

## Do We Need More Empathic Judges?



A light rape sentence sparks outrage—and raises questions about the place of empathy and bias in judicial decision-making.

BY JILL SUTTIE | JUNE 22, 2016

When a Stanford University swimmer was found guilty of rape earlier this month, Santa Clara County Superior Court judge Aaron Persky handed him a light sentence. In pronouncing the sentence, the judge seemed to show more empathy for the perpetrator, who went to the same university as Persky, than the rape victim, who didn't. And of course, the judge and convicted rapist also shared the same race and gender.

The incident sparked outrage on the Internet—and raised questions about the place of empathy in judicial decision-making.



In 2009, President Obama told Americans that he thought empathy was an important quality for a judge to possess, saying, “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.”

In the debate that followed, some legal scholars argued that more empathic judges might be less punitive toward those who come from difficult backgrounds. But others worried that empathic judges might show favoritism or bias, as critics allege happened in the Stanford swimmer case.

Scientists have long known that empathy plays a role in how people treat each other. Empathy is a potent predictor of helping behavior, and will lead people to altruistic action even at great risk to themselves. The opposite is also true: not having empathy for someone will likely increase your willingness to inflict harm on them, particularly if they are from a different racial group.

So, is empathy a problem for judges—or a crucial tool for leveling the playing field? Will empathy lead to fairer or less-fair decisions? Can we even modulate our empathy if we wanted to?

Research may help supply some answers. To date, the science of empathy suggests, at a minimum, judges need to appreciate the role of emotion in their decisions, if they want to be fairer in the courtroom. Society may benefit as well if more judges—who are predominantly white, male, and from affluent backgrounds—could widen their circle of empathy to include people from all walks of American life. This research suggests that empathy can help make justice more equal for all—but only when we understand its limits.

### **Empathy in the courtroom**

People naturally vary in how much empathy they feel for others, and judges are no different.

Stina Bergman Blix has studied court proceedings in Sweden and found that judges can fall prey to emotional reactivity toward other players in the courtroom, responding with condescension, and impatience when bored or angry. In analyzing those proceedings, Blix discovered that empathy—which she describes as perspective-taking and reading the emotions of others—was paramount to the process of adjudicating cases.

“In decision-making, the judge needs to understand multiple perspectives: Is the scenario described by a witness plausible? Is the action and experience of that event feasible? Is the statement credible and reliable?” she says. “I would argue that empathy is both unavoidable and essential to answer these questions.”



Stina Bergman Blix

But, many judges aren't always aware of the importance of empathy, says Blix, in part because the court's rituals and the norms of behavior tend to make judges believe they are not affected by their emotions or concerns for others. Some may see empathy as a weakness.

"The problem is that the ideal of non-emotionality does not allow legal professionals actively and explicitly to reflect upon how they do use emotions at work," says Blix.

Adam Benforado, a law professor and author of the 2015 book, *Unfair*, agrees that many judges aspire to be free of empathy and emotion. "Empathy has gotten something of a bad name, partly as a result of Justice Roberts coming out and saying that judges are only umpires, there to call balls and strikes," he says. "The judge who exercises empathy is often thought of as an activist judge."

Yet Benforado and Blix both argue that empathy is endemic to the legal process, whether judges are aware of it or not, and that wise judges should understand its effects and take steps to nurture empathy for *all* participants in a case.

"Research has shown that we tend to empathize with people that are similar to us—it is easier to tune in to someone or something that we recognize," says Blix. "If judges do not reflect about their empathic behavior they risk being biased by spontaneously tuning in to one side but not the other."

Indeed, some studies support the assertion. Results from one study suggests judges are subject to the same implicit racial biases that many Americans carry, though the researchers also noted that judges could compensate for the biases' influence on their judging if they were motivated to pay closer attention to them.

In another study, researchers found that male judges with daughters tended to endorse rulings more favorable to women than justices without daughters, even more so if the judges were Republican. According to the researchers' analyses, male judges with daughters were better able to see things from a woman's perspective—one inherently different than their own—and give more credence to their claims, while those without daughters tended to fall upon their personal biases.

These studies suggest that widening a judge's perspective can lead to different decisions, perhaps leading to fairer judgments. It also suggests that those who don't recognize their biases may end up ruling in a less-fair manner, perhaps even being more lenient or more punitive, depending on who's before them.

For example, researchers analyzing employment discrimination cases filed between 1988 and 2003 in seven regions across the country found that minority judges were more apt than white colleagues to let a case proceed to trial, while white judges were more likely to do so only if the plaintiff was white.

Similarly, a 2010 paper found that people who were more attractive got lower sentences than less attractive people, while another showed that black men with more Afro-centric features received heavier sentences than those who looked less stereotypically African-American.

Studies like these suggest that empathy already plays a role in how cases are decided, at least in discrimination cases, and that having a life experiences similar to plaintiffs or defendants affects a judge's decision without their conscious awareness. They also imply that unless a judge can empathize with those who are different from them, they will continue to make decisions that are unfair and perhaps lead to over-punitive sentences.

## Empathy and punishment

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In a study by Mina Cikara and Susan Fiske, participants had their brain activity monitored through fMRI while seeing individuals from different racial/age groups experiencing positive or negative events. Later the participants were asked

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to judge those individuals as warm or competent and then asked to choose one individual over another to receive painful electric shocks in a forced choice situation.

Results showed that when participants experienced pleasure seeing bad things happen to individuals from out-groups they didn't find warm, or to people they envied, they were more willing to nominate those same individuals for the electric shocks. Interestingly, the pleasure signal in the brain didn't always match a participant's self-reported pleasure, suggesting that the willingness to harm another because of a lack of empathy may be below one's conscious awareness.

In a new study, researchers monitored participants using fMRI technology while they watched videos of out-group and in-

group perpetrators purposely harming both out-group and in-group victims. The participants displayed higher activation in brain regions suggesting a willingness to harm and behaved in less empathic ways when perpetrators were out-group members, and even more so when the perpetrator's victim was an in-group member.

Though these studies were not done with judges, the findings could still have important implications for the judiciary: if a judge isn't conscious of how little they empathize with another from a different social group, they may be more likely to hand out harsher punishments.

But the reverse is true too: cultivating empathy could lead kinder and gentler sentencing.

In one study, university students who were induced to feel empathy for a hypothetical defendant committing grand larceny were more likely to assign more lenient punishments to them than to those for whom they felt little or no empathy.

The reason for this was that empathy increased the participants' willingness to consider situational factors impacting the defendant. In other words, empathy helped the participants overcome the fundamental attribution error (FAE)—the tendency to assign character flaws to bad actors rather than understanding the role of context in their behavior.

Benforado has studied the FAE and its impacts in the criminal justice system as a whole and argues that judges, like most people, tend to attribute bad behavior to character flaws.

“Judges have an initial instinct is to look at people through this dispositional lens—this person has done something wrong, so they are a bad person; they made a mistake, so it’s their problem,” says Benforado. “That’s because it’s a lot harder to see things through another’s perspective.”

Empathy, he argues, provides the remedy to that.

“Empathy is all about perspective, all about being able to step into someone else’s shoes and appreciate all of the forces and constraints that shaped their behavior.”

### **What happened—and why?**



Judge Jessica Silvers and her staff.

Judge Jessica Silvers, a criminal court judge in Los Angeles, agrees that understanding situational factors has been critical to making good judgments in her courtroom.

“A judge needs empathy in order to see why people do things—not to just decide what happened, but why it happened—whether it’s an accused defendant, a victim, a witness, or a family member,” she says. “You really need to have empathy, because

though you'd like to think the law is very clear, it's not always completely clear, and there's a lot of room for discretion.”

She talks about some of the situational factors that have come up in her courtroom, mitigating her responses.

“Homelessness can be a factor, mental illness is a factor, and as societies are more focused on that, we as judges should be more focused on that too,” she says. “You don't want somebody just looking at the hard letter of the law, because the law is applied to human beings and society changes.”

Researchers James Unneer and Francis Cullen suggest that empathy affects judges in another way, too, by reducing a natural desire for retribution. Empathy, they write, decreases anger that may naturally arise when hearing about offending behavior, encourages less judgmental listening, and increases the willingness to believe that an offender feels remorse for bad behavior.

These findings suggest that without increasing judicial empathy, we will continue to have the same punitive criminal justice system we have now. That's because, as Benforado notes, most judges are still older white men who went to Ivy League schools, despite President Obama's efforts to diversify the federal courts, which means the courts are likely to be unfairly stacked against women and minorities.

“The worst thing in the world is to have all of the empathy bias operating in one direction,” he says. “If we can't root out bias, the next best solution is that we have a diversity of bias, so that at least no one starts out severely disadvantaged.”

In other words, we need to increase empathy in judges and diversify the courts, if we are to impart justice more fairly. Otherwise, we risk putting people behind bars more frequently and inflicting harsher punishments, or not taking their discrimination or rape cases seriously, because of the gender or ethnicity of the judge.

## **Where to go from here**





Adam Benforado

Of course, many judges are already aware of how empathy plays a role in the law, and actively try to pay attention to all sides of a case.

But Benforado thinks judges should be encouraged to do more by tracking the outcomes of their cases to see if there is evidence of bias—perhaps preferential outcomes for white defendants over black defendants, or Hispanic defendants over white defendants.

“It’s really hard to understand how your own identity shapes the world until you have the data that shows you,” he says. “So talking to judges on how to track this stuff on an individual level, to me that’s part of the solution with the judiciary.”

He’s been training judges from all over the country on how bias shapes criminal proceeding and hoping to make an impact in how they see their work. He believes that many judges get into the profession because they genuinely care about people and want to do the right thing; but they don’t understand how bias impacts them personally.

“I think most judges think of themselves as objective arbiters that go around in the world and look at things through neutral lenses,” says Benforado. “But people really see everything in a biased fashion because of who they are and what they’ve experienced in their life, and judges are no different in that regard.”

He believes that widening one’s circle of empathy is also part of the solution, and he encourages judges to spend more time learning about the people who come into their courtrooms, to better understand their perspectives. He suggests that judges not only visit prisons where they send convicted felons and spend time in the



neighborhoods where their defendants live, but also talk to police officers on their beats, and go on police ride-alongs. These experiences, he believes, will help them to empathize with the concerns articulated by all of the actors in their courtrooms.

“Any of those experiences are going to make someone a better judge,” says Benforado.

He may have a point. Evidence shows that empathy-training can make a difference in outcomes in another profession involved in making life and death decisions: doctors. This research has led to some innovative programs in medical school, including bringing medical students into the homes of their patients to better empathize with their predicaments and understand their behavior.

Benforado argues that something similar should be done in the legal profession, starting with law school, so that future lawyers and judges will understand the importance of empathy and the role of emotion in the courtroom. Only by doing that, he argues, will we have better, fairer outcomes for all. From this perspective, the solution to Aaron Persky’s sentence for the Stanford rapist is not less empathy—but rather, *more* of it for the female victim.

“I want my law students to feel for the different actors in a court case, to step into their shoes, to try to understand their actions,” says Benforado. “That’s hard for people to do, because our expectations for lawyers stands in contrast to that. But it’s a very necessary step.”

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## About the Author



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**Jill Suttie, Psy.D.**, is *Greater Good's* former book review editor and now serves as a staff writer and contributing editor for the magazine. She received her doctorate of psychology from the University of San Francisco in 1998 and was a psychologist in private practice before coming to *Greater Good*.

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