Consenti alteram partem: Sympathy and Empathy in Judging

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Etymological roots

• **Sympathy** – classical term for the concept of “fellow feeling”, or sharing the emotion of another; today often confounded with compassion or caring

• **Empathy** – 20th century term for the concept of understanding the thoughts, feelings, and perspective of another; today often considered more “objective” and “professional” than sympathy
Neurological bases

• **Sympathy** – arises from a distinct neurological system probably associated with “mirror neurons” in the brain and possibly related to mimicry; thus an existential state which may be inhibited or suppressed

• **Empathy** – outcome of another more cognitively oriented system possibly related to imagination and symbolic representation of concepts and ideas; thus an epistemological achievement which may be more or less accurate
Compatibility with judging

• Neither sympathy nor empathy entail evaluation or judgment; and,
  sympathy and empathy may be experienced in relation to all parties in conflict
  – therefore, sympathy and empathy do not derogate from impartiality
• Sympathy gives authority a human face
• Empathy assists in understanding diverse people and unfamiliar situations
Benefits of sympathy and empathy

• **Sympathy** contributes to perceptions of procedural justice in its aspect of “interpersonal” or “interactional” fairness: “voice” includes tears

• **Empathy** contributes to better decision making through deeper understanding of parties’ feelings, thoughts, and actions: the “face” of the other becomes more distinct
Applications of sympathy and empathy

• In **adjudication**:  
  - Judicial sympathy contributes to perceptions of procedural justice and having one’s “day in court”  
  - Judicial empathy assists in understanding cases from the perspectives of the litigants

• In **judicial mediation**:  
  - Judicial sympathy has the like effect as above  
  - Judicial empathy can model and stimulate reciprocal understanding by the parties’ of their needs and concerns (interests)
Concerns regarding affective engagement

- Accuracy of perception and characterization of the parties’ emotional expression
- “Emotional contagion” and emotional regulation
- Equality of engagement
- Emotional burnout and disengagement

The benefits outweigh the difficulties!
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Thanks!