

EMPHATIC PLEA FOR THE EMPATHIC JUDGE

Justice must not only be done, it must be seen to be done. Thus, the contemporary orthodoxy is that the dispensation of justice must be dispassionate and blind, for to do otherwise is to risk accusations of subjectivity and bias. This article adopts the contrarian position – judges ought, in their decision-making, to take full account of the different perspectives of the parties involved, and can only properly do so if they possess and exercise empathy. The prejudice-related risks involved in embracing empathy are acknowledged, and strategies for dealing with these excesses are explored. With that in mind, this article posits field work to identify a judge’s propensity towards empathy, and also the development of a professional programme aimed at raising awareness and enabling judges to apply and control empathic perspective-taking in their adjudicatory duties.

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I. Introduction

1 The oft-mentioned adage is that justice must not only be done, it must also be seen to be done.¹ This has traditionally been interpreted, amongst others, as requiring the judge to exclude irrelevant considerations, including personal biases and prejudices. Judges, after all, “like Caesar’s wife, should be above suspicion”.² Justice is thus portrayed frequently as blind, paying no heed to the parties’ race or social stature, and resulting in a judicial decision-making process that denies all else save for cold rationality. But should the scales conceal Justitia’s eyes? Is there no room for a humanistic response, like empathy,

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1 *R v Sussex Justices, ex parte McCarthy* [1924] KB 256 at 259, *per* Lord Hewart CJ. Although attributing this hallowed principle to such a personality might cause some to blush – see J Spigelman, “Seen to be Done: The Principle of Open Justice”, keynote address to the 31st Australian Legal Convention Canberra 9 October 1999 (9 October 1999).

2 *Leeson v The General Medical Council* (1889) 59 LJChNS 233 at 241, *per* Lord Bowen.

in judicial decision-making? The answer is, perhaps, not as clear as initially supposed. Former US President Barack Obama sparked voracious debate about empathy in judges when he commented in 2009 that the eligibility criteria for candidates to succeed then retiring US Supreme Court Justice David Souter had to include the ability to empathise.³

2 In recent years, the language of empathy has crept in, across the Pacific, on an island whose legal institutions' established reputation is one of efficiency rather than emotion. Unlike the fanfare and scorn with which it is treated in the US, empathy's reception in Singapore's legal and judicial ecosystem is something of a quiet revolution.⁴ Lawyers, in the encouragement of *pro bono publico*, demonstrate "an empathetic hearing of [the public's] concerns".⁵ As part of restorative justice initiatives, the Singapore Prison Service runs the Victim Empathy Programme, in which prisoners are encouraged to reflect on the consequences of their actions from the perspective of their victims.⁶ The 2011 annual report of the then-Subordinate Courts of Singapore insisted that "showing empathy to court users" is part and parcel of its organisational culture.⁷ Indeed, its Chief Justice, Sundaresh Menon, in his address at the 2014 opening of the Family Justice Courts, made the general observation that "in some respects, the judicial task can be likened to that of a doctor with a focus on diagnosing the problem, having the appropriate bedside manner to engender and convey

3 See the remarks of the White House Press Secretary (1 May 2009) at <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-justice-david-souter> (accessed 8 January 2018); see also Tobin Sparling, "Resurrecting the Argument for Judicial Empathy: Can a Dead Duck Be Successfully Repackaged for Sale to a Skeptical Public?" (2010) 20 Temp Pol & Civ Rts L Rev 1, Thomas Colby, "In Defence of Judicial Empathy" (2012) 96 Minn L Rev 1945 and Rebecca K Lee, "Judging Judges: Empathy as the Litmus Test for Impartiality" (2014) 82 U Cin L Rev 146. To be sure, there were already academic discussions on the topic before it became the theme *du jour*: eg, Douglas Linder, "Juror Empathy and Race" (1996) 63 Tenn L Rev 883.

4 The author claims no credit for associating "empathy" with a "quiet revolution": see Jill Stark, "The Empathy Revolution: Fighting Crime with Compassion" *The Sydney Morning Herald* (21 February 2016).

5 Malathi Das, "4th Southeast Asia Pro Bono Conference Mandalay, Myanmar, September 2015: Keynote Address – Further Developing the Pro Bono Legal Culture and Structure in the Region", *Singapore Law Gazette* (March 2016) at p 18.

6 Singapore Prison Service, *Annual Report 2015: Collaboration*, at p 87 <http://www.sps.gov.sg/docs/default-source/publication/spsannual_lowres_revised.pdf> (accessed 2 May 2016).

7 Subordinate Courts of Singapore, *Annual Report 2011: Greater Heights, New Horizons*, at p 3 <<https://www.statecourts.gov.sg/Resources/Documents/AnnualReport2011.pdf>> (accessed 2 May 2016).

empathy, and the wisdom to choose the right course of treatment to bring about healing” [emphasis added].⁸

3 Latching onto this last comment, it would appear that empathy is beginning to be *en vogue* amongst stakeholders in Singapore’s judicial system, though without there being a concomitant deliberate debate about its merits. Indeed, just such a discussion ought to take place; this is since the role empathy ought to play in the meting out of justice is a question of public interest. Should judges reject the mercurial influence of empathy, espousing cold formal rationality in order to preserve certainty and predictability? Or, should empathy provide that necessary human(e) counterbalance to law’s formalistic propensity towards mechanical rigidity?⁹ Translated into more concrete terms: should our judges display empathy? If so, should empathy be part of the criteria for judicial appointments? Differences in opinion to these questions could, of course, also be seen as proxies for disagreements regarding the role of judges – and, thereby, the function of judicial decision-making – in any given legal system.

4 Such unanswered questions are important to engage with, and provide a foretaste of the gap in the discussion which this article seeks to fill. It does so in the following manner. Part II addresses and debunks the ideal of the rational objective judge. Part III springboards from the premise of the boundedly rational judge to introduce empathy as a concept and means to perfect judicial decision-making. In part IV, the major objections to the use of empathy are discussed and diffused, ultimately resulting in support for the view that judicial empathy in the form of perspective taking ought to be part and parcel of judicial decision-making. Part V maps out an empirical research agenda on identifying empathic traits in judges as well as incorporating empathy in judicial training. Part VI concludes.

8 Sundaresh Menon CJ, opening address at the Opening of the Family Justice Courts (1 October 2014) at para 24 https://www.familyjusticecourts.gov.sg/NewsAndEvent/Documents/2014Oct01_Keynote_OpeningFJCourts.pdf (accessed 2 May 2016).

9 Martin Hoffmann, “Empathy, Justice and the Law” in *Empathy: Philosophical and Psychological Perspectives* (Amy Coplan & Peter Goldie eds) (Oxford University Press, 2011); John Deigh, “Empathy, Justice, and Jurisprudence” (2011) 49 *The Southern Journal of Philosophy* 73.

II. The Laplacean rational judge does not exist

5 While the notion of rationality has had a long and steady grip on the legal domain,¹⁰ it is neoeconomics' standard of perfect rationality that has dominated the scene in recent years,¹¹ positing that the Laplacean¹² judge sets about his task "with cold, rational precision".¹³ He is that mythical quasi-Platonic philosopher-king systematically sifting through evidence and facts with ruthless efficiency and applying legal rules coldly to achieve objectively fair outcomes. *Of course this should be the case.* As Richard Posner pointed out, judges are but "ordinary people responding rationally to ordinary incentives".¹⁴ Judges make decisions on a "judicial utility function",¹⁵ analogous to an economic cost-benefit analysis.¹⁶ This is the modern guise of the Hobbesian judge as one "divested of all fear, anger, hatred, love and compassion".¹⁷ That the judicial process reaches efficient and rational,

10 See Paul Freund, "Rationality in Judicial Decisions" in *Rational Decision* (Carl Friedrich ed) (Aldine Transaction, 2007), Chaïm Perelman, "Disagreement and Rationality" in *Droit, Morale et Philosophie* (1968) at p 103, Pablo T Spiller, "Rationality, Decision Rules, and Collegial Courts" (1992) 12 *International Review of Law and Economics* 186, Arthur Stinchcombe, "Reason and Rationality" in *The Limits of Rationality* (Karen Schweers Cook & Margaret Levi eds) (University of Chicago Press, 1990) and Claire Finkelstein, "Legal Theory and the Rational Actor" in *Oxford Handbook of Rationality* (Alfred Mele & Piers Rawling eds) (Oxford University Press, 2004).

11 This was forcefully argued in Robin West, "The Anti-empathic Turn" in *Passion and Emotions* (James Fleming ed) (NYU Press, 2013).

12 See Peter Todd & Gird Gigerenzer, "Précis of Simple Heuristics That Make Us Smart" (2000) 23 *Behavioral and Brain Sciences* 727 at 729. The adjective "Laplacean" is a reference to the Enlightenment philosopher Pierre-Simon-Laplace, who described an all-knowing and all-seeing intelligence. Gigerenzer used the term "demon" in its original Greek sense to denote a superior or supernatural entity, instead of one that embodies evil.

13 Darrell A H Miller, "Iqbal and Empathy" (2010) 78 *U Mo-Kan City L Rev* 999 at 1007.

14 Richard A Posner, "What Do Judges and Justices Maximise?: (The Same Things Everybody Else Does)" (1993) 3 *Sup Ct Econ Rev* 1.

15 Richard A Posner, *How Judges Think* (Harvard University Press, 2008).

16 For an empirical defence of the rational choice model of judicial decision-making, see Lee Epstein, William M Landes & Richard A Posner, *The Behaviour of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Harvard University Press, 2013). For a forceful rebuttal, see Charles M Cameron & Lewis A Kornhauser, "Rational Choice Attitudinalism" (2017) 43 *European Journal of Law and Economics* 535.

17 Thomas Hobbes, "Leviathan or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil" (1651) ch XXVI.

objectively justifiable outcomes, is a claim made by both common law¹⁸ and civilian jurists.¹⁹

6 Epistemologically, subjectivity is inevitable: “[judgments] are the result of an act of decision by the judicial decision maker ... [T]he objective character ascribed to the logical schema of judicial syllogism is revealed to be specious, because the premises of such a logical inference are the result of unavoidable subjective choices”.²⁰ If this is true, then all judgments are necessarily subjective. However, as Richard Wasserstrom pointed out, jurists are able to reconcile this tension by drawing a distinction between the decision-making process, which is admittedly subjective, and the decision itself, manifested in the form of the written judgment, which can be justified independent of judge’s state of mind.²¹

7 Indeed, one of the litmus tests for impartiality in the judicial decision-making process is the duty for judges to give reasons. In so

18 See, eg, Lewis A Kornhauser, “Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System” (1995) 68 S Cal L Rev 1605 and “Modeling Collegial Courts I: Path-Dependence” (1992) 12 *International Review of Law and Economics* 169.

19 See Max Weber, *Max Weber on Law in Economy and Society* (Max Rheinstein ed; Max Rheinstein & Edward A Shils trans) (Harvard University Press, 1954) at p 307; Anthony Kronman, *Max Weber* (Stanford University Press, 1893) at p 89; consider also Karl Wurzel, “Methods of Juridical Thinking” in *Science of Legal Method: Select Essays by Various Authors* (Ernest Bruncken & Layton B Register trans) (The MacMillan Company, 1921) at p 298; an overview is provided by Terry A Maroney, “Emotion and the Discourse of Judging” in *The Emotional Dynamics of Law and Legal Discourse* (Heather Conway & John Stannard eds) (Hart Publishing, 2016).

20 Christopher Grey, *The Philosophy of Law: An Encyclopedia* (Taylor & Francis, 1999) at p 455, in reliance on Hans Kelsen, *Essays in Legal and Moral Philosophy* (Dordrecht Reidel, 1973) ch 9, at p 228.

21 Richard Wasserstrom, *The Judicial Decision: Towards a Theory of Legal Justification* (Stanford University Press, 1961) at p 25:

One kind of question asks about the manner in which a decision or conclusion was reached; the other inquires whether a given decision or conclusion is justifiable. That is to say, a person who examines a decision process may want to know about the factors that led to or produced the conclusion; he may also be interested in the manner in which the conclusion was to be justified.

For an excellent discussion on Wasserstrom’s observation, see Claudio Michelon, *Practical Wisdom in Legal Decision-Making* (University of Edinburgh School of Law Working Paper No 2010/13, 2010): “[t]hat distinction allows the theorist to admit that decisions reached by legal decision-makers are subjective, while also claiming that the justification process can be understood objectively. In that way, objectivity is preserved and subjectivity in legal decision-making is explained away”; see also Klaus Mathis & Fabian Diriwächter, “Is the Rationality of Judicial Judgements Jeopardized by Cognitive Biases and Empathy?” in *Efficiency, Sustainability and Justice to Future Generations* (Klaus Mathis ed) (Springer, 2011) at p 67.

doing, the judge is made accountable to both litigants as well as society at large that the decision so reached is done logically, systematically, as well as rationally.²² This is underscored by the celebrated Australian judgment of McHugh JA in *Soulemazis v Dudley*, in which he emphasised the provision of reasons as the “hallmark of a judicial decision” without which there is nothing to separate it from complete and utter arbitrariness.²³ Thus former Chief Justice Chan Sek Keong insists that judgments are assessed “from the careful examination of exact rationale and methodology”.²⁴ Agreeing with these sentiments, the Singapore Court of Appeal in *Thong Ah Fat v Public Prosecutor* declared that:²⁵

[A] legal decision will ... be deprived of many of its illocutionary forces if no sufficient reason is stated[. Today, it] cannot be justified solely by the judge’s statement of belief that it is right, without providing any explanation as to why it is so. The days when it sufficed for a judge to say ‘because I say so’ are well behind us ...

8 Be that as it may, advances in the realm of law and psychology cast doubt over the sufficiency of the mere duty to give reasons regarding the soundness of the judicial decision. How a person cognates (that is, thinks) – or whether matters are attended to specifically or peripherally – can be divided into two main processes, and this is now widely accepted under the label of dual-processed theory.²⁶ Processes may be distinguished into those which are “rapid, parallel and automatic in nature” (that is, system 1).²⁷ System 2 refers to the deliberate use of

22 Patrick Neill, “The Duty to Give Reasons: The Openness of Decision-Making” in Christopher Forsyth & Ivan Hare, *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (Oxford University Press, 1998).

23 *Soulemazis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 279, per McHugh JA.

24 Chan Sek Keong, “Securing and Maintaining the Independence of the Court in Judicial Proceedings” (2010) 22 SAclJ 229 at 249, citing in support Christopher M Larkins, “Judicial Independence and Democratisation: A Theoretical and Conceptual Analysis” (1996) 44 Am J Comp L 605.

25 [2012] 1 SLR 676 at [17].

26 See Daniel Kahneman, “Maps of Bounded Rationality: Psychology for Behavioural Economics” (2003) 93 *The American Economic Review* 1449 at 1452: “the automatic operations of perception and the deliberate operations of reasoning”; see also Steven A Sloman, “The Empirical Case for Two Systems of Reasoning” (1996) 119 *Psychological Bulletin* 3 and Daniel Kahneman & Shane Frederick, “Representativeness revisited: Attribute substitution in intuitive judgment” in *Heuristics and Biases: The Psychology of Intuitive Judgment* (Thomas Gilovich, Dale W Griffin & Daniel Kahneman eds) (Cambridge University Press, 2002).

27 See generally Jonathan Evans, “In Two Minds: Dual-Process Accounts of Reasoning” (2003) 7 *Trends in Cognitive Sciences* 454. While there may be individual differences of opinion amongst theorists, there appears to be a general consensus on the nature of the systems: cf Michael W Eysenck & Mark T Keane, *Cognitive Psychology: A Student’s Handbook* (Psychology Press, 2010), eg, the two systems are not “autonomous homunculi”, but are instead “collections of processes”
(cont’d on the next page)

our analytical faculties. It is in this sense relatively slower, conscious and deductive. The mind has limited capacity not only to deliberately think things through, but also to store information in its working memory to aid in such decisional processes. The severity of the mental load brought to bear on our cognition has consequences for man's conduct. The complexity of the task at hand, the (un)familiarity of the situation, the expertise of the person, and whether there are irrelevant pieces of information distracting him from the task all contribute to whether: he is able to efficiently and accurately come to a decision; or, as a result of these factors, he takes into account irrelevant factors or focuses on peripheral issues and arrives at an erroneous or poor decision. It is a result of these demands imposed on man's cognitive limitations, the Nobel laureate Herbert Simon posited that man seeks not to maximise his utility but instead to "satisfice".²⁸ We simply have make do with what we have.

9 How does our mind process the mountains of information before it and deal adequately with the many tasks at hand? It develops mental rules-of-thumb known as heuristics to help with judgment and decision-making. These are essentially known as system 1 processes. Using them allows for quick decisions to be arrived at with relatively little burden on cognitive resources. It is the frequent and predictable misapplication of system 1 processes which corrupts the decision-making processes and leads to erroneous decisions. These misapplications are known as "biases" and which, in other words, "prevent or distort rational calculation".²⁹

10 Perhaps we want to be able to say that none of these is true of judges – judges: are (s)elected precisely for their phenomenal intellectual and rational capacities; and trigger their deliberative system 2 faculties rather than their system 1 mental shortcuts when it comes to judicial decision-making. Chris Guthrie, Jeffrey Rachlinski and Andrew Wistrich (one of whom is a judge himself) conducted a series of

that are distinguished by their speed, controllability, and the contents on which they operate"; cf Daniel Kahneman & Shane Frederick, "Representativeness Revisited: Attribute Substitution in Intuitive Judgment" in *Heuristics and Biases: The Psychology of Intuitive Judgment* (Thomas Gilovich, Dale W Griffin & Daniel Kahneman eds) (Cambridge University Press, 2002) at p 51.

28 This is a portmanteau of the words "satisfaction" and "suffice": see Herbert A Simon, "A Behavioral Model of Rational Choice" (1955) 69 *The Quarterly Journal of Economics* 99 and Herbert Simon, "Rational Choice and the Structure of the Environment" (1956) 63 *Psychological Review* 129.

29 James A Fanto, "Quasi-rationality in Action: A Study of Psychological Factors in Merger Decision-Making" (2001) 62 Ohio St LJ 1333 at 1343; see also Amos Tversky & Daniel Kahneman, "Judgment under Uncertainty: Heuristics and Biases" (1974) 185 *Science* 1124 and Jeffrey J Rachlinski, "Gains, Losses, and the Psychology of Litigation" (1996) 70 S Cal L Rev 113.

experiments on a group of practising judges, which led them to assert that “[e]mpirical evidence suggests that even highly qualified judges inevitably rely on cognitive decision-making processes that can produce systematic errors in judgment”.³⁰ An associated line of research advances the proposition that, judges reason backwards³¹ and their decisions are culled from intuition or “judicial hunches”.³²

11 At this juncture, it becomes clear that Wasserstrom’s distinction between the subjective and objective is unpersuasive. In spite of the fact that judgments can be: (a) independently and objectively justifiable; and (b) although seemingly, the result of a rule-based application of the law to the facts, judgments can *also and at the same time* be based on errors of judgment or prejudice.³³ This should obviously trouble us, but why should it come as a surprise? Judges are, after all, human.³⁴

12 It surely is a perversion of justice if judges, whether innocently or deliberately, misinterpret or ignore relevant information and take into account legally irrelevant ones. How then can one resolve this? If we accept that subjectivity is inevitable in the judicial decision-making process, then, from the discipline which first highlighted the problem comes also its potential solution³⁵ – empathy.

30 Chris Guthrie, Jeffrey J Rachlinski & Andrew J Wistrich, “Inside the Judicial Mind” (2001) 86 Cornell L Rev 777 at 779; see also Chris Guthrie, “Misjudging” (2007) 7 Nev LJ 420.

31 David Lyons, “Legal Formalism and Instrumentalism – a Pathological Study” (1981) 66 Cornell L Rev 949.

32 Andrew J Wistrich, Jeffrey J Rachlinski & Chris Guthrie, “Heart versus Head: Do Judges Follow the Law or Follow Their Feelings?” (2015) 93 Tex L Rev 855; Diana Richards, “When Judges Have a Hunch: Intuition and Experience in Judicial Decision-Making” (2016) 102 *Archiv für Rechts-und Sozialphilosophie* 245.

33 Frederick Schauer, “Do Cases Make Bad Law?” (2006) 73 U Chi L Rev 883, but contrast Elizabeth Sherwin, “Judges as Rule Makers” (2006) 73 U Chi L Rev 919.

34 See Jerome Frank, “Are Judges Human? – Part One: The Effect on Legal Thinking of the Assumption That Judges Behave Like Human Beings” (1931) 80 U Pa L Rev 17; see also Chad M Oldfather, “Judges as Humans: Interdisciplinary Research and the Problems of Institutional Design” (2007) 36 Hofstra L Rev 125. Consider the tongue-in-cheek remarks of Australian Judge Elizabeth Gaynor at a debate held at the Essoign Club (31 August 2006) on this precise topic:

Judge Gaynor argued that once she had become a judge she had ceased being a human and had transformed into a celestial being – St Elizabeth of Hungary. She had acquired the virtue of St Elizabeth of Hungary, and proceeded to sing songs of adulation to the Court of Appeal, the Chief Justice and the Chief Judge. She made life on the County Court seem far from dull.

35 This much is briefly suggested in Darrell A H Miller, “Iqbal and Empathy” (2010) 78 U Mo-Kan City L Rev 999, although neither advanced nor developed: “[i]f empathy is in fact essential for more accurate decision making, then it suggests a far more ambitious project than this Essay can develop”: at 1012.

III. Empathy in judicial decision-making

13 Our modern understanding of “empathy” as part of the English language comes from Edward Titchener, who himself translated the term from the German “*Einfühlung*”.³⁶ The concept itself is much older, of course.³⁷ It was dealt with at considerable length by Adam Smith in *The Theory of Moral Sentiments* before he wrote his seminal *Wealth of Nations*.³⁸ It is as old as Aristotle.³⁹

14 Modern scholarship on the subject is confusing, contributed chiefly by divergent or overlapping meanings of empathy. In one recent review, up to 43 distinct conceptual definitions were identified.⁴⁰ A *first* line of research posits that empathy is an umbrella term for associated concepts like sympathy,⁴¹ compassion, and emotional contagion,⁴² and this is because all these concepts could have broadly in common sharing of feelings between one another. A *second* line of research focuses on empathy as a phenomenon that influences both the cognitive and affective processes in the mind. Cognitive empathy refers to understanding another person’s perspective. Affective empathy refers to feeling another person’s emotions.⁴³ A *third* line of research focuses on

36 Lauren Wispé, “The Distinction between Sympathy and Empathy. To Call Forth a Concept, a Word Is Needed” (1986) 50 *Journal of Personality and Social Psychology* 314.

37 Ezra Stotland *et al*, *Empathy, Fantasy and Helping* (SAGE Publications, 1978).

38 As Adam Smith argued, in relation to how members of a society ought to judge each other:

[T]he [judge] must, first of all, endeavor, as much as he can, to put himself in the situation of the other, and to bring home to himself every little circumstance of distress which can possibly occur to the sufferer. He must adopt the whole case of his companion with all its minutest incidents; and strive to render as perfect as possible, that imaginary change of situation.

See also Martha C Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Beacon Press, 1997) at p 72. Therefore, in applying this view to the role of the judge, it is clear that Smith would have intended a decision-making process not devoid of empathetic information, but one that is informed by it.

39 When Aristotle first employed the term empathy (“*ἐμπάθεια*”), he intended to have readers experience the intense sensations of a coward imagining the approaches of his mortal enemy. This makes sense, since at its root are the words “in” (“*ἐν*”) and “pathos” (“*πάθος*”); and so empathy conveys a state of “feeling into”.

40 Benjamin Cuff *et al*, “Empathy: A Review of the Concept” (2016) 8 *Emotion Review* 144.

41 This is to describe the understanding and especially *influence* of the other’s emotional state without necessarily sharing that emotional state.

42 That is to say, empathy as an automatic affective or emotional response, feeling as the other feels: see Norma D Feshbach & Kiki Roe, “Empathy in Six and Seven-Year-Olds” (1968) 39 *Child Development* 133 and Douglas Watt, “Towards a Neuroscience of Empathy: Integrating Affective and Cognitive Perspectives” (2007) 9 *Neuropsychoaanalysis* 119.

43 This is exemplified by Helene Borke, “Interpersonal Perception of Young Children: Egocentrism or Empathy?” (1971) 5 *Developmental Psychology* 263.

the behavioural consequences of empathy, mostly in the way of altruism. Some studies deny that experiencing empathy translates into a particular outcome.⁴⁴ Others establish that prosocial behaviour precedes empathy, or that such behaviour was only possible due to also experiencing sympathy. A good reason to reject the misimpression that empathy results in prosocial behaviour is that the understanding of others' emotions can be abused by psychopaths to manipulate victims or businessmen to outmanoeuvre their competitors. A *fourth* line deals with whether empathy is something that is automatically triggered or can be controlled by our cognitive faculties. Neuroscientific studies show that, upon the right stimuli, feelings of empathy can automatically be triggered. At the same time, we can use our cognitive processes to control empathy by changing the way we perceive another person, not thinking about the situation, or suppressing one's emotions.

15 Proponents of empathic judging tend to be allied exclusively to the view of empathy as perspective-taking. This is a good thing since not doing so means only the judge's one-sided perspective is taken into account. "[E]mpathic induction helps individuals recognize more nuanced, situational narratives that are distinct from their own"⁴⁵ and in accordance with the notion of the judge as umpire, his decisions are fair if and only if all relevant information is taken into account in the rendering of it.⁴⁶ It is, thus, that Thomas Colby advanced the proposition that only empathic perspective-taking helps resolve who ought to prevail "because the legal question at issue often cannot be answered without understanding the way in which the litigants will be impacted by the decision".⁴⁷

44 Hector Betancourt, "An Attribution-Empathy Model of Helping Behavior: Behavioral Intentions and Judgments of Help-Giving" (1990) 16 *Personality and Social Psychology Bulletin* 573; William L Marshall, Stephen M Hudson, R Jones & Yolanda Maria Fernandez, "Empathy in Sex Offenders" (1995) 15 *Clinical Psychology Review* 99. Yet, studies have linked empathy to pro-social behavior and attitudes: see C Daniel Batson, "Empathy-Induced Altruistic Motivation", draft of lecture/chapter for Inaugural Herzliya Symposium on "Prosocial Motives, Emotions, and Behavior" (24–27 March 2008). In other words, having empathy seems to suggest altruistic conduct or result in cooperation: see, eg, Taya R Cohen & Chester A Insko, "War and Peace – Possible Approaches to Reducing Intergroup Conflict" (2008) 3 *Perspectives on Psychological Science* 87.

45 Jill D Weinberg & Laura Beth Nielson, "Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking" (2012) 85 *S Cal L Rev* 313 at 350.

46 See Bruce Wever, "Umpires v Judges" *New York Times* (11 July 2009), but contrast Aaron S J Zelinsky, "The Justice as Commissioner: Benching the Judge-Umpire Analogy" (2010) 119 *Yale LJ Online* 113.

47 Thomas Colby, "In Defence of Judicial Empathy" (2012) 96 *Minn L Rev* 1945 at 1965; contrast Susan A Bandes, "Empathetic Judging and the Rule of Law" [2009] *Cardozo Law Review De Novo* 133.

16 Keyword searches of emotive language in judgments in the Singapore legal database throw up dozens and dozens of cases.⁴⁸ Indeed, across the diverse legal field, one finds examples of judges taking into account the perspective of the litigants before the courts.

17 Thus, for instance, in constitutional law, doing so is implicit in the task of balancing fundamental rights protection. Consider the cases where the right of free speech of defendant litigants was pit, in the context of the rules on defamation, against the reputation of the plaintiffs. Amongst others, the court *places itself in the shoes of the injured party to assess the relative importance of and harm to his political reputation*, which could be why in this particular context, there are more limits placed on free speech than there otherwise would be.⁴⁹ In *Jeyaretnam Joshua Benjamin v Lee Kuan Yew*,⁵⁰ the court involved the particular perspective of the injured party in advancing the proposition that the law in that instance ought to be sensitive to protecting the reputation of “honourable men” like the plaintiff to avoid deterring them from seeking high office. Consider also the implicit rejection of the constitutional equal protection clause in awarding enhanced damages taking into account, once again, the high office held by defendants in cases like *Goh Chok Tong v Chee Soon Juan (No 2)*.⁵¹

18 Consumer law also provides neat examples. Exemption clauses are unenforceable under the Unfair Contract Terms Act⁵² unless the party relying on them is able to satisfy the test of reasonableness. What is reasonable is highly fact-dependent, and the courts have a list of factors to consider, including the bargaining position of the parties and whether one of the parties is vulnerable. In *Kenwell & Co Pte Ltd v Southern Ocean Shipping Co Pte Ltd*,⁵³ faced with the lack of evidence satisfying the reasonableness test, the judge attempted to step into the shoes of the defendant⁵⁴ to understand whether it was possible to justify the validity of the contractual term in question, before ruling that the clause was invalid.

48 The Singapore Academy of Law’s LawNet database was used in June 2016 for a general keyword search limited to reported cases. These include “happy” (393 cases), “angry” (155 cases), “sad” (88 cases), “sympathise” (76 cases), “empathise” (10 cases), *etc.* The author adds that this is a simplistic search that may at the same time be over and under-inclusive.

49 For the constitutional law perspective, see Thio Li-Ann, “Between Apology and Apogee, Autonomy: The ‘Rule of Law’ Beyond the Rules of Law in Singapore” [2012] Sing JLS 269.

50 [1992] 2 SLR 310 at [64] and [65].

51 [2005] 1 SLR 573 at [72].

52 Cap 396, Rev Ed 1994.

53 [1998] 2 SLR(R) 583.

54 See *Kenwell & Co Pte Ltd v Southern Ocean Shipping Co Pte Ltd* [1998] 2 SLR(R) 583 at [52] to [54].

19 Such is also evident in the law of contract: where V K Rajah J (as he then was) in his typically methodical analysis, approached the question of the doctrine of mistake by stepping into the shoes of the plaintiff (specifically, as a 29 year-old business and technology degree graduate) to ascertain whether it was possible for him to innocently believe that the online offer made was a genuine one or whether he must have known it was a mistake on the part of the defendant electronics webshop.⁵⁵

20 Compare also the judicial approach in *BNJ v SMRT Trains Ltd*,⁵⁶ regarding the standard of care in the tort of negligence. The judge in that case put himself in the position of the defendant train operator to ascertain whether it took reasonable steps to mitigate possible risks and dangers to its customers at the stations it operated. This much is implied when, in absolving the defendant of a breach of the duty of care, he said, “more can always be done when it comes to safety. That is particularly so when safety is analysed with the perfect vision of hindsight.”⁵⁷

21 In *Hii Chii Kok v Ooi Peng Jin London Lucien*,⁵⁸ a case regarding medical negligence, the Court of Appeal had occasion to redefine the standard of care a doctor owed his patient in relation to the provision of medical advice. The court rejected in part the English authority of *Bolam v Friern Hospital Management Committee*,⁵⁹ according to which the requisite standard of care takes into account only the views of the medical profession: “it is the court that must be the ultimate arbiter of the adequacy of the information given to the patient, and in reaching its decision, *it would be illogical not to adopt ... the perspective of the patient*” [emphasis added].⁶⁰ Explaining why, the court noted in the context of a doctor’s provision of information he knows is important to the patient in question, that the inquiry on the standard of care “should be undertaken essentially from the perspective of the patient, because the autonomy of the patient, who has an interest in being furnished with sufficient information, in terms of both quantity and quality – to allow him to arrive at an informed decision as to whether to submit to the proposed therapy or treatment, demands nothing less.”⁶¹

22 In *Singapore Medical Council v Wong Him Choon*,⁶² a construction worker suffered fractures to his right hand from a

55 *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR 594.

56 [2014] 2 SLR 7.

57 *BNJ v SMRT Trains Ltd* [2014] 2 SLR 7 at [92].

58 [2017] 2 SLR 492.

59 [1957] 1 WLR 582.

60 *Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] 2 SLR 492 at [125].

61 *Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] 2 SLR 492 at [132].

62 [2016] 4 SLR 1086.

workplace accident. The respondent diagnosed him and performed surgery, discharged him two days later, and certified him fit for “light duties” for a month thereafter. A week later, the worker was re-admitted to hospital for 19 days due to intense pain suffered. Following a complaint by a charity for migrant workers, the respondent was charged for professional misconduct in failing to discharge his duty of care towards the worker in certifying inadequate hospitalisation leave and inappropriately certifying that the worker was fit for light duties at work.

23 Andrew Phang JA exhorted the need for a doctor to display “care and common humanity”.⁶³ In so doing, what is required from the doctor is therefore perspective-taking: or, in other words, empathy. This, his Honour explained, quoting from Harper Lee, is because “[y]ou never really understand a person until you consider things from his point of view ... until you climb into his skin and walk around in it”.⁶⁴ Although this comment concerns perspective-taking *by the doctor*, in requiring the doctor to display empathy, and judging whether he sufficiently did so, the court is itself obliged to conduct perspective-taking in relation to both the patient and the doctor. This can be seen by the court’s and disciplinary tribunal’s emphasis that the doctor had to establish whether conditions were adequate for the construction worker’s rest and rehabilitation for the duration of the medical leave given, and whether and what “light duties” could be given in the context of the construction worker’s job. The fact that the doctor did not enquire about these issues demonstrated a lack of empathic perspective-taking, and which therefore led to a finding that the doctor fell short of the standard of care expected of a medical professional.⁶⁵

24 Within the realm of criminal law, one observes instances where judges do take the perspective of the accused in assessing both culpability and sentencing. Referring to *Public Prosecutor v Chee Cheong Hin Constance*,⁶⁶ Ho Hock Lai pointed out that although “the judge rightly condemned her action and punished her for it[,] what is especially praiseworthy was *how he kept firmly in his sight, and made us see, the humanity in Constance Chee*” [emphasis added].⁶⁷

25 In the same vein, acts of mercy by the court are worth mentioning. In *Chng Yew Chin v Public Prosecutor*,⁶⁸ Rajah J (as he then

63 *Singapore Medical Council v Wong Him Choon* [2016] 4 SLR 1086 at [5].

64 *Singapore Medical Council v Wong Him Choon* [2016] 4 SLR 1086 at [4].

65 *Singapore Medical Council v Wong Him Choon* [2016] 4 SLR 1086 at [55] and [62].

66 See *Public Prosecutor v Chee Cheong Hin Constance* [2006] 2 SLR 24 on culpability and [2006] 2 SLR 707 on sentencing.

67 Ho Hock Lai, “Virtuous Deliberation on the Criminal Verdict” in *Law, Virtue and Justice* (Amalia Amaya & Ho Hock Lai eds) (Hart Publishing, 2013) at p 251.

68 [2006] 4 SLR 124.

was) decided that “the sentence meted out to a seriously ill offender ... must strike the right balance between the administering of an appropriate sentence on the one hand and allowing a very seriously ill person to live out his remaining days with dignity in peace on the other. The exercise of mercy calls for sound but finely tuned discretion”, pithily quoting from Shakespeare that “the quality of mercy is not strained” by substituting for a fine both the defendant’s custodial sentence as well as order for corporal punishment on the basis of his terminal medical condition.⁶⁹

26 Law in the reports aside, what about law in action? What evidence do we have of perspective-taking by judges? Consider the Australian magistrate in the trenches “[d]ealing with, [he supposed], that personal interaction with people where you actually need to find a whole lot of different skills as how to appease people, how to manage their problems, how to make them feel comfortable ... rather than being able to be the ‘authority’ in those situations – ‘don’t speak to me like that in my court’ usually inflamed the situation. So [he tends] to be more of a mediator, or a counsellor ... and take the heat out of the situation, which isn’t part of the legal skill – it’s just more of a survival skill”.⁷⁰ The humanity involved in judicial decision-making is returned to the fore in the following comment: “because you’re actually talking to the person rather than to his counsel it makes it all the more acute, that sense of feeling sympathy for the person, but you’re not allowed to let that sympathy get in the way of what you do”.⁷¹

27 The above examples are merely a sampling of a potentially deep and wide lake of judicial perspective-taking. The discussion could go on *ad infinitum* (or, from the perspective of opponents, *ad nauseum*). It is true that there will be instances where empathy is not required to inform the factual matrix or does not add to the legal analysis, but given that the above-mentioned examples are taken from a broad spectrum of the law, one could assert that empathy is very often an ingredient of proper as well as popular judicial decision-making.⁷²

28 Based on this working definition, therefore, empathy is about process rather than outcome. It is *strictu sensu* about the capacity to put one’s self in someone else’s shoes. There are two consequences of taking this position. *First*, by saying that empathy is solely about perspective-

69 *Chng Yew Chin v Public Prosecutor* [2006] 4 SLR 124 at [50] and [61].

70 Sharyn Roach & Kathy Mack, “Magistrates’ Everyday Work and Emotional Labour” (2005) 32 *Journal of Law and Society* 590 at 607–608.

71 Sharyn Roach & Kathy Mack, “Magistrates’ Everyday Work and Emotional Labour” (2005) 32 *Journal of Law and Society* 590 at 611.

72 Thomas Colby, “In Defence of Judicial Empathy” (2012) 96 *Minn L Rev* 1945 at 1983.

taking, supporters are expressly or impliedly distinguishing cognitive from affective empathy, with their preference for the former. *Second*, what one does with the information gained through empathising is deemed a separate issue altogether. Employed in this manner, empathy may be easily distinguished from sympathy. As Colby puts it succinctly, “to sympathise is the feel *for* someone; to empathise is to feel *with* them... to empathise with others ... is simply to understand things from their perspective and to be able to sense what they are feeling” [emphasis in original].⁷³ In both cases, the underlying motivation is to dispel the suggestion that empathy *as defined* entails a predisposition or determinate outcome.⁷⁴

IV. Problems of and solutions to empathic judicial decision-making

29 Critics say that adopting perspective-taking as judicial empathy’s standard-bearer is misleading: there is growing consensus that the cognitive and affective are not distinct but overlapping traits of empathy, and that it is by no means unanimous that emphatic perspective-taking can be divorced from conduct.⁷⁵ It has been suggested that it is simply impossible to inhibit otherwise natural emotive responses in judicial decision-making.⁷⁶ The disagreement is not merely a matter of semantics or theory. By saying that empathy is not about feeling for someone and has no necessary link to outcomes, opponents are denied the opportunity of accusing proponents of empathy as back-dooring bias into the judicial decision-making process.

73 Thomas Colby, “In Defence of Judicial Empathy” (2012) 96 Minn L Rev 1945 at 1959.

74 Thomas Colby, “In Defence of Judicial Empathy” (2012) 96 Minn L Rev 1945 at 1959; see also Susan A Bandes, “Empathetic Judging and the Rule of Law” [2009] Cardozo Law Review De Novo 133 at 136:

Empathy is a capacity ... It differs from sympathy or compassion ... Empathy entails understanding another’s perspective. Sympathy is a feeling for or with the object of the emotion. Empathy does not require, or necessarily lead to, sympathy. Empathy, unlike sympathy, does not necessarily lead to action on behalf of its object, or the desire to take action on his behalf ... [references omitted]

and Susan A Bandes, “Empathy and Article III: Judge Weinstein, Cases and Controversies” (2015) 64 DePaul L Rev 317 at 320.

75 See Thomas Colby, “In Defence of Judicial Empathy” (2012) 96 Minn L Rev 1945 at 1958. This point draws inspiration from Frans B M de Waal, “Putting Altruism Back into Altruism: The Evolution of Empathy” (2008) 59 Annu Rev Psychol 279 at 285: empathy is perspective-taking combined with emotional engagement).

76 Jill D Weinberg & Laura Beth Nielson, “Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking” (2012) 85 S Cal L Rev 313.

30 Such arguments fit snugly with that line of research which, rooted in the legal realism movement, suggests a direct correlation between a judge's personal characteristics and the outcome of a case. Thus, for example, a judge on the political right is likely partisan and to rule in favour of a litigant championing a conservative cause.⁷⁷ Judges might likewise side with litigants who belong to the same socio-economic class.⁷⁸ Gender stereotypes are also common accusations, in that a male judge renders a more sympathetic verdict in rape cases.⁷⁹ UK Supreme Court Deputy President Baroness Hale (as she then was) alluded to this point when she said a male colleague in the House of Lords "referred to [her] 'unique insight into these issues' – quite what he meant by that [she does] not know. [She is] sure he meant it as a compliment. [She hopes] that he meant that [she] was unique in bringing the perspective of a woman, who had been a girl, and had spent most of [her] life working in areas of law relating to women and children. But of course [she is] by no means unique in any of that".⁸⁰ Other studies hint that a Caucasian judge is likely, in the presence of a fellow Caucasian victim, likely to discriminate against a black accused.⁸¹ Such attitudes are prevalent and insidious: "stereotypical associations [are] so subtle that people who hold them might not even be aware of them".⁸² The gist of the concern is that being empathic is simply another word for unduly favouring the party in the litigation process whose perspective has, as a result, been taken.

31 In this vein, frets Henderson:⁸³

The reality of empathy is that we are more likely to empathize with people similar to ourselves, and that such empathic understanding

77 Robert M Howard & Jeffrey A Segal, "A Preference for Deference? – The Supreme Court and Judicial Review" (2004) 57 *Political Research Quarterly* 131; Jeffrey A Segal & Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press, 2002).

78 Michele Benedetto Neitz, "Socioeconomic Bias in the Judiciary" (2013) 61 *Clev St L Rev* 137.

79 Christina L Boyd, Lee Epstein & Andrew D Martin, "Untangling the Causal Effects of Sex on Judging" (2010) 54 *American Journal of Political Science* 389.

80 Lady Hale, "It's a Man's World: Redressing the Balance", speech at Norfolk Law Lecture 2012, University of East Anglia (16 February 2012). Her Ladyship was referring to *R v G* [2009] 1 AC 92, involving a case of statutory rape.

81 Jonathan P Kastlelec, *Race, Context, and Judging on the Courts of Appeals: Race-Based Panel Effects in Death Penalty Cases* (26 July 2016).

82 Jeffrey J Rachlinski, Sheri Johnson, Andrew J Wistrich & Chris Guthrie, "Does Unconscious Racial Bias Affect Trial Judges?" (2008–2009) 84 *Notre Dame L Rev* 1195.

83 Lynne Henderson, "Legality and Empathy" (1987) 85 *Mich L Rev* 1574 at 1584; see also Darrell A H Miller, "Iqbal and Empathy" (2010) 78 *U Mo-Kan City L Rev* 999 at 1010. The same as much is suggested in Adam N Glynn & Maya Sen, "Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?" (2015) 59 *American Journal of Political Science* 37.

may be so automatic that it goes unnoticed: elites will empathize with the experiences of elites, men empathize with men, women with women, whites with whites. I would call this 'unreflective' empathy ... [references omitted]

According to Klaus Mathis and Fabian Diriwächter, this unreflective empathy is embedded in the system 1 biases which plague our decision-making processes. By way of example, they raise the "familiarity bias" in which we are more likely to empathise with members of the same group or people with characteristics in common as ourselves,⁸⁴ as neatly encapsulated in the categories enunciated in the preceding paragraph.

32 Yet, even if true, it is not all bad. Ho extolled the virtue of emphatic concerns reflected in outcomes: "[a]ll else being equal the greater the empathic care the [judge] has for the accused, the more it will pain her to convict him of a crime he did not do, and consequently, the more it will take to convince her to return a guilty verdict."⁸⁵ Although he made this observation in the context of criminal trials, there is nothing inherently objectionable to applying this to civil matters, or indeed, taking into account any and all stakeholders in the justice system. As if to emphasise the point, Brett Kavanaugh exhorted of fellow judges that "[w]e must walk in the shoes of the other judges, the lawyers, and the parties. It is important to understand [all parties], to keep our emotions in check, and be calm amidst the storm. To put it in the vernacular: to be a good umpire and a good judge, don't be a jerk."⁸⁶

33 It is a red herring to debate whether emotions ought to be excluded from judicial decision-making. Perhaps what is needed is an acknowledgment that judges are emotive creatures, like the rest of us, and that their empathic perspective-taking and empathic concern not only do play a part but may also have a legitimate role in judicial decision-making.⁸⁷ The crux of the matter, then, is whether empathy's potential for excesses may be sufficiently controlled. In other words, the challenge is policing the line between enabling empathy to improve judicial decision-making processes, and where it renders the outcome liable to criticisms of bias.

84 Klaus Mathis & Fabian Diriwächter, "Is the Rationality of Judicial Judgements Jeopardised by Cognitive Biases and Empathy?" in *Efficiency, Sustainability and Justice to Future Generations* (Klaus Mathis ed) (Springer, 2011) at p 69.

85 Ho Hock Lai, "Virtuous Deliberation on the Criminal Verdict" in *Law, Virtue and Justice* (Amalia Amaya & Ho Hock Lai eds) (Hart Publishing, 2013) at p 252.

86 Brett M Kavanaugh, "The Judge as Umpire: Ten Principles" (2016) 65 *Cath U L Rev* 683 at 689.

87 Terry A Maroney, "The Emotionally Intelligent Judge: A New (and Realistic) Ideal" (2013) 49 *Court Review* 100 at 110.

34 Mathis and Diriwächter summarised the position succinctly:⁸⁸

[C]onscious analysis of the intentions and interests of the parties and one's own prejudices is, on the one hand, an indispensable prerequisite for a judgment that fulfils its intended function, namely, to bring about reconciliation between the competing interests of the parties to the proceedings. On the other hand, the empathetic judge is also accountable for the effects of this process on his own emotions. Empathy in the application of law does not therefore mean that judges allow private intentions, interests and prejudices to surreptitiously influence their judgment directly or even to take the place of judgment. On the contrary, they should enable judges to develop and preserve the necessary conscious distance between the aims of the parties and the judges' own feelings.

35 If we say empathic perspective-taking is good judicial decision-making, then good judgments ought to reflect the role empathy plays. If we agree that emotion cannot be excluded from judicial decision-making, then it would require collective selective amnesia for the entire judicial institution not to mention it. Judges ought to forthrightly account (to themselves, at the very least) for empathic perspective-taking, how they have sought to guard against – for instance – unwanted emotional contagion, and therefore how adopting an empathic attitude has affected their decision. The important lesson, Ho contended, is that while “[w]e often praise dispassionate dispensation of justice. It seems to me this is best read to mean not that justice should be dispensed without any empathic care for anyone at all but that empathic care should not be unfairly distributed when dispensing justice”.⁸⁹ It is only through an express judicial rendering of empathy into the words of a judgment can it *truly* be scrutinised and made accountable to the public, rendering both the subjective decision-making process and its objective outcome justifiable. Once again, as with the first point, this solution is only viable if the judge is even aware of the role empathy plays in his decision-making process.

V. Judicial empathy: An empirical agenda

36 If we believe that empathy is a virtue in judging, then empathic capacity ought to be a quality for those holding judicial office. Yet, what hampers this agenda (and, at the same time, revealing the potential for

88 Klaus Mathis & Fabian Diriwächter, “Is the Rationality of Judicial Judgements Jeopardised by Cognitive Biases and Empathy?” in *Efficiency, Sustainability and Justice to Future Generations* (Klaus Mathis ed) (Springer, 2011) at pp 69–70.

89 Ho Hock Lai, “Virtuous Deliberation on the Criminal Verdict” in *Law, Virtue and Justice* (Amalia Amaya & Ho Hock Lai eds) (Hart Publishing, 2013) at p 251; see also Terry A Maroney, “The Emotionally Intelligent Judge: A New (and Realistic) Ideal” (2013) 49 *Court Review* 100 at 110.

future research in the field of judicial decision-making) is the sore lack of empirics:⁹⁰ only a clutch of studies – in the US, Australia, and Sweden – have thus far been conducted linking emotions to judicial behaviour. These studies are important and path-breaking: one assessed the impact of allowing victims of crimes to have a voice in the courtroom through victim impact statements;⁹¹ a second qualitatively highlighted the emotional burden judges carry in dealing with ordinary litigants;⁹² and a third focused on methodology for data collection.⁹³ Others have suggested that the next steps ought to be to contextualise data collection, perhaps contrasting emotional responses in the civil/criminal law context, appellate versus trial, when judges work individually or collectively, or in an inquisitorial or adversarial environment: “[c]omparative work might yield important insights into the role of culturally divergent social constructions of judging.”⁹⁴ While much of the legal literature focuses on appellate courts in the judicial hierarchy, it is perhaps unsurprising that the empirical work focuses on trial courts and judges in the middle and lower tiers of the Judiciary: these are the officers in the proverbial trenches, exposed on a daily basis to the raw emotions of the everyday man, hearing the great bulk of all matters that go through the judicial process. There is a pressing need to understand and regulate the role of emotion in the incidence of greatest impact for the greatest number of people in the dispensation of justice.

37 To the above, a further two points may be added. First, how can we know whether a judge is or can be empathic? Is it possible to separate the empathic wheat from the psychopathic chaff? There are simply as many tests for empathic aptitude as there are definitions of empathy, and for that same reason, one must proceed cautiously in understanding the kind of test that might be suitable for such needs. There are measurement scales which test for only cognitive empathy,⁹⁵ or those for purely the affective variant.⁹⁶ Others measure empathy in the sense of it

90 This point is clearly echoed in Terry A Maroney & James J Gross, “The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective” (2014) 6 *Emotion Review* 142 at 148.

91 Mary Lay Schuster & Amy Propen, “Degrees of Emotion: Judicial Responses to Victim Impact Statements” (2010) 6 *Law, Culture and the Humanities* 75.

92 Sharyn Roach & Kathy Mack, “Magistrates’ Everyday Work and Emotional Labour” (2005) 32 *Journal of Law and Society* 590.

93 Sharyn Roach Anleu, Stina Bergman Blix, Kathy Mack & Åsa Wettergren, “Observing Judicial Work and Emotions: Using Two Researchers” (2016) 16 *Qualitative Research* 375.

94 Terry A Maroney & James J Gross, “The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective” (2014) 6 *Emotion Review* 142 at 148.

95 Robert Hogan, “Development of an Empathy Scale” (1969) 33 *Journal of Consulting and Clinical Psychology* 307.

96 Albert Mehrabian & Norman Epstein, “A Measure of Emotional Empathy” (1972) 40 *Journal of Personality* 525.

as an umbrella term encompassing sympathy or compassion.⁹⁷ If the intent is to test for a judge's propensity towards perspective-taking, then the first type of test is suitable; but that presupposes an acceptance of the important and as-yet-not-established assumptions that cognitive and affective empathy can be distinguished, and there is no necessary link between empathy as a process and as an outcome. Perhaps like a broad-spectrum antibiotic, the latter type of test is more suitable, as it gives a holistic picture of the cognitive and affective makeup of our judicial office-holder. Having more awareness that he is not only of his cognitive ability to step into the shoes of the other, but also of his propensity to emote in relation to that other, affords him at the very least the opportunity to minimise empathic corruption and to regulate empathic concern in a just manner towards all concerned by his judgment. No attempt has been made to measure the judicial propensity towards empathy, and yet such data could usefully inform both the factors involved as well as the outcome of any particular judicial decision in any given field.

38 The second point flows from the preceding comment – is it possible to train⁹⁸ judges to be or become empathic?⁹⁹ Concomitantly, can we train judges to control the effect of empathy on decision-making?¹⁰⁰ A growing body of research posits that emotional contagion or affect in the empathic process can be controlled, modified or inhibited cognitively. This is similar to the debiasing strategy adopted to counter cognitive biases in that both require the decision-maker to be

97 Darrick Joliffe & David P Farrington, "Development and Validation of the Basic Empathy Scale" (2006) 29 *Journal of Adolescence* 589.

98 See generally Francy L Rubin, Margaret M Judd & Tali A Conine, "Empathy: Can It Be Learned and Retained?" (1977) 57 *Physical Therapy* 644 and Carol M Davis, "What Is Empathy, and Can Empathy Be Taught?" (1990) 70 *Physical Therapy* 707.

99 A good example of judicial training in empathy is the session organised by the New York County Lawyers' Association entitled, "The Role of Empathy in Judicial Decision Making" on 2 May 2013, available at <http://www.nycla.org/PDF/The%20Role%20of%20Empathy%20in%20Judicial.pdf> (accessed 2 May 2016). This follows comments on embedding empathy training in professional judicial courses: see Terry A Maroney & James J Gross, "The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective" (2014) 6 *Emotion Review* 142 at 150.

100 Roman Krznaric, "The Empathy Effect: How Empathy Drives Common Values, Social Justice and Environmental Action" *Friends of the Earth* (March 2015) at endnote 98: "I have myself been involved in giving empathy training courses to UK Employment Tribunal judges". <<https://www.foe.co.uk/sites/default/files/downloads/empathy-effect-roman-krznaric-76075.pdf>> (accessed 2 May 2016); see also the New York County Lawyers' Association Continuing Legal Education's course: "The Role of Empathy in Judicial Decision Making" (2 May 2013) available at <http://www.nycla.org/PDF/The%20Role%20of%20Empathy%20in%20Judicial.pdf> (accessed 2 May 2016).

aware of the problem, and subsequently to take deliberate steps to protect his decisional processes from corruption.¹⁰¹

39 Strategies include emotional suppression or anticipatory cognitive reappraisal.¹⁰² *Emotional suppression* takes a number of forms. For example, it might constitute denial in that the judge cognitively disengages from (that is, refuses to mentally admit to) his own emotional response or pretending that it is no longer being felt. The feeling, whether anger at a defendant mother accused of abandoning her child, or disgust at the hedonistic displays of an accused charged with acts of sadomasochism, is mentally suppressed. Emotion may also be behaviourally repressed, such as to inhibit expressions of emotion through behaviour – whether laughter or sadness or smiles or wincing. *Cognitive reappraisal*, for instance, involves deliberately re-interpreting an emotional response such as to modify the intensity of the emotion felt. Applied to the judicial context, this involves the judge consciously attempting to be emotionally neutral in relation to possible emotional responses to a given stimulus (for instance, gruesome crime scene photographs, a victim crying, or an accused's *mea culpa*), and, thus arriving at a similar emotional state as with expressive suppression. Both strategies can be reactive or anticipatory (that is, the judge mentally preparing himself for an expected emotional stimulus). Both strategies have as their object the distancing between the judge and his emotional state, such as to mute affective empathy, while retaining the benefits of cognitive empathy.¹⁰³ Both strategies require the judge to be aware of the potential (negative) influence of emotion on the judicial decision-making process.

40 If so, how ought a judicial training programme to be structured? Could priming judges for perspective-taking be effective? Should we encourage judges to disclose their empathic responses, both during proceedings and in their judgments, as well as how they dealt with these selfsame responses? The key objectives in so doing include: raising

101 Timothy D Wilson, David B Centerbar & Nancy Brekke, "Mental Contamination and the Debiasing Problem" in *Heuristics and Biases: The Psychology of Intuitive Judgment* (Thomas Gilovich, Dale W Griffin & Daniel Kahneman eds) (Cambridge University Press, 2002) at p 191. Amos Tversky & Daniel Kahneman, "Rational Choice and the Framing of Decisions" (1986) 59 *The Journal of Business* S251 at S274–S275.

102 For an overview, see Terry A Maroney & James J Gross, "The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective" (2014) 6 *Emotion Review* 142.

103 See, eg, Patricia L Lockwood, Ana Seara-Cardoso & Essi Viding, "Emotion Regulation Moderates the Association between Empathy and Prosocial Behaviour" (2014) 9 *PLoS One* e96555. For an application in the judicial context, see Terry A Maroney, "Emotional Regulation and Judicial Behaviour" (2011) 99 *Cal L Rev* 1485.

awareness of empathy as a judicial virtue, while guarding against its potential excesses; determining how to implement empathy in what must be the daily task of empathic engagement with courtroom stakeholders; and deciding the extent to which empathy is required by different areas of the law or enhances our understanding of the law. At the very least, engagement by judicial office-holders of this topic ought to generate the kind of open discussion on the role of empathy in judicial decision-making that it deserves,¹⁰⁴ if it is to have an increasingly prominent place in our system of justice.

VI. Conclusion

41 Plato famously described a tribe of men, prisoners in the dark confines of a cave.¹⁰⁵ From beyond a rocky wall is a fire that burns bright, offering potential comfort and illumination. The tribe is unable to see beyond the wall, perceiving only shadows and sounds, and willing themselves to believe that only shadows and sounds are real, and nothing else. There are those who escape the cave, and are able to comprehend the full reality of their situation. Some return to the cave to share in this truth, only to be persecuted by the tribe who cannot see the light.

42 This article represents an emphatic plea to recognise the truths that emotion cannot and ought not to be excluded from judicial decision-making. Justice as fairness demands that all perspectives be taken into account by the judge, and impartiality demands that he confronts and deals with his emotions in the decision-making process in an honest and accountable manner. If the virtuous judge is the empathic judge, then it is not only time to start a conversation on this very topic, but to also recognise and train this virtue in those who hold this high office.

104 One possible outcome is to discuss whether Richard Posner was right in saying that “the internal perspective – the putting oneself in the other person’s shoes – that is achieved by the exercise of empathetic imagination lacks normative significance”: Richard A Posner, *Overcoming Law* (Harvard University Press, 1995) at p 381.

105 Plato, “The Republic – Book VII: Allegory of the Cave” in *Great Dialogues of Plato* (W H D Rouse trans; Phillip Rouse & Eric H Warmington eds) (New American Library, 1956) at p 365.