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# Is Justice Blind to Compassion?
# A Modern Defence of Schopenhauer in Legal Reasoning

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**Abstract**

*"Just", "impartial", "fair", "unbiased" – these words are often used to describe the "ideal" judiciary, one which interprets and enforces the law without feeling. Indeed, traditional motifs of Lady Justice portray her blindfolded, wilfully ignorant of individuals' circumstances. Yet, what is often overlooked is that Lady Justice is fundamentally human. In that regard, this notion of humanity - especially in terms of the human propensity for compassion - seems to be oversimplified or ignored within the judiciary, and largely taken for granted despite its significant roles in deciding cases. On that note, we reflect on the works of Arthur Schopenhauer and his writings on the "Will", the "Representation" and "Compassion". In doing so, we present a modern defence of Schopenhauer's works against the backdrop of legal reasoning and judicial decision-making and argue that the subjective Will of the judiciary cannot be removed from the objective decisions they make. We then propose that Compassion should be the core driving force behind one's Will to dispense appropriate justice. This would allow for a more nuanced, and more humane judiciary.*

## I. Introduction

"*When an action is characterised by an extraordinary absence of compassion, it bears the certain stamp of the deepest depravity and loathsomeness*."[2]

In 1840, Arthur Schopenhauer famously declared that Compassion was the foundation for human morality.[3] Compassion, he argues, is guided by the twin virtues of voluntary justice, and loving-kindness, and allows one to engage in the sufferings of another.[4] Short of a better phrase, this is akin to being in the shoes of another and understanding their plights to better assist them in their work. This allows us to

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[2] Arthur Schopenhauer, *On the Basis of Morality* (Arthur Brodrick Bullock tr, Lector House 2014) 106.

[3] ibid 165-175.

[4] ibid 170.

develop our moral outlook and engage with what he regards as the single universal consciousness - the Kantian "thing-of-itself", or, as Schopenhauer regarded it, the Will.[5] This theme of imaginative empathy is seen all throughout his seminal piece "*On the Basis of Morality*" ("*OBM*") and forms the crux of his beliefs. Originally intended as a critique on Hegelian theory, the paper would later become regarded as one of his major works on ethics, analysed for decades to come.[6]

Perhaps it is on this note that Professor Maksymilian Del Mar was inspired to write his paper on the incorporation of Compassion in legal reasoning.[7] While Schopenhauer was not mentioned then as the paper was focused on Compassion as an evaluative emotion used by judges, his teachings seemed to be littered within Del Mar's work. For instance, Del Mar goes in depth into the notion of how a multi-perspective imaginative framework would operate, discussing how imagining someone's suffering is used to stimulate compassion.[8] This interaction with the suffering of another is core to Schopenhauer's formulation of Compassion. In that regard, Del Mar thus argues that the incorporation of Compassion would allow for better nuanced approaches to use of precedent, characterisation of the facts, alongside the addition of the "human touch" to cases to better engage with litigants, third parties, and those who would be affected by the consequences of their decisions.[9]

Yet, if one were to accept this view, one must reconcile the subjectivity that comes with Compassion, with the objectivity that is required by the Courts.[10] Lady Justice is infamously blind, impartial to the status, wealth, plight and circumstances of those before her and only caring for what is "just". However, these core notions of an "unbiased" and "impartial" judiciary seem to come into direct conflict with Schopenhauer's conceptualisation of Compassion. It is on this basis that the strongest objections against Schopenhauer's Compassion thrive. Friedrich Nietzsche was one such critic. Despite having idolised Schopenhauer's work for a majority of his life, he

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[5] Arthur Schopenhauer, *The World as Will and Representation* (E F J Payne tr, Falcon Wing Press 1966) 94-166.
[6] See, for example: Philipp Mainländer, *Die Philosophie der Erlösung* (1879); for a modern critique of Schopenhauer's work, see Stjepan G Mestrovic, 'Moral Theory Based on the 'Heart' versus the 'Mind': Schopenhauer's and Durkheim's Critiques of Kantian Ethics' (1989) 37(3) The Sociological Review 431.
[7] Maksymilian Del Mar, 'Imagining by feeling: A case for compassion in legal reasoning' (2017) 13(2) International Journal of Law in Context 143.
[8] ibid 10-19.
[9] ibid 20.
[10] George C Christie, 'Objectivity in the Law' (1968-1969) 78(8) Yale Law Journal 1311.

later re-evaluated his position, becoming one of his strongest opponents.[11] Thus, on Schopenhauer's formulation of Compassion, Nietzsche comments that having sympathy for others is only self-destructive;[12] the very antithesis of Schopenhauer's work. Indeed, Nietzsche's formulation of objective analysis through considering the "empirical reality" of the world comes into direct conflict with Schopenhauer's work.[13] This is similar to Thomas Hobbes' formulation of objectivity, with a focus on factualism rather than objective values,[14] and has been said to form the basis of the Courts' modern doctrines.[15]

Perhaps there is no need to reconcile emotions with the objectivity of the law. Even if Lady Justice is blind, who is to say that she also cannot feel? With the judiciary coming under increasing scrutiny in the public lens, the debate on the appropriateness of compassion within the law comes at an apt time. An incorporation of compassion into judicial deliberation would present it as a humane institution and improve its standing in public opinion. Further, with the law dealing primarily with people and people-centred interests, it would seem unreasonable to the layperson to not consider a fellow human without a measure of compassion.

To that end, this essay presents a modern defence of Schopenhauer's Compassion, and argues for the incorporation of what we regard as compassionate jurisprudence into the judiciary. This term is adopted for its simplicity and elegance, inspired by an empirical study by Dr Bridgett Ortega on compassionate behavioural patterns in the judiciary,[16] allowing us to query whether Compassion is essential to a just outcome in the Courts. It is our ultimate position that the judiciary should embrace Compassion into their legal reasoning; if the law was drafted by humans, should we not then embrace this humanity to connect with those affected by it? Only then, would we have a truly just judiciary.

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[11] João Constâncio, 'On consciousness: Nietzsche's Departure from Schopenhauer' (2011) 40(1) Nietzsche Studien 1.

[12] Friedrich Nietzsche, *Twilight of the Idols and the Anti-Christ* (Reginald John Hollingdale tr, Penguin 1968) 118-119.

[13] Friedrich Nietzsche, *The Gay Science* (Random House 1974) 373.

[14] Thomas Hobbes, *De Cive* (Howard Warrender ed, Oxford University Press 1984). For a more modern discussion of Hobbes' work, see Carlo Burelli, 'Subjectivity is Objective. Thomas Hobbes on Normative Truth' (2018) 129(34) Notizie di Politeia 98.

[15] David Dyzenhaus, 'Hobbes and the Legitimacy of the Law' (2001) 20(5) Law and Philosophy 461.

[16] Bridgett Elaine Ortega, 'Compassionate Jurisprudence as Praxis for Justice: A Qualitative Dialogic Inquiry Action Research Study' (DM thesis, University of Phoenix 2018).

As a brief disposition, Section II first examines Schopenhauer's writings, drawing on his past works to better understand how Compassion is formulated in OBM, and queries whether the exclusion of Compassion would amount to an exclusion of justice. It does not, however, consider other formulations of Compassion by other philosophers due to the limited scope of the paper. Next, Section III considers the tension between the incorporation of Compassion as a driving subjective force in objective legal reasoning. Lastly, Section IV concludes.

## II. Schopenhauer's Compassion in Law - an Overview of a "Compassionate-*Will*"

At the outset, the links between Schopenhauer's view on morality and its impact on the law should be drawn to better understand his formulation of morality. The complexities of this lies in linking the various reflections found across his texts to form a clear interpretation. The key to this lies in the central works of *The World as Will and Representation* ("TWWR"), and OBM. The former considers models of law and justice, while the latter draws from the intertwining of morality and law.

### A. The Will, the Representation, and Compassion

Chronologically, the concepts of the Will, and the Representation were first mentioned in TWWR in 1818. While the former considers the subjective internal unconscious, the latter forms the basis for external objective perception from others.[17] These concepts, Schopenhauer argues, are co-existing yet contrasting perspectives, and can be described as the metaphysical reality versus the physical appearance of things. Schopenhauer best illustrates the link between these concepts through the feelings one undergoes when moving a hand: when we move our hands, it is a single act with two simultaneous perspectives. The subjective internal feeling of one willing the hand's movement is comprehended as the Will, and the objective movement of the hand which can be externally perceived by others is the Representation.[18] This dichotomy between the internal subjective and the external objective forms the basis for Schopenhauer's philosophical thought and interpretation of the world.

While a rather crude overview, this basic understanding paves the way to consider these concepts independently. One can liken the Will to Schopenhauer's

[17] (n 3) 9-13, 103-109.
[18] (n 3) 107.

conceptualisation of the "essence of the universe".[19] It was regarded as an unconscious instinct found within us.[20] This took inspiration from his roots studying Kantian Idealism; Schopenhauer himself referred to the concept of the Will as "the closest manifestation of the thing-in-itself".[21] Yet, this innermost voluntary expression was distinguished from motives; motives require certain conditions (the "I will if"), whereas the Will is a generalised volition based on one's nature (the general "I will").[22] Indeed, such goes to the very core of one's unconscious cognition, and directly emphasises the innermost driving forces which often cannot be explained by reason. For instance, the manifestation of one's nature can be seen in the unconscious bias in everyday life including workplace interactions,[23] education[24], and even academia.[25] One can say that these subtle forces go beyond rational thinking, creating a collection of unconscious repression of thoughts and feelings condensed into a wave to push us in a certain direction.[26] This analogy of the sea is perhaps fitting, as Schopenhauer notes that the *Will* operates as the "blind operation of a force of nature".[27]

Following on, we then turn to the twin concept of the Representation. The first mention of Schopenhauer's Representation comes from the beginning of TWWR with the phrase "*Die Welt ist meine Vorstellung*", translated to "the world is my Representation".[28] Such exemplifies Schopenhauer's view of the objectivity of how individuals sense the world; that there is only one objectively correct way to perceive

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[19] (n 3) 106.
[20] (n 3) 411. Schopenhauer describes intellect here as an "accident of our being".
[21] (n 3) 407.
[22] (n 3) 152.
[23] Himani Oberai and Ila Mehrotra Anand, 'Unconscious bias: thinking without thinking' (2018) 26(6) Human Resource Management International Digest 14.
[24] Craig L Frisby, 'Science versus the Unconscious Bias Paradigm in Education: A Review Essay' (2021) 15(1) International Research and Reform 139.
[25] Jane Onken, Lin Chang and Fasiha Kanwal, 'Unconscious Bias in Peer Review' (2020) 19(3) Clinical Gastroenterology and Hepatology 419.
[26] It is worth acknowledging Daniel Kahneman's seminal formulation of decision-making through 'System 1' and 'System 2' thinking in: Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux 2011), where he argues that each experience is cumulative rather than unique, resulting in System 1's intuition influencing 'System 2's methodological thinking by looking for established and familiar patterns from experiences in decision-making rather than looking at the new facts, resulting in a similar pattern of decision-making. However, this notion of familiarity and patterns is lacking in Schopenhauer's formulation as he regards the Will's influence as something which "cannot be explained", signalling a deeper and more intimate relationship between the Will and cognitive decision making.
[27] (n 3) 135.
[28] (n 3) 1. Translated and elaborated upon in: Paul Bishop, 'Social critique and aesthetics in Schopenhauer' (2003) 29(4) History of European Ideas 411.

external sensations, whether by sight, sound or feeling. For instance, a tree on the hill is objectively, a tree on a hill. The Representation does not query why the tree was on the hill, but merely focuses on it being there. This, he argues, forms the basis for what we regard as knowledge: it allows us to discern how things are in relation to one another, imbuing notions such as causality and relativity into our perceptions. These conscious acts of observing, taking in, and processing information, allows us to interact with the external environment as it is presented.[29]

However, this is distinguished from the interpretation of the Representation: while the perception remains objective, the individual interpretation of a Representation must be said to be subjective. Schopenhauer writes that the unconscious and subjective Will cannot be separated from conscious 'objective' reasoning. Hence, there will always be a subtle, but ever-present force, driving us to interpret the Representation of the world in a certain way. Schopenhauer himself wrote in TWWR that "besides the Will and the Representation there is absolutely nothing known or conceivable to us"[30], specifically higher Platonic Ideals. Thus individuals are predominantly guided by the unconscious Will, and this Will is fundamentally shaped by our experiences. On that basis, we argue that the Will and the Representation are linked more than initially alluded to by Schopenhauer. We suggest that they are linked through the notion of experience, and more particularly, a feeling of empathy.[31] Through an experience, one is able to gain the Representation associated with the event. This translates to knowledge, exposure, and other conscious reflexes, whether beneficial or harmful. In return, the intuition crystallises these feelings, condensing it with the sensations of other experiences, to form and develop the Will. This 'new' Will would then allow for a 'new' objective manifestation of itself through the Representation, similarly enriching it for both the representor and others in future interactions.

This provides an excellent segue towards Schopenhauer's formulation of Compassion in OBM. Namely, he presents Compassion as one of the basis for the *Will*, the others being egoism and malice. However, only Compassion was regarded as the only acceptable motivational force, forming the bedrock of moral conduct.[32] On this,

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[29] (n 3) 8-17.

[30] (n 4) 105.

[31] For a more in-depth discussion of experience, and how different sensations which arise from the physical "world of experience" affects the Will, see: John E Atwell, *Schopenhauer on the Character of the World: The Metaphysics of Will* (University of California Press 1995) 92.

[32] (n 2) 162.

he explains that the twin virtues of *justice*[33] and *loving-kindness*[34] manifest in Compassion and when either forms the true motivation for any human action, only then can we say that an act was truly moral. The practice of these virtues however, required placing another to become the ultimate object of one's Will; that is, having a mental picture to identify with another.[35] This creates the springboard for the virtues to act upon, allowing for what Schopenhauer came to regard as sympathetic assistance to create the moral value of an act.[36]

On that front, it can be considered then that the purest interaction of Wills between two individuals beyond the physical Representation forms true Compassion, allowing for true moral action through participation in the weal and woes of others around us. If we may amend the famous saying, perhaps we could say Schopenhauer believed that "Compassion *begets* Compassion".

### B. Justice and Compassion - independent or intertwined?

Having gone through an overview of Schopenhauer's works, one can then query the proposition this paper has put forth. At the start of this section, we put forth the term "compassionate jurisprudence" - the incorporation of Compassion within legal reasoning. Indeed, the fundamental purpose of the Courts is the dispensation of justice.[37] Yet, does dispensing justice automatically allow us to deem the judgement as compassionate through engaging one of the twin virtues; or would the exclusion of Compassion amount to an exclusion of justice? These are questions which this paper seeks to address. Yet, one must caution the potential for circular logic present: just because the virtue of justice is incorporated in Schopenhauer's formulation of *Compassion*, it should not automatically follow that unconsciously engaging Compassion automatically makes all decisions 'just'. One must still query the foundations of such decisions.

To answer these propositions, one should delve into Schopenhauer's formulation of the virtue of justice. Schopenhauer explains the virtue of justice rather

[33] (n 2) 198-205.
[34] (n 2) 177-186.
[35] (n 2) 113-114, 162-164.
[36] (n 2) 178, 184-186, 196-198.
[37] See, for a more in-depth discussion of the role of Courts, in: Greg Berman and John Feinblatt, *Good Courts: The Case for Problem-Solving Justice* (Quid Pro Books 2015).

broadly, summing it as the core principle to not do harm unto others.[38] Particularly, he likens the operation of justice to being a fence around ourselves, protecting others from an injury by the anti-moral forces reaching towards them.[39] This forms the basis for the fundamental rule - *neminem laude* - to hurt nobody.[40] This is indeed trite and even finds support from traditional legal doctrines.[41] However, it is insufficient to conclude that Compassion already has a place in the law. Schopenhauer further notes that justice also has a place in egoism, which arises when one uses others' sufferings to achieve their ends.[42] While an example was absent in *OBR*, we can see its modern operation through the critiques of American Legal Realism. In particular, the Supreme Court of the United States ("SCOTUS") has been often been accused of allowing their political leanings to come into the decisions to dispense justice.[43] Critically, many commentators allege the personal biases in play at the overturning of *Roe v Wade*[44] concerning abortion rights by these top Court judges.[45] While these biases could be said to form part of their Will and subconsciously lean them towards decisions, the question must be had on whether this force is the moral Compassion, or the anti-moral egoism. On this, we suggest that there was a degree of egoism. The Courts arguably failed to consider those whom the decision would impact the most.

Though extreme, this example provides a backdrop to allow us to further query Schopenhauer's formulation of justice and its operation in the courts of law. One cannot deny that the Courts are engaging in positive actions in making a determination of what is just; the very nature of adjudicating disputes requires a

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[38] (n 2) 184.

[39] (n 2) 179.

[40] (n 2) 180.

[41] See, for example, the traditional formulation of the law of negligence as attaching liability to a positive act which breaches the general negative duty from doing harm unto harms: *Caparo Industries PLC v Dickman* [1990] UKHL 2; *Marc Rich & Co v Bishop Rock Marine Co Ltd* [1996] AC 211 (*The Nicholas H*, per Lord Steyn). See also, as argued in: Nicholas J McBride, 'Duties of Care: Do They Really Exist?' (2004) 24(3) OJLS 417 for the position of English Law, and more generally, by Ori J Herstein, 'Responsibility in Negligence: Why the Duty of Care is not a Duty "To Try"' (2010) 23(2) Canadian Journal of Law & Jurisprudence 403. But note there are limited exceptions for attaching liability for omissions in negligence, that is, a negative act which breaches the positive obligation to be careful: for instance, where there was an assumption of responsibility: *Al-Najar and others v The Cumberland Hotel (London) Ltd* [2020] EWCA Civ 1716.

[42] (n 2) 179.

[43] For example, SCOTUS Justices are often identified as 'Democrat' and 'Republican' and tend to vote according to these political lines on controversial issues such as abortion, gun control and education. For a more in depth discussion of this, see literature around American Legal Realism, for instance, in: Brian Z Tamanaha, 'Understanding Legal Realism' (2009) 87 Texas Law Review 731.

[44] 410 US 113 (1973).

[45] *Dobbs v. Jackson Women's Health Organization* 597 U.S. __ (2022).

positive decision. Schopenhauer thus goes further to reformulate Hugo Grotius' conception of justice, interpreting it as to "take none from his own".[46] In the context of everyday life, this would indeed follow the traditional, non-interventionist obligations of the Court as they refrain from being lawmakers. Yet, for an adjudicative body whose role is to enforce justice, a literal interpretation of this phrase in this context suggests that justice requires determining the nature of a wrong suffered and the gains of the wrongdoer, and the granting of an appropriate remedy as though the wrongdoer had "taken none" from their victim. To then incorporate Compassion into this framework would require one to engage directly with the Will of both the wrongdoer and the victim, with no ulterior motive other than to restore and remedy the wrong.

This consideration of factors outside the fact is an example of subjective factors. Del Mar builds on this, suggesting an 'imaginative interpretation' of past precedents. Del Mar argues that Courts should go beyond the principles which authorities cited stand for and further consider how the litigants in these previous authorities had acted in proceedings, their subjective motives, characteristics, among other matters.[47] This consideration of subjective factors however, must be distinct from the legal tests adopted by the Courts; one should not conflate the incorporation of Compassion with the mere consideration of the litigant's subjective factors. It is not our argument that subjective factors should be considered in all cases: indeed, there are cases where an objective standard is preferable.[48] Yet, these should not be regarded as an exclusion of Compassion to achieve a just result, but rather, understanding Compassion as an underlying tone in one's Will. While indeed difficult to engage with the Will of litigants of the past, it then becomes the duties of the previous quorate of Courts to draft their reasoning to allow this interpretation.

Indeed, this proposition draws support with the second twin virtue of Compassion, that of loving-kindness. As a brief overview in lieu of space constraints, Schopenhauer's loving-kindness is based on the maxim "*Omnes, quantum potes, juva*

[46] (n 2) 184.

[47] (n 5) 148, 153.

[48] For example, in the interpretation of statutory instruments, the Courts generally prefer an objective interpretation: *R v Maginnis* [1987] AC 303, *Fisher v Bell* [1961] QB 394. However, there are exceptions when the objective standard creates absurdities: *Adler v George* [1964] 2 QB 7. In other areas of the law, we similarly see objective interpretation in contract interpretation per the standard of a reasonable person: *Thake v Maurice* [1986] QB 644. This is generally argued to improve legal certainty in: Hans Gribnau, 'Legal Certainty: A Matter of Principle' in Hans Gribnau and Melvin Pauwels (eds), *Retroactivity of tax legislation* (IBFD 2013).

(help all people, as much as lies in your power)",[49] which spurs positive action rather than less onerous negative duties. What is interesting is that the language of "sacrifice with", and "suffer with" was littered in his description of positive actions. While the law is generally cautious to impose positive duties to rescue,[50] it would be consistent to frame this notion of loving-kindness as a Court's positive duty to engage with the litigants, and make an effort to understand their plights. In that regard, one can interpret this as having a degree of empathy and humility for others; to join them in their suffering and understand them through interactions.

Finally, a distinction should be made between Compassion and Mercy. This relationship is perhaps best understood in Schopenhauer's terms. Where Compassion serves as the basis for the Will, Mercy acts as the Representation and the product of a Compassionate Will. In other words, Mercy has tangible effects in the real world, which could be motivated by Compassion.[51] In that vein, one undoubtedly finds a vast sea of literature around the interactions between Mercy and Justice.[52] However, this paper refrains from engaging in this latter debate, and instead, focuses the argument on the means rather than the end. In that vein, Compassion remains core to modern formulation of justice in the eyes of the Court.

On this, it becomes rather evident that Compassion cannot be excluded from such a formulation of justice. To allow Courts to determine the appropriate remedy in given situations and deliver a just result, it becomes imperative to engage with the innermost Will of not only litigants in the general sense, but also that of the past when reviewing previous authorities. Such then allows for nuanced application of a law specific to the plight of litigants, as opposed to blanket-wide general principles in all cases. This then forms the basis for the cycle for Compassion to beget Compassion; the judiciary building upon the experiences and the Wills of their predecessors to allow proper dispense of justice.

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[49] (n 2) 204.

[50] See here, the dicta *Stovin v Wise* [1996] 3 WLR 389 the court noted that if one were to walk past a drawing child, there would be no obligation to save the child from drowning; hence, it should follow that there is no positive duty to rescue others in English law. Upheld in the recent case at *Tindall v Chief Constable of Thames Valley Police* [2022] EWCA Civ 25. Note further that the situation is different where one assumes responsibility for others: *Barrett v Ministry of Defence* [1995] 1 WLR 1217.

[51] (n 2) 210-211.

[52] For instance, for a further elaboration of Schopenhauer's discussion in: Jiwei Ci, 'Schopenhauer on Voluntary Justice' (1998) 15(2) History of Philosophy Quarterly 227. See also, more generally, at: Claudia Card, 'On Mercy' (1972) 81(2) The Philosophical Review 182; Jeffrie G Murphy, 'Mercy and Legal Justice' (2009) 4(1) Social Philosophy and Policy 1.

## III. Reconciling a Compassionate Will and judicial reasoning

Having underscored Schopenhauer's definition of Will, Representation and Compassion, this tension between a judge's subjective Will, and traditional legal reasoning then becomes self-explanatory.

To many, the ideal judiciary is fair, unbiased, impartial, among many other synonyms used to describe a degree of objectivity that judges should have. There are numerous studies surrounding the strictness of the Courts,[53] the importance of objective legal certainty,[54] the use of legal tests and doctrines of *stare decisis* to ensure consistencies in the law,[55] and so on. Indeed, the traditional position frowns upon the incorporation of subjective elements within the judiciary. There has been public outcry when mentions of empathy were used by Heads of States to describe judges.[56] In a similar vein, internal practices of emotional regulation and detachment within the judicial community have been attributed to the expectation of what has been regarded as the "dispassionate but objective" judge.[57] As such, this coupling of public opinion with internal practices could indeed be said to have had a chilling effect on the judiciary's shoulders.

Yet, contrasting this with Schopenhauer's formulation of the Will and the Representation, one finds that there are inconsistencies. If we consider the judgments as the judiciary's Representations, would this not be the manifestation of a subjective unconscious Will of the judges? Following then, if the Will cannot then be separated, how would we ensure Compassion to be the core driving force to ensure that justice has been done?

These are all the questions which this section attempts to answer, drawing

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[53] Raymond Youngs, 'Cold Neutrality? A Comparison of the Standards of the House of Lords with those of the German Federal Constitutional Court' (2000) 20(3) OLJS 391.

[54] James R Maxeiner, 'Some Realism About Legal Certainty in the Globalization of the Rule of Law' (2008) 31 Hous J Int'l L 27.

[55] Margit Cohn, 'Form, Formula and Constitutional Ethos: The Political Question/Justiciability Doctrine in Three Common Law Systems' (2011) 59(3) The American Journal of Comparative Law 675.

[56] Ari Shapiro, 'Sotomayor Differs With Obama On 'Empathy' Issue' *NPR* (Washington DC, 14 July 2009), <https://www.npr.org/2009/07/14/106569335/sotomayor-differs-with-obama-on-empathy-issue?refresh=true> accessed 18 October 2022.

[57] Terry A Maroney and James J Gross, 'The Ideal of a Dispassionate Judge: An Emotional Regulation Perspective' (2014) 6(2) Emotion Review 142.

upon our conclusions from Schopenhauer's work alongside modern studies of cognition and the Court's jurisprudence. However, we nonetheless conclude later with a rather pessimistic view - that attempts to separate unconscious thoughts from the Will is impossible. Instead, the judiciary should strive to incorporate Compassion in their judgements to maintain the human-element of law.

### A. The unconscious Will manifested in an "objective" Representation

At the outset, it is worth recalling Schopenhauer's position that true "objective" reasoning is merely fiction; the subjective and unconscious Will cannot be separated from one's Representation. This occurs even more so when intellect and knowledge is engaged to interpret the Representation of others. And although he further writes that there are few who can split this subjective Will from objective reasoning, they are far and few between.[58] Hence, even if the top Court judges can do so, they are not wholly representative of the entire judiciary. In the United Kingdom, as of October 2022, there are 33 Lord and Lady Justices in the Court of Appeal,[59] 98 justices of the High Court,[60] and significantly more District Court Judges and Magistrates. Such considerations provide a more holistic outlook of the judiciary, which, owing to this diverse nature, cannot all be said to fit within Schopenhauer's exception. As such, an acceptance of Schopenhauer's work would allow us to form the natural conclusion that despite claims of objectivity, all judges are influenced by their subjective unconscious bias to a certain extent.

Unfortunately, greater nuanced analysis is required before finding a conclusion. In particular, we note Dr Richard Corne's research in this field of unconscious bias in the judiciary from the perspective of psychoanalytic theory. In particular, he argues that while difficult, the judiciary attempts to split their personal and legal personalities through emotional regulation processes such as "splitting" and "repression".[61] If we were to take these practices at face value and assume judges

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[58] Robert Wicks, 'Arthur Schopenhauer' *The Stanford Encyclopedia of Philosophy* (Fall edn, 2021) <https://plato.stanford.edu/archives/fall2021/entries/schopenhauer/> accessed 19 October 2022.

[59] For a list of judges on the Court of Appeal, see: <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/senior-judiciary-list/lord-and-lady-justices-of-appeal/> accessed 19 October 2022. As of date of access, there are 33 Lord and Lady Justices.

[60] For the number of judges in the High Court, see: <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judges/high-court-judges/> accessed 19 October 2022. As of date of access, there are 19 judges in the Family Division, 18 judges in the Chancery Division, and 71 Judges in the King's Bench Division.

[61] Richard M Cornes, 'Making up the Judge's Mind – a Psychoanalytic Perspective on Legal

practise them regularly, it would serve sufficient to conclude the dominance of the traditional objective view within the judiciary, moving us away from Schopenhauer's formulation of reasoning. This tension between the subjective nature of the Will and attempts to separate it forms the basis of this section.

Beginning with a quote from Lord Neuberger. In his extrajudicial address to the Criminal Justice Alliance in 2015, his Lordship notes:

> I dare say that we all suffer from a degree of unconscious bias, and it can occur in all sorts of manifestations. It is almost by definition an unknown unknown, and therefore extraordinarily difficult to get rid of, or even to allow for.[62]

It is on this, that we are sceptical of the findings of Crone and the effectiveness of these practices which he suggests. Rather briefly first, "splitting" involves judges taking parts of the litigants that are relevant to a case, and splitting them from the portions that are not; "repression" however, involves repressing unconscious thoughts from conscious reasonings.[63] Commonly between them, Crone notes that the most common mechanism to engage these processes is for judges to often go further to acknowledge their personal biases to allow them to reject it in either instance.[64] However, in line with Schopenhauer's work, we are doubtful of this proposition. We argue that few people possess sufficient levels of self-awareness to acknowledge their biases, and even fewer can take action once they are cognisant of it. Borrowing from the medical field, empirical studies have shown that even where patients are aware that a certain treatment is placebo, they remain affected by it.[65] Hence, taking the

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Reasoning and the Role of the Judge' (2014) <https://ssrn.com/abstract=2446452> accessed 19 October 2022.

[62] Lord Neuberger, 'Fairness in the Courts: the best we can do' (Address to the Criminal Justice Alliance,10 April 2015) <https://www.supremecourt.uk/docs/speech-150410.pdf> accessed 19 October 2022.

[63] (n 49) 9-12. On the latter point of repression, an individual's practices can be symbolic; he writes about anecdotal evidence about a New Zealand Judge that takes a shower sometimes after hearing terrible criminal cases at 11-12.

[64] (n 49) 11.

[65] See, for example, studies in this field in: Michael Schaefer, Tamay Sahin and Benjamin Berstecher, 'Why do open-label placebos work? A randomised controlled trial of an open-label placebo induction with and without extended information about the placebo effect in allergic rhinitis' (2018) 13(3) PloS One <https://doi.org/10.1371/journal.pone.0192758> accessed 18 October 2022, and Cláudia Carvalho and others, 'Open-label placebo treatment in chronic low back pain: a randomized controlled trial' (2016) 157(12) Pain 2766.

'placebo' in legal reasoning as the judiciary writing about their emotions, they remain subtly influenced by such personal bias. While such acknowledgements may lead to the isolation of conscious feelings, the unconscious nature of the Will will always influence conscious Representations made.

Going back to the legal world, the emotive language which Crone refers to can also be found in numerous cases. While not mentioned in Crone's work, we find Lord Denning MR's opening lines of *Beswick v Beswick*[66] (CA) as a particularly pertinent example of this:

> Old Peter Beswick was a coal merchant in Eccles, Lancashire. He had no business premises. All he had was a lorry, scales and weights. He used to take the lorry to the yard of the National Coal Board, where he bagged coal and took it round to his customers in the neighbourhood…
>
> In March, 1962, old Peter Beswick and his wife were both over 70. He had had his leg amputated and was not in good health. The nephew was anxious to get hold of the business before the old man died.[67]

While such references are rather subtle, there are some rather nuanced emotional tendencies in this. Primarily, the case concerned privity of contract between third parties. However, in his description of the parties, it is not a coincidence that Lord Denning MR includes Peter Beswick's limited means, old age and poor health, looking to paint Mr. and Mrs. Beswick in a sympathetic light, perhaps even as victims of their younger, more cunning nephew. Lord Denning's judgement in favour of the plaintiff is a foregone conclusion, meant to protect the helpless Beswick widow. Salmon LJ subsequently writes:

> Does the law allow [the defendant] to take the full benefit of the contract and evade his contractual obligations with impunity? If so, there must be something fundamentally wrong with the law, for no system of jurisprudence should permit what is manifestly such a monstrous injustice.[68]

[66] [1966] Ch 538.
[67] (n 54) 549.
[68] (n 54) 563.

What is intriguing here is Salmon LJ's use of the phrase "monstrous injustice". If we were to look back towards the basis of Compassion, one of the twin virtues lies in this concept of justice - the virtue to not do harm unto others. Upon this, it could then be said that Salmon LJ's expansive interpretation of the law was founded on the notion of Compassion, allowing a sense of connection between him and the parties to better understand their plight. This is akin to Lord Denning's connection with the parties through their characteristics going back to connect with them imaginatively. On this, the role of Compassion as an unconscious force becomes evident and showcasing in their lordships Representation of their written judgement. Despite being overturned on appeal to the House of Lords,[69] the Court of Appeal's reasoning was codified in subsequent legislation by Parliament. On this, perhaps we could say Parliament had listened to the Court of Appeal's cries of true moral righteousness through their Compassion; understanding the impact of their previous legislation on litigants (dare we say, a sense of loving-kindness for its positive act), and moving to amend the legislation.

On that note, similar references in other cases can be observed. Mummery LJ in *Dunbar v Plant*[70] emphasised the Court is not "insensitive to the tragic human events", numerous references to "profound regret" by Lord Wilson in Supreme Court in *Serafin v Malkiewicz*[71] in coming to his decision.[72] There is unfortunately insufficient space to analyse the language used by these judges. Yet, what we can identify is an ongoing tension between the judiciary and the hints of *Compassion* found in the *Will*. While the Courts in these cases are ready to acknowledge the plights of litigants, there is a tendency to do so cautiously.

Such subjective and emotive writings hence represent Crone's discussions of emotional acknowledgement, followed by their rejection of their effect on their judgments. Yet, these subjective writings perhaps showcase the more human side of

[69] *Beswick v Beswick* [1967] UKHL 2.
[70] [1998] Ch 412.
[71] [2020] UKSC 23. A case involving the principles of Cross-Examination. Their Lordships (with leading speech by Lord Wilson) were at pains to uphold the judgement of the Court of Appeal.
[72] *Cook v The Mortgage Business Plc* [2012] 5 EG 82. This list should not be regarded as exhaustive. We see further cases here where similar dictum can be found in *Travis Perkins Trading Company Limited v Bambhra* [2022] EWHC 138 (QB), [30], where Senior Master Fontaine expressed "considerable sympathy for the Defendant's plight" in a contract case, *Thaler v Comptroller General of Patents Trade Marks and Designs* [2021] EWCA Civ 1374, [67] per Birss LJ in intellectual property case in the Court of Appeal, and similarly, Lord Sumption in *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2016] UKSC 45, [77]. Many more examples are present, however, that would make this list impossibly long.

the judiciary. On that note, inspiration can be had from Dr Erving Goffman's "*The Presentation of Self in Everyday Life"*, and the dichotomy between what he regarded as the "front stage" and the "backstage" in the performance that was everyday life.[73] Particularly, he notes that the front stage, where we present ourselves to others (akin to Schopenhauer's Representation) is often an idealised version of ourselves.[74] Correspondingly, the "backstage" represents our innermost thoughts, values and Will, which we do not show to others. Accordingly, Goffman writes that on the front stage, we often present an idealised version of ourselves, incorporating and exemplifying what we perceive to be morally righteous; the "best" manifestation of our Will.[75] Yet, in addition to the public, Goffman views people as further performing to ourselves, forming our capability of self-reflection.[76] This front stage is where the judiciary's judgements come to light - they are written and published for the wider public. Hence, while these emotive languages used become a tool for judges to showcase their personal moral virtues, they cannot simply be rejected or repressed. To go against one's own morals is simply unconscionable, impossible to accept for most and results in self-condemnation even when there is no audience present in the theatre.

To Schopenhauer, there is no true "objective" reasoning present in the judiciary. Despite attempts made, and emotional regulation practices enacted, it would be too onerous on many to abandon personal values and live in a schism oscillating between their personal and professional life; the splitting of the Will from the Representation goes beyond "objective reasoning" but to a rejection of humanity. And in a field where one's decisions can significantly impact the life of another, this element of humanity should instead be embraced, and integrated to create a just outcome.

### B. The driving force of Compassion

The above sections have illustrated that the Representation, while objective and interpreted by others, is fundamentally shaped by the subjective Will; dare we say, that true objective reasoning is most likely a fiction. Yet, following on from the

[73] Erving Goffman, *The Presentation of Self in Everyday Life* (Doubleday 1956). A word has to be said that, as indicated earlier, we are considering the judiciary holistically. Hence, they do not have any special characteristics attributed to "top court judges" as discussed by various pieces of literature.
[74] (n 62) 66-86.
[75] (n 62) 35.
[76] (n 62) 108.

theoretical exposition of Schopenhauer's formulation of Compassion and Justice, one cannot neglect the practical implications of such a claim. How then would one ensure the Will to be sufficiently filled with Compassion such that the true justice can be dispensed by the Courts?

If we may begin with an extreme example - Court of Appeal in *Dunnage v Randall*[77] ("*Dunnage*"). Here, Mr Vincent Randall, suffering from schizophrenic disorders, lit himself on fire with a petrol pump. While burning, Mr Dunnage attempted to douse him, but was injured by the fires. While Mr Randall had passed away, Mr Dunnage suffered major burn injuries, and brought a claim against the estate of Mr Randall. The Court of Appeal allowed this claim but made particularly troubling remarks. One which stood out here includes:

> The next question is whether Vince's conduct breached the standard of care imposed by the law of negligence that is, failed to act as a reasonable person would act. Having come into close proximity with the claimant, Vince clearly owed him a duty of care not to take action which would or might cause him injury. The standard to be expected of Vince is purely objective. It is the standard of a reasonable person, not a person having Vince's disabilities. It does not therefore matter whether the person was in fact drunk or had some disability. The only question is whether he failed to act as a reasonable person would have done.[78]

While *Dunnage* was applauded by scholars for the clarity it brought to the law of negligence,[79] one must be cognisant of the intricate nature of Vince's situation. The Court, in holding that the test for a breach of Duty is one of a reasonable man, rather than an individual man with the Defendant's characteristics, presents a troubling conclusion. While Schopenhauer's analysis of the virtue of justice is similar to the Court's here - to not do harm unto others,[80] Schopenhauer makes a further distinction between justice in Compassion, and justice in egoism; while the former is moral, the latter is not. To determine the distinguishing factor, we can draw back to his earlier writings on imaginative empathy - to be able to understand the plight of others.[81] This

[77] [2015] EWCA Civ 673.
[78] ibid [149].
[79] Maria Orchard, 'Liability in negligence of the mentally ill: A comment on *Dunnage v Randall*' (2016) 45(4) Common Law World Review 366.
[80] (n 2) 180.
[81] (n 2) 170.

was what was lacking in *Dunnage*. Not only were the Court of Appeal silent on Vince's state prior to the incident despite the medical experts report, but also, the nuanced effect of particular mental illnesses.[82] Perhaps one reason for this was that Vince was being represented by the insurance company who would have to shoulder the damages. One must inevitably wonder if the situation would differ if Vince had survived the tragedy, and had arrived in Court alongside his legal representation. Perhaps then, this would allow the Courts to imaginatively engage with Vince's circumstance, as opposed to reading it off a piece of paper submitted by counsel.

This concept of imaginative interpretation is difficult to quantify; one cannot truly say when the Courts have implemented such a mechanism. Ultimately, it would seem that such efforts would all fall towards the trust that individuals have in the judiciary: that the judiciary is capable of expanding their perspectives to indulge in the plight of litigants while maintaining adherence to the rule of law. On that note, this internal balancing remains largely at the hands of the judiciary. Nonetheless, a few words could be said about the opposite - what not to do.

It must be rejected that the use of Compassion becomes self-serving. In Schopenhauer's view, this would move the motivating force from Compassion to egoism, which does not allow for the proper dispense of justice. On this, there is a current tendency within the judiciary to only make such references to Compassion when the vulnerable small plaintiff that draws sympathy fails in their claim.[83] Of note, in *Denise Cook v The Mortgage Business plc v Mortgage Express*[84] ('Denise Cook'), Etherton LJ writes:

> It is right that I should say at the outset, as did the Judge, that it is impossible not to feel the greatest sympathy for the situation in which the appellant vendors find themselves.[85].

Indeed, the facts of *Denise Cook* concerned an equity release scheme mortgage fraud for the innocent homeowner, causing the vulnerable appellants to be evicted by the victorious bank through no fault of their own. Writing emotively in such a context

[82] (n 66) [104], where the Court expressly noted that there were no differences between physical illnesses and mental illnesses, using the example of epilepsy and down syndrome.
[83] This is especially true for cases such as *Bank of Baroda v Dhillon* [1997] EWCA Civ 2511; *Bank of Ireland Home Mortgages v Bell* [2001] 2 FLR 809; *Re Citro* [1991] Ch 142.
[84] [2012] EWCA Civ 17.
[85] ibid [4].

would indicate the rejection of bias and thus, increasing their credibility of the Courts. Hence, one could similarly say that these matters are written to promote and enhance the image of the judiciary, rather than to uphold the moral righteousness of the Courts. Indeed, if the flipside would occur, and top judges wrote emotively where a sympathetic litigant wins, the credibility of judgements would arguably be compromised; scholars would be quick to argue then that judges were drawn to clear subjective *Compassion* with the innocent victim rather than deciding on the merits.

While this may be the case, there are better and perhaps more convincing arguments to explain the Court's actions.. First, this assumes that the Courts act with a self-preservation mindset. However, Courts are actively encouraging out-of-court processes.[86] It should similarly then follow that the judiciary should encourage society to use its adjudication functions less. While that is not to say Courts should frame itself as non-credible, instead, its focus should be shifted to dispensing righteous justice as opposed to billing litigants for time. Secondly, while we do accept that such may enhance their protection from alleged bias, especially for lower Court judges, one must be cognisant of the law in this area. The principle surrounding the appearance of bias remains primarily in conflict-of-interest rules; where a judge has a sufficient connection to the case that warrants disqualification.[87] Engaging with the status and general well-being of litigants to better understand their plights would likely not fall under these principles. Conversely, it would seem that such would allow a more nuanced understanding of the factual matrixes, alongside the intent of the parties in their actions before coming to litigation to engage in more highly fact-sensitive mechanisms. This, in turn, requires judges to actively engage and understand others imaginatively, engaging their Compassion to affirm what they believe is just in their Representation to the parties.

Finally, a word has to be said on notions of therapeutic jurisprudence. Compassionate jurisprudence perhaps finds its soulmate in studies to alleviate the highly charged emotional impact of litigation. Indeed, it cannot be denied that there

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[86] See, for example, Ministry of Justice, 'Government Reveals Plans to Divert Thousands of Civil Legal Disputes Away from Courts' (2022) <https://www.gov.uk/government/news/government-reveals-plans-to-divert-thousands-of-civil-legal-disputes-away-from-court> accessed 18 October 2022.

[87] See the line of authority from *R v Cowle* (1759) 2 Burr 835; *R v Gough* [1993] 2 WLR 883; *Porter v Magill* [2002] UKHL 67; *Taylor v Lawrence* [2002] EWCA Civ 90; *Re Pinochet (no 2)* [1999] UKHL 1. See also: Courts and Tribunals Judiciary, 'Guide to Judicial Conduct' (March 2019) <https://www.judiciary.uk/wp-content/uploads/2018/03/Guide-to-Judicial-Conduct-March-2019.pdf> accessed 17 October 2022.

is immense psychological and mental stress for litigants when appearing before the Courts.[88] Coupled with lack of legal literacy[89] and use of popular media to create a tinted lens on the legal process,[90] a sense of reverence and mysticism is imbued in the eyes of the layperson. Indeed, there should be no reason for litigants to feel intimidated by the legal process; judges are human, and they should serve to bring the 'human touch' to the Courtroom, rather than to remove it. Anecdotal evidence reported by Professor Baldwin's survey of small-claims litigants appearing *pro se* in County Courts in 1999 is a poignant example. The result here indicates that litigants are unsure of what those immersed in the field are like. One particularly striking quote from an individual interviewed:

> The difficulty is that I'm an engineer and I don't know the law and the way the law works … They're looking for legal arguments as opposed to facts, so it's always preferable to have somebody who understands the law as opposed to someone who understands engineering.[91]

This feeling is echoed by numerous litigants, even those appearing in higher Courts. Thus, this serves to alleviate such harsh responses by litigants to Courts, allowing litigants to feel that their cases and circumstances have been fully appreciated. The acknowledgement of the injustices one has faced can also act as catharsis for litigants and contribute to the image that the court had come to its decision only after considering the full picture. As such, judges should strive to engage litigants on a personal level throughout the judicial process and humanise the process.

## IV. Conclusion

Traditional doctrines of legal reasoning favour a purely objective approach, applying the law to the facts and ignoring the realities of litigation. But we ask, why

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[88] Paul R Lees-Haley, 'Litigation Response Syndrome: How Stress Confuses the Issues' (1989) 56 Defence Counsel Journal 110. See also: Michael S King and Kate Auty, 'Therapeutic Jurisprudence: An Emerging Trend in Courts of Summary Jurisdiction' (2005) 30(2) Alt Law Journal 69.

[89] Troy Allen Davies, 'The Worrisome State of Legal Literacy among Teachers and Administrators' (2009) 2(1) Canadian Journal for New Scholars in Education <https://journalhosting.ucalgary.ca/index.php/cjnse/article/view/30455/2486> accessed 30 January 2023.

[90] Kimberlianne Podlas, 'Guilty on All Accounts: Law & Order's Impact on Public Perception of Law and Order' (2008) 18 Seton Hall Journal of Sports and Entertainment 1, 43-46.

[91] John Baldwin, 'Litigants' Experiences of Adjudication in the County Courts' (1999) 18 (Jan) Civil Justice Quarterly, 12-40.

should this remain the norm? Behind every dispute brought to Court, there is a story that litigants are a part of. Looking past the principled common law, the Courts merely operate as a retroactive means for recourse through dispute-resolution. Hence, a preferable approach should see the judiciary integrate Compassion into legal reasoning to be able to consider such factors in a more nuanced way.

On this, we took to explore the seminal works of Arthur Schopenhauer, and adopted his extensive approach of thinking about morality and one's interaction and relativity within the world. While numerous challenges have been issued against his work, it seems to finally have found solace within modern developments; concepts surrounding the Will, the Representation, and Compassion have all found its place in the 21st century. On that note, we brought it to its biggest contender yet - the cold and barren lands of the legal world.

Yet, a detailed analysis reveals that the common law is already littered with undertones of references to emotive languages, but in a textured and controlled manner. The complete integration of emotions would resolve such inconsistencies, while also clarifying the boundaries of the extent of judges interacting with litigants. Such would allow for justice to be dispensed; the appropriate remedies and extent of remedies better enforced through a better and more nuanced understanding of the nature of disputes. Indeed, the current judicial system already reflects some Compassion in the way judgments are written, it would not be a far cry to incorporate it to a greater extent. With its acknowledgement, the judiciary can work towards a more humane outlook, and in Schopenhauer's opinion, one that is also more just.