ESSAY

SENTENCING: A ROLE FOR EMPATHY

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INTRODUCTION

When Supreme Court Justice David H. Souter announced his retirement in 2009, President Barack Obama observed that “empathy”—which he defined as the quality of “understanding and identifying with people’s hopes and struggles”—was an “essential ingredient” for a judge.¹

The reaction from some was swift and caustic. Empathy, some said, was a code word for activism—for activist judges.² Indeed, Michael Steele, Chairman of the Republican National Committee at the time, was quoted as saying, “I don’t need some judge sitting up there feeling bad for my opponent because of their life circumstances or their condition. And short changing me and my opportunity to get fair treatment under the law. Crazy nonsense empathetic. I’ll give you empathy.

¹ The President issued a written statement, which included the following:

Now, the process of selecting someone to replace Justice Souter is among my most serious responsibilities as President, so I will seek somebody with a sharp and independent mind and a record of excellence and integrity. I will seek someone who understands that justice isn’t about some abstract legal theory or footnote in a case book; it is also about how our laws affect the daily realities of people’s lives, whether they can make a living and care for their families, whether they feel safe in their homes and welcome in their own nation.

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. I will seek somebody who is dedicated to the rule of law, who honors our constitutional traditions, who respects the integrity of the judicial process and the appropriate limits of the judicial role. I will seek somebody who shares my respect for constitutional values on which this Nation was founded and who brings a thoughtful understanding of how to apply them in our time.

Remarks on the Retirement of Supreme Court Justice David H. Souter, 1 PUB. PAPERS 604, 604 (May 1, 2009).

Empathize right on your behind. Craziness.”3 After the President’s remarks, some members of the Senate Judiciary Committee began asking judicial candidates about their views on the role empathy should play in a judge’s consideration of a case, apparently to identify candidates who might let empathy creep into their decisionmaking.4

Is empathy an important trait for a judge? Is there a role for empathy in the law? What about the related concept of emotion? Is it correct that “[a] good judge should feel no emotions” and that “the ideal judge is divested ‘of all fear[,] anger, hatred, love, and compassion?’”5

Empathy, of course, should play no role in a judge’s determination of what the law is.6 Judges determine the law based on statutes, case law, and legal principles, guided by the rule of stare decisis. With statutory questions, we look to the plain wording of the governing statute (or sentencing guideline), and, where there is ambiguity, we apply the rules of statutory construction and seek to ascertain legislative intent.7

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4 In November 2009, following my confirmation hearing, written questions about empathy were collected and posed to me by Senator Jeff Sessions. For example, I was asked, “What role do you believe that empathy should play in a judge’s consideration of a case?” and, “Do you think that it’s ever proper for judges to indulge their own subjective sense of empathy in determining what the law means?” Confirmation Hearings on Federal Appointments: Hearings Before the S. Comm. on the Judiciary (pt. 4), 111th Cong. 835-36 (2011) (written questions of Sen. Jeff Sessions, Member, S. Comm. on the Judiciary). Indeed, a website was created to track the responses of judicial candidates to the Senate questionnaire about empathy. See Senate Debate on Empathy, CENTER FOR BUILDING CULTURE OF EMPATHY, http://cultureofempathy.com/references/senate-debate (last visited Mar. 15, 2012); see also Wardlaw, supra note 2, at 1648 (“[E]mpathy’ quickly became a three-syllable call to arms, inciting opposition to the President’s judicial nominees.”).

5 Terry A. Maroney, The Persistent Cultural Script of Judicial Dispassion, 99 CALIF. L. REV. 629, 630-31 (2011) (quoting THOMAS HOBBES, LEVIATHAN 203 (A.R. Walker ed., Cambridge Univ. Press 1904) (1651)). Professor Terry Maroney has noted that “[i]nsistence on emotionless judging—that is, on judicial dispassion—is a cultural script of unusual longevity and potency.” Id. at 630. He disagrees, however, with the view that judges should be emotionless and concludes that the “cultural script of judicial dispassion” should be put “aside.” Id. at 681.

6 See Diane S. Sykes, Gender and Judging, 94 MARQ. L. REV. 1381, 1387-88 (2011) (expressing disagreement with President Obama “to the extent that the President’s standard for deciding hard cases is meant to suggest that a judge’s empathy should determine the substantive content of the law”).

7 See, e.g., United States v. Mullings, 330 F.3d 123, 124-25 (2d Cir. 2003) (“When interpreting the Guidelines, we begin with the basic rules of statutory construction, and we give all terms in the Guidelines their ordinary meanings unless there are persuasive reasons not to do so.”). See generally United States v. Verkhoelyad, 516 F.3d 122, 127-37 (2d Cir. 2008) (considering relevant statutory language, applicable guidelines, and
We do not determine the law or decide cases based on “feelings” or emotions or whether we empathize with one side or the other. We instruct our juries that they “are not to be swayed by sympathy,” and we tell them that “once you let fear or prejudice[,] or bias or sympathy interfere with your thinking there is a risk that you will not arrive at a true and just verdict.” These concepts apply to judges as well.

Nonetheless, there is a place within the law for empathy and emotion. In my view, empathy is an essential characteristic for a judge. Despite the rhetoric, the reality is that empathy and emotion play an essential role in the real-world, day-to-day administration of justice—particularly in sentencing. And we should be clear: by “empathy” I do not mean “sympathy.” I do not mean feeling “bad” or “sorry” for someone and letting that emotion influence the decisionmaking. Rather, by empathy I mean the capacity to understand and appreciate the perspective of others, whether that perspective is of individuals

Sentencing Commission policy statements in reviewing the sentence for reasonableness as to both length of sentence and process by which it was reached).

8 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS § 2.01 (Instruction 2-12) (2011).
9 Id.
10 See Guido Calabresi, Dedication, What Makes a Judge Great: To A. Leon Higginbotham, Jr., 142 U. PA. L. REV. 513, 513 (1993) (“To be truly great a judge needs wisdom, that sense of balance which allows one to weigh what cannot be measured, generosity of spirit, that compassion which causes one to know what it is like to be in trouble and in pain, and to desire instinctively to reach out and help, and above all courage, that fire which compels one to do what is right though the heavens—and one’s own career—may fall.”); Erwin Chemerinsky, Korematsu v. United States: A Tragedy Hopefully Never to Be Repeated, 39 PEPP. L. REV. 163, 164-65 (2011) (“I would think the opposite of somebody with empathy is a sociopath. Surely we don’t want sociopaths on the United States Supreme Court, but we do want the Justices to consider the social impact of their ruling.”); Carlton F.W. Larson, Tribute, Judge Michael Daly Hawkins, The Jury System, and American Democracy, 43 ARIZ. ST. L.J. 49, 55 (2011) (“When President Obama famously described empathy as a significant judicial virtue, he was widely mocked by people who mistook empathy for sympathy. Empathy, properly understood, is the ability to put oneself in another’s shoes and understand how the world appears to him or her. Surely that is what good judges do every day.” (footnote omitted)); Sykes, supra note 6, at 1388 (“Empathy is a virtue, and it is also a desirable quality in a judge, who of course must interpret and apply the law in the context of real-life cases. We cannot properly decide our cases without acquiring some insight into the contextual realities of each party’s situation, and a judge’s knowledge of the human condition and capacity to identify with others is important to that endeavor.”).
12 See Wardlaw, supra note 2, at 1646-47 (“Empathy allows the judge to appreciate more fully the problem before her; it does not solve it for her; it does not dictate a result.”).
trying to “make a living or care for their families” or corporations required to defend themselves against frivolous claims brought by vexatious litigants. We were selected to be judges because of our experiences in life, and because of the wisdom, good judgment, and sense of justice that hopefully we have developed as a result of those experiences. It would make no sense for us to set aside these attributes once we reach the bench.

In this Essay, I will consider the role of empathy and emotion in sentencing. I do so from the perspective of someone who has sentenced hundreds of individuals. I was a trial judge for almost sixteen years, during which time I was assigned 699 criminal cases with 1256 defendants. The vast majority were convicted—after a guilty plea or trial—and I was required to sentence them.

Sentencing involves both process and substance. First, a sentencing court must comply with all procedural requirements. Second, the

13 Remarks on the Retirement of Supreme Court Justice David H. Souter, supra note 1, at 604.
14 See In re Martin-Trigona, 9 F.3d 226, 227 (2d Cir. 1993) (“The unfortunate tendency of some individuals to abuse the litigation process has prompted courts to adopt a variety of techniques to protect both themselves and the public from the harassing tactics of vexatious litigants.”).
15 Even after I was confirmed as a circuit judge in April 2010, I continued to sentence defendants, as I kept my entire criminal docket.
16 In fact, I sentenced many defendants more than once, as some would violate their terms of supervised release and would be brought back before me to be sentenced for the violations. For example, I sentenced a defendant in a securities case three times—first for the original crime and twice more for violations of supervised release. See Benjamin Weiser, A Judge’s Education, One Sentence at a Time, N.Y. TIMES, Oct. 9, 2011, at MB1.
17 The New York Times published two comprehensive articles on sentencing that focused on a number of my cases. The first considered my sentencing of financier Bernard Madoff to 150 years in prison. See Benjamin Weiser, Madoff Judge Recalls Rationale for Imposing 150-Year Sentence, N.Y. TIMES, June 29, 2011, at A1. The second examined several more of my sentencings and addressed the difficulties and challenges judges encounter when passing judgment on individuals convicted of crimes. See Weiser, supra note 16. These articles were also instructive because the reporter found defendants who were willing to talk publicly about their experiences in the criminal justice system. I also agreed to be interviewed and to talk about cases that were no longer pending. Although it is not part of our culture as judges to talk to the press on the record about specific cases, I agreed to do so because I felt it would benefit the public to learn more about the sentencing process.
18 See United States v. Tutty, 612 F.3d 128, 130-31 (2d Cir. 2010) (“We ‘must first ensure that the district court committed no significant procedural error . . . .'” (quot-
sentencing court must also impose a sentence that is substantively reasonable and falls “within the range of permissible decisions.” The sentencing judge must take certain substantive factors into account. A failure to do so will constitute procedural error and may also lead to a sentence that is substantively unreasonable. Consideration of both the procedural and the substantive aspects of sentencing is important to determine the proper role, if any, of empathy and emotion in sentencing. Accordingly, first, I discuss the sentencing process; second, I discuss the substantive considerations that bear on the sentencing decision; and, third, I discuss the role of empathy and emotion in sentencing.

I. THE PROCESS

A defendant is entitled to a sentencing process that meets the procedural requirements of law—including those set forth in section 3553 of the Sentencing Reform Act of 1984, the Sentencing Guidelines, and the Federal Rules of Criminal Procedure. Compliance with these requirements helps to ensure a sentence that is both procedurally fair and substantively reasonable.

The court is required to impose sentence “without unnecessary delay.” At the guilty plea or following a guilty verdict, the court will typically schedule sentencing approximately ninety days later. In most cases, the Probation Department will conduct a presentence investigation, which will include an interview of the defendant. The Probating Gall v. United States, 552 U.S. 38, 51 (2007)); United States v. Cavera, 550 F.3d 180, 189-90 (2d Cir. 2008) (en banc) (noting that judicial deference is warranted only if the appellate court is “satisfied that the district court complied with the Sentencing Reform Act’s procedural requirements”).


21 United States v. Dorvee, 616 F.3d 174, 179 (2d Cir. 2010) (citing Cavera in observing that reasonableness is determined by examining whether a sentence is “within the range of permissible decisions”).


23 United States v. Rigas, 490 F.3d 208, 238 (2d Cir. 2007) (noting that judicial deference is warranted only if the appellate court is “satisfied that the district court complied with the Sentencing Reform Act’s procedural requirements”).

24 Id. 32(b)(1).

25 Id. 32(c)(1)(A). In some limited situations, the presentence investigation and a presentence report are waived. Id.
tion Department will issue a presentence report (PSR) that will contain extensive information about the defendant, including his or her personal background (e.g., education, employment, financial information, and family history) and the details of the crime of conviction. It will contain a Guidelines analysis that calculates the offense level, criminal history category, and resulting sentencing range.\footnote{Id. 32(d).}

The Probation Department must disclose the draft PSR to the defendant, his or her attorney, and the government at least thirty-five days before sentencing.\footnote{Id. 32(e)(2).} The defendant has an opportunity to object to the Probation Department,\footnote{Id. 32(f).} which must then consider the objections and submit a final PSR to the court at least seven days before sentencing.\footnote{Id. 32(g).} After consulting with both defense counsel and the government, the Probation Department will typically recommend a specific sentence in the final PSR.

The lawyers will also make written submissions, including sentencing memoranda—briefs addressing legal issues or advocating for a certain sentence, such as time served, a below-Guidelines sentence, or a within-Guidelines sentence. Defense counsel may also submit exhibits that provide information about the defendant, including medical records, psychiatric reports, and photographs of family members. Additionally, defense counsel will submit letters from the defendant, family members, employers, and others in support of the defendant. These letters are important and can be effective.\footnote{For example, when I sentenced Oscar Wyatt, Jr., who pleaded guilty to crimes involving the United Nations oil-for-food program, to a below-Guidelines sentence, I was influenced by the many letters submitted to me in support of Wyatt. Alan Feuer, One-Year Term for Oilman Convicted in Iraq Kickbacks, N.Y. TIMES, Nov. 28, 2007, at A12.} The government will also, on occasion, submit letters from victims and victim impact statements, or documents that provide details of the crime.\footnote{I received many such letters in the Madoff case. See United States v. Madoff, 626 F. Supp. 2d 420, 425-27 (S.D.N.Y. 2009) (addressing request by media to unseal emails submitted by victims); Leslie Wayne, Madoff’s Victims Speak in Court Letters, N.Y. TIMES,
At times, there may be factual disputes that can have a bearing on sentencing, such as the amount of loss in a fraud case\(^{34}\) or whether a victim is a “vulnerable victim.”\(^{35}\) In these situations, the district court will conduct an evidentiary hearing—a *Fatico* hearing\(^{36}\)—at which witnesses testify and counsel presents evidence.\(^{37}\)

Finally, there is the sentencing hearing, the culmination of the sentencing process. The defendant, defense counsel, and the government will be present. Often, the defendant’s family and supporters will be there, and their presence is important as it is some indication that the defendant will return to a supportive environment.\(^{38}\) On occasion, victims will attend as well. Of course, the proceedings are public, and members of the public—including representatives of the media—may also observe.

The sequence may vary from courtroom to courtroom, but victims, defense counsel, the defendant, and the government all have a right to be heard.\(^{39}\) In my experience, victims rarely exercised their right to ad-

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\(^{35}\) See, e.g., United States v. Sangemino, 136 F. Supp. 2d 293, 298-301 (S.D.N.Y. 2001) (holding that an elderly widow in a securities fraud case was a “vulnerable victim” pursuant to section 3A1.1(b) of the U.S. Sentencing Guidelines Manual and imposing a two-level increase in the offense level).

\(^{36}\) See United States v. Fatico, 603 F.2d 1053, 1057 & n.9 (2d Cir. 1979) (addressing issues relating to evidentiary sentencing hearings and concluding that the government should not be held to a beyond a reasonable doubt standard of proof with respect to sentencing issues).

\(^{37}\) When a defendant raises a factual dispute and forces a *Fatico* hearing, there is a risk that the court will impose a more severe sentence because the court will see the evidence. Indeed, one of the benefits of pleading guilty is that the court most likely will not see the evidence. In the *Sangemino* case, because the defendant contested whether the victim was a “vulnerable victim,” I held an evidentiary hearing and listened to the recordings of the defendant trying to take advantage of a lonely, elderly widow. I was deeply troubled by what I heard. See *Sangemino*, 136 F. Supp. 2d at 296-98 (describing a series of phone calls in which the defendant unflinchingly lured and siphoned money from a widow despite her fall into financial troubles).

\(^{38}\) See Rosen, *supra* note 31, at 6 (“[A]t the sentencing hearing itself, the defendant’s obviously distraught family is often in the courtroom, reminding the judge just by their presence of the defendant’s human side.”).

dress the court at the sentencing hearing.\textsuperscript{40} Even though there were thousands of victims in the Madoff case, for example, only nine spoke at the sentencing.\textsuperscript{41} When victims do speak, however, there is much emotion.\textsuperscript{42} I remember vividly a murder case where the daughter of the victim spoke. She explained that her father had not been present for her graduation from high school, he was going to miss her attending college, and he would not be around when she got married and had children. Yet, she said to the defendant, “[E]ven after all that pain and anger that I have inside, even after being daddy’s little girl, I forgive you. . . . I’m going to pray for you, because that’s the way I was raised.”\textsuperscript{43}

Defense counsel always speaks. In fact, after the Supreme Court held in \textit{United States v. Booker} that the Sentencing Guidelines were advi-

\textsuperscript{40} Rule 32(i)(4)(B) of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3771(a)(4) provide victims with the right to be reasonably heard before a sentence is imposed.

\textsuperscript{41} Barnard, supra note 33, at 1483; see also id. (“There were . . . thousands of documented direct investors in Madoff’s Ponzi scheme. Of that number only 113 consented to have their statements submitted to Judge Chin . . . and only a handful of them—nine in total—actually stood up to provide victim allocution.” (footnotes omitted)).

\textsuperscript{42} Such was the case at the Madoff sentencing. See id. at 1484-87 (summarizing victims’ statements, discussing “the problem with emotional allocution,” and observing that “the kind of naked emotion often seen in victim allocution—the finger pointing, the name-calling, the raining down of curses—can lead, as one federal judge suggested, to ‘some kind of lynching’”).

\textsuperscript{43} The victim’s daughter said the following:

[A] couple of years ago, I was about 14 years old, and I woke up in the morning, I woke up in the morning and I had to go to day camp, and my father used to take me to day camp every morning, and I looked all over the house and he was not there. I didn’t know what happened. I was only 14 years old.

After that day I never saw my dad again since then. He has missed two graduations, my first graduation from eighth grade. I was valedictorian and he was not there to see it. Then I went to high school. He didn’t see that graduation, either.

Now I’m going to college, I got a scholarship. I’m going to college for free, and my father missed that, too. Soon I’m going to get married and have children and my father is not going to see that, either.

I just want to say that even after all that pain and anger that I have inside, even after being daddy’s little girl, I forgive you. And some day in the future, when I’m very successful and I have a good job, I’m going to send you food, I’m going to send you clothes and I’m going to pray for you, because that’s the way I was raised.

I could stand here and tell you I hate you, but I don’t. I can stand here and tell you I hope you rot in hell, but I don’t. I hope you live forever.

I found that defense counsel talked longer at sentencings. This is a good thing in my view. The lawyers are trying harder because they know they now have a better chance of obtaining a below-Guidelines sentence for their client. In fact, the role of a defense lawyer has changed somewhat since Booker. Before, when involved in plea-bargaining and sentencing, defense counsel was more of a tactician, trying to take advantage of the intricacies and technical aspects of the Guidelines. Although these matters are still important after Booker, defense counsel now has a greater opportunity to persuade a judge to impose a below-Guidelines sentence with eloquent oration—telling a compelling story that persuades the sentencing judge that the defendant is deserving of a lower sentence.

Most defendants will take advantage of their opportunity to speak. Some defendants remain silent. Although it is their prerogative to decline to speak, in my view it is a mistake. The defendant’s statement to the court is important as it helps the judge try to answer a number of questions: What was the defendant thinking when he committed his crime? Is he remorseful? Is he sincere? What are the chances he will turn his life around? Should I give him another chance? The way a defendant speaks, what he says, and how he says it may help point me to these answers.

The government usually will address the court, although often, in my experience, it will only urge that the court impose a sentence within the applicable Guidelines range. On occasion, the government will advocate for a sentence at the top of the range.

44 543 U.S. 220, 244-46 (2005).
45 The defendant’s intent, of course, and the extent of his culpability are factors to consider in determining the length of his sentence. See, e.g., Enmund v. Florida, 458 U.S. 782, 798 (1982) (“Unless the death penalty when applied to those in [the defendant’s] position measurably contributes to one or both of these goals [retribution and deterrence], it ‘is nothing more than the purposeless and needless imposition of pain and suffering,’ and hence an unconstitutional punishment.” (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977))).
46 See FED. R. CRIM. P. 32(i)(4)(A)(iii) (requiring the court to provide the government an opportunity to speak at the sentencing hearing).
47 Cf. e.g., Payne v. Tennessee, 501 U.S. 808, 825 (1991) (“[T]he State has a legitimate interest in countering the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family,” (alteration in original) (quoting Booth v. Maryland, 482 U.S. 496, 517 (1987) (White, J., dissenting)) (internal quotation marks omitted)).
The court has responsibilities at the sentencing hearing. It must make certain findings before imposing sentence, calculate the applicable Guidelines range, and rule on any objections or disputed matters that may affect sentencing. And then comes the moment when the defendant is asked to rise, and the court imposes a sentence. When I sentenced Patrick Regan, a highly decorated police officer convicted of perjury, the courtroom was filled with police officers in support. As Regan stood to be sentenced, in the back of the courtroom, first one police officer, then another, and then virtually the entire courtroom rose in support.

The court is required to "state in open court the reasons for its imposition of the particular sentence" as well as provide an explanation sufficient "to allow for meaningful appellate review." The court also has an opportunity to address the defendant directly. It was not my style to preach or scold the defendant, but if I felt a harsh sentence was warranted, I did not hesitate to impose one and to explain why. Usually, but not always, I tried to say something positive to the defendant after I imposed sentence so as to encourage him going forward. If I thought a defendant was bright and articulate and had potential to turn his life around, I would say so. I would suggest, for example, that he not let his family down again.

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49 FED. R. CRIM. P. 32(i)(3)(B). In most cases, these rulings are made from the bench. Occasionally, however, judges will issue a written opinion addressing significant sentencing disputes, as I did in a case in which I granted a motion for a downward departure for extraordinary family circumstances. See United States v. White, 301 F. Supp. 2d 289, 293, 296 (S.D.N.Y. 2004) (granting downward departure where a mother of five children, who also took care of her fourteen-year-old sister, pled guilty to bank robbery).
50 See Weiser, supra note 16.
51 18 U.S.C. § 3553(c) (2006); see also United States v. Buissereth, 638 F.3d 114, 117 (2d Cir. 2011) (holding that the court has a statutory obligation to state in open court the reasons for a given sentence).
52 Gall, 552 U.S. at 50; accord United States v. Dorvee, 616 F.3d 174, 180 (2d Cir. 2010) (quoting Gall’s language).
53 The New York Times interviewed several defendants I sentenced, including Daniel Sangemino. He was twenty-five years old at the time and had pled guilty to securities fraud. I sentenced him first to thirty-seven months, then to eight more months after he violated his supervised release, and then to an additional sixteen months after yet another violation of supervised release. At the third sentencing, I said to him: “I don’t know what you are doing with yourself. . . . This is really your last chance.” Weiser, supra note 16. He completed his sentence and did manage to stay drug free. He told the Times that I had treated him fairly. He said about me: “I’ll never forget his expression. He wasn’t angry. He was, like, ‘C’mom.'” Id. For a description of Sangemino’s
As a result of the process—the presentence investigation and the preparation of the PSR, the submission of sentencing memoranda, and other documentary support, and the presentation of arguments and statements at the sentencing hearing—we usually have a great deal of information about the defendant. We are able to make an informed decision, and we are able to sentence a defendant, not just for the crime he committed, but also for who he is, who he has been, and who he may be in the future.

II. SUBSTANTIVE CONSIDERATIONS

In sentencing a defendant, a court must take a number of substantive considerations into account. These criteria are found in the Sentencing Guidelines, the Sentencing Reform Act, and the case law.

The sentencing court must first consider the Guidelines. The court must begin the sentencing proceeding “by correctly calculating the applicable Guidelines range.” The court must ascertain the base offense level, make any appropriate adjustments to arrive at the total offense level, determine the criminal history category, consider whether any mandatory minimums apply, and, finally, calculate the advisory Guidelines range.

Although the Guidelines are now advisory only, sentencing judges are not free to ignore them or treat them “merely as a ‘body of casual advice.’” As sentencing law has evolved since I first became a judge,
district judges have gained greater discretion and flexibility, and they are now free even to reject a particular Guideline based on personal policy disagreements.\cite{58} Although one could argue that the Guidelines have lost their significance under these circumstances, in my view they still play a critical role as they provide an enormously helpful starting point. It is useful to begin with an empirically based “heartland” range that is drawn from the collective wisdom and experiences of colleagues from around the country,\cite{59} but as a consequence of Booker, we now have much greater ability to fashion a just sentence. The Guidelines are now as they should be—true guidelines, advisory and not mandatory in nature.\cite{60} They are something to which we should give “respectful consideration.”\cite{61}

Once the applicable Guidelines range is determined, the sentencing court “must give serious consideration” to whether the circumstances warrant an above- or below-Guidelines sentence.\cite{62} The court “shall consider” what are known as the “statutory factors”:

\begin{itemize}
  \item requiring district judges to sentence within the applicable Guidelines range “if the case is an ordinary one.” Koon, 518 U.S. at 92. Much of the sentencing court’s discretion has been restored with the line of cases culminating in the Supreme Court’s holding that the Guidelines were advisory only. See United States v. Booker, 543 U.S. 220, 226-27, 245 (2005) (holding that (1) the Sixth Amendment as construed by Blakely applies to the federal Sentencing Guidelines and juries must find facts relevant to sentencing; (2) provisions of the federal sentencing statute making the Guidelines mandatory are unconstitutional and therefore must be “severed and excised”; and (3) as modified, the federal sentencing statute made the Guidelines “effectively advisory”); Blakely v. Washington, 542 U.S. 296, 298-300, 313-14 (2004) (holding that the defendant was entitled to a jury trial with respect to the disputed factual issue of whether he acted with “deliberate cruelty,” which would permit the trial court to sentence him to an “exceptional sentence” above the “standard range”); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (“[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury.”).\cite{58}
  \item See Kimbrough v. United States, 552 U.S. 85, 101 (2007) (concluding that the sentencing judge may consider policy disagreement with crack/cocaine disparity in the Guidelines when imposing sentence); see also Spears v. United States, 555 U.S. 261, 264 (2009) (per curiam) (observing that Kimbrough recognized that district courts have authority to vary from crack cocaine Guidelines based on policy disagreement with them).\cite{59}
  \item See Gall, 552 U.S. at 46 (“For even though the Guidelines are advisory rather than mandatory, they are . . . the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.”).\cite{60}
  \item See Cavera, 550 F.3d at 189 (“It is now . . . emphatically clear that the Guidelines are guidelines—that is, they are truly advisory.”). In Rita v. United States, the Supreme Court held that a sentence within the applicable Guidelines range is not presumptively reasonable. 551 U.S. 338, 347 (2007).
  \item United States v. Jones, 531 F.3d 163, 174 (2d Cir. 2008).
  \item Gall, 552 U.S. at 46.
\end{itemize}
(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . .

The statute provides that the sentencing court “shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2)” of § 3553(a). The “sufficient, but not greater than necessary” language has become a common refrain of defense counsel.

The statutory factors reflect the traditional goals of punishment: retribution, deterrence, incapacitation, and rehabilitation. In sentencing Bernard L. Madoff for securities fraud, I relied heavily on two of these traditional goals, deterrence and retribution. Although Mr. Madoff was seventy-one years old, I imposed a sentence of 150 years nonetheless because “the symbolism [was] important.” I stated:

One of the traditional notions of punishment is that an offender should be punished in proportion to his blameworthiness. Here, the message must be sent that Mr. Madoff’s crimes were extraordinarily evil, and that this kind of irresponsible manipulation of the system is not merely a bloodless financial crime that takes place just on paper, but that it is in-

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63 18 U.S.C. § 3553(a)(1)–(2) (2006). Other statutory factors include the kinds of sentences available, policy statements issued by the Sentencing Commission, the need to avoid disparity in sentencing, and the need to provide restitution to victims. Id. § 3553(a)(3)–(7).

64 Id. § 3553(a).


66 See Weiser, supra note 17.

67 Transcript of Sentencing Hearing at 47, United States v. Madoff, No. 09-0213 (S.D.N.Y. June 29, 2009).
instead, as we have heard, one that takes a staggering human toll. The symbolism is important because the message must be sent that in a society governed by the rule of law, Mr. Madoff will get what he deserves, and that he will be punished according to his moral culpability.\textsuperscript{68}

I also had in mind an objective not included among the traditional goals of punishment—helping victims heal.\textsuperscript{69} I said:

\begin{quote}
[T]he symbolism is also important for the victims. The victims include individuals from all walks of life. The victims include charities, both large and small, as well as academic institutions, pension funds, and other entities. Mr. Madoff’s very personal betrayal struck at the rich and the not-so-rich, the elderly living on retirement funds and social security, middle class folks trying to put their kids through college, and ordinary people who worked hard to save their money and who thought they were investing it safely, for themselves and their families.
\end{quote}

. . . .

A substantial sentence will not give the victims back their retirement funds or the moneys they saved to send their children or grandchildren to college. It will not give them back their financial security or the freedom from financial worry. But more is at stake than money, as we have heard, . . .

. . . . A substantial sentence, the knowledge that Mr. Madoff has been punished to the fullest extent of the law, may, in some small measure, help these victims in their healing process.\textsuperscript{70}

The abstract traditional goals of punishment and the statutory factors are also reflected in more concrete terms in a host of questions that we ask ourselves in virtually every sentencing: How serious was the criminal conduct? What was the loss to the victims and society, both monetary and otherwise? How culpable was the defendant, and what was his role? What motivated him to break the law? Were there any mitigating factors? What is his state of mind now? Is he remorseful? Did he break the law before? Is he likely to do it again? Does he deserve another chance? Will he redeem himself? Did he otherwise lead a productive life, and was this an aberrational mistake? What is the impact on the defendant’s family?\textsuperscript{68}

\footnotesize{\textsuperscript{68} Id.}\n
\footnotesize{\textsuperscript{69} The cases discussing the traditional goals of punishment do not include helping victims heal, see supra note 65, and this was not a consideration that I recall relying on explicitly in prior sentences. Given the magnitude of the harm in the Madoff case, however, and what I perceived then to be the slim chance of meaningful recovery for the victims, I felt this was an important consideration.}\n
\footnotesize{\textsuperscript{70} Transcript of Sentencing Hearing, supra note 67, at 47-49.}
Of course, some of these factors conflict. A sentencing judge, for example, should want to give the defendant and his or her family some hope that he or she will return in time for them to continue as a family; yet, the goals of retribution and deterrence may call for stronger punishment. Notions of retribution and deterrence often tug in a different direction from the goal of rehabilitation. To some extent, a sentencing judge is also trying to predict the future, as she must determine whether the defendant really learned his lesson, whether he is likely to break the law again, and whether he will finally turn his life around.

III. EMOTION AND EMPATHY IN SENTENCING

The reality is, of course, that sentencings are almost always emotional, and often highly so. I have three examples of unusually emotional sentencings.

First, while sentencings are usually somber, I recall one sentencing that was a happy occasion. The defendant was a crack addict. She was a cooperator and had testified against the leaders of a narcotics trafficking ring. At trial, she looked like the junkie she was, sitting on the witness stand, withered and frail, anxiously testifying in her prison jumpsuit. Some months later, after the trial, she appeared for sentencing. She had undergone drug treatment and was clean of drugs. She wore a

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71 In *Graham v. Florida*, when addressing the constitutionality of life without parole for a juvenile, the Supreme Court wrote:

> The State does not execute the offender sentenced to life without parole, but the sentence alters the offender’s life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence. As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.”


72 I sentenced someone recently for a murder he had committed in 1992, when he was eighteen years old. If I had sentenced him then, I would have had to try to predict the future, taking into account the factors relevant to the sentencing of minors. Younger people, for example, are more capable of redemption. See *Graham*, 130 S. Ct. at 2026-30. The defendant was not apprehended, however, for nearly twenty years, and I could see that by then he had been able to change his ways and lead a productive life. I sentenced him to twenty-four years of imprisonment.
pretty, bright yellow dress, and she looked great. And her lawyer brought a bouquet of flowers to give to her after the sentencing. He brought flowers because the sentencing had become a celebration—the defendant had turned her life around, and everyone expected that I would give her time served. Indeed, that is what I did. She would not have to return to jail, and she could continue her new life.

A year later, she was back in my courtroom. The drugs had reclaimed her, and she was brought back for violating the terms of her supervised release.\footnote{Weiser, \textit{supra} note 16.}

Second, in another case, I was accused by defense counsel of being too emotional. The defendant had initially pled guilty to passport fraud. Before he was sentenced, the terrorist attacks of September 11, 2001, took place. The defendant engaged in an “elaborate scheme” to avoid further prosecution by pretending that he had been killed in the World Trade Center attack.\footnote{United States v. Leung, 360 F.3d 62, 64-65 (2d Cir. 2004); see also Weiser, \textit{supra} note 16 (discussing the sentencing).} His scheme was discovered, and he was charged with and pled guilty to additional crimes—bail-jumping and obstruction of justice.\footnote{\textit{Leung}, 360 F.3d at 66.} At sentencing, I upwardly departed and imposed an above-Guidelines sentence of forty-eight months imprisonment—in part because I found his conduct “despicable” and “complete[ly] selfish[ ]” at a time of enormous tragedy and stress.\footnote{\textit{Id.} at 70 (alteration in original) (quoting sentencing transcript).} Defense counsel objected and asked me to reconsider, suggesting that I had let emotion unduly affect my sentence. I responded:

\begin{quote}
I don’t believe that emotion is unduly affecting my judgment here. There is no doubt emotion comes into play to some extent. Emotion comes into play in every sentencing decision. . . . Emotion comes into play when the Court downwardly departs or the Court shows compassion and imposes a sentence that is lower than one would expect, and that happens. When you were a prosecutor [addressing defense counsel] in a case before me and I sentenced the defendants to what I thought was a relatively high sentence, emotion came into play. Emotion always does. Obviously, however, you can’t let emotion cloud your judgment, and I don’t believe I have done that here.\footnote{\textit{Id.} at 71 (quoting sentencing transcript).}
\end{quote}
The Second Circuit affirmed this aspect of the sentence, finding “no fault with the District Court’s decision to depart.”

Third, in what was perhaps my most difficult sentencing, I had to sentence a woman who was raising six children: five of her own, ages five to thirteen (by three different fathers, none of whom was available to take custody of the children), and her fourteen-year-old sister (their mother was a crack addict). But the defendant had pled guilty to bank robbery—she was a lookout for a violent bank robbery that led to a high-speed chase, a shoot out between the two bank robbers and the police, and the death of one of the assailants. The Guidelines range was fifty-seven to seventy-one months, and because this was before Booker, I had much less flexibility. Defense counsel asked for a noncustodial sentence, arguing that any significant prison sentence would mean that the six children would be placed in foster care. The decision was particularly difficult because the defendant was a good mother—she was working and managing to raise six children on her own, with the children doing reasonably well in school (maintaining B or B+ averages).

The defendant’s family circumstances surely were extraordinary, but I still had to decide whether to depart from the Guidelines, and, if so, to what extent. I was deeply concerned about the children and their future, and I understood the struggles of the family—in other words, I empathized with them. As I wrote in my decision granting the downward departure motion, “[A] sentence within the Guidelines range of 57 to 71 months would almost certainly and irreparably destroy the family as a unit.” Still, the defendant participated in a bank robbery, and I felt that a sentence of probation or home confinement

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78 Id. at 72. The Second Circuit, though, concluded that I had erred in my grouping analysis and that I had failed to make a required finding with respect to acceptance of responsibility. Id. at 69-70.
79 United States v. White, 301 F. Supp. 2d 289, 291 (S.D.N.Y. 2004); see also Weiser, supra note 16 (interviewing defendant in United States v. White).
80 Id. 301 F. Supp. 2d at 290-91.
81 Id. at 293.
82 Id. at 296.
83 Id. at 291-92.
84 Id. at 295.
85 Id. at 295-96.
86 My grandfather was a waiter in Chinese restaurants, and I was one of five children raised by a Chinese cook and a seamstress who worked in Chinatown garment factories. Denny Chin, Representation for Immigrants: A Judge’s Personal Perspective, 78 FORDHAM L. REV. 633, 635-38 (2009).
87 White, 301 F. Supp. 2d at 296.
would send “the wrong message” leaving the defendant “utterly unpunished.”

I decided some imprisonment was necessary. I wrote: “The Court will endeavor to impose a sentence that not only furthers the goals of retribution and deterrence, but that also will give [the defendant] and her children some hope that they will be able to continue as a family unit upon her release.” In the end, I sentenced her to thirty months in prison. I wanted to give the defendant and her family some hope, because without hope a defendant has little reason to want or try to do better.

Some years later, the New York Times managed to track down the defendant, after she had completed her sentence. She reported that when she went to prison, friends and relatives—including her mother, who rose to the occasion and dealt with her own drug problem—“stepped in” to help take care of the children. After her release, the family was able to stay together. She found employment and was also studying nursing. She told the Times, “I feel like I got that second chance that everybody’s talking about. . . . And I’m taking full advantage of that.”

Sentencing is perhaps the most important responsibility of a trial judge, and surely the most difficult. Emotion is one reason it is so difficult. The competing considerations evoke strong sentiments—anger, indignation, shame, sorrow, grief, despondency, and hope. The sentencing judge is not immune from these emotions.

The law is not emotionless, as some would suggest. Rather, it recognizes that some emotion and passion are appropriate. As Judge

88 Id.
89 Id. at 297.
90 Weiser, supra note 16.
91 See Graham v. Florida, 130 S. Ct. 2011, 2027 (2010) (observing that a sentence that denies hope renders good behavior and character development meaningless (citing Naovarath v. State, 779 P.2d 944, 944 (Nev. 1989))). Of course, in many situations the absence of hope is debilitating not only for the defendant, but also for her family.
92 Weiser, supra note 16.
93 Id.
94 See Mark W. Bennett, Hard Time: Reflections on Visiting Federal Inmates, 94 JUDICATURE 304, 304 (2011) (“It is an awesome responsibility to take one’s liberty away.”); Jack B. Weinstein, Does Religion Have a Role in Criminal Sentencing?, 23 TOURO L. REV. 539, 539 (2007) (“Sentencing, that is to say punishment, is perhaps the most difficult task of a trial court judge.”).
95 See supra note 3 and accompanying text.
96 See, e.g., United States v. Farhane, 634 F.3d 127, 167 (2d Cir. 2011) (“[S]um-mations . . . are not ‘detached exposition[s].’” (second alteration in original) (quoting
Learned Hand observed, "It is impossible to expect that a criminal trial shall be conducted without some show of feeling; the stakes are high, and the participants are inevitably charged with emotion." The same is true, of course, for sentencing.

There is no "right" answer as to what a particular sentence should be; rather, there usually is a range of acceptable sentences, and often that range is quite wide. Some measure of emotion helps judges reach the right answer—or at least the more correct answer. In short, a judge is more likely to reach a just answer if he or she cares.

Emotion and empathy cut both ways. They are important both to the prosecution and to the defense. It is not simply a matter of making the judge get angry at or feel sorry for the defendant for what he or she has done. Rather, emotion—some emotion, emotion both...
Sentencing: A Role for Empathy

ways, emotion not alone but in combination with the law, logic, and reason—helps judges get it right.101

Empathy is particularly important when it comes to sentencing, when a judge is called upon to pass judgment on another human being. As Judge Jack B. Weinstein has observed, “Sentencing . . . turns on the judge’s heart and life experience. It reveals the human face of the law. Without empathy between judge and defendant, sentencing lacks humanity. It becomes a form of robotism.”102 When confronted, for example, with the question of whether to send a mother to jail and take her away from her family, we will not find the answer in a book or statute or case. We must call upon our life experiences and the wisdom and judgment that hopefully we have gained as we weigh competing considerations to arrive at a just and fair sentence.103 The ability to have some understanding of the defendant’s motivations and “hopes and struggles” can only help in that endeavor.104

Edward Devitt, a highly regarded federal judge, wrote a guide for new federal judges half a century ago, entitled Ten Commandments for the New Judge.105 He published a slightly revised version in 1979.106 The first of the Commandments was: “Be kind.”107 Judge Devitt explained,

If we judges could possess but one attribute, it should be a kind and understanding heart. The bench is no place for cruel or callous people re-

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101 As Judge Kim McLane Wardlaw has written,

Nobody would suggest that judges throw the law to the wind and decide cases based exclusively on individual sentiments of justice. But it is irresponsible to pretend that one’s notions of justice do not play, or may not play, a role in the cases for which precedent fails to command one outcome or another. They constitute one—and only one—of the judge’s points of reference. Empathy allows the judge to appreciate more fully the problem before her; it does not solve it for her; it does not dictate a result. Wardlaw, supra note 2, at 1646-47 (footnote omitted).

102 Weinstein, supra note 94, at 539.

103 See Wardlaw, supra note 2, at 1644 (“Life experiences provide each of us with sentiments of right and wrong, fair and unfair, rational and irrational, just and unjust. And that is true for judges as it is for anyone else.”).

104 Remarks on the Retirement of Supreme Court Justice David H. Souter, supra note 1, at 604. As Judge Wardlaw has written, “It is those judges who are unable to understand the views and problems of others—who are unable to assess problems from any vantage point other than their own—who may not be up to the task of administering justice equally and impartially.” Wardlaw, supra note 2, at 1649.


107 Id. at 299.
gardless of their other qualities and abilities. There is no burden more onerous than imposing sentence in criminal cases. Would then that the judge had the wisdom of Solomon. But absent that, and possessing plenary and awesome power, the judge can thank God for a kindly heart. An understanding heart was the gift of God asked by the ancient king, and it is that gift above all others for which a judge should pray.

CONCLUSION

I conclude by discussing one more case. In 2006, Vernon Lawson applied to be naturalized as a U.S. citizen. The government denied the application, and he sought review in the Southern District of New York. I heard the case in the district court. The sole question was whether Mr. Lawson was a person of “good moral character,” as the government agreed he met all the other requirements to become an American citizen. This was a military naturalization case, and thus, the relevant time period spanned from one year before Mr. Lawson applied (i.e., from 2005) to when the case was decided. Earlier conduct, however, could be considered to the extent it bore on Mr. Lawson’s character during the relevant time period.

In that respect, Mr. Lawson had a substantial strike against him: in 1985, twenty years earlier, he had killed his wife.

There were mitigating circumstances. He had enlisted in the Marines at age eighteen. He served thirteen months of combat duty in Vietnam, as a consequence of which he developed drug and alcohol addictions and post-traumatic stress disorder. When he returned from the war, he had little support; indeed, post-traumatic stress disorder had not yet even been recognized as a diagnosis. It was against

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108 Id. at 209-10.
110 Id. at 292-93.
111 Id. at 295-96.
112 Id.
113 Thus, the relevant statutory provision was 8 U.S.C. § 1440(a) (2006).
114 Lawson, 795 F. Supp. 2d at 294.
115 Id. at 293-95.
116 Id. at 289.
117 Id. at 286.
118 Id. at 286-89.
119 Id. at 288-89 & n.10.
this background that he lost control in a quarrel with his wife and killed her.\textsuperscript{120}

Mr. Lawson was convicted of manslaughter, although, significantly, he was acquitted of murder.\textsuperscript{121} He served more than thirteen years in prison.\textsuperscript{122} There, he overcame his drug and alcohol problems, earned three degrees (two with honors), completed several training programs, and counseled and taught other inmates, drawing on his own painful experiences.\textsuperscript{123} Upon his release, he obtained gainful employment and worked for eight years as a drug abuse counselor, helping countless individuals who were trying to deal with their own addictions.\textsuperscript{124} He moved back home with his mother and took care of her as her health failed.\textsuperscript{125} He went to church every Sunday and regularly volunteered for church activities, cooking curry goat and curry chicken for fund-raisers and events.\textsuperscript{126} He brought leftover food to homeless veterans in the park.\textsuperscript{127} He played chess in a neighborhood chess club.\textsuperscript{128} His mother had tended a garden in front of the apartment complex, and when she died, he took over the garden.\textsuperscript{129}

Yes, Mr. Lawson took a life, but twenty-five years had gone by. In the meantime, he was prosecuted and convicted—and sentenced. He paid his debt to society, while making the most of his time in prison. After his release, he returned to his community and led a positive and constructive life.\textsuperscript{130}

I ruled in his favor. I held that Vernon Lawson was a person of “good moral character.”\textsuperscript{131} I did not sentence Mr. Lawson, nor was his criminal prosecution before me. Nonetheless, I have included his story here because it implicates many of the concepts relevant to sentencing, including the goals of punishment, the role of empathy, and the operation of the criminal justice system.

\begin{footnotes}
\footnote{\textsuperscript{120} Id. at 289, 298.}
\footnote{\textsuperscript{121} Id. at 289, 296; see also 8 C.F.R. § 316.10(b)(1)(i) (2011) (providing that a person convicted of murder at any time “shall” be found to lack good moral character).}
\footnote{\textsuperscript{122} Lawson, 795 F. Supp. 2d at 289-90.}
\footnote{\textsuperscript{123} Id. at 289-90, 298.}
\footnote{\textsuperscript{124} Id. at 290.}
\footnote{\textsuperscript{125} Id. at 291.}
\footnote{\textsuperscript{126} Id.}
\footnote{\textsuperscript{127} Id.}
\footnote{\textsuperscript{128} Id.}
\footnote{\textsuperscript{129} Id.}
\footnote{\textsuperscript{130} Id. at 297-300.}
\end{footnotes}
Mr. Lawson committed an unspeakable crime. The criminal justice system could not forgive him for what he did, but it could—and did—treat him with some understanding and appreciation for the difficulties he had encountered. The jury surely had some empathy for him in 1986 when, despite the circumstances of the brutal stabbing, it acquitted him of murder and convicted him only of manslaughter, finding that he had acted under “extreme emotional disturbance.” Likewise, the sentencing court must have had some understanding of the struggles that led Mr. Lawson to commit his crime, as it imposed a sentence of only ten to twenty years for the intentional taking of a life.

Mr. Lawson was punished. At the same time, he was given some hope and the opportunity for redemption. He made the most of that opportunity, becoming, in the end, a productive member of society.

The government elected not to appeal, and a few weeks after my decision, Mr. Lawson was naturalized, in a ceremony at our Courthouse. Afterwards, he stopped by my Chambers. I was able to shake his hand, and he was able to shake mine—as an American citizen.

132 Id. at 289.
133 Id.