offender, so the aggression-inducing effects of focusing on victims may be mitigated.

Empathy may also help judges understand what sentences look like. Though judges might not fully understand what it is like to be an imprisoned individual, an understanding of the experiences of imprisoned people could help judges weigh the effects of prison sentences on people convicted of charges. Understanding the long-standing harms experienced by formerly incarcerated people may also be possible through exposure to

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161. See generally Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207 (2012) (addressing the effect of judicial anger).

162. See generally Julian V. Roberts, *The Time of Punishment: Proportionality and the Sentencing of Historical Crimes*, in *OF ONE-EYED AND TOOTHLESS MISCREANTS: MAKING THE PUNISHMENT FIT THE CRIME?* 149, 150 (Michael Tonry ed., 2019) (describing ordinal and cardinal proportionality).

such situations combined with the natural empathetic response.<sup>163</sup>

#### V. RECOGNIZING THE EFFECTS OF COGNITIVE DISTORTIONS SUCH AS EMPATHY CAN HELP JUDGES BE FAIRER SENTENCERS

Judges may benefit from longer, thought-out cognitive processing. Though sentences within the federal guidelines may not require detailed elaboration, judicial decisions must be accompanied by a legally sufficient explanation.<sup>164</sup> Sentencing that deviates from the sentencing guidelines must come with an adequate explanation for the deviation.<sup>165</sup> This means that judges cannot rely on automatic processes and must generally check their reasoning thoroughly.<sup>166</sup> Judges are not making decisions for their own personal benefit, so they are not able to rely as easily on the studies suggesting that intuition creates better personal outcomes. Research generally suggests that knowing about bias, and consciously checking for such bias, helps combat the effects of such bias.<sup>167</sup> Automatic processes such as empathy

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163. See Katie J. MacDowell, *Thinking Beyond Ban the Box: How to Alleviate Disproportionate Sentencing to Assist Ex-Offenders in Rejoining Society*, 25 GEO. MASON L. REV. 809, 810–11 (2018) (describing the post-prison effects of sentences on formerly incarcerated individuals).

164. See *Rita v. United States*, 551 U.S. 338, 339 (2007) (“[T]he sentencing judge should articulate enough to satisfy the appellate court that he has considered the parties’ arguments and has a reasoned basis for exercising his own legal decisionmaking [sic] authority. He may say less when his decision rests upon the Commission’s own reasoning that the Guidelines sentence is proper in the typical case, and the judge has found that the case before him is typical.”); see also *Commonwealth v. Johnson*, 666 A.2d 690 (Pa. Super. Ct. 1995) (applying sentencing explanation standards to two counts on appeal, with differing outcomes).

165. See *United States v. Ballard*, 950 F.3d 434, 439 (7th Cir. 2020) (“Because the district court did not provide an adequate explanation for the extreme upward departure from Ballard’s recommended Guidelines range, we hold that it committed procedural error.”).

166. Cf. R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUS. L. REV. 1381, 1420–21 (2006) (“Crucially, an opinion accompanying an intuitionist outcome can itself amount to reasonable evidence that the judge has taken full, careful, empathetic, and detailed account of all of the main interests and concerns of the opposing and other affected parties. In this way, the opinion can properly add to (or inadvertently undermine) the persuasiveness and legitimacy of even an intuition-based outcome.”).

167. See, e.g., Alexander R. Green et al., *Implicit Bias Among Physicians and its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN.

have the capacity to create systemic inequities in the way cases are decided, because it addresses how individuals relate to judges.<sup>168</sup> For these reasons, refining the ability of higher-order processes to intervene on lower-order processes may benefit the field of law.<sup>169</sup>

Given that judges will experience empathy, the question arises as to whether they should put their empathy aside or “integrate their feelings with those of the subject being judged; law and precedent setting a broad framework.”<sup>170</sup>

#### A. GUIDELINES ARE NOT ENOUGH

Sentencing guidelines alone are unlikely to be an effective way to combat biases in the criminal justice system. Though this technique may be effective at limiting the spread of divergent outcomes, the freedom within which judges decide sentences means that recognizing and combating bias is still important.<sup>171</sup> Guidelines might also constrain the ability of a judge to do the right thing in certain circumstances.<sup>172</sup>

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INTERNAL MED. 1231, 1237 (2007) (“This [study] suggests that implicit bias can be recognized and modulated to counteract its effect on treatment decisions.”).

168. See Corso, *supra* note 10, at 101 (“If empathy is identified with sympathy or compassion or any other form of benevolence towards one party in the case (typically one party’s claim), judicial impartiality could be undermined.”).

169. See *New Study by Prof. David Abrams and Co-Authors Confirms Racial Bias in Criminal Sentencing*, PENN LAW (Aug. 22, 2012), <https://www.law.upenn.edu/live/news/2170-new-study-by-professor-david-s-abrams-confirms> (“No judge is likely to acknowledge, on his or her own, ‘Well, of course, I take race into account.’ And likely they don’t in any explicit way. But they probably do implicitly, because we take all kinds of things into account implicitly. And I think making judges aware of it could potentially help going forward.”) [hereinafter Abrams].

170. MH, *‘Empathy’ and Compassion Are Attributes a Judge Should Possess*, SILIVE.COM (last updated Mar. 21, 2019), [https://www.silive.com/opinion/letters/2009/07/empathy\\_and\\_compassion\\_are\\_att.html](https://www.silive.com/opinion/letters/2009/07/empathy_and_compassion_are_att.html).

171. Abrams, *supra* note 169, (discussing the findings from a study that provides statistically conclusive evidence of racial discrimination in criminal sentencing, and analogizing the situation to the field of medicine where a study found that the doctors, who suspected the study to center around race, realized race was an issue and no longer varied treatment decisions based on race).

172. *Id.* (“They are a way to try to constrain variation in sentencing, but they also limit a judge’s ability to be fairer in particular cases.”).

## B. MINDFULNESS

Mindfulness can play a key role in regulating one's emotions. The ideal of a mindful judge has long roots in legal scholarship, as articles have suggested that judges who recognize their own prejudices and biases may nullify the effect of such biases.<sup>173</sup> For a long time, "introspective self-criticism [and] attempting to feel empathy" have been offered as solutions to discrimination in judging.<sup>174</sup> Given that "[p]ersonal experience, identification, [and] compassion" "will always influence decision-making," judges can examine and evaluate compassionate impulses and "determine whether they are relevant."<sup>175</sup> Mindfulness, along with other emotional-regulation techniques, can allow judges to experience the positive effects of emotions without the harmful effects of emotional suppression.<sup>176</sup>

Fatigue, depleted resources, and multitasking can lower a judge's ability to adjudicate fairly.<sup>177</sup> These effects, as well as empathetic distortive effects, can be mitigated by tackling the central issues. If over-work causes judges to resort to System 1 processing and use heuristics and biases,<sup>178</sup> then a reduction of judicial workload may be in order. If judges are sentencing more harshly before their lunch break,<sup>179</sup> then mandated breaks may be crucial to a just system. Reflective mindfulness can help

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173. See JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 414 (1973).

174. Colby, *supra* note 18, at 2005 n.286 (citation omitted).

175. Bandes, *supra* note 21, at 194.

176. See Terry A. Maroney & James J. Gross, *The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective*, 6 EMOTION REV. 142, 144–48 (2014) (discussing the benefit and uses of various emotional-regulation techniques over the idea of emotional suppression, and ultimately suggesting cognitive change to be the most effective and appropriate form of emotional-regulation for judges).

177. Pamela Casey, Kevin Burke & Steve Leben, *Minding the Court: Enhancing the Decision-Making Process*, 5 INT'L J. CT. ADMIN. 45 (2013) (stating the negative effects that fatigue, diminished resources, and multitasking has on performance).

178. See Low, *supra* note 26, at 102–03 (discussing System 1 and System 2 processes).

179. See Danziger, Levav & Avnaim-Pesso, *supra* note 94, at 6890 (finding that the greatest likelihood of a favorable ruling occurs at the beginning of the day and after a food break, and that further along in the sequence of cases the likelihood of a favorable ruling decreases to "nearly zero" but then "jumps back" after a meal or break to the initial likelihood value).

judges assess why they decide what they decide, improving sentencing decisions.<sup>180</sup> Empathy will affect judicial decisions, and self-awareness of such empathy can help judges come to just decisions.

In an adversarial system, the key may also be to cultivate compassion instead of empathy. Still, compassion is not the only emotion that judges must employ, as empathy maintains a strong role when judges are sentencing under specific philosophical rationales. “[M]oral outrage by and on behalf of the victims of injustice” may play a stronger role,<sup>181</sup> depending on a judge’s punishment rationale. Healthy emotional regulation can help prevent negative effects of various emotional states.<sup>182</sup>

### C. DIVERSE JUDICIAL PANELS

Another solution to the sentencing issue lies in having a panel of judges decide sentences. Since judges on a panel affect other judges’ perspectives, causing them to consider other viewpoints, having diverse panels of judges consider sentencing decisions would help mitigate the effects of empathetic bias. Studies already suggest that judges are highly affected by other judges with whom they share panels.<sup>183</sup> Other authors have already recommended increasing diversity on the bench.<sup>184</sup> Diverse judicial panels can cause judges to change their views, reducing the effects of disparate empathy.<sup>185</sup> The negative effects of empathy

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180. Casey, Burke & Leben, *supra* note 177, at 45 (“Understanding how the brain processes information and the various factors that can influence decisions and courtroom behaviors is a first step to practicing more mindful decision making that is consistent with the principles of procedural justice.”).

181. Bandes, *supra* note 21, at 191.

182. See Maroney & Gross, *supra* note 176, at 148 (summarizing the benefits and drawbacks of various emotional-regulation strategies that a judge may utilize).

183. See Rebecca K. Lee, *Judging Judges: Empathy as the Litmus Test for Impartiality*, 82 U. CIN. L. REV. 145, 180–81 (2013) (discussing the findings of a study that found a positive correlation between the number of female judges on an appellate panel and the likelihood a plaintiff prevails in sex discrimination cases, and using this to suggest “male judges are likely to acknowledge the different life experiences of female judges and thus may give greater weight to female jurists’ understanding of a case when it involves gender discrimination”).

184. See, e.g., Colby, *supra* note 18, at 2002 (arguing that a diverse judiciary may help judges empathize with “those whose experiences tend to be very far afield from those of most judges”).

185. See Boyd, Epstein & Martin, *supra* note 96, at 390 (“[W]hen a woman serves on a panel with men, the men are significantly more likely to rule in favor of the rights litigant.”).



may therefore be outweighed by the benefit of group work. Having a set of judges with different perspectives, and different propensities to empathize with different sides in the system, may enable just decision-making to prevail.

Necessary to this concept would be a panel with different empathetic distortions. If the panel was composed of judges with identical life experience, then that panel might empathize with the perspective of one side of the conflict more than another.<sup>186</sup> Discussion among diverse judges may help them come to a more holistic understanding of the conflict.

## VI. CONCLUSION

Empathy is a capacity that everyone experiences. Legal discourse should accommodate this reality by addressing how it might be used to come to more just sentencing decisions. Important to this process is focusing on all sides of a conflict, empowering victims without enabling empathetic aggression in judges, diversifying the judiciary, and creating judicial panels for sentencing decisions. If these proposals are followed, judges will be able to work with the sentencing guidelines, issuing fairer sentences and reducing disparities in the justice system.

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186. See Colby, *supra* note 18, at 2001 (stating it is human tendency to empathize with those “whose perspectives, experiences, and situations” are most similar to the individual); Lee, *supra* note 183, at 176–81 (arguing that diversifying the bench would lead to a more empathic judiciary).

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