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**Article**

**In Defense of Judicial Empathy**

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## INTRODUCTION

President Barack H. Obama has repeatedly stated that he views a capacity for empathy as an essential attribute of a good judge.<sup>1</sup> And conservatives have heaped mountains of scorn upon him for saying so—accusing him of expressing open contempt for the rule of law.<sup>2</sup> To date, the debate has been surprisingly one-sided. One federal judge has recently noted that “President Obama’s statement that judges should have ‘empathy’ was met with strong criticism from his opponents and uncomfortable silence from his supporters.”<sup>3</sup> No one has yet offered a sustained scholarly defense of the President’s call for empathy in judging.<sup>4</sup>

This Article seeks to fill that void. Part I summarizes and critiques the agonizingly simplistic and misleading public and political debate over the proper role empathy (and its popular adversary—umpiring) in the judicial craft. It laments the success that the President’s critics have had in misleadingly portraying the judicial selection process as a choice between conservative judges who simply call balls and strikes and decide all cases according to determinative rules set down by the governing sources of law, and liberal judges whose reliance on empathy amounts to ignoring the law and deciding cases in favor of whichever party seems more sympathetic. Part II then examines the treatment of the President’s call for judicial empathy at the hands of conservative legal intellectuals, which, disappointingly, tends to be only marginally more nuanced.

In Part III, the Article explains that empathy is properly defined as the cognitive ability to understand a situation from the perspective of other people, combined with the emotional capacity to comprehend and feel those people’s emotions in that situation. Part III then contrasts empathy with the entirely distinct concept of sympathy. Empathy involves feeling and understanding the emotions that other people feel; sympathy involves feeling sorry for other people.

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1. See *infra* Part IV.A.

2. See *infra* Parts II, III.

3. Kim McLane Wardlaw, *Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1647 (2010).

4. See John Paul Rollert, *Reversed on Appeal: The Uncertain Future of President Obama’s “Empathy Standard,”* 120 YALE L.J. ONLINE 89, 90 (2010), available at <http://yalelawjournal.org/images/pdfs/903.pdf> (noting that the Left has steadfastly avoided a “scholastic debate over the merits of empathy”).

In Part IV, the Article seeks to explain why empathy is in fact an essential characteristic of a good judge. The President's critics might be surprised to find that the argument here is neither grounded in extralegal, touchy-feely notions of humanity and compassion nor based on some sort of radical vision of wealth redistribution through activist courts. Nor, for that matter, does it spring from a post-Realist rejection of "law" as a legitimate constraining force on judges. Quite to the contrary, the argument is grounded in a firm commitment to the rule of law and a deep-seated appreciation of—rather than rejection of—legal doctrine. In brief, legal doctrine, at both the constitutional and subconstitutional level, is permeated with reasonableness and balancing tests and other doctrinal mechanisms that cannot possibly be employed effectively unless judges are able to gain an empathic appreciation of the case from the perspective of all of the litigants. A judge can neither craft nor employ legal doctrine competently if she is not willing and able to understand the perspectives of, and the burdens upon, all of the parties.

Part V then endeavors to illustrate the shortcomings of the model of non-empathic, umpire judging. It argues that a judge who believes in the popular portrait of judges as umpires, and who rejects as illegitimate calls for judicial empathy, will fail to realize that, while he thinks that he is simply calling objective balls and strikes, he is in fact unwittingly giving disproportionate weight in his doctrinal calculus to the interests of those whose perspectives come most naturally to him. Finally, Part VI paints a portrait of the ideal empathic judge—a judge who has a talent for empathy and makes a conscious effort to empathize with all parties, thus ensuring that she is not subconsciously undervaluing the interests of those whose perspectives she does not instinctively appreciate. Part VI explains that, far from being the enemy of judicial neutrality, empathy is in fact necessary to impartial judging.

#### I. THE "UMPATHY" DIVIDE AND THE POVERTY OF POPULAR DISCOURSE ON JUDGING

Over the five-year period from 2005 to 2010, the Senate Judiciary Committee held confirmation hearings for four Supreme Court nominees—a sudden flood of activity that followed more than a decade without a single high court vacancy. Some observers celebrated those events as a rare opportunity for the American public to give serious consideration to matters of ju-

dicial philosophy.<sup>5</sup> Alas, the opportunity, if there ever truly was one, was squandered. In the place of thoughtful dialogue and public education, the hearings presented the American people with maddeningly simplistic and vapid accounts of judicial decision making. They pitted against each other two starkly contrasting visions of the role of the judge.<sup>6</sup> On the right, we had the portrait, popularized by Chief Justice Roberts in his confirmation hearings, of the judge as detached umpire—simply calling balls and strikes, applying the law, rather than making it.<sup>7</sup> On the left, we had the portrait, popularized by President Obama, of the engaged, empathic judge—whose decisions are influenced by a “quality of empathy, of understanding and identifying with people’s hopes and struggles.”<sup>8</sup>

In the form in which they were received by the public, both portraits are clumsy and vacuous caricatures.<sup>9</sup> And it is the conservatives who, it seems, have been most successful in shaping the public’s understanding of both models. That is to say, conservatives have had considerable success in portraying the

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5. See generally Dahlia Lithwick, *Teach to America*, SLATE (June 4, 2009, 5:18 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2009/06/teach\\_to\\_america.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2009/06/teach_to_america.html).

6. As Matthew Frank put it, the “line between the Democrats and the Republicans” at these hearings “might be called the ‘umpathy’ line.” See *The Federalist Society Online Debate Series: The Sotomayor Nomination, Part II*, FEDERALIST SOC’Y (July 13, 2009), <http://www.fed-soc.org/debates/dbtid.30/default.asp>.

7. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) [hereinafter *Roberts Hearing*] (statement of John G. Roberts, Jr.) (“Judges are like umpires. Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire.”).

8. Press Briefing by Press Secretary Robert Gibbs (May 1, 2009), available at <http://www.whitehouse.gov/the-press-office/press-briefing-press-secretary-robert-gibbs-5-1-09> (statement of President Obama).

9. See CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* 5–8 (2007) (criticizing a popular discourse that presents judges as either nonpolitical umpires or purely ideological politicians); Francis J. Mootz III, *Ugly American Hermeneutics*, 10 NEV. L.J. 587, 588 (2010) (referring to this rhetoric as “ugly American hermeneutics”); Todd E. Pettys, *Judicial Discretion in Constitutional Cases*, 26 J.L. & POL. 123, 125 (2011) (lamenting the “legitimacy dichotomy”: “the notion that judges faced with constitutional disputes either behave in a democratically legitimate manner by dutifully obeying the sovereign people’s constitutional instructions or behave in a democratically illegitimate manner by usurping the role of the sovereign people and imposing their own personal preferences on the rest of the nation”).

judicial selection process as a choice between conservative judges who dutifully and humbly follow the law without regard to their own personal preferences and liberal judges who brazenly ignore or defy the law so as to rule out of personal sympathy for their preferred groups.<sup>10</sup>

Painting judging in this light obviously serves political goals, and perhaps does so quite effectively. But it undermines any serious attempt to educate the public about judicial decision making.<sup>11</sup> On that score, neither of these portraits is in the least bit enlightening.

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10. See Rollert, *supra* note 4, at 98 (noting that conservatives have succeeded in turning into “conventional wisdom” the “picture of liberal judges as rogue jurists who make up the law as they go along and conservative judges who act as humble clerks to the Founders and the legislative wisdom of the day”). Senator Jeff Sessions was a typical source of this rhetoric. See *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 5–6 (2009) [hereinafter *Sotomayor Hearings*] (Statement of Sen. Sessions) (portraying the Supreme Court selection process as a choice between “impartial and wise judges” who guide us to “objective truth” and a “Brave New World” in which “a judge is free to push his or her own political or social agenda”); *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2010) [hereinafter *Kagan Hearings*] (remarks of Sen. Sessions) (“There are two views of the courts. One is the judge as a neutral umpire. The other view is that a judge should be activist . . . [and believe] that they have a right to advance a political agenda.”).

Of course, when the choice is portrayed in these terms, the “correct” answer is obvious. See THE FEDERALIST SOCIETY, 2008 POST-ELECTION SURVEY OF 800 ACTUAL VOTERS, at 5 (2008), available at [http://www.fed-soc.org/doclib/20081105\\_PostElectionSurvey11408.pdf](http://www.fed-soc.org/doclib/20081105_PostElectionSurvey11408.pdf) (presenting results of a 2008 survey that found that the public overwhelmingly prefers judges who “will interpret and apply the law as it is written and not take into account their own viewpoints and experiences” over judges who “will go beyond interpreting and applying the law and take into account their own viewpoints and experiences”). If, however, a more charitable picture of the empathic judge is presented, the public is much more receptive. See Jamal Greene et al., *Profiling Originalism*, 111 COLUM. L. REV. 356, 366 (2011) (presenting results of a 2009 survey that found that fifty-nine percent of the public believes it to be either somewhat or very important for Supreme Court justices to “feel empathy for the people involved in a case”); James L. Gibson, *Expecting Justice and Hoping for Empathy*, PAC. STANDARD (June 20, 2010), <http://www.miller-mccune.com/legal-affairs/expecting-justice-and-hoping-for-empathy-17677/> (presenting results of a 2009 survey that found that two-thirds of the public assigns the highest degree of importance to a judge being “able to empathize with ordinary people—that is, to be able to understand how the law hurts or helps the people,” and only eight percent rates this characteristic as entirely unimportant).

11. See Wardlaw, *supra* note 3, at 1630 (“Though much of the rhetoric about judges and judging has proven politically expedient for politicians and interest groups engaged in judicial confirmation fights, it has been a disservice to the American public and the federal judiciary.”).

The judge-as-umpire analogy has the potential to be nuanced and perhaps even edifying,<sup>12</sup> and maybe Chief Justice Roberts meant to invoke a complicated concept.<sup>13</sup> But the message received by the public—and the Senate—lacked any such subtlety.<sup>14</sup> Rather, the message came across that good judges (which is to say, conservative judges) decide all cases by simply following the law, mechanically calling balls and strikes according to clear and determinative rules set down by the Framers and legislatures.<sup>15</sup>

This bears virtually no resemblance to the actual process of judging. It should be difficult for any knowledgeable person to take seriously the claim that good, principled, “non-activist” judges never make law—that they, instead, simply act as umpires, discerning in every case the single, correct answer that is inexorably dictated by the governing legal authorities.<sup>16</sup> As Er-

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12. See generally Michael P. Allen, *A Limited Defense of (at Least Some of) the Umpire Analogy*, 32 SEATTLE U. L. REV. 525 (2009); Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709 (2007).

13. See *Roberts Hearing*, *supra* note 7, at 205–06 (noting that judges bring their life experiences to the bench and that reasonable people can sometimes disagree about the proper answer to constitutional questions).

14. See Rollert, *supra* note 4, at 95 (“Listening to John Roberts, one might have wondered how the Supreme Court ever came to be so highly regarded. He made it sound as if the work of a Justice were no more complicated than assembling a futon from Ikea, a task that most any person could do who had an aptitude for following directions and the patience of Job.”); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 702–11 (2007); Wardlaw, *supra* note 3, at 1636 (“The judge-as-umpire construct establishes a false choice between the judge who calls balls and strikes, and nothing more, and the activist judge who behaves extrajudiciously.”).

15. See Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 8 (2009) (lamenting that “Senate confirmation hearings . . . bolster the popular fable that constitutional adjudication can be practiced in something close to an objective and mechanical fashion”). Louis Michael Seidman had little patience for Justice Sotomayor’s testimony to this effect at her confirmation hearings:

How could someone who has been on the bench for seventeen years possibly believe that judging in hard cases involves no more than applying the law to the facts? First year law students understand within a month that many areas of the law are open textured and indeterminate—that the legal material frequently . . . must be supplemented by contestable presuppositions, empirical assumptions, and moral judgments. To claim otherwise—to claim that fidelity to uncontested legal principles dictates results—is to claim that whenever Justices disagree among themselves, someone is either a fool or acting in bad faith. What does it say about our legal system that in order to get confirmed Judge Sotomayor must tell the lies that she told today? That judges and justices must live these lies throughout their professional careers [sic]?

FEDERALIST SOC’Y, *supra* note 6.

16. See, e.g., *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (“I am not so naive (nor do I think our forebears

win Chemerinsky has explained, “any first year law student knows that judges make law constantly. The first year student’s common law subjects are almost entirely judge-made law. Interpretation of an ambiguous statute or a constitutional provision’s broad, open-textured language is also a judge’s legal product.”<sup>17</sup> Surely “we are all realists now” in the simple sense

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were) as to be unaware that judges in a real sense ‘make’ law.”); RICHARD A. POSNER, *HOW JUDGES THINK* 78 (2008) (arguing that neither Chief Justice Roberts “nor any other knowledgeable person actually believed or believes that the rules that judges in our system apply, particularly appellate judges and most particularly the Justices of the U.S. Supreme Court, are given to them the way the rules of baseball are given to umpires”); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989) (discussing and accepting the lawmaking role of judges); *id.* at 1181, 1186 (noting that when judges apply standards, rather than bright-line rules, “there is no single ‘right’ answer”).

If I were a judicial nominee testifying before the Senate Judiciary Committee, and a Senator asked me a question suggesting that principled judges always reach clear answers dictated by the law, I would be tempted to answer by pointing out that Justices Scalia and Thomas—the most favored Justices of the political right—disagreed in twenty cases in the last Term alone. *See The Supreme Court, 2009 Term—The Statistics*, 124 HARV. L. REV. 411, 414 tbl.I (2010). “Senator,” I would ask, “which one of them is the principled judicial umpire, and which one is the hopeless judicial activist?” Justice Kagan came about as close as a nominee can realistically be expected to get to giving an answer along these lines when she testified as to the limits of the umpire analogy:

I suppose the way in which I think that the metaphor does have its limits . . . [is] that the metaphor might suggest to some people that law is a kind of robotic enterprise, that there is a kind of automatic quality to it, that it is easy, that we just sort of stand there and, you know, we go ball and strike, and everything is clear-cut and that there is no judgment in the process. And I do think that that is not right, and it is especially not right at the Supreme Court level, where the hardest cases go and the cases that have been the subject of most dispute go. . . . [W]e do know that not every case is decided 9-0, and that is not because anybody is acting in bad faith. It is because those legal judgments are ones in which reasonable people can reasonably disagree sometimes.

*Kagan Hearings*, *supra* note 10, at 203 (2010).

17. Erwin Chemerinsky, *Seeing the Emperor’s Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1069 (2006); *see also* BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 91 (2010) (observing that “it was apparent to many that the law has inconsistencies, runs out, and routinely comes up against unanticipated situations and that judges possess a substantial degree of flexibility when working with legal materials”); Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 1036 (2009) (“[E]ven those who rail against so-called ‘judicial activism’ now generally accept that judges sometimes make law. That reality . . . cannot be denied.”) (footnote omitted); Frederick Schauer, *Do Cases Make Bad Law*, 73 U. CHI. L. REV. 883, 888 (2006) (“[W]hether in the context

that any even remotely sophisticated student of law recognizes that the formal sources of law often do not dictate clear and unequivocal answers to the questions posed to judges.<sup>18</sup> The popular judge-as-umpire portrait utterly fails to acknowledge the basic reality of judging.

As for the other portrait—the empathic judge—conservatives have largely succeeded in painting it in such spectacularly unflattering terms<sup>19</sup> that the Democratic members of the Judiciary Committee shied away from defending it,<sup>20</sup> President Obama’s own Supreme Court nominees appeared to reject it,<sup>21</sup> and even the President himself eventually backed off of it.<sup>22</sup> “Empathy,” as observers of political discourse have noted, has “become code now for activist judge.”<sup>23</sup>

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of pure common law decisionmaking or instead in the context of the supposed ‘interpretation’ of capacious language in statutes or the Constitution, it is far too late in the day to deny that judges are often . . . engaged in the process of making law.”).

18. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 165 (1921) (noting that there are cases in which the law does not dictate a clear answer); Chad M. Oldfather, *Error Correction*, 85 *IND. L.J.* 49, 50–51 (2010); Pettys, *supra* note 9, at 124 (noting that “judges faced with constitutional controversies often must choose from an array of conflicting—yet conventionally permissible—interpretive options”). See generally Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 *TEX. L. REV.* 267 (1997).

19. “By the time the Sotomayor hearings began, Republicans were united in their aim to put empathy on trial. In their opening statements, every Republican member of the Senate Judiciary Committee singled out the term for abuse.” Rollert, *supra* note 4, at 92.

20. See *id.* at 90.

21. See *Sotomayor Hearings*, *supra* note 10, at 120 (“I don’t—wouldn’t approach the issue of judging in the way the President does.”); Wardlaw, *supra* note 3, at 1631 (“That one word became so politically charged that Supreme Court nominee Sonia Sotomayor went on record as distancing herself from the approach to judging espoused by the President.”); *Kagan Disregards Obama View on Empathy*, BLOG LEGALTIMES (June 29, 2010, 12:51 PM), <http://legaltimes.typepad.com/blt/2010/06/kagan-disregards-obama-view-on-empathy.html> (“As Justice Sonia Sotomayor did a year ago, Supreme Court nominee Elena Kagan backed away today from President Barack Obama’s statements about the role of empathy in judging.”).

22. See Rollert, *supra* note 4, at 90, 105 (noting that President Obama made no mention of empathy when Justice Stevens retired or when Justice Kagan was nominated); Wardlaw, *supra* note 3 (noting that “Sotomayor distanced herself from it; and the President, perhaps believing that discretion is the better part of valor, never repeated it”).

23. *Transcript of American Morning*, CNN.COM (July 14, 2009), <http://archives.cnn.com/TRANSCRIPTS/0907/14/lm.03.html> (remarks of CNN correspondent Carol Costello); see also Rollert, *supra* note 4, at 92 (referring to empathy as “the Scarlet E”); Wardlaw, *supra* note 3, at 1631 (explaining that empathy “became a code word for judicial overreaching, and it served as the

According to many conservatives, liberals openly and unabashedly view judging as a purely political act. Accordingly, the only thing that liberals look for in a judge is an assurance that he or she will reach politically liberal results.<sup>24</sup> As one commentator sees it:

For most liberal judges, the primary purpose of being a judge is to promote social justice and transform society. That is why liberal judges are so much more likely to be judicial activists than conservative judges. Most liberal judges do not see their roles as merely adjudicating a dispute according to the law. They see their role primarily as using the law and their power to rule on the law to promote social justice.<sup>25</sup>

Thus, claim conservatives, “as a general matter . . . political conservatives want non-ideological judges, not ‘conservative’ ones, while political liberals want ideologically liberal judges.”<sup>26</sup>

Those who ascribe to this cynical view of liberal judicial philosophy take President Obama’s call for judicial empathy as an acknowledgement of his preference for this approach—as a stunningly honest confession that he wants judges who will ignore the law and instead decide cases in favor of minorities and the oppressed.<sup>27</sup> They insist that, because “judging based on

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blank slate onto which politicians painted doomsday scenarios of a judiciary run amok”).

24. See, e.g., Rush Limbaugh, *A Look Inside the Liberal Mind*, RUSHLIMABUGH.COM (June 30, 2009), [http://www.rushlimbaugh.com/home/daily/site\\_063009/content/01125112.guest.html](http://www.rushlimbaugh.com/home/daily/site_063009/content/01125112.guest.html) (“I think it’s time to forget holding out hope for liberal judges, folks. They are not like us. They don’t look at the judicial system the way we do. They don’t look at the law the way we do. . . . They don’t look at the law as a means of finding legal adjudications to cases [sic]. They look at the law and the court system as a way to level the playing field according to their view of how it’s unfair.”).

25. Dennis Prager, *Why Reporters—and Judges and Professors—Are Biased*, TOWNHALL (Nov. 25, 2008), [http://townhall.com/columnists/DennisPrager/2008/11/25/why\\_reporters\\_--\\_and\\_judges\\_and\\_professors\\_--\\_are\\_biased/page/full/](http://townhall.com/columnists/DennisPrager/2008/11/25/why_reporters_--_and_judges_and_professors_--_are_biased/page/full/).

26. Matthew J. Franck, *Souter Vacancy I: Toward Armistice in the Judicial Wars?*, NAT’L REV. ONLINE (May 3, 2009, 4:29 PM), <http://www.nationalreview.com/blogs/print/50214>.

27. See, e.g., Rollert, *supra* note 4 (“To the Right, empathy was nothing less than a code word for judicial activism, a dog whistle to the Democratic base that the President would choose judges who would put the counsel of a bleeding heart above the demands of impartial justice.”); Karl Rove, Op-Ed., “Empathy” is Code for Judicial Activism, WALL ST. J., May 28, 2009, at A13 (“‘Empathy’ is the latest code word for liberal activism, for treating the Constitution as malleable clay to be kneaded and molded in whatever form justices want. It represents an expansive view of the judiciary in which courts create policy that couldn’t pass the legislative branch or, if it did, would generate voter backlash.”); Editorial, *After Souter*, NAT’L REV. ONLINE (May 4, 2009, 4:00 AM), <http://article.nationalreview.com/393115/after-souter/the-editors> (“Empathy is simply a codeword for an inclination toward liberal activ-

empathy is really just legislating from the bench,”<sup>28</sup> President Obama’s empathy standard is “antithetical to the proper role of a judge.”<sup>29</sup>

## II. THE VIEW OF EMPATHY AMONG CONSERVATIVE LEGAL INTELLECTUALS

One might be tempted to speculate that these crude portraits, however much salience they might have with lay commentators, politicians, and the general public,<sup>30</sup> hold no sway over those who should know better.<sup>31</sup> Perhaps this is all just dumbed-down political theater, and is recognized as such by se-

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ism. . . [President Obama] cares about getting another vote for liberal results.”); Gary Bauer, Commentary, *An Ideological Choice*, WASH. TIMES (May 27, 2009), <http://www.washingtontimes.com/news/2009/may/27/an-ideological-choice/> (“Mr. Obama has told us what kind of judges he is seeking: judges who feel unconstrained by the plain language of the law or the text of the Constitution, judges who instead will act on their ‘empathy,’ on their own sense of right and wrong. He wants judges who will legislate from the bench. That is the very definition of judicial activism.”); *Transcript of Special Report With Bret Baier Panel on President Obama Replacing Justice Souter*, FOXNEWS.COM (May 4, 2009), [http://www.foxnews.com/printer\\_friendly\\_story/0,3566,518880,00.html](http://www.foxnews.com/printer_friendly_story/0,3566,518880,00.html) (remarks of Fred Barnes) (arguing that President Obama’s claim to be searching for a Justice who understands how law affects people’s lives is “what liberal judicial activism . . . is all about. It’s entirely results oriented”).

28. *Sotomayor Hearings*, *supra* note 10, at 17 (statement of Sen. Grassley).

29. *Id.* at 40 (statement of Sen. Coburn); *see also id.* at 6 (statement of Sen. Sessions) (“[O]ur system will only be further corrupted . . . as a result of President Obama’s views that, in tough cases, the critical ingredient for a judge is the ‘depth and breadth of one’s empathy.”); Charles Krauthammer, Op-Ed., *Sotomayor: Rebut, Then Confirm*, WASH. POST, May 29, 2009, at A17 (insisting that “conservatism . . . stands unequivocally against justice as empathy”); Rich Lowry, *A Bad Day for Impartiality*, NAT’L REV. ONLINE (May 26, 2009, 6:15 PM), <http://www.nationalreview.com/articles/227584/bad-day-impairality/rich-lowry> (“Impartiality has been supplanted by empathy. The old-fashioned virtue of objectivity—redolent of dusty law books and the unromantic task of parsing the law and facts—is giving way to an inherently politicized notion of judging based on feelings. Lady Justice is to slip her blindfold and let her decisions be influenced by her life experiences and personal predilections.”); *Transcript of “This Week with George Stephanopoulos,”* ABC (May 3, 2009), [http://abcnews.go.com/ThisWeek/story?id=7491153&page=1#.T1FQ0\\_EgcUJ](http://abcnews.go.com/ThisWeek/story?id=7491153&page=1#.T1FQ0_EgcUJ) (remarks of Sen. Orrin Hatch) (dubbing empathy “a code word for an activist judge” and suggesting that empathic judges rule “on the basis of their personal politics, their personal feelings, their personal preferences”).

30. *See* Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY 111, 112 (2010) (observing that “one might think the popular culture is the last preserve of vulgar formalism”).

31. *Cf.* TAMANAHA, *supra* note 17, at 197 (“No one thinks that law is autonomous and judging is mechanical deduction, and rare is the informed jurist who thinks that judges are engaged in the single-minded pursuit of their personal preferences.”).

rious intellectuals of all stripes. But my impression is that many—though of course not all—conservative legal intellectuals do indeed believe a somewhat softened version of these claims. They do think that there are “correct” doctrinal answers to most of even the thorniest legal questions,<sup>32</sup> and they doubt very much that liberals have any genuine interest in ascertaining them.<sup>33</sup> Viewed charitably, their line of reasoning would appear to be that liberals have been seduced by what might be called “vulgar realism”<sup>34</sup> to believe that law is radically indeterminate, and thus that it must really be the judges’ political beliefs that decide cases.<sup>35</sup> As such, liberals have given up on law, and they simply ask judges to be reliable liberal politicians.<sup>36</sup> When President Obama calls for empathy in judging,

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32. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (arguing that, for “the vast majority of questions the answer is clear”); Frederick Liu, Comment, *The Supreme Court Appointments Process and the Real Divide Between Liberals and Conservatives*, 117 YALE L.J. 1947, 1951 (2008) (“Judicial conservatives believe that traditional legal authorities—text, history, and structure—rarely run out; the law almost always yields a single right answer.”).

33. See, e.g., Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL’Y 283, 283 (1995) (arguing that liberals believe that fundamental questions of public policy should be decided by “the Justices of the Supreme Court, guided only by their own notions (or those of some professor or clerk) of what is good for the country”); cf. Lee Renzin, Note, *Advice, Consent, and Senate Inaction—Is Judicial Resolution Possible?*, 73 N.Y.U. L. REV. 1739, 1746 (1998) (quoting Sen. Orrin Hatch) (“We have liberal activists who ignore what the law is, don’t care what the law is.”).

34. See Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 728 (1997).

35. See Thomas W. Merrill, *High-Level, “Tenured” Lawyers*, 61 LAW & CONTEMP. PROBS. 83, 88 (1998) (“We live in a post-Legal Realist Age, when most legal commentators take it for granted that law cannot be disentangled from politics and that legal judgment is driven by the political beliefs of the decisionmaker.”); Pettys, *supra* note 9, at 130 (noting that many second- and third-year law students “believe that litigators often cite what they describe as ‘authorities’ in order to try to shape the judge’s preferences—but at the end of the day, the judge’s preferences are what centrally matter”); Suzanna Sherry, *Putting the Law Back in Constitutional Law*, 25 CONST. COMMENT. 461, 461–65 (2009) (lamenting the extent to which this belief has pervaded the legal academy). Likewise, the attitudinalist political science literature has been characterized by a tendency to view judicial opinions as merely the product of the judge’s politics, see Sherry, *supra*, at 461–62, and to view law professors as hopelessly naive for continuing to pay attention to legal doctrine, see H. Jefferson Powell, *A Response to Professor Knight, Are Empiricists Asking the Right Questions About Judicial Decisionmaking?*, 58 DUKE L.J. 1725, 1725 (2009).

36. See, e.g., 156 CONG. REC. S6603 (daily ed. Aug. 3, 2010) (remarks of Sen. Sessions) (attributing future Justice Kagan’s judicial views to the fact that “many liberal activists in America have lost faith in the idea of objectivity, which means they have lost faith in the reality of objective truth, the find-

he simply means that politician-judges should be good liberals and favor the sympathetic little guy.

Sentiments along these lines have been expressed by conservative commentators with serious legal credentials<sup>37</sup> and by conservative judges and law professors.<sup>38</sup> Steven Calabresi, for instance, summarizes President Obama's "extreme left-wing views about the role of judges. He believes—and he is quite open about this—that judges ought to decide cases in light of the empathy they ought to feel for the little guy in any lawsuit."<sup>39</sup> Obama's view is that "[e]mpathy, not justice, ought to be the mission of the federal courts, and the redistribution of wealth should be their mantra."<sup>40</sup> Which means, in turn, that

Obama's emphasis on empathy in essence requires the appointment of judges committed in advance to violating [their] oath. To the traditional view of justice as a blindfolded person weighing legal claims

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ing of which—the finding of truth—has been the goal, the central focus of the American legal system since its creation"); EISGRUBER, *supra* note 9, at 7–8 (attributing an approach much like this one to Sen. Charles Schumer).

37. See, e.g., Jess Bravin, *Barack Obama: The Present is Prologue*, WALL ST. J., Oct. 7, 2008, at A22 (quoting Theodore Olson, former Solicitor General of the United States) (claiming that President Obama "is looking for someone who would make judicial decisions based upon emotions and sympathy and picking the underdog, rather than applying the law"); Wendy E. Long, Op-Ed., *Opening of a Sorry Chapter*, WASH. TIMES, May 4, 2009, at A21 (deriding "empathy" as a "lawless standard of partiality"); Lithwick, *supra* note 5 (noting remarks of Ed Whelan, former law clerk to Justice Scalia, former principal Deputy Assistant Attorney General for the Office of Legal Counsel of the Justice Department, and former General Counsel to the Senate Judiciary Committee) (claiming that liberals "see[] no meaningful constraints on interpretive methodologies and look[] to the Supreme Court to pave the way to a progressive future by inventing a continuing series of new rights"); Jessie Weiser, *Define Empathy*, RELIGIOUS ACTION CENTER BLOG (May 21, 2009), [http://blogs.rj.org/rac/2009/05/21/define\\_empathy](http://blogs.rj.org/rac/2009/05/21/define_empathy) (quoting Wendy Long, former law clerk to Justice Thomas) ("Lady Justice doesn't have empathy for anyone. She rules strictly based upon the law and that's really the only way that our system can function properly under the Constitution."); Edward Whelan, *Obama's Constitution*, WEEKLY STANDARD (March 17, 2008), <http://www.weeklystandard.com/print/Content/Public/Articles/000/000/014/849oyckg.asp> ("No clearer prescription for lawless judicial activism [than President Obama's call for empathy] is possible"); *id.* ("So much for the judicial virtue of dispassion. So much for the craft of judging that is distinct from politics.").

38. For a good place to start for the view among some conservative law professors that liberals want judges to ignore the law, see generally Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631 (1993).

39. Steven G. Calabresi, Op-Ed., *Obama's "Redistribution" Constitution*, WALL ST. J., Oct. 28, 2008, at A17.

40. *Id.*

fairly on a scale, he wants to tear the blindfold off, so the judge can rule for the party he empathizes with most.<sup>41</sup>

In welcome contrast to these overblown fusillades, my colleague, Orin Kerr, has offered a significantly more sophisticated take on President Obama's call for empathic judges. In an extended blog post, Kerr suggests that, to understand what President Obama means by empathy, "we need to recognize the important but usually overlooked differences in how different people understand the role of ambiguity in judicial decisionmaking."<sup>42</sup> Kerr notes "that there is a sliding scale between cases where the relevant legal materials point to an absolute answer and cases where there is a tougher call to make," and he opines that, when it comes to cases at the latter end of the scale, "there are two different ways to deal with this kind of legal ambiguity."<sup>43</sup> The first "approach is to see legal ambiguity as cause for judicial weighing. This view sees the role of the judge as narrow."<sup>44</sup> On this view, the

judge must weigh the best legal arguments on one side and the best legal arguments for the other, and must pick the side that has the better of it, no matter how slight the advantage. If a case is 55/45, [then] there is a correct answer, because 55 is greater than 45.<sup>45</sup>

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41. *Id.*; see also Lino A. Graglia, *Birthright Citizenship for Children of Illegal Aliens: An Irrational Public Policy*, 14 TEX. REV. L. & POL. 1, 11 (2009) ("Justice Brennan never let law, fact, or logic stand in the way of a decision he wanted to reach. He agreed with President Barack Obama that the function of the court was to decide challenging cases on the basis of 'empathy.'" (footnote omitted)); Thomas B. Griffith, *Was Bork Right About Judges?*, 34 HARV. J.L. & PUB. POL'Y 157, 159–62 (2011) (arguing that many liberal intellectuals believe that judges should be results oriented rather than neutral); *id.* at 162–63 (suggesting that President Obama's call for empathy in judging "will lead a judge to side with the disadvantaged . . . in the face of law that requires a different outcome"); J. Harvie Wilkinson III, *Subjective Art; Objective Law*, 85 NOTRE DAME L. REV. 1663, 1664 (2010) (arguing that "evocations of judicial empathy" are indicative of judges who engage in "freewheeling adjudication" and give into temptation "to do justice as they feel it should be done rather than adhering to the strictures of text and structure"); *id.* at 1676 (arguing that empathy "has no place in judging"); *id.* at 1678 (arguing that "it requires a certainchutzpah . . . to assert that empathy . . . should be used by judges in reaching legal determinations"); John Yoo, *Empathy Triumphs Over Excellence*, ENTERPRISE BLOG (May 26, 2009, 1:03 PM), <http://blog.american.com/2009/05/empathy-triumphs-over-excellence/> (suggesting that then-Judge Sotomayor decided cases on the basis of her "empathy" rather than a correct reading of the Constitution").

42. Orin Kerr, *Legal Ambiguity, Empathy, and the Role of Judicial Power*, VOLOKH CONSPIRACY (May 13, 2009, 5:51 PM), <http://volokh.com/2009/05/13/legal-ambiguity-empathy-and-the-role-of-judicial-power/>.

43. *Id.*

44. *Id.*

45. *Id.*

The other approach, by contrast, “is to see legal ambiguity as cause for judicial empowerment.”<sup>46</sup> On this alternative view, the judge must “dutifully follow[] the law when the law is clear. But as soon as there is some ambiguity, and the law is unclear, then the judge is free to decide the case however he wants.”<sup>47</sup> There is no need “for a case to be truly 50/50” for the judge to follow her own preferences.<sup>48</sup>

So long as there is some appreciable legal ambiguity, there is no clear “correct” answer. Maybe 70/30 is enough, or maybe even 75/25 will do. Either way, the lack of a “correct” answer means that the judge can rule in a way that furthers whatever normative vision of the law that the judge happens to like.<sup>49</sup>

Kerr opines that President Obama’s statements about empathy indicate that he “is in the latter camp: He sees legal ambiguity as a cause for judicial empowerment. He believes that when there is legal ambiguity, a judge is then free to make the decision he wants.”<sup>50</sup> Thus,

Obama sees empathy as critical because he thinks that judges in close cases have a free choice as to which side should win. A substantial number of the close cases that reach the Supreme Court involve some sort of power dynamic—employer versus employee, plaintiff versus big company—and Obama wants the judge who will pick the side of the powerless.<sup>51</sup>

In its nuance, this interpretation is certainly more charitable to the President than other recent critiques of empathy in judging have typically been. Yet it still boils down to an assertion that, in some meaningful category of important cases (indeed, the most important and most difficult cases), judges of the sort favored by the President self-consciously choose politically desirable results over legally stronger arguments. In the hardest of cases, conservative judges do their best to follow the law regardless of their policy preferences, whereas empathic judges consciously ignore or override their own sense of the stronger legal argument in favor of their policy preferences.<sup>52</sup>

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46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. In fairness to Kerr, he goes out of his way to point out that this “view of the judicial power isn’t necessarily conservative or liberal; it is very much the view of Richard Posner, who envisions that position as a ‘realist’ and ‘pragmatist’ view.” *Id.*

If even Orin Kerr—as thoughtful and fair-minded a conservative public intellectual as they come—thinks that this is what liberals are looking for in an empathic judge, then liberals need to do a much better job of explaining themselves.

### III. THE NATURE OF EMPATHY

In order to defend empathy, we must first define it. We could easily get bogged down at this first step, for the meaning of “empathy” is surprisingly elusive. The word is relatively new to the English language, and for many years the science and social science literature has struggled to agree upon a definition.<sup>53</sup> But for our purposes, the dictionary definition should do fine.<sup>54</sup> Empathy is “the action of understanding, being aware of, being sensitive to, and vicariously experiencing the feelings, thoughts, and experience of another of either the past or present without having the feelings, thoughts, and experience fully communicated in an objectively explicit manner; *also*: the capacity for this.”<sup>55</sup>

That is to say, empathy involves the cognitive skill of perspective taking—the ability to see a situation from someone else’s perspective—combined with the emotional capacity to understand and feel that person’s emotions in that situation.<sup>56</sup>

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53. See, e.g., MICHAEL E. MORRELL, *EMPATHY AND DEMOCRACY: FEELING, THINKING, AND DELIBERATION* 39–66 (2010); Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 CARDOZO L. REV. DE NOVO 133, 134 (noting that “empathy is a term with no fixed meaning”); Justin D’Arms, *Empathy and Evaluative Inquiry*, 74 CHI.-KENT L. REV. 1467, 1477 (2000) (“Though ‘empathy’ is a relatively recent term in English, it has already become ambiguous.”); Darrell A.H. Miller, *Iqbal and Empathy*, 78 UMKC L. REV. 999, 1009 (2010) (noting that scholars have used the term “empathy” to denote a number of different concepts); Bert S. Moore, *The Origins and Development of Empathy*, 14 MOTIVATION & EMOTION 75, 76 (1990); Frederique de Vignemont & Tania Singer, *The Empathic Brain: How, When and Why?*, 10 TRENDS COGNITIVE SCI. 435, 435 (2006) (“There are probably nearly as many definitions of empathy as people working on the topic.”); Lauren Wispé, *History of the Concept of Empathy*, in *EMPATHY AND ITS DEVELOPMENT* 17, 17–37 (Nancy Eisenberg & Janet Strayer eds., 1987).

54. Then-Senator (and presidential candidate) Obama once wrote in a letter to a child, “If you don’t already know what it means, I want you to look up the word ‘empathy’ in the dictionary. I believe we don’t have enough empathy in our world today, and it is up to your generation to change that.” Doreen Yu, *Pinay Girl Writes to Obama, Gets Response*, PHILIPPINE STAR (Nov. 7, 2008, 12:00 AM), <http://www.philstar.com/article.aspx?articleid=413244>.

55. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 408 (11th ed. 2003).

56. The psychology literature emphasizes that true empathy goes beyond perspective taking; there is a necessary component of emotional engagement. See, e.g., Frans B.M. de Waal, *Putting the Altruism Back into Altruism: The*

Empathy does not, then, dictate or even imply a propensity to act in any particular way, or to favor any particular group. “Empathy is first and foremost a capacity. Strictly speaking, it is value-free. . . . What one does with the insight provided by empathic understanding” is a separate inquiry from whether or not one is capable of empathizing.<sup>57</sup> By the same token, empathy is manifestly not the same thing as sympathy. To sympathize is to feel *for* someone; to empathize is to feel *with* them.<sup>58</sup> “[W]hen you feel sympathy for another with a problem, you do not actually experience emotions parallel to their’s [sic]; instead, you experience different emotions that are associated with concern or sorrow for another.”<sup>59</sup> To empathize with others, by contrast, is not to feel sorry for them or to feel a need to help them; it is simply to understand things from their perspective and to be able to sense what they are feeling.<sup>60</sup> Virtually everyone experiences empathy; humans are hard-wired to em-

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*Evolution of Empathy*, 59 ANN. REV. PSYCHOL. 279, 285 (2008) (finding perspective-taking is only empathy in combination with emotional engagement); Nancy Eisenberg & Janet Strayer, *Critical Issues in the Study of Empathy*, in EMPATHY AND ITS DEVELOPMENT, *supra* note 53, at 3, 5 (noting empathy requires sharing perceived emotions or “feeling with” another). “Empathy . . . requires not only that you can *identify* another person’s feelings and thoughts, but that you *respond* to these with an appropriate emotion too.” SIMON BARON-COHEN, ZERO DEGREES OF EMPATHY 11 (2011).

57. Michael Franz Basch, *Empathic Understanding: A Review of the Concept and Some Theoretical Considerations*, 31 J. AM. PSYCHOANALYTIC ASS’N 101, 119, 123 (1983).

58. See, e.g., Jean Decety & Kalina J. Michalska, *Neurodevelopmental Changes in the Circuits Underlying Empathy and Sympathy from Childhood to Adulthood*, 13 DEVELOPMENTAL SCI. 886, 886 (2010) (noting that it is important to “distinguish between empathy (the ability to appreciate the emotions and feelings of others with a minimal distinction between self and other) and sympathy (feelings of concern about the welfare of others)”; Darrick Jolliffe & David P. Farrington, *Development and Validation of the Basic Empathy Scale*, 29 J. ADOLESCENCE 589, 591 (2006) (noting that sympathy and empathy “are distinct and separate constructs” because empathy involves “emotion congruence” whereas “sympathy involves the appraisal of how one feels about the emotions of another”).

59. Nadine R. Richendoller & James B. Weaver III, *Exploring the Links Between Personality and Empathic Response Style*, 17 PERSONALITY & INDIVIDUAL DIFFERENCES 303, 304 (1994).

60. See Vignemont & Singer, *supra* note 53; cf. Bandes, *supra* note 53, at 136 (“Empathy is a capacity, not an emotion. It differs from sympathy or compassion . . . . Empathy does not require, or necessarily lead to, sympathy.”); D’Arms, *supra* note 53, at 1479 (noting that “sympathy is an emotion, empathy is a way of acquiring an emotion”).

pathize.<sup>61</sup> Indeed, the complete inability to do so is the defining characteristic of a psychopath.<sup>62</sup>

#### IV. THE IMPORTANCE OF EMPATHY IN JUDGING

Judge Richard Posner has suggested that, when it comes to judging, “the internal perspective—the putting oneself in the other person’s shoes—that is achieved by the exercise of empathetic imagination lacks normative significance.”<sup>63</sup> It seems that a great many lawyers, judges, and legal academics would tend to agree. After all, the “popular image of lawyers is that we are committed to formal rationality. We are trained to cabin ‘empathic’ responses and remain steadfast in our commitment to legal principles despite emotional dissonance.”<sup>64</sup> The object of this Article is to establish that, when properly understood, empathy is an essential tool of an effective judge. The argument in support of that assertion unfolds in four steps that cut progressively deeper into both the nature of judging and the nature of empathy.

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61. See de Waal, *supra* note 56; Robert Plutchik, *Evolutionary Bases of Empathy*, in *EMPATHY AND ITS DEVELOPMENT*, *supra* note 53, at 38, 38–46 (discussing the use of empathy in the evolution and survival of animals and humans); Stephanie D. Preston & Frans B.M. de Waal, *Empathy: Its Ultimate and Proximate Bases*, 25 *BEHAV. & BRAIN SCI.* 1, 9–14 (2002).

62. See ROBERT L. KATZ, *EMPATHY: ITS NATURE AND USES* 58 (1963); Tania Singer, *The Neuronal Basis of Empathy and Fairness*, in *EMPATHY AND FAIRNESS* 20, 20 (Greg Bock & Jamie Goode eds., 2007) (noting a lack of empathy defines psychopaths who can hurt others guilt-free). Simon Baron-Cohen explains that persons with zero empathy tend to fall into one of two categories. The first includes those with autism or Asperger’s syndrome; they have no empathy, but they tend to follow the law and behave “super-morally” as a product of their “systemising” nature. See BARON-COHEN, *supra* note 56, at 65–84. The second includes those with pathological conditions like borderline personality disorder, antisocial personality disorder, and narcissistic personality disorder; they are likely to harm others and are utterly unmoved by the pain and misery that they visit upon others. See *id.* at 29–64.

63. RICHARD A. POSNER, *OVERCOMING LAW* 381 (1995). *But see* POSNER, *supra* note 16, at 117 (listing “empathy” as component of judgment, to which judges must turn when the law is not clear).

64. Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 *MICH. L. REV.* 2099, 2103 (1989).

A. THE INITIAL CUT: EMPATHY IN JUDGING MEANS SEEING (AND UNDERSTANDING THE EFFECT OF) THE ISSUE FROM ALL SIDES

President Obama has never spelled out in detail the role that he intends empathy to play in judicial decision making.<sup>65</sup> Indeed, some feel that he has sent conflicting signals in this regard.<sup>66</sup> But, it is nonetheless possible to distill from his statements a basic vision of judicial empathy.<sup>67</sup>

In explaining his vote against Chief Justice Roberts, then-Senator Obama declared that “adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court, so that both a Scalia and a Ginsburg will arrive at the same place most of the time on those 95 percent of the cases.”<sup>68</sup> But in the other five percent,

adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon. That last mile can only be determined on the basis of one’s deepest values, one’s core concerns, one’s broader perspectives on how the world works, and the depth and breadth of one’s empathy. . . .

In those circumstances, your decisions about whether affirmative action is an appropriate response to the history of discrimination in this country or whether a general right of privacy encompasses a more specific right of women to control their reproductive decisions or whether the commerce clause empowers Congress to speak on those issues of broad national concern that may be only tangentially related

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65. See Rollert, *supra* note 4, at 92–93 (arguing that no one at the Sotomayor confirmation hearings really knew what President Obama meant when he said that empathy is an essential ingredient in judicial decision making).

66. See Kathryn Abrams, *Empathy and Experience in the Sotomayor Hearings*, 36 OHIO N.U. L. REV. 263, 266 (2010) (noting that some of President Obama’s statements about empathy “included a taxonomy of the kinds of positions with which a judge should be able to empathize,” but other statements indicated that “Obama’s ideal of judicial empathy seems more comprehensive in its reach and less specific in its targets”); *id.* at 275 (“President Obama’s discussions of empathy, in fact, fluctuated between those that highlighted understanding of particular groups and those that highlighted a posture that sought to understand the concrete life circumstances of the many kinds of litigants who come before the Supreme Court.”).

67. A tremendous resource in this regard is a website maintained by The Center for Building a Culture of Empathy that purports to collect all of President Obama’s statements on empathy, in both text and video form. See CENTER FOR BUILDING CULTURE EMPATHY, <http://cultureofempathy.com/Obama/VideoClips.htm> (last visited Feb. 28, 2012) [hereinafter CULTURE OF EMPATHY].

68. 151 CONG. REC. S10,366 (daily ed. Sept. 22, 2005) (statement of Sen. Obama).

to what is easily defined as interstate commerce, whether a person who is disabled has the right to be accommodated so they can work alongside those who are nondisabled—in those difficult cases, the critical ingredient is supplied by what is in the judge’s heart.<sup>69</sup>

In fairness, these remarks are perhaps naturally read to support Professor Kerr’s view that, in the President’s mind, selective empathy for the downtrodden should be the decisive factor in cases where the law is not clear.<sup>70</sup> And, independent of President Obama, some liberals who have called for empathy in judging seem to have endorsed that very sentiment.<sup>71</sup>

But one can call for empathy in judging without making such a radical claim, and I believe that that is what President Obama meant to do.<sup>72</sup> Some years later, in explaining the criteria that would guide his search for a replacement for Justice Souter, President Obama declared:

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 a[t] just decisions and outcomes.<sup>73</sup>

There is nothing in this statement that implies that the President was searching for a judge who empathizes only with groups favored by the political left. The President appeared to reference not only the poor (“whether they can make a living and care for their families”) and immigrants and minorities (“whether they feel . . . welcome in their own nation”), but also

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69. *Id.*

70. See also Carrie Dann, *Obama on Judges, Supreme Court*, FIRST READ (July 17, 2007, 7:21 PM) [http://firstread.msnbc.msn.com/\\_news/2007/07/17/4439758-obama-on-judges-supreme-court](http://firstread.msnbc.msn.com/_news/2007/07/17/4439758-obama-on-judges-supreme-court) (quoting remarks made by then-Senator Obama at a July 17, 2007, Planned Parenthood conference) (“We need somebody who’s got the heart, the empathy, to recognize what it’s like to be a young teenage mom. The empathy to understand what it’s like to be poor, or African-American, or gay, or disabled, or old. And that’s the criteria by which I’m going to be selecting my judges.”).

71. See, e.g., Teresa Bruce, *The Empathy Principle*, 6 LAW & SEXUALITY REV. LESBIAN & GAY LEGAL ISSUES 109, 111–13 (1996); see Massaro, *supra* note 64, at 2113 (arguing that “the empathy discourse implies a political and ethical agenda, which involves making choices among competing values or sets of feeling” and “represents a hope that certain specific, different and previously disenfranchised voices . . . will be heard, and will prevail”).

72. Cf. Kenji Yoshino, *On Empathy in Judgment (Measure for Measure)*, 57 CLEV. ST. L. REV. 683, 700 (2009) (“The President has never advocated a model of pure empathy devoid of law.”).

73. Press Briefing by Press Secretary Robert Gibbs, *supra* note 8.

actual and potential crime victims (“whether they feel safe in their homes”)—a group that in recent years tends to draw more empathy from conservatives than from liberals.<sup>74</sup> Indeed, several years earlier, President Obama had written that “empathy . . . calls us all to task, the conservative and the liberal, the powerful and the powerless, the oppressed and the oppressor. We are all shaken out of our complacency. We are all forced beyond our limited vision.”<sup>75</sup> And in an interview with Oprah Winfrey, he had said that “[e]mpathy doesn’t just extend to cute little kids. You have to have empathy when you’re talking to some guy who doesn’t like black people.”<sup>76</sup>

Recall that empathy is not sympathy<sup>77</sup>—a point that President Obama himself has made repeatedly.<sup>78</sup> Empathy is not compassion for the oppressed, or for anyone else, for that matter. Nor is it the capacity to feel the emotions of only the down-trodden. It is, rather, the capacity to understand the perspective and feel the emotions of others—all others. President Obama has reiterated many times that he understands the “basic idea of empathy” to be exactly that: the ability to “imagine standing in [others’] shoes, imagine looking through their

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74. See Lynne N. Henderson, *The Wrongs of Victim’s Rights*, 37 STAN. L. REV. 937, 942–53 (1985) (discussing the role of victims in American law).

75. BARACK OBAMA, *THE AUDACITY OF HOPE* 68 (2006).

76. *Oprah Talks to Barack Obama*, O, OPRAH MAG., Nov. 2004, at 248, available at <http://www.oprah.com/world/Oprah-Winfrey-Interviews-Barack-Obama/9>. Thus, President Obama insists not only on “depth . . . of . . . empathy” but also on “breadth of . . . empathy.” 151 CONG. REC. S10,366 (daily ed. Sept. 22, 2005) (statement of Sen. Obama); cf. President Barack Obama, Remarks at Student Roundtable, Istanbul, Turkey (Apr. 7, 2009) (transcript available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-Of-President-Barack-Obama-At-Student-Roundtable-In-Istanbul](http://www.whitehouse.gov/the_press_office/Remarks-Of-President-Barack-Obama-At-Student-Roundtable-In-Istanbul)) (“In the Muslim world, this notion that somehow everything is the fault of the Israelis lacks balance—because there’s two sides to every question. That doesn’t mean that sometimes one side has done something wrong and should not be condemned. But it does mean there’s always two sides to an issue. I say the same thing to my Jewish friends, which is you have to see the perspective of the Palestinians. Learning to stand in somebody else’s shoes to see through their eyes, that’s how peace begins.”); *Newshour with Jim Leher: President Barack Obama Is Interviewed* (PBS television broadcast Dec. 23, 2009) (“[O]ne of the things that I think Democrats and Republicans have to constantly do is try to put themselves in the other person’s shoes.”).

77. See *supra* Part III.

78. See, e.g., OBAMA, *supra* note 75, at 66 (“[E]mpathy . . . is at the heart of my moral code, and it is how I understand the Golden Rule—not simply as a call to sympathy or charity, but as something more demanding, a call to stand in somebody else’s shoes and see through their eyes.”); Barack Obama, *Here’s What It Takes to be a ‘Full-grown’ Man*, CHI. TRIB., June 22, 2005, at 27 (quoting Obama’s Father’s Day remarks in 2005) (“Not sympathy, empathy.”).

eyes.”<sup>79</sup> A judge who exercises the ability to empathize will surely do so with the poor, the weak, and the little guy. But she will also empathize with the rich, the powerful, and the big guy. An empathic judge will understand the perspective of both the innocent man who was mistakenly detained by the police and the police officer who had to make a snap judgment when lives appeared to be at risk. She will understand the perspective of both the aggrieved insured who was denied coverage for her loss and the skeptical claims adjuster who was concerned with avoiding fraud and containing costs. She will understand the perspective of both the dying patient who was misdiagnosed and the doctor who was rightly concerned with the costs and risks of ordering additional tests.

Empathy in judging centers on an ability to truly understand the human dimension of the case—the effects of the judge’s ruling on all of the people who will be affected by it. President Obama’s point is not that judges should ignore law in favor of sympathy, but rather that the ability to render justice necessitates not only an ability to grapple with complex legal theories and dense technical footnotes, but also an ability to “understand[] and identify[] with people’s”—*all* people’s—“hopes and struggles.”<sup>80</sup>

#### B. THE SECOND CUT: THE PERVASIVE NECESSITY TO UNDERSTAND THE PERSPECTIVES OF ALL SIDES IN JUDGING

Why is that so? Why must a judge be able to understand and identify with people’s hopes and struggles in order to accurately dispense justice? The answer to that question circles back to the bankruptcy of the popular judge-as-umpire analo-

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79. CULTURE OF EMPATHY, *supra* note 67 (scroll down to “2008-08-16-Barack Obama Promotes Empathy: Saddleback Civil Forum Presidency”) (quoting then-Senator Obama’s remarks from an election forum on August 16, 2008).

80. Press Briefing by Press Secretary Robert Gibbs, *supra* note 8; see Douglas W. Kmiec, *The Case for Empathy*, AMERICA MAG. (May 11, 2009), [http://www.americamagazine.org/content/article.cfm?article\\_id=11649](http://www.americamagazine.org/content/article.cfm?article_id=11649) (noting that “one can be empathetic toward all sides of a dispute”); Dahlia Lithwick, *Once More, Without Feeling*, SLATE (May 11, 2009, 7:15 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2009/05/once\\_more\\_without\\_feeling.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2009/05/once_more_without_feeling.html) (“Empathy in a judge does not mean stopping midtrial to tenderly clutch the defendant to your heart and weep. It doesn’t mean reflexively giving one class of people an advantage over another because their lives are sad or difficult. When the president talks about empathy, he talks not of legal outcomes but of an intellectual and ethical process: the ability to think about the law from more than one perspective.”).

gy.<sup>81</sup> If the law really were objectively determinate in every case, and if judging really were a mechanical exercise, then empathy would have very little role to play in good judging.<sup>82</sup> A computer would be the perfect judge, and computers cannot empathize.

But the law is not mechanical; judging requires judgment. And judgment requires empathy. To understand why, we must explore the nature of the legal doctrine that judges are called upon to apply.

Susan Bandes, a pioneer in thinking about empathy and the law, has opined that a “judge uses empathy as a tool toward understanding conflicting claims. Empathy assists the judge in understanding the litigants’ perspectives. It does not help resolve the legal issue of which litigant ought to prevail.”<sup>83</sup> I disagree. Empathy *does* help resolve the legal issue of which litigant ought to prevail, because the legal question at issue often cannot be answered without understanding the way in which the litigants will be impacted by the decision.

This basic notion is embedded in the very foundation of our legal system. The entire common law system of judging is premised on the assumption that “making law in the context of deciding particular cases produces lawmaking superior to the methods that ignore the importance of real litigants exemplifying the issues the law must resolve.”<sup>84</sup> When it comes to the federal courts in particular, one of the “implicit policies embodied in Article III”<sup>85</sup> is that requiring a genuine case or controversy “tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.”<sup>86</sup> That

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81. See *supra* Part I.

82. See Geoffrey R. Stone, Op-Ed., *Our Fill-in-the-Blank Constitution*, N.Y. TIMES, May 14, 2010, at A27 (“If all judges did was umpire, then judicial empathy would be irrelevant.”).

83. Bandes, *supra* note 53, at 137.

84. Schauer, *supra* note 17, at 883. Indeed, the common law system is centered around the concept of reasoning by analogy, and a judge cannot determine whether one litigant or injury is sufficiently like another without being able to empathize with each litigant. See Robin West, *The Anti-Empathic Turn*, NOMOS (forthcoming 2011) (manuscript at 2–4), available at <http://ssrn.com/abstract=1885079>.

85. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 96 (1968)).

86. *Id.*

is to say, Article III's case or controversy requirement—and the justiciability doctrines of standing, mootness, ripeness, and the rule against advisory opinions that stem from it—are grounded in substantial part in the notion that real-world context matters. Judges should not decide legal and constitutional issues in the abstract because they will arrive at better answers if they have a genuine appreciation of the ways in which the law affects real people.

Indeed, across the broad spectrum of constitutional law (and, more generally still, *all* law), the legal doctrine that has been built upon this foundation *requires* judges to gain an empathic appreciation of the case from the perspective of all of the litigants.

### 1. Constitutional Law

Let us begin with an obvious recent example.<sup>87</sup> In *Safford Unified School District v. Redding*, the Supreme Court was called upon to determine “whether a 13-year-old student’s Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school.”<sup>88</sup> Under established Fourth Amendment doctrine, determining the constitutionality of searches by school officials requires “a careful balancing of governmental and private interests”; a school search “will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”<sup>89</sup> Thus, in order to resolve the constitutional issue, the Justices had to ascertain the extent to which the search was “intrusive” to the student. To do that, they needed to be able to empathize with her—to understand how the search would have felt to her and the impact that it would have had upon her. In an interview, Justice Ginsburg said that she had been worried that her all-male colleagues would not be up to the task. “They have never been a 13-year-old girl,” she lamented. “It’s a very sensitive age for a

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87. See Bandes, *supra* note 53, at 143–44 (discussing this example).

88. 129 S. Ct. 2633, 2637 (2009).

89. *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985).

girl. I didn't think that my colleagues, some of them, quite understood."<sup>90</sup>

Resolving the Fourth Amendment issue also required the Justices to empathize with the school administrators who ordered the search. One cannot, after all, "balanc[e] governmental and private interests"<sup>91</sup> without a full appreciation of the extent of the government's interest. Thus, at oral argument, Justice David H. Souter tried to see the case from the perspective of the school principal:

The principal says, I know as a matter of reliable fact that one student got sick, violently sick, within the past week or so on some pill; we don't know exactly what it was. We also know within a reasonable period of time from where we are now that there have been kids who died from ingesting dangerous drugs. I've got suspicion that some drug is on this kid's person. My thought process is I would rather have the kid embarrassed by a strip search . . . than to have some other kids dead because the stuff is distributed at lunchtime and things go awry. . . . Is that thought process, that reasoning, the basis for a . . . reasonable strip search?<sup>92</sup>

Only after seeking to fully understand the impact of the search, or of a decision not to search, on all of the relevant parties, could the Court determine whether the search was constitutional.

Accordingly, this was not a case of the Justices choosing empathy over the law. It was instead a case of the Justices using the essential tool of empathy in order to determine the proper application of the law to the facts at hand. The Court could not possibly have done a good job in deciding which party should win under the law without first seeking to understand the perspective of each party. Failure to do so—to fully and successfully empathize with either the student or the administrator—could have resulted in a bad decision. To understand and appreciate the student's interest, but not the principal's, or vice versa, would be to give insufficient weight to one side of the scale, which would improperly tip the balance in favor of one party or the other, quite possibly in a dispositive manner.

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90. Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY, (Oct. 5, 2009, 11:16 AM), [http://www.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg\\_N.htm](http://www.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg_N.htm).

91. *T.L.O.*, 469 U.S. at 341.

92. Transcript of Oral Argument at 48–49, *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633 (2009) (No. 08-479), 2009 WL 1064200 (question of Justice Souter).

This same point can be made about virtually any Fourth Amendment case, as the Fourth Amendment necessitates this sort of empathic balancing.<sup>93</sup>

The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.<sup>94</sup>

In addition, to determine whether a "search" has occurred, the court must determine whether "the government violate[d] a subjective expectation of privacy that society recognizes as reasonable."<sup>95</sup> To determine whether a "seizure" has occurred, the court must determine whether, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."<sup>96</sup> To determine whether a police officer had a "reasonable suspicion" sufficient to justify a *Terry* stop, the court must determine whether the officer had a "reasonable fear for his own or others' safety."<sup>97</sup> And so on. None of these determinations can sensibly be made without an ability to empathize with, and understand the thought processes of both, the police officer and the accused. To take just one example, it is impossible to determine whether a passenger should have felt entitled to refuse to cooperate with police officers who entered the bus on which he was riding, stationed officers on each end of the bus, and then walked down the aisle searching passengers and luggage,<sup>98</sup> without attempting to put oneself into the shoes of the passenger.

Indeed, in the just-decided case of *J.D.B. v. North Carolina*,<sup>99</sup> the need for empathy in Fourth Amendment decision making took center stage. After noting that a judge, in deter-

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93. See Wardlaw, *supra* note 3, at 1649 (noting protections under the Fourth Amendment would be altered without judicial empathy); Susan Bandes, *Why is Empathy Controversial? Or Liberal?*, BALKINIZATION (May 25, 2009, 9:48 AM), <http://balkin.blogspot.com/2009/05/why-is-empathy-controversial-or-liberal.html> ("To resolve the Fourth Amendment issue, the Court must determine how intrusive the search was, how important the government interest was, and whether the government adopted a reasonable means of addressing its concern. To do that, it first has to understand what's at stake for all the litigants. That's where empathy plays a role.").

94. *United States v. Knights*, 534 U.S. 112, 118–19 (2001) (internal quotation marks omitted).

95. *Kyllo v. United States*, 533 U.S. 27, 33 (2001).

96. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

97. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

98. See *United States v. Drayton*, 536 U.S. 194, 194 (2002).

99. 131 S. Ct. 2394 (2011).

mining whether the defendant was in custody for purposes of *Miranda v. Arizona*,<sup>100</sup> must consider whether a reasonable person in the suspect's shoes would have felt free to leave,<sup>101</sup> the Court held that the judge must take the suspect's age into account in making that determination.<sup>102</sup> In his dissent, Justice Samuel A. Alito acknowledged that the Court's holding requires judges to "attempt to put themselves in the shoes of the average 16-year-old, or 15-year-old, or 13-year-old, as the case may be."<sup>103</sup> He lamented the difficulty of "a 60-year-old judge attempting to make a custody determination through the eyes of a hypothetical, average 15-year-old. Forty-five years of personal experience and societal change separate this judge from the days when he or she was 15 years old. And this judge may or may not have been an average 15-year-old."<sup>104</sup>

The Fourth Amendment is surely the most obvious example of the need for this type of judicial empathy, but there is in fact nothing unique about the Fourth Amendment in this regard. As Chemerinsky reminds us, "Reasonableness issues arise in countless areas of constitutional law."<sup>105</sup>

Consider the law of abortion rights. Under *Planned Parenthood v. Casey*, regulations of pre-viability abortions may not impose an "undue burden" on a woman's right to choose an abortion.<sup>106</sup> *Casey*, in short, struck a balance. The balance was central to its holding.<sup>107</sup> A judge cannot strike that balance in any given abortion case without empathizing with the woman, trying to understand, from her perspective, the extent to which the regulation burdens her right to choose. A judge must "assess the effects of waiting periods, counseling mandates, and laws regulating the practice of abortion providers from a contextualized, fact-sensitive perspective that incorporates the real life circumstances of the girls and women actually impacted by these laws."<sup>108</sup> The judge must empathize with the woman's hopes, concerns, and fears. Thus, for instance, the Court in *Casey* itself struck down a spousal-notification requirement after

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100. 384 U.S. 436 (1966).

101. See *J.D.B.*, 131 S. Ct. at 2402.

102. See *id.* at 2406.

103. *Id.* at 2416 (Alito, J., dissenting).

104. *Id.*

105. Chemerinsky, *supra* note 17, at 1070.

106. 505 U.S. 833, 877 (1992).

107. *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007).

108. Linda J. Wharton, *Roe at Thirty-Six and Beyond*, 15 WM. & MARY J. WOMEN & L., 469, 488 (2009).

finding that many women “fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends.”<sup>109</sup> “We must not,” concluded the Court, “blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.”<sup>110</sup>

These sorts of “[b]alancing tests pervade constitutional law,”<sup>111</sup> from the Dormant Commerce Clause test that a non-discriminatory state regulation “will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits,”<sup>112</sup> to the executive privilege mandate for judges to “weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President’s responsibilities against the inroads of such a privilege on the fair administration of criminal justice.”<sup>113</sup> Eighth Amendment cruel and unusual punishment claims turn on a balancing of the severity of the offense with the severity of the sentence to determine whether the sentence imposed on the offender is disproportionate to the harm inflicted on society<sup>114</sup>—an inquiry that generally necessitates em-

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109. *Casey*, 505 U.S. at 893.

110. *Id.* at 894.

111. Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 81 (2006); see also T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943–45 (1987) (arguing that “balancing” as a “form of constitutional reasoning” has “become widespread, if not dominant, over the last four decades” and that “balancing has transformed constitutional adjudication and constitutional law”); Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 963 (1998) (noting that “constitutional law today is dominated by the phenomenon of ‘balancing’”); Bradford R. Clark, *Translating Federalism: A Structural Approach*, 66 GEO. WASH. L. REV. 1161, 1179 (1998) (noting the “innumerable ‘balancing’ tests [used] throughout constitutional law”). In the Supreme Court’s own words, “[t]he fact is that, regardless of the terminology used, the precise content of most of the Constitution’s civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable.” *Anderson v. Creighton*, 483 U.S. 635, 643–44 (1987).

112. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

113. *United States v. Nixon*, 418 U.S. 683, 711–12 (1974).

114. See *Solem v. Helm*, 463 U.S. 277, 286–90 (1983) (holding that a criminal sentence must be proportionate to the crime for which a defendant is convicted).

pathic understanding of the burden imposed on the offender,<sup>115</sup> and sometimes of the harm imposed upon the victim as well.<sup>116</sup> First Amendment freedom of expressive association claims require the Court to “balance the strength of the associational interest in resisting governmental interference with the state’s justification for the interference,” which among other factors, “require[s] an assessment of . . . the strength of the associational interests asserted and their importance to the plaintiff.”<sup>117</sup> The

question of whether speech of a government employee is constitutionally protected expression necessarily entails striking a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.<sup>118</sup>

Government restrictions on speech in a limited public forum must be “reasonable,”<sup>119</sup> as must government actions that interfere with the obligation of contracts.<sup>120</sup> Public school officials can restrict student expression if “their actions are reasonably related to legitimate pedagogical concerns,”<sup>121</sup> and time, place, and manner and other content-neutral restrictions on speech are unconstitutional if they “unreasonably limit alternative avenues of communication.”<sup>122</sup> Sixth Amendment in-

115. *See, e.g.,* *Weems v. United States*, 217 U.S. 349, 366 (1910) (“We can now give graphic description of Weems’s sentence . . . . No circumstance of degradation is omitted. It may be that even the cruelty of pain is not omitted. He must bear a chain night and day. He is condemned to painful as well as hard labor.”).

116. *See, e.g.,* *Payne v. Tennessee*, 501 U.S. 808, 814–15 (1991) (allowing the jury to consider, in a case in which defendant killed a mother and her daughter, testimony from the victim’s mother regarding the words of the victim’s three-year-old son who survived the attack: “He cries for his mom. He doesn’t seem to understand why she doesn’t come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I’m worried about my Lacie.”).

117. *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136, 143 (2d Cir. 2007).

118. *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 284 (1977) (citation and internal quotation marks omitted).

119. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (explaining that government entities have a limited ability to regulate private speech in public forums).

120. *See Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 438 (1934) (explaining that legislative action which affects contracts must address a legitimate end, and the action must be “reasonable and appropriate to that end”).

121. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

122. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

effectiveness of counsel cases turn on whether “counsel’s representation fell below an objective standard of reasonableness.”<sup>123</sup> Prisoner suits challenging the deprivation of the rights turn on whether the prison regulation is reasonable in light of “legitimate penological interests.”<sup>124</sup> The Due Process Clause necessitates “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>125</sup> Multifactor tests like the *International Shoe*<sup>126</sup> test for personal jurisdiction require a judge to ascertain and balance, among other factors, “the burden on the defendant” and “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies.”<sup>127</sup> The notorious balancing test for procedural due process claims turns on “the extent to which [the recipient of government benefits] may be condemned to suffer grievous loss, and depends upon whether the recipient’s interest in avoiding that loss outweighs the governmental interest in summary adjudication,”<sup>128</sup> a determination that of course necessitates an empathic understanding of the grievousness of the beneficiary’s suffering.

Beyond these and other explicit balancing tests, most of constitutional doctrine turns on the application of the various levels of scrutiny,<sup>129</sup> which are themselves in many respects “just a tool for arranging the weights in constitutional balancing.”<sup>130</sup> The use of that tool often requires empathy, at both the ends and the means steps of the process.

Evaluation of whether the State’s interest is “compelling” or “important” within the meaning of strict or intermediate scrutiny often necessitates judicial appreciation of the feelings of others. For instance, the Supreme Court has found that diversity in higher education is a compelling state interest in

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123. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

124. *See Turner v. Safley*, 482 U.S. 78, 89 (1987).

125. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

126. *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

127. *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

128. *Goldberg v. Kelly*, 397 U.S. 254, 262–63 (1970) (citation and internal quotation marks omitted).

129. *See* ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 542 (3d ed. 2006) (“The levels of scrutiny are . . . extremely important in almost all areas involving individual rights and equal protection.”).

130. Chemerinsky, *supra* note 17, at 1071; *see also* Aleinikoff, *supra* note 111, at 946 (noting that the inquiry into a “compelling” or “important” state interest involves balancing); Bhagwat, *supra* note 111, at 963–65 (explaining how the tiers of scrutiny, in practice, lead courts to engage in balancing).

part because obtaining a “critical mass” of minority students ensures that “underrepresented minority students do not feel isolated or like spokespersons for their race.”<sup>131</sup>

Likewise, evaluation of whether the law is “narrowly tailored” or “substantially related” to the State’s interest often requires an empathic understanding of the cost that the regulation imposes on individuals. Thus, for instance, Justice Anthony Kennedy’s conclusion that school districts must pursue their compelling interests in avoiding racial isolation and achieving classroom diversity in a way that does not make school assignments turn on crude racial labels, because “[t]o be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society.”<sup>132</sup>

Indeed, the Supreme Court’s decision in *Brown v. Board of Education*<sup>133</sup> was explicitly grounded in empathy for black children.<sup>134</sup> Only by putting themselves in the shoes of the children, and understanding segregation from the emotional perspective of the children, could the Justices conclude that to “separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>135</sup>

Even when it purports to be applying only rational basis review, the Court at times engages in empathy to determine whether the law is rationally related to a legitimate government interest. Usually, that empathy is with the legislators or government officials who cannot realistically be expected always to draw perfect lines in the course of doling out governmental benefits or burdens.<sup>136</sup> Sometimes, the empathy is with

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131. *Grutter v. Bollinger*, 539 U.S. 306, 318–19 (2003).

132. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

133. 347 U.S. 483 (1954).

134. See Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1593–1609 (1987) (discussing *Brown v. Board of Education* and empathic understanding).

135. *Brown*, 347 U.S. at 494.

136. See, e.g., *FCC v. Beach Commc’ns., Inc.*, 508 U.S. 307, 315–16 (1993) (“These restraints on judicial review have added force where the legislature must necessarily engage in a process of line-drawing. Defining the class of persons subject to a regulatory requirement—much like classifying governmental beneficiaries—inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, considera-

those who are harmed by the law. Thus, in *Lawrence v. Texas*, the Court found “no legitimate state interest which can justify . . . [the State’s] intrusion into the personal and private life of the individual” to the extent of denying gays and lesbians the right to sexual intimacy.<sup>137</sup> Such a denial strips gays and lesbians of “their dignity as free persons”<sup>138</sup> and “demean[s] their existence.”<sup>139</sup> To reach that conclusion, the Court empathized with gays and lesbians enough to understand their sexual encounters from their emotional perspective, rather than the Justices’ own.<sup>140</sup> “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”<sup>141</sup>

Of course, some realms of constitutional doctrine are dominated by doctrinal tests other than the tiers of scrutiny, but those tests also frequently call for judicial empathy.<sup>142</sup> Among

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tion. . . . Congress had to draw the line somewhere . . .” (internal citations and internal quotation marks omitted); *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) (“Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.” (citations omitted)).

137. 539 U.S. 558, at 578 (2003).

138. *Id.* at 567.

139. *Id.* at 578.

140. *Cf.* William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011, 1031 (2005) (arguing that earlier Court rulings on gay issues indicated that the Justices found gay sex to be “disgusting”).

141. *Lawrence*, 539 U.S. at 567.

142. For instance, the shocks-the-conscience test that governs substantive due process violations by executive officials requires judges to understand the official’s perspective on the events in question. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 855 (1998) (“While prudence would have repressed the reaction, the officer’s instinct was to do his job as a law enforcement officer, not to induce Willard’s lawlessness, or to terrorize, cause harm, or kill. Prudence, that is, was subject to countervailing enforcement considerations, and while Smith exaggerated their demands, there is no reason to believe that they were tainted by an improper or malicious motive on his part.”). A judge must also place herself in the shoes of another in order to determine “whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play,” which in turn depends on “whether [a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.” *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citations and internal quotation marks omitted).

the numerous Establishment Clause doctrines, for example, are the coercion and endorsement tests. The coercion test provides that “government may not coerce anyone to support or participate in religion or its exercise.”<sup>143</sup> To determine whether the government has done so, a judge must seek to empathize with those who claim to feel coercive pressure. Thus, for instance, the Supreme Court has held that allowing clergy members to offer official prayers as part of a public school graduation ceremony violates the Establishment Clause because it “places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.”<sup>144</sup> “[F]or the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is . . . real.”<sup>145</sup> The Court reached this conclusion after consciously attempting to empathize with the affected students, concluding that “[r]esearch in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.”<sup>146</sup>

The endorsement test asks “whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of” religion.<sup>147</sup> This too requires a judge to place herself in another person’s (albeit, a hypothetical reasonable person’s) shoes to try to understand how that person is impacted by the government’s action. Only through empathy can the judge determine whether the government’s action impermissibly “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”<sup>148</sup>

On top of all of this, psychologists understand empathy as an essential tool in predicting the behavior of others; to accu-

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143. *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

144. *Id.* at 593.

145. *Id.*

146. *Id.*

147. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (citation and internal quotation marks omitted).

148. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

rately determine how other people are likely to act in particular circumstances, one has to first be able to determine how they would feel in those circumstances.<sup>149</sup> A great deal of constitutional doctrine requires judges to do just that. Free speech law, for example, contains numerous tests that require judges to predict how listeners will respond to speech. Under the *Brandenburg v. Ohio* incitement test, a judge may allow the State to punish “advocacy of the use of force or of law violation” only “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>150</sup> To apply that test, the judge must put herself into the shoes of the listeners to evaluate the likelihood that those particular persons would be incited to commit harm upon hearing those words spoken by that speaker in that manner at that place and time. Similarly, to apply the *Chaplinsky v. N.H.* fighting words test, the judge must understand the perspective of the listener to determine whether, in the particular circumstances of the case, the speech was “likely to provoke the average person to retaliation, and thereby cause a breach of the peace.”<sup>151</sup>

## 2. Beyond Constitutional Law

The need to empathize in order to properly apply the law goes well beyond constitutional law. To begin with, common law decision making is now almost universally understood to be a form of lawmaking on the part of judges,<sup>152</sup> and most observers would recognize that there is at least some aspect of consequentialism embedded in the process of common law judging. That is to say, at least some of the time, a common law judge will formulate rules and decide cases based on her sense of what will, on balance, be best for the parties and for society.<sup>153</sup>

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149. See, e.g., D’Arms, *supra* note 53, at 1487; Miller, *supra* note 53, at 1010; Vignemont & Singer, *supra* note 53, at 439 (discussing the “epistemological role” of empathy—its ability to provide information by helping us to predict the behavior of others).

150. 395 U.S. 444, 447 (1969).

151. 315 U.S. 568, 574 (1942).

152. See Schauer, *supra* note 17, at 885–88; Scalia, *supra* note 16, at 1176–77.

153. See, e.g., CARDOZO, *supra* note 18, at 94 (“There are some rules of private law which have been shaped in their creation by public policy, and this, not merely silently or in conjunction with other forces, but avowedly, and almost, if not quite, exclusively.”); H.L.A. HART, *THE CONCEPT OF LAW* 132 (1961) (noting that common law judging is sometimes an indeterminate enterprise that necessitates “striking a balance, in the light of circumstances, be-

A judge who lacks a taste or talent for empathy will not perform that aspect of her job particularly well. To determine which rule will be best for society, one needs to understand how the various members of society will be impacted by, and will respond to, the possible rules.<sup>154</sup>

On top of that, legal doctrine outside of the constitutional law arena, every bit as much as constitutional law doctrine, necessitates predicting the behavior of others,<sup>155</sup> balancing individual interests,<sup>156</sup> and understanding the perspectives of others. Across the entire doctrinal spectrum, public and private,

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tween competing interests”); Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1128 (1990) (arguing that “judicial instrumentalism, understood as judges formulating, modifying, and changing legal rules to achieve public policy goals, was characteristic of the common law for centuries”); Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 4 (1943) (“The body of the common law is made up of adjustments or compromises of conflicting individual interests in which we turn to some social interest, frequently under the name of public policy, to determine the limits of a reasonable adjustment.”); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 900 (1996) (“Moral judgments—judgments about fairness, good policy, or social utility—have always played a role in the common law, and have generally been recognized as a legitimate part of common law judging.”).

154. Thus, Judge Posner, who elevates consequentialism to the center stage of judging, should be a champion of empathic judges. See generally Richard A. Posner, *Legal Pragmatism Defended*, 71 U. CHI. L. REV. 683 (2004) (advocating legal pragmatism in judicial decision making); Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1670 (1990) (“All that a pragmatic jurisprudence really connotes . . . is a rejection of a concept of law as grounded in permanent principles and realized in logical manipulations of those principles, and a determination to use law as an instrument for social ends.”). But see *supra* note 63 and accompanying text.

155. See Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1499–1500 (1998) (“Nearly all interesting legal issues require accurate predictions about human behavior to be resolved satisfactorily. Judges . . . invoke mental models of individual and social behavior whenever they estimate the desirability of alternative rules, policies, or procedures.”). Consider, as just one example, the law of pretrial detention, which requires a judge to “determine . . . whether the defendant is likely to flee the jurisdiction if released,” *United States v. Vasconcellos*, 519 F. Supp. 2d 311, 317 (N.D.N.Y. 2007), and to predict the future dangerousness of the defendant, see *United States v. Salerno*, 481 U.S. 739, 746 (1987).

156. See Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 3 & n.14 (1987) (noting that “balancing has emerged as the jurisprudential model at the center of the modern Court’s work,” so much so that “the word ‘balance’ or ‘balancing’ . . . appear[s] in 214 of the 473 cases decided in the last three years [preceding 1987]”); R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUS. L. REV. 1381, 1399 n.104 (2006) (noting that “explicit balancing tests pervade civil and criminal law, constitutional and otherwise”).

civil and criminal, statutory and common law, our law is littered with “reasonableness” tests in general,<sup>157</sup> and “reasonable person” tests in particular—tests that require judges to assume the perspective of various actors to determine whether their behavior was objectively reasonable.<sup>158</sup>

In addition, mens rea and scienter doctrines routinely require judges to view and seek to understand events from the perspective of particular individuals.<sup>159</sup> This inquiry is some-

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157. See George Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 949 (1985) (“We lawyers should listen to the way we talk. If we paused to listen to our pattern of speech, we would be surprised by some of its distinguishing features. One of the most striking particularities of our discourse is its pervasive reliance on the term ‘reasonable.’ We routinely refer to reasonable time, reasonable delay, reasonable reliance, and reasonable care. In criminal law, we talk incessantly of reasonable provocation, reasonable mistake, reasonable force, and reasonable risk.”); *id.* at 949 n.1 (“The Uniform Commercial Code, the Model Penal Code, and the various restatements couple the adjective ‘reasonable’ and the adverb ‘reasonably’ with over 100 different words.”); Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 47 (1986) (“Anglo-American law is pervaded by standards that require similar judgments of degree and reasonableness.”). Reasonableness tests infiltrate all areas of our law, from employment law, to tax law, and everything in between. See, e.g., 42 U.S.C. § 12112(b)(5)(A) (2009) (requiring employers to make a “reasonable accommodation” for employee disabilities); Randall S. Thomas & Harwell Wells, *Executive Compensation in the Courts*, 95 MINN. L. REV. 846, 856 (2011) (“Courts, for instance, have applied a reasonableness test to determine for tax purposes whether executive pay is in part a disguised dividend to officers/shareholders.”).

158. See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (explaining that for qualified immunity purposes, a right is “clearly established” if “[t]he contours of the right . . . [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right”); *Smith v. AmSouth Bank, Inc.*, 892 So.2d 905, 910 (Ala. 2004) (“[T]he question of foreseeability is answered by viewing events from the perspective of the defendant charged with negligence . . . .”); *Hernandez v. City of Pomona*, 207 P.3d 506, 513 (Cal. 2009) (noting that negligence law requires “the trial court . . . [to] specifically conclude[] from the perspective of a reasonable [person] on the scene, taking into account the facts and circumstances confronting them, the [person’s] conduct was objectively reasonable”); *Schafer v. State, Dep’t of Insts.*, 592 P.2d 493, 495 (Mont. 1979) (“Foreseeability is measured on a scale of reasonableness; it is not measured abstractly. . . . [T]he law judges the actor’s conduct in the light of the situation as it would have appeared to the reasonable man in his shoes at the time of the act or omission complained of. Not what actually happened, but what the reasonably prudent person *would then have foreseen as likely to happen*, is the key to the question of reasonableness.” (citations and internal quotation marks omitted)), *overruled in part on other grounds by Estate of Striver v. Cline*, 924 P.2d 666 (Mont. 1996).

159. See, e.g., *State v. Torres*, 495 N.W.2d 678, 682 (Iowa 1993) (“In judging whether this act—sweeping the lamp off the table—was reckless, the district court could not use hindsight. The court had to put itself in Jimmy’s shoes at the moment of the act and then determine whether the act was reckless.”);

times objective—asking the judge to determine what a reasonable person would have done—but even so, it still requires the judge to place the reasonable person in the shoes of the actor.<sup>160</sup> Other times, the inquiry is a subjective one—requiring the judge to assume the mindset of the actual actor himself.<sup>161</sup> And sometimes, the judge is expected to do both. Consider the doctrine of self-defense. Some jurisdictions hold that, “[i]n determining whether a defendant has produced sufficient evidence to show reasonable apprehension of harm, the trial court must apply a mixed subjective and objective analysis.”<sup>162</sup> The subjective component “requires the trial court to place itself in the defendant’s shoes and view the defendant’s acts in light of all the facts and circumstances known to the defendant.”<sup>163</sup> The objective component “requires the court to determine what a reasonable person in the defendant’s situation would have done. The imminent threat of great bodily harm does not actually have to be present, so long as a reasonable person in the defendant’s situation could have believed that such threat was present.”<sup>164</sup> Many jurisdictions focus on the subjective inquiry, agreeing with Holmes that

[d]etached reflection cannot be demanded in the presence of an uplifted knife. Therefore . . . it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.<sup>165</sup>

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Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 23 (Tex. 1994) (“Determining whether an act or omission involves extreme risk or peril requires an examination of the events and circumstances from the viewpoint of the defendant at the time the events occurred, without viewing the matter in hindsight.”).

160. See, e.g., Thornton v. State, 919 A.2d 678, 683 (Md. 2007) (“The requisite *mens rea* is measured by an objective standard, i.e., could or should a reasonable person, under the circumstances, have foreseen that death would likely ensue as a result of his or her conduct.”).

161. See, e.g., United States v. Buonocore, 416 F.3d 1124, 1133 (10th Cir. 2005) (“[T]his inquiry is entirely subjective, the inquiry is not to be viewed from the perspective of a hypothetical reasonable person, and the *mens rea* element is not satisfied if Defendant acted through mistake, negligence, carelessness, or belief in an inaccurate proposition.”).

162. State v. Walker, 966 P.2d 883, 885 (Wash. 1998) (en banc).

163. *Id.*

164. *Id.*

165. Brown v. United States, 256 U.S. 335, 343 (1921); see also, e.g., People v. Desmond, 93 A.D.2d 822, 823 (N.Y. App. Div. 1983).

This inquiry necessitates empathy—a judicial ability to internalize the sense of panic that can overcome a person whose life may be in danger.<sup>166</sup>

The defense based on battered women syndrome is a particularly clear example of the need for judicial empathy. To find (or allow a jury finding) that a woman's fear of unavoidable harm was reasonable notwithstanding the fact that her husband was asleep at the time that she killed him, a judge must understand the fragile emotional state of women who are victims of domestic violence.<sup>167</sup> The judge must comprehend the "psychological reality for battered women," which appears alien and counterintuitive to most people.<sup>168</sup> Courts have appreciated that some "women . . . become so demoralized and degraded . . . that they sink into a state of psychological paralysis," feel "low self-esteem" and "tremendous feelings of guilt," and "literally become trapped by their own fear."<sup>169</sup> "Only by understanding these unique pressures that force battered women to remain with their mates, despite their long-standing and reasonable fear of severe bodily harm and the isolation that being a battered woman creates, can a battered woman's state of mind be accurately and fairly understood."<sup>170</sup>

Empathy pervades countless other inquiries that judges are required to perform. Child custody cases turn in part on the judge's evaluation of the best interests of the child, and "there is no way to consider the best interests of the child without a consideration of the child's feelings."<sup>171</sup> Awarding, or evaluating

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166. Similarly, the provocation defense typically allows mitigation of murder charges "if the defendant . . . was actually provoked into a heat of passion and a reasonable person in the defendant's shoes would also have been provoked." CYNTHIA LEE, *MURDER AND THE REASONABLE MAN* 7 (2003). The Model Penal Code replaces this test with one that "permits mitigation if the defendant was suffering from an extreme mental or emotional disturbance for which a reasonable explanation or excuse exists." *Id.* at 8. "The MPC explicitly states that the reasonableness of the defendant's explanation or excuse must be determined *from the defendant's perspective.*" *Id.* These inquiries too require empathy. *See id.* at 248–49.

167. *See, e.g.,* *State v. Hennum*, 441 N.W.2d 793, 798 (Minn. 1989) (recognizing the value of battered women syndrome evidence to dispel common misconceptions, bolster the woman's credibility, and establish the reasonableness of her fear of bodily harm).

168. *State v. Daws*, 662 N.E.2d 805, 811 (Ohio Ct. App. 1994).

169. *State v. Kelly*, 478 A.2d 364, 372 (N.J. 1984).

170. *Id.*

171. Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 307 (1996); *see, e.g., In re Leo M.*, 24 Cal. Rptr. 2d

a jury award of, pain and suffering, mental anguish, or other forms of intangible damages requires a judge to empathize with the emotional pain of others.<sup>172</sup> The test for whether to grant temporary or permanent injunctive relief requires the judge to evaluate the “balance of equities” between the parties,<sup>173</sup> which means that the “court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.”<sup>174</sup> Numerous areas of our law employ “undue hardship” tests that require a judge to ascertain the burden on a party from that party’s perspective,<sup>175</sup> and often necessitate an appreciation of the emotional toll imposed by the conduct at issue.<sup>176</sup> The Freedom of Information Act requires judges to evaluate personal privacy interests and balance them against the public interest in transparency.<sup>177</sup>

Sexual harassment law requires a determination of whether the plaintiff was humiliated by the defendant’s conduct,<sup>178</sup> and whether the employer created an environment that was “both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.”<sup>179</sup> The subjective inquiry obviously necessitates empathy—a journey into the “[p]laintiff’s

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253, 259 (1993) (noting that the judge must “explore the minor’s feelings regarding his/her biological parents, foster parents, and prospective adoptive parents, if any, as well as his/her current living arrangements”).

172. See, e.g., *Connell v. Steel Haulers, Inc.*, 455 F.2d 688, 691 (8th Cir. 1972) (noting that calculating mental anguish damages requires empathy).

173. *Winter v. Nat’l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

174. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987).

175. See, e.g., 11 U.S.C. § 523(a)(8) (2006) (imposing an undue hardship test for the discharge of educational loans in bankruptcy); 42 U.S.C. § 2000(e)(j) (employing an undue hardship test in religious accommodation); *id.* § 12112(b)(5)(A) (imposing undue hardship test in disability accommodation); FED. R. CIV. P. 26(b)(3)(A)(ii) (imposing an undue hardship test in civil discovery).

176. See, e.g., *In re Fahrner*, 308 B.R. 27, 36 (Bankr. W.D. Mo. 2004) (“Another factor which this Court may take into consideration in determining whether repayment would constitute an undue hardship is the psychological and emotional impact of the Debtor’s continuing liability for the repayment of such a large sum of money over such an extended period of time.”).

177. See *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004) (declaring that courts must “balance the family’s privacy interest against the public interest in disclosure” when applying the FOIA provision that bans disclosure of law enforcement records when disclosure would amount to “an unwarranted invasion . . . of personal privacy”).

178. See *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002) (identifying humiliating nature of discriminatory conduct as a relevant factor).

179. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998).

mind” to understand if she “felt humiliated and upset” and experienced “a loss of self-respect.”<sup>180</sup> Similarly, “the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering all the circumstances.”<sup>181</sup> “[T]hat inquiry requires careful consideration of [how the] behavior . . . is experienced by its target” and “an appropriate sensitivity to social context.”<sup>182</sup> A judge must therefore assume the often very foreign perspective of someone in the shoes of the plaintiff.<sup>183</sup>

This list could go on for pages. Such is the nature of our legal system; it requires judicial empathy to apply legal doctrine.<sup>184</sup> That is why the best lawyers write their legal briefs in a manner that seeks to draw empathy from the judge, using the fact section to tell a story that helps the judge to see the case from their client’s perspective.<sup>185</sup> This is not to say that empathy is essential in every single case. Surely, one could come up with a list of cases in which the nature of the doctrinal rules, the litigants, or the situation at hand renders empathy relatively unimportant. But the fact remains that, across the entire

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180. *Smith v. Nw. Fin. Acceptance, Inc.*, 129 F.3d 1408, 1413 (10th Cir. 1997).

181. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998) (internal quotation marks omitted).

182. *Id.*

183. *See, e.g., Alvarado v. Fed. Express Corp.*, 384 Fed. App’x 585, 589 (9th Cir. 2010) (“The unwelcome ‘chest to breast’ hugs made Boswell feel embarrassed and humiliated, and the jury could conclude that a reasonable woman in Boswell’s position would have felt the same way.”); *United States v. Dowd*, 417 F.3d 1080, 1088 (9th Cir. 2005) (noting that many courts have held “that harassment should be analyzed from the perspective of the victim, taking into account the gender of the plaintiff alleging a hostile work environment”).

184. *See* ANTHONY T. KRONMAN, *THE LOST LAWYER* 326 (1993) (arguing that adjudicative decision making requires “the capacity to entertain a point of view defined by interests, attitudes, and values different from one’s own without actually endorsing it”); Benjamin Zipursky, Note, *DeShaney and the Jurisprudence of Compassion*, 65 N.Y.U. L. REV. 1101, 1103, 1135–37 (1990) (arguing that “certain concepts can only be fully understood from a perspective that includes empathy and compassion” and “[b]ecause some of those concepts are embedded in the law, interpretation of the law requires compassion”).

185. *See* Elyse Pepper, *The Case for “Thinking like a Filmmaker”: Using Lars von Trier’s Dogville as a Model for Writing a Statement of Facts*, 14 LEGAL WRITING 171, 171–73 (2008) (arguing that the best advocacy uses a movie-like narrative); Steven L. Winter, *The Cognitive Dimension of the Agon between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2272 (1989) (arguing that a good narrative creates a persuasive effect); *cf.* Henderson, *supra* note 134, at 1592 (noting that lawyers often frame a case with “empathic narratives”).

spectrum of legal doctrine, empathy is very often essential to good judging.

### 3. A Law of Rules?

Of course, not everyone celebrates the current state of our legal doctrine. One imagines that, to someone like Justice Antonin Scalia, the preceding several pages of this Article would read like a horror novel: a grotesque parade of everything that is wrong with American legal doctrine; a hall of fame of subjective doctrinal mushiness that should be purged from the judicial canon forthwith. Justice Scalia has long criticized our law for relying too much on open-ended balancing tests in lieu of straightforward, bright-line rules. The rule of law, Justice Scalia insists, calls for a law of rules,<sup>186</sup> and thus judges should make legal doctrines that establish general rules rather than flexible standards.<sup>187</sup> Perhaps if they did so, there would be less of a need for empathy on the part of the judges who apply those doctrines.<sup>188</sup>

Perhaps. But even Justice Scalia acknowledges that we do not currently live in such a world—to the contrary, “sticking close to [the] facts, not relying upon overarching generalizations, and thereby leaving considerable room for future judges is thought to be the genius of the common-law system” in which we now reside.<sup>189</sup> And he further acknowledges that it would be impossible to purge open-ended standards from the law altogether—“[w]e will have totality of the circumstances tests and balancing modes of analysis with us forever.”<sup>190</sup>

What is more, even if we were someday to make the massive transition to a world driven by rules rather than standards, judges would still have to make the rules.<sup>191</sup> And that process too requires empathy—at least if it is going to be done well. That is to say, the shaping of the doctrine, not just

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186. See Scalia, *supra* note 16, at 1175.

187. See *id.* at 1176–77.

188. Cf. Massaro, *supra* note 64, at 2110–20 (noting that many advocates of empathy in the law seek fewer rules and more open-ended standards to allow individual stories and emotions to dictate decisions).

189. Scalia, *supra* note 16.

190. *Id.* at 1187.

191. See *id.* at 1176 (“For I want to explore the dichotomy between general rules and personal discretion within the narrow context of *law that is made by the courts.*”).

its application, necessitates empathy.<sup>192</sup> Suzanna Sherry explains that legal doctrines

are built on foundational facts: potentially contested factual assumptions that are embedded in the doctrine itself and on which the doctrine is based.<sup>193</sup> . . . Whether a particular defendant acted in a particular way out of a particular motive are decisional facts . . . . But the *likelihood* of actors in defendant's position acting in a particular way or having a particular motive is a foundational fact, and doctrinal rules—including burdens of proof and standards of review—will be structured differently depending on whether judges assume a high or low likelihood.<sup>194</sup>

These determinations about the likelihood of particular actors behaving in particular ways or having particular motives must be based on the judge's ability to place herself in the shoes of those actors.<sup>195</sup>

In addition, the creation of doctrinal rules often involves "definitional balancing" (as distinct from the "ad hoc balancing" required by the application of those rules).<sup>196</sup> In free speech

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192. See Mary Becker, *The Passions of Battered Women: Cognitive Links Between Passion, Empathy, and Power*, 8 WM. & MARY J. WOMEN & L. 1, 2 (2001) ("Empathy plays crucial roles in both shaping law and affecting outcomes in litigation. . . . The ability or inability to empathize with someone is often the basis for either recognition or denial of a tort action to redress an injury or of a defense in such an action. Similar points could be made about all areas of law and hold whether the law is made by judges or by legislators.").

193. Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 146. "Foundational facts are the background facts that are not explicitly at issue in any particular case; they are the meta-facts on which the doctrine itself depends." *Id.* at 150.

194. *Id.* at 146.

195. To take just one example, the Supreme Court has based its decisions to create, and then expand, the good faith exception to the Fourth Amendment's exclusionary rule on predictions about how police officers (and other actors in the criminal justice system) would likely behave. See *Arizona v. Evans*, 514 U.S. 1, 15 (1995) ("[T]here is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed. Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion of evidence could not be expected to deter such individuals from failing to inform police officials that a warrant had been quashed."); *United States v. Leon*, 468 U.S. 897, 918 (1984) ("If exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, therefore, it must alter the behavior of individual law enforcement officers or the policies of their departments.").

196. See Aleinikoff, *supra* note 111, at 948 (arguing that definition balancing sets a "principle of general application"); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 77–78 (1997) (discussing the role of balancing in "the process by which the Court crafts doctrine in the

law, for instance, the Supreme Court has established a rules-based framework pursuant to which certain categories of speech are generally excluded from the scope of the First Amendment. The Court insists that “the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.”<sup>197</sup> Which classes of speech are excluded? Those that “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>198</sup> The categorical rules—that obscenity, fighting words, child pornography, et cetera, are generally excluded from the scope of the First Amendment—are themselves the product of judicial balancing of individual and state interests.<sup>199</sup> And empathy is, of course, needed to determine the weight of both the individual’s interest in speech<sup>200</sup> and society’s interest in exclusion.<sup>201</sup>

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first instance”); Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 942 (1968) (coining the term “definitional” balancing).

197. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (footnotes omitted).

198. *Id.* at 572.

199. See Nimmer, *supra* note 196 (“[T]he Court employs balancing not for the purpose of determining which litigant deserves to prevail in the particular case, but only for the purpose of defining which forms of speech are to be regarded as ‘speech’ within the meaning of the first amendment.”). *But see* *United States v. Stevens*, 130 S. Ct. 1577, 1585–86 (2010) (suggesting, implausibly, that the excluded categories are determined by history rather than balancing).

200. See, e.g., *Miller v. California*, 413 U.S. 15 (1973) (liberalizing the definition of obscenity in order to ensure that serious literary, artistic, political, and scientific speech is not censored); *Cohen v. California*, 403 U.S. 15, 25–26 (1971) (declining to treat profanity as an excluded category because many speakers find lyrical beauty in words that others find offensive, and because often profanity is essential to fully convey one’s emotions). Empathy for speakers is also evinced by the fact that much of the Court’s free speech jurisprudence—including, for instance, the overbreadth doctrine—has been based on the Court’s evaluation of whether potential speakers would be chilled from speaking out of fear of liability. See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 497 n.5 (2007) (Scalia, J., concurring in part and concurring in the judgment) (“Our normal practice is to assess *ex ante* the risk that a standard will have an impermissible chilling effect on First Amendment protected speech.”). This inquiry involves placing oneself in the shoes of the speaker and predicting how he would likely behave. See, e.g., *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (“We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or ‘chill’ constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions. Many persons, rather than undertake the considerable burden (and

Even when they are not based on definitional balancing, good judge-made doctrines are of necessity the product of empathy—either in the sense of understanding the emotional perspective of others, or in the sense of predicting the behavior of others (which itself is dependent on an ability to understand the emotional perspective of others).<sup>202</sup> Two examples from the constitutional law arena should suffice to illustrate the point. First, the Supreme Court based its decision that police officers are generally not liable to bystanders who were injured during a high-speed police chase on its ability to empathize with officers who “have obligations that tend to tug against each other. . . . They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made in haste, under pressure, and frequently without the luxury of a second chance.”<sup>203</sup> Second, the Court based its decision that the executive privilege must generally yield to a criminal subpoena on the ground that it “cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.”<sup>204</sup>

In sum, even a law of rules requires judges to make the rules, and judges cannot make rules competently without empathizing broadly with the potentially affected parties. Moreover, this fundamental reality of judicial lawmaking cannot be avoided by taking refuge in an allegedly objective judicial phi-

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sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech . . . .” (citations omitted)).

201. See, e.g., *New York v. Ferber*, 458 U.S. 747, 758–59 & n.10 (1982) (adding child pornography to the list of excluded categories because “the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child,” in that a “child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography” and “the fear of exposure and the tension of keeping the act secret . . . have . . . profound emotional repercussions” (citations and internal quotation marks omitted)); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (limiting First Amendment protection for defamation of private figures because of the state interest in “the compensation of individuals for the harm inflicted on them by defamatory falsehood,” an interest that “reflects no more than our basic concept of the essential dignity and worth of every human being” (citations and internal quotation marks omitted)).

202. See *supra* note 149 and accompanying text.

203. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998) (citation and internal quotation marks omitted).

204. *United States v. Nixon*, 418 U.S. 683, 712 (1974).

losophy. There are those who believe that employing an originalist interpretive methodology would allow judges to ascertain historically determined constitutional rules without having to resort to empathy, or any other subjective method of rulemaking.<sup>205</sup> Not so. This issue goes well beyond the scope of this Article,<sup>206</sup> but the bottom line is that originalism does not, in fact, purge subjectivity from judging. As many originalists have themselves come to recognize, the constitutional provisions that generate the most litigation are written in such broad, open-ended terms that their original public meaning is too general to establish concrete rules of decision.<sup>207</sup> Randy Barnett explains that, “[d]ue to either ambiguity or generality, the original meaning of the [constitutional] text may not always determine a unique rule of law to be applied to a particular case or controversy.”<sup>208</sup> Thus, “there is often a gap between abstract or general principles of the kind found in the Constitution and the rules of law that are needed to put these principles into action;”<sup>209</sup> a commitment to original meaning will not dictate particular doctrinal rules. Most constitutional doctrines supported by originalist judges are therefore “not precisely mandated by the original meaning of the constitutional text, but rather, have been invented by judges in an effort to put the Constitution’s open-ended textual meaning into effect.”<sup>210</sup> Even originalist judges cannot avoid the need to invent legal rules.<sup>211</sup> No judge can avoid the need to empathize.

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205. See, e.g., Scalia, *supra* note 16, at 1183–84.

206. For detailed exploration, see Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529 (2008), and Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011) [hereinafter *New Originalism*].

207. See, e.g., KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 8 (1999) (“Traditional tools of interpretive analysis can be exhausted without providing a constitutional meaning that is sufficiently clear to guide government action. The text may specify a principle that is itself identifiable but is nonetheless indeterminate in its application to a particular situation. . . . Alternatively, the principle established by the text may be unclear . . . .”) (footnote omitted).

208. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 645 (1999).

209. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 109–10 (2001).

210. *New Originalism*, *supra* note 206, at 733.

211. See *id.* at 749–64 (detailing the profound extent to which the “New Originalism” fails to dictate rules of constitutional law).

C. THE THIRD CUT: DIFFERENCES IN THE CAPACITY TO EMPATHIZE

As Adam Smith noted long ago, no one can empathize perfectly with another's feelings.<sup>212</sup> But scientists have confirmed that some people are able to come much closer to doing so than others.<sup>213</sup> Simon Baron-Cohen, Professor of Developmental Psychopathology at the University of Cambridge, has developed an empathy quotient—a means of measuring an individual's capacity for empathy—and has determined that the population's empathic skills can be plotted on a bell curve.<sup>214</sup> There are ten major regions of the brain that are involved in empathy, and the differences in individuals' empathic abilities can actually be documented in neural brain scans.<sup>215</sup>

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212. See ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* ¶ Li.4.7 (Oxford Press 1976) (“Mankind, though naturally sympathetic, never conceive, for what has befallen another, that degree of passion which naturally animates the person principally concerned. . . . [T]he thought that they themselves are not really the sufferers, continually intrudes itself upon them; and though it does not hinder them from conceiving a passion somewhat analogous to what is felt by the sufferer, hinders them from conceiving any thing that approaches to the same degree of violence.”).

213. See MARK H. DAVIS, *EMPATHY: A SOCIAL PSYCHOLOGICAL APPROACH* 46–61 (1996) (arguing for individual psychological profiles concerning empathy); KATZ, *supra* note 62, at 57 (arguing that empathetic power differs by individual); MORRELL, *supra* note 53, at 109–15 (noting that studies have found variation in the capacity to empathize with out-groups); TANIA SINGER & ERNST FEHR, *THE NEUROECONOMICS OF MIND READING AND EMPATHY* 9 (2005) (recounting studies that suggest “that there are individual differences in empathic abilities”); Mark A. Barnett, *Empathy and Related Responses in Children*, in *EMPATHY AND ITS DEVELOPMENT*, *supra* note 53, at 146, 149 (discussing scientific “evidence that young children can differ markedly in their capacity or willingness to be sensitive and responsive to the feelings of others”); Janet Strayer and Nancy Eisenberg, *Empathy Viewed in Context*, in *EMPATHY AND ITS DEVELOPMENT*, *supra* note 53, at 389, 396 (noting that the capacity for empathy may vary across individuals).

214. See BARON-COHEN, *supra* note 56, at 13 (illustrating a quantitative model of empathy across the population). Baron-Cohen has divided the continuum into seven degrees of empathy. See *id.* at 16–19. Other scientists have devised various other scales for measuring empathy. See Jolliffe & Farrington, *supra* note 58, at 590, 592 (discussing other scales and proposing and employing a new one).

215. See BARON-COHEN, *supra* note 56, at 19–28, 42–43, 54–57, 68–71 (noting that functional magnetic resonance imaging has identified ten regions of the brain that are correlated with empathy; people with low empathic abilities show less neural activity in these areas); SINGER & FEHR, *supra* note 213, at 6 (noting that studies have “confirmed that the ability to empathize is heterogeneous across individuals” and can be seen in neural scans); Tom F.D. Farrow, *Neuroimaging of Empathy*, in *EMPATHY IN MENTAL ILLNESS* 201, 201–17 (Tom F.D. Farrow & Peter W.R. Woodruff eds., 2007) (illustrating the neuroimaging of empathy).

These disparities appear to be partially determined by genetics<sup>216</sup> and other biological factors.<sup>217</sup> They are also believed to stem in substantial part from environmental influences during childhood, including family relationships and parenting styles, particularly in matters of discipline.<sup>218</sup>

Studies suggest, however, that one's empathic abilities are not completely predetermined by biology and early childhood.<sup>219</sup> It seems that those who are willing to work at it can get better at empathizing.<sup>220</sup>

Since empathy is an essential tool for good judging, and since people naturally vary in their empathic abilities, it makes

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216. See BARON-COHEN, *supra* note 56, at 86 (concluding “that environmental factors interact with genes for empathy” and that “some genes are associated with your score on various measures of empathy”); *id.* at 94 (explaining that studies have identified four genes associated with empathy); DAVIS, *supra* note 213, at 62–70; *id.* at 64 (summarizing studies showing that “genetic factors seem to make a substantial contribution to individual differences in affective empathy”).

217. See BARON-COHEN, *supra* note 56, at 93 (discussing studies that have found that testosterone shapes “empathy circuit[s]” in the brains of developing fetuses, and the more testosterone a fetus generates in the womb, the less empathic the child will end up being); Strayer & Eisenberg, *supra* note 213.

218. See BARON-COHEN, *supra* note 56, at 47 (noting that “how your mother (or father) treated you turns out to be very important . . . for the development of healthy empathy”); *id.* at 57; DAVIS, *supra* note 213, at 70–81; MARTIN L. HOFFMAN, EMPATHY AND MORAL DEVELOPMENT: IMPLICATIONS FOR CARING AND JUSTICE 282 (2000) (noting that empathy “can be destroyed by power-assertive childrearing, diminished by cultural valuing of competition over helping others, and overwhelmed by egoistic motives within the individual . . .”); Barnett, *supra* note 213, at 149–57. See generally ARNOLD P. GOLDSTEIN & GERALD Y. MICHAELS, EMPATHY: DEVELOPMENT, TRAINING, AND CONSEQUENCES 12–61 (1985) (discussing the development of empathy).

219. See BARON-COHEN, *supra* note 56, at 120 (noting that “there is already evidence that components of empathy (such as emotion recognition) can be learned”); GOLDSTEIN & MICHAELS, *supra* note 218, at 50 (discussing a program that appeared to improve empathic abilities in adolescents); HOFFMAN, *supra* note 218 (same); KATZ, *supra* note 62, at 59–61; Martin L. Hoffman, *The Contribution of Empathy to Justice and Moral Judgment*, in EMPATHY AND ITS DEVELOPMENT, *supra* note 53, at 47, 69 (arguing that moral education can overcome empathic biases). This is an area in which more empirical studies are needed. See BARON-COHEN, *supra* note 56, at 101–02 (discussing therapies, technologies, and even medical treatments that might be effective in increasing empathy); *id.* at 120 (“These methods only scratch the surface in terms of what could be tried . . . Counselling and other psychological therapies such as role-playing techniques purport to be aiming to encourage empathy, and it would be valuable to have systematic studies to show if these are working. . . . [I]t would not be surprising if someone who is slightly below average in their [empathy score] slightly boosted their empathy following intervention.”).

220. See Miller, *supra* note 53, at 1010.

sense that the President should look for judges who possess strong empathic skills. (Intelligence is also an essential skill for good judging, and we would hardly fault a President who explicitly seeks smart judges.) And since empathic abilities seemingly can be honed and improved, it makes sense that the President would look for judges who have openly expressed an interest in empathy.

#### D. THE FINAL CUT: EMPATHIC BLIND SPOTS

Not only is there variance across the population in general empathic abilities, but there is also variance within each individual's ability to empathize, depending on the target of their empathy. That is to say, we all naturally empathize with some people more than others. More specifically, there is substantial "research evidence that observers are more empathic to [persons] who are familiar and similar to themselves than to [persons] who are different."<sup>221</sup>

Accordingly, in assigning weight to the interests of the various parties in the course of making or applying legal doctrine, judges are naturally inclined to empathize with—and thus place greater value upon—the feelings and interests of those whose circumstances and experiences most closely resemble their own. Thus, for instance, studies show that female judges do not tend to decide cases markedly differently than male judges, except in the area of sex discrimination.<sup>222</sup> When it

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221. Hoffman, *supra* note 219, at 67; *see also* HOFFMAN, *supra* note 218, at 283 ("Empathic morality is also subject to biases that favor friends, relatives, and people similar to oneself."); Barnett, *supra* note 213, at 154 (noting that "[c]hildren have been found to respond more empathically to those who are perceived as similar to the self than to those who are perceived as dissimilar"); Lisa M. Brown et al., *Affective Reactions to Pictures of Ingroup and Outgroup Members*, 71 *BIOLOGICAL PSYCH.* 303–311 (2006) (presenting results of study that found that people empathize more with members of their own ethnic group); Henderson, *supra* note 134, at 1581 n.35 (noting that children show more empathy for persons who are like themselves and for people in situations that they have experienced themselves); Tania Singer et al., *Empathic Neural Responses are Modulated by the Perceived Fairness of Others*, 439 *NATURE* 466, 466 (2006) (noting that neural studies show that, sometimes, people empathize more with persons whom they like than with persons whom they dislike); Vignemont & Singer, *supra* note 53, at 438 (noting that an important factor in determining whether a person can empathize with another is whether the would-be empathizer has had experiences similar to those of the other person); *id.* at 439 (noting that studies have found that ability to predict the actions of others through empathy "depends on the similarity between the empathizer's and the target's experiential repertoires").

222. *See* Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 *AM. JUR. POL. SCI.* 389, 390 (2010).

comes to that area—and not others—male and female judges, whose backgrounds tend to be otherwise quite similar, have starkly different perspectives. Male judges are more naturally inclined to see the employer's side, and they have trouble empathizing with the woman's perspective. Female judges are naturally more inclined to understand and value the woman's perspective, as it more closely resembles their own.

Similarly, and perhaps even more interestingly, preliminary results of a recent study of the voting patterns of federal appellate judges suggest that judges who have daughters are significantly more likely to vote in favor of women in cases involving sex discrimination, pregnancy discrimination, and reproductive rights than are judges who have sons.<sup>223</sup> This effect persists after controlling for other potentially relevant characteristics, including partisanship, and does not extend to other categories of cases.<sup>224</sup> These results “suggest that the effect may be due in part to the empathy that parents feel toward their daughters . . . .”<sup>225</sup> A judge with daughters finds it easier to empathize with the women in these cases; their experiences and perspectives are more familiar and comprehensible to him than they are to a judge who does not have daughters.

Everyone, or almost everyone anyway, can empathize with familiar perspectives. A good judge has to be able to empathize with unfamiliar ones, too. Key to good judging is both a desire and an ability to overcome the natural inclination to empathize more with those whose experiences and circumstances resemble one's own. To succeed at their jobs, judges must also empathize with those who are most different from and unfamiliar to them, and whose interests and perspectives they are likely to naturally undervalue.<sup>226</sup>

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223. See Adam Glynn & Maya Sen, *Like Daughter, Like Judge: How Having Daughters Affect Judges' Voting on Women's Issues* 28 (Mar. 10, 2011) (working paper), available at <http://scholar.harvard.edu/msen/files/judicialdaughters.pdf>.

224. *Id.* (manuscript at 1).

225. *Id.* (manuscript at 29); see also *id.* (suggesting that judicial decision making appears to be driven in part by “empathic connections”).

226. Although this Article does not focus on such a claim, it is worth noting that there appears to be a “general consensus among scholars in various fields who have studied emotion” that “reasoning has an emotive aspect.” Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 366 (1996); see also Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 645–48 (2011). “It is [therefore] incoherent to say that a judge should base an opinion on reason and not emotion because emotions are an inherent part of decision-making. Emotions are the process we use to assign value to different possibilities.” Da-

V. THE INADEQUACY OF THE NON-EMPATHIC,  
UMPIRE JUDGE

A judge who believes in the popular portrait of judges as umpires, and who rejects as illegitimate calls for judicial empathy, will “call ‘em like he sees ‘em”—applying the law as he understands it to the facts as he perceives them. What he will fail to realize is that he is seeing the case from a particular perspective—his own—and is mistaking that perspective for an unbiased, neutral one. What he views as the disinterested, “correct” answer will in fact in many close cases just be the contingent answer that he arrives at after unintentionally privileging his own perspective—subconsciously empathizing with those whose experiences he shares, whose perspective comes naturally to him, and whose plight strikes a chord with him. Without meaning to, he will give disproportionate weight to their interests in his legal calculus and undervalue the interests of those whose perspectives he does not fully appreciate. All the while, he will claim, and genuinely believe, that he is being completely neutral—an umpire, just calling balls and strikes. But in fact, he will tend disproportionately to decide cases in favor of the parties with whom he most naturally empathizes—usually large corporations, the government, employers, and the like, given the background of most federal judges<sup>227</sup> (especially most conservative federal judges, who are the most likely to endorse umpiring over empathy). This distorts the law. It is bad judging under a false (and falsely superior) sense of neutrality and professional excellence.<sup>228</sup>

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vid Brooks, Op-Ed., *The Empathy Issue*, N.Y. TIMES, May 29, 2009, at A25. If this is true—that all reasoning, including legal reasoning, necessarily has an emotional component—then empathy is all the more important to good judging. If a judge cannot help but base her rulings at least in part on her emotional view of the case, then it is essential that she comprehend and feel the emotional perspective of all of the parties, rather than just the ones with whom she feels a natural affinity. Cf. Bandes, *supra*, at 370 (noting that because emotions have a cognitive aspect and can change as we are exposed to new information and new experiences, if one is empathic, “it may be possible to mitigate the limitations of one’s own perspective” in forming an emotional reaction to a case).

227. See *infra* note 276 and accompanying text.

228. Cf. Bandes, *supra* note 53, at 139–42 (noting the danger of selective empathy that comes from mistaking one’s own perspective for a neutral and unbiased one); Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 410 (1983) (“The real threat that a judge’s personal ideologies may affect his decisions in an inappropriate case arises when the judge is not even consciously aware of the potential threat.”); McKee, *supra* note 12,

Chief Justice Roberts may believe that he “confront[s] every case with an open mind . . . fully and fairly analyz[ing] the legal arguments . . . and decid[ing] every case . . . according to the rule of law . . . [and that he simply] call[s] balls and strikes . . . .”<sup>229</sup> But, according to one observer, “[i]n every major case since he became the nation’s seventeenth Chief Justice, Roberts has sided with the prosecution over the defendant, the state over the condemned, the executive branch over the legislative, and the corporate defendant over the individual plaintiff.”<sup>230</sup> The Chief Justice thinks that he is umpiring in a neutral fashion, but perhaps he is just subconsciously empathizing only with those whose experiences and perspectives most closely resemble his own as a former corporate and executive-branch lawyer.<sup>231</sup>

Similar concerns can be raised about Justice Scalia, at least some of the time. Justice Scalia is acutely aware of the danger “that the judges will mistake their own predilections for the law,” and he believes that “[a]voiding this error is the hardest part of being a conscientious judge.”<sup>232</sup> Yet his jurisprudence evinces a tendency to empathize only with those like himself, which sometimes leads him to commit the very error that he takes pride in avoiding.

Consider *Lee v. Weisman*, in which the Supreme Court held, over Justice Scalia’s dissent, that allowing clergy members to offer official prayers as part of a public school gradua-

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at 1712 (“The umpire metaphor obscures the reality of personal bias. Getting beyond that bias is extremely difficult even for the most introspective and sincere judge.”); Cheryl L. Wade, *When Judges Are Gatekeepers: Democracy, Morality, Statu, and Empathy in Duty Decisions (Help from Ordinary Citizens)*, 80 MARQ. L. REV. 1, 49 (1996) (noting that, if judges fail to empathize with all parties, their decisions will tend to reflect the values of the segments of society from which they themselves have been drawn); Wardlaw, *supra* note 3, at 1649 (“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.”).

229. *Roberts Hearing*, *supra* note 7, at 56.

230. Jeffrey Toobin, *No More Mr. Nice Guy*, NEW YORKER (May 25, 2009), [http://www.newyorker.com/reporting/2009/05/25/090525fa\\_fact\\_toobin](http://www.newyorker.com/reporting/2009/05/25/090525fa_fact_toobin).

231. For a similar charge against Justice Alito, see Emily Bazelon, *Mysterious Justice*, N.Y. TIMES, March 20, 2011, at MM13. Bazelon cites instances of Alito’s opinions evincing empathy for military families and white men, but argues that “Alito’s sense of empathy never seems to involve an act of imagination; it rarely extends to people who are not like him.” *Id.*

232. Scalia, *supra* note 32.

tion ceremony violates the Establishment Clause.<sup>233</sup> The Court's majority opinion was grounded in a conscious attempt to empathize with students who practice a minority religion (or no religion) and suffer emotional injury from the school's conduct.<sup>234</sup> In his dissent, Justice Scalia utterly failed to understand or appreciate those interests, derisively labeling the injury as nothing more than "minimal inconvenience."<sup>235</sup> He was

oblivious to the fact that, for a nonbeliever or a practitioner of a non-Judeo-Christian religion, the harm of having either to participate in a prayer that runs counter to one's core religious beliefs or to be stared at and ostracized for not doing so is a very serious one—especially to a teenager trying to fit in and find acceptance in a world in which she is already an outsider.<sup>236</sup>

Justice Scalia cast his lot instead with the members of the majority who, like him, enjoy prayer, and who will now be precluded from hearing biblical prayer at future graduations: "[N]othing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek."<sup>237</sup> Seeking to balance the interests of both sides, Justice Scalia found that the interests of those whose values and experiences matched his own—whose perspective he understood and shared—easily trumped the interests of those whose emotional struggles he made no effort to appreciate:

The Baptist or Catholic who heard and joined in the simple and inspiring prayers . . . on this official and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that cannot be replicated. To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.<sup>238</sup>

More than a decade later, Justice Scalia did it again, this time in the course of voting to uphold a Ten Commandments monument in a public courthouse. He correctly noted that, "in the context of public acknowledgments of God there are legiti-

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233. 505 U.S. 577 (1992).

234. See *supra* notes 144–46 and accompanying text.

235. *Weisman*, 505 U.S. at 646 (Scalia, J., dissenting).

236. Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, 1120 (2006).

237. *Weisman*, 505 U.S. at 645–46 (Scalia, J., dissenting) (recounting "the personal interests on the other side").

238. *Id.* at 646.

mate *competing* interests.”<sup>239</sup> But he then went on to place vanishingly little value on the interests of those with whom he has no natural tendency to empathize (“[o]n the one hand, the interest of that minority in not feeling ‘excluded’”) and to place great value on the interests of those whose plight he shared (“but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*, and with respect to our national endeavors.”)<sup>240</sup> A Christian himself, he seemed “blind to the fact that nonmonotheists suffer serious alienation when their government erects and endorses ‘as a people’ a religious monument that explicitly rejects and condemns nonmonotheists’ deeply held beliefs and practices.”<sup>241</sup>

Another example of Justice Scalia’s empathic limits is his declaration in *California v. Hodari D.* that it “contradicts proverbial common sense” to suggest that, as a matter of Fourth Amendment law, “it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police.”<sup>242</sup> As Tracey Maclin has noted, “From a police perspective, Justice Scalia’s remarks may make sense.”<sup>243</sup> A police officer might be inclined to believe that someone who runs away at his approach must be hiding something. But “this viewpoint never considers that Hodari, a black youth, may have had alternative reasons for wanting to avoid the police.”<sup>244</sup> In light of numerous reports of police officers harassing, harming, or humiliating black youths in random stops, from the perspective of the youth, it might have made perfect sense to run away even if he had nothing to hide.

Justice Scalia may think that an approaching officer only wants to ask “What’s going on here?” A black youth, however, may have had a different experience on the street and may believe that the approaching officer is out to administer a little “street justice” of the type recently documented in Boston and Los Angeles.<sup>245</sup>

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239. *McCreary County v. ACLU*, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting).

240. *Id.* Justice Scalia claimed that the balance between those interests was dispositively struck by the framers, and by “[o]ur national tradition.” *Id.* That claim is dubious. See Colby, *supra* note 236, at 1126–38.

241. Colby, *supra* note 236.

242. 499 U.S. 621, 623 n.1 (1991).

243. Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 748 n.110 (1992).

244. *Id.* at 749 n.110.

245. *Id.*; see also DAVID H. BAYLEY & HAROLD MENDELSON, *MINORITIES AND THE POLICE: CONFRONTATION IN AMERICA* 120 (1969) (“Our data have

The fact that Justice Scalia issued this tone-deaf opinion just a month after the entire “nation watched in horror as the videotape depicting the brutal beating of Rodney King, an African American man, at the hands of more than a dozen white Los Angeles police officers played over and over on television screens across the country”<sup>246</sup> is a testament to his diminished skill for empathy. Because he empathized only with the police officer, his balancing of the interests—his reasonableness calculation—failed to give fair consideration to the suspect’s interest.

## VI. THE IDEAL EMPATHIC JUDGE

When liberals call for judicial empathy, they do so because they believe that there is a better alternative. To be sure, liberals, every bit as much as anyone else, want judges who are supremely smart and accomplished—the cream of the crop. We all want judges with top-notch legal reasoning skills and unparalleled expertise in analyzing and working with complex statutes, regulations, and precedents. We all want our judges to be talented technocrats with razor-sharp legal minds.

### A. BROAD EMPATHY, NOT NARROW SYMPATHY

Liberals also insist on judges who are impartial and who decide cases based solely on the law. If empathy were sympathy,<sup>247</sup> then conservatives would be right that its role in judging should be extremely limited.<sup>248</sup> Good judges will often feel genuinely sorry for a litigant while at the same time concluding that the law does not favor him.<sup>249</sup> Any judge who determines

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shown that minority people carry into contacts with the police more negative expectations than do [whites]. One important result of these attitudes is the generation of a strong disposition to avoid the police.”); Tracey Maclin, “*Black and Blue Encounters*” *Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 276 (1991).

246. Kit Kinports, *The Buck Does Not Stop Here: Supervisory Liability in Section 1983 Cases*, 1997 U. ILL. L. REV. 147, 148.

247. See *supra* Part III (explaining the difference between empathy and sympathy).

248. Sympathy might play a legitimate role in criminal sentencing. See *Garner v. Jones*, 529 U.S. 244, 258 (2000) (Scalia, J., concurring in part in the judgment) (“Discretion to be compassionate or harsh is inherent in the sentencing scheme . . .”).

249. See, e.g., *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 202–03 (1989) (noting that judges “are moved by natural sympathy in a case like this to find a way” for the aggrieved party to be compensated, yet they are compelled to follow the law); cf. *Texas v. Johnson*, 491 U.S. 397, 420–21 (1989) (Kennedy, J., concurring) (“The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in

that the law favors—even if only slightly—one party, and yet rules for the other party is behaving lawlessly.<sup>250</sup> By the same token, H. Jefferson Powell gets it exactly right when he condemns

those who are happy to maintain the trappings of legal argument on the understanding, shared among those in the know, that the real determinants of constitutional decision have nothing to do with the law. This is no mere impoverishment of law; it is the negation of law. Put into action, it is a betrayal: a judge who thinks legal reasoning is *nothing* more than a rationalization for decisions reached on other grounds, and yet announces those decisions in the name of the Constitution, acts in bad faith. Such decisions may enjoy raw institutional power but they are lawless, as our tradition has understood law.<sup>251</sup>

That is emphatically not what good judging entails. To the extent that there are or have been liberal judges who behave this way,<sup>252</sup> or liberal academics who endorse this behavior, they do a disservice to liberalism and to the rule of law. A call for empathy in judging is not a call to decide cases on the basis of sympathy, or anything else other than law.<sup>253</sup>

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the sense that the law and the Constitution, as we see them, compel the result.”).

250. See Zipursky, *supra* note 184, at 1123–28 (arguing that concerns for the separation of powers and the rule of law do not permit a judge to choose a weaker, but still legally plausible, argument over a stronger argument based on sympathy, nor do they even permit judges to use sympathy as a “tie-breaker” to choose between arguments whose strength is in equipoise).

251. H. Jefferson Powell, *On Not Being “Not an Originalist,”* 7 U. ST. THOMAS L.J. 259, 280 (2010).

252. See, e.g., Griffith, *supra* note 41, at 164 (recounting the recollections of a former D.C. Circuit law clerk whose judge allegedly told him, “This is how we go about our work: We learn the facts of the case, then we think long and hard about the fair outcome, the equitable disposition, the just result. Finally, we go find the law to support our conclusion”); Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 755–56 (1995) (describing an anecdote about Justice Abe Fortas who drafted an opinion consisting of unsupported policy conclusions and then told his law clerk to “[d]ecorate it” with citations to legal authorities and suggesting that Fortas had been influenced by “the Yale legal realists who were his mentors and friends” to believe that “invocations of ‘the law’ were merely facades for policy preferences” and thus that, “[a]s a judge, . . . he had no need to work through what the law required before he arrived at a judgment”) (citing LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 18, 271–72, 274 (1990)); cf. Tim Wells, *Legends in the Law: A Conversation with Peter B. Edelman*, WASH. LAW., Apr. 2008, at 29, 31 (recounting the recollection of a former law clerk that Justice Arthur J. Goldberg’s “first question in approaching a case always was, ‘What is the just result?’ Then he would work backward from the answer to that question to see how it would comport with relevant theory or precedent”).

253. See Henderson, *supra* note 134, at 1576 (rejecting the notion that empathy and the rule of law “are mutually exclusive concepts”); Catherine Gage O’Grady, *Empathy and Perspective in Judging: The Honorable William C.*

A call for empathy in judging is instead a claim that judges need more than just smarts, experience, expertise, and impartiality.<sup>254</sup> To be sure, in the vast majority of cases, those skills will be enough to get the job done. In most routine cases, the law (and the proper application of the law to the facts at hand) is so clear that every minimally competent and honest judge would reach the same result. The scales are so far from equipoise that it would be virtually impossible for a smart and conscientious judge to come up with the wrong balance. President Obama was right that “adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court, so that both a Scalia and a Ginsburg will arrive at the same place most of the time on those 95 percent of the cases.”<sup>255</sup> But President Obama was also right that, in the other five percent of cases, “adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon,”<sup>256</sup> in the sense that different judges could reach different results on the basis of a sincere attempt to apply the governing law.<sup>257</sup>

Because of the nature of both law application and lawmaking in our judicial system,<sup>258</sup> in order to successfully traverse that last mile—to definitively and fairly strike the close balance—judges also need an ability to understand the issue from the perspective of all of the parties, and to fully comprehend and appreciate the implications and impact of their rulings on

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*Canby, Jr.*, 33 ARIZ. ST. L.J. 4, 10 (2001) (“Although empathy is sometimes used interchangeably with compassion, sympathy, and pity, empathy as a component of judicial decisionmaking does *not* mean experiencing sympathy or pity for another and allowing that sympathy to shape an outcome.”); Sophie H. Pirie, *John T. Noonan as Judge: What Can Empathic Judging Mean for Women?*, 12 J.L. & RELIGION 541, 544 (1996).

254. Cf. BARON-COHEN, *supra* note 56, at 53 (noting that empathy and IQ are independent of each other); *id.* at 123 (“[W]hen it comes to problem solving, clearly many situations require both logic and empathy. They are not mutually exclusive.”); Jolliffe & Farrington, *supra* note 58, at 604 (presenting the results of a study that found very little correlation between intelligence and empathy).

255. 151 CONG. REC. S10,366 (daily ed. Sept. 22, 2005) (statement of Sen. Obama).

256. *Id.*

257. See *Kagan Hearings*, *supra* note 10, at 203 (“But we do know that not every case is decided 9-0, and that is not because anybody is acting in bad faith. It is because those legal judgments are ones in which reasonable people can reasonably disagree sometimes.”).

258. See *supra* Part IV.B.

all parties (and nonparties).<sup>259</sup> They need a talent for empathy.<sup>260</sup>

Thus, Justice Kagan was spot-on at her confirmation hearings when she responded to a question about President Obama's call for empathy in judging by saying that, although she did not "want to speak for the president," and did not "know what the president was speaking about specifically," she did

think that in approaching any case a judge is—is required really, not only permitted, but required to think very hard about what each party is saying, to try to see that case from each party's eyes, in some sense to think about the case in the best light for each party, and then to weigh those against each other.<sup>261</sup>

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259. See *Interview with President Barack H. Obama* (C-SPAN broadcast May 23, 2009), available at <http://www.c-span.org/pdf/obamainterview.pdf> ("I said earlier . . . that I thought empathy was an important quality and I continue to believe that. You have to have not only the intellect to be able to effectively apply the law to cases before you. But you have to be able to stand in somebody else's shoes and see through their eyes and get a sense of how the law might work or not work in practical day-to-day living."); see also *supra* Part IV.A.

260. See MARTHA C. NUSSBAUM, *POETIC JUSTICE* 86–90 (1995) (arguing that judges must apply neutral principles and be nonpartisan, but at the same time they must "develop as rich and comprehensive an understanding as possible of the situation of the groups involved in the case"); Bandes, *supra* note 53, at 137 ("In the context of judicial decision-making, empathy is an essential capacity for understanding what's at stake for the litigants. Ideally, a judge will have the capacity to put herself in the shoes of all those with a stake in her ruling."); D'Arms, *supra* note 53, at 1494–95 ("It is surely only reasonable to grant that judgments we make after seeing what things feel like from several such points of view are ipso facto better judgments."); Jerome Frank, *Corbin on Contracts Volume Three*, 61 *YALE L.J.* 1108, 1112 (1952) (book review) ("[T]he judicial judge . . . should be . . . quick with empathy, the capacity to feel himself into the minds and moods of other men.") (paraphrasing Arthur Corbin); Massaro, *supra* note 64, at 2107 (noting that "an empathic person will better 'hear' all stories—that is, 'both sides'—than one who heeds only one voice"); Thomas Morawetz, *Empathy and Judgment*, 8 *YALE J.L. & HUMAN.* 517, 523 (1996) (noting that empathy is a "second-order emotion[]"—a "mode[] of being in touch with the emotions, feelings, expectations, and vulnerabilities of others": "What we expect from judges is not the experience of first-order emotions—such as fear, love, anger, distress—but the capacity to make morally significant decisions in the light of empathy with the first-order emotions of others."); O'Grady, *supra* note 253, at 12 (advocating empathy in judicial decision making by which "a judge will seek to learn about a case by engaging in conceptual perspective taking and the active process of imagining another's situation"); Wardlaw, *supra* note 3, at 1648 ("A judge's work requires a capacity to understand the challenges faced by a wide range of potential litigants from across the spectrum of our society.").

261. *Kagan Hearings*, *supra* note 10, at 103 (testimony of General Kagan).

In other words, “the judge is required to give consideration to each party, to try to figure out what the case looks like from that party’s point of view, that’s an important thing for a judge to do.”<sup>262</sup> Still, Justice Kagan took pains to emphasize, “at the end of the day, what the judge does is . . . apply the law.”<sup>263</sup> “You are looking at law all the way down, not your political preferences, not your personal preferences.”<sup>264</sup>

There is nothing extralegal or inappropriate about judicial empathy—certainly nothing that led conservatives to object when Justice Clarence Thomas testified at his confirmation hearings,

I believe Senator, that I can make a contribution, that I can bring something different to the Court, that I can walk in the shoes of the people who are affected by what the Court does. . . . I say to myself almost everyday, “But for the grace of God, there go I.”<sup>265</sup>

And certainly nothing that led conservatives to object when Justice Alito testified as his confirmation hearings that, when he hears an immigration case, he says to himself, “You know, this could be your grandfather, this could be your grandmother. They were not citizens at one time, and they were people who came to this country.”<sup>266</sup> And when he hears a case involving children, he “can’t help but think of [his] own children and think about [his] children being treated in the way the children may be treated in the case that’s before [him].”<sup>267</sup> Alito continued, “[a]nd that goes down the line. When I get a case about discrimination, I have to think about people in my own family

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262. *Id.*

263. *Id.*

264. *Id.* at 203. That Justice Kagan properly captured the essence of President Obama’s views is supported by the fact that President Obama spoke of empathy as “an essential ingredient for arriving at just decisions” in the same breath in which he claimed that he will “seek somebody who is dedicated to the rule of law” and “who respects the integrity of the judicial process and the appropriate limits of the judicial role.” Press Briefing by Press Secretary Robert Gibbs, *supra* note 8.

265. *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 102d Cong. 260 (1991) (testimony of Judge Thomas); *see also* JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 104–05 (2007) (“Being an RVer helps me do my job better. . . . The world I live in is very cloistered. The bulk of my adult life has been spent in Washington, D.C. RVing allows me to get out and see the real America.” (quoting Justice Thomas’s remarks to the Recreational Vehicle Industry Association in 2004)).

266. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 333 (2006) (testimony of Judge Alito).

267. *Id.* at 475.

who suffered discrimination because of their ethnic background or because of religion or because of gender, and I do take that into account.”<sup>268</sup>

Empathy of this sort is not only appropriate; it is essential.<sup>269</sup> And given that some people are naturally better at it than others,<sup>270</sup> we should seek judges who have evinced a proclivity for empathy, just as we want judges who have proven themselves to be intelligent. And given that people apparently can improve their empathic skills,<sup>271</sup> we should seek judges who have expressed an interest in, and a commitment to, empathy.

#### B. OVERCOMING EMPATHIC BLIND SPOTS

A skeptic would certainly be warranted in asking why, if empathy in judging just means seeing and appreciating the human element of the case *from all sides*, does President Obama focus so much on empathy for particular groups?<sup>272</sup> Why does he say that he is specifically looking for someone with the “empathy to understand what it’s like to be poor, or African-American, or gay, or disabled, or old?”<sup>273</sup>

The answer stems from the problem of empathic blind spots.<sup>274</sup> All judges—unless they are psychopaths<sup>275</sup>—will invariably empathize to some degree with at least some of the parties before them. It would be impossible to even try to balance equities or interests if a judge did not at least subconsciously appreciate another’s perspective. But everyone has a tendency to empathize more with those who are most like them—with those whose perspectives, experiences, and situa-

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268. *Id.*; see Bandes, *supra* note 53, at 137–38 (noting that Justices Thomas and Alito indicated that they “both intend to uphold the rule of law and are capable of empathy for those less fortunate”).

269. See *supra* Part IV.B.

270. See *supra* Part IV.C.

271. See *supra* Part IV.C.

272. See *supra* Part IV.A.; cf. David Limbaugh, *Sotomayor, Reverse Empathy and the Rule of Law*, TOWNHALL (May 27, 2009) [http://townhall.com/columnists/davidlimbaugh/2009/05/27/sotomayor\\_reverse\\_empathy\\_and\\_the\\_rule\\_of\\_law/page/full/](http://townhall.com/columnists/davidlimbaugh/2009/05/27/sotomayor_reverse_empathy_and_the_rule_of_law/page/full/) (paraphrasing President Obama: “Forget what I just said about how judges should interpret, not make, the law. I want my judges to have empathy. And don’t tell anyone, but when I say ‘empathy,’ that’s code for bending the law to achieve the results I want based on the selective empathy I have for certain victimized groups.”).

273. Dann, *supra* note 70 (quoting Barack Obama).

274. See *supra* Part IV.D.

275. See *supra* note 62 and accompanying text.

tions are most like their own. Federal judges tend to come from certain backgrounds. They are likely to have privileged up-bringsings, elite educations, and professional experience as prosecutors, government attorneys, or corporate lawyers.<sup>276</sup> As such, they will subconsciously tend to empathize with the powerful, the elites, and the insiders. President Obama wants to make sure that he appoints judges who can also empathize with those whose experiences tend to be very far afield from those of most judges.<sup>277</sup> Only then will the courts properly weigh unfamiliar interests in the greater calculus of the law.

Of course, one way to seek to ensure that the interests of other groups will be understood and valued in the courts is to seek to ensure that more members of those groups are given the opportunity to serve as judges. Since they, too, will naturally tend to empathize more with people like themselves, the judiciary will take their interests into account in decision making simply by giving them a seat on the bench. That is indeed the motivation behind much of the call for greater diversity in the judiciary.<sup>278</sup>

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276. See, e.g., Amy E. Black & Stanley Rothman, *Shall We Kill All the Lawyers First?: Insider and Outsider Views of the Legal Profession*, 21 HARV. J.L. & PUB. POL'Y 835, 839 (1998) (noting that many judges come from privileged backgrounds and attended elite schools); Susan Haire et al., *An Intercircuit Profile of Judges on the U.S. Court of Appeals*, 78 JUDICATURE 101, 102–03 (1994) (providing data that show that a high percentage of federal appellate judges have prior prosecutorial experience and attended elite law schools); Rorie L. Spill Solberg & Kathleen A. Bratton, *Diversifying the Federal Bench: Presidential Patterns*, 26 JUST. SYS. J. 119, 124–25 (2005) (providing data that show that more than a third of federal district judges attended Top-15 law schools and close to half of federal district judges have prior prosecutorial experience, whereas only a tiny percentage have worked in legal aid, civil rights, or civil liberties organizations).

277. Thus, when President Obama lists downtrodden groups with whom he wants judges (and everyone for that matter) to empathize, he emphasizes that he lists those groups because they are different from us, and we cannot understand their struggles while wearing our own shoes. See, e.g., CULTURE OF EMPATHY, *supra* note 67 (quoting Obama's remarks at a Campus Progress Conference on July 7, 2006, in which he argues for the need to close the "empathy deficit" by acquiring "the ability to put ourselves in someone else's shoes; to see the world through those who are different from us—the child who's hungry, the laid-off steelworker, the immigrant woman cleaning your dorm room").

278. See, e.g., Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 411 (2000) ("[D]iversity on the bench . . . encourages judicial impartiality, by ensuring that a single set of values or views do not dominate judicial decision-making."); Angela Onwuachi-Willig, *Representative Government, Representative Court? The Supreme Court as a Representative Body*, 90 MINN. L. REV. 1252, 1253

In fact, there are some skeptics out there who doubt that members of majority groups will ever successfully empathize with the powerless,<sup>279</sup> and who therefore believe that diversity is the only solution to the problem of unconsciously biased judging in favor of the majority. Justice Sotomayor made her infamous “wise Latina” remark in the context of arguing that, while “we should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group,” the fact of the matter is that, “to understand takes time and effort, something that not all people are willing to give. For others, their experiences limit their ability to understand the experiences of others. Others simply do not care.”<sup>280</sup> Thus, there is a need for greater diversity on the bench.<sup>281</sup>

Diversity is indeed important, but not just because it can substitute for empathy. More importantly, it can facilitate empathy. It does not just mitigate the damage caused by empathic blind spots; it actually helps to eliminate those blind spots altogether. The presence of some judges with different life experiences can help to ensure that *other judges*—their colleagues—are exposed to different perspectives and can properly comprehend and appreciate interests and struggles that are beyond their own realms of experience.<sup>282</sup> To take the most famous example, Justice Thurgood Marshall’s experiences with segregation and discrimination surely influenced his own voting. But they also influenced the voting of his fellow Justices, whose ability to empathize with the victims of discrimination was

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(2006) (arguing that, because it is “inevitable that judges’ different professional and life experiences have some bearing on how they confront various problems that come before them,” it is “important . . . that courts . . . are comprised of individuals who represent a cross section of the country” (internal quotation marks omitted)).

279. See, e.g., Richard Delgado, *Rodrigo’s Eleventh Chronicle: Empathy and False Empathy*, 84 CALIF. L. REV. 61 (1996).

280. Sonia Sotomayor, *A Latina Judge’s Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002).

281. See *id.* at 89–90.

282. Cf. Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law That Is Inclusive?: What Grutter v. Bollinger Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101, 145–46 (2004) (drawing upon the reasoning of *Grutter v. Bollinger*, 539 U.S. 306 (2003), to argue that appointing a “critical mass” of minority judges will generate meaningful dialogue on the bench and will improve decision making because minority judges will inform their colleagues “when positive or negative racial dynamics may be impacting a legal issue in a way that is not readily discernible to a majority judge”).

heightened by his stories.<sup>283</sup> Similarly, in most cases, it makes no difference to the votes of male appellate judges whether the other judges on the appellate panel happen to be men or women. But in sex discrimination cases—where their female colleagues are able to articulate an important, relevant perspective that men do not naturally appreciate—men are significantly more likely to vote in favor of female plaintiffs if one of the other judges on the panel is a woman.<sup>284</sup>

Judges should not, however, have to depend on their colleagues to help them gain a fair appreciation for the unfamiliar interests of parties from other walks of life. Judges should have a skill for doing that on their own.<sup>285</sup> And they should actively

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283. See, e.g., DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 269 (2000) (quoting Justice O'Connor's statement that Justice Marshall's recounting his experiences was important to her because she had "no personal sense of being a minority in a society that cared primarily for the majority"); MARK V. TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961–1991*, at 5 (1997) (recounting Justice O'Connor's belief that Justice Marshall "made clear . . . the impact of legal rules on human lives"); William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23, 31 (1991) (claiming that Justice Marshall's stories were "a form of education for the rest of us. Surely Justice Marshall recognized that the stories made us—his colleagues—confront walks of life we had never known."); Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992) ("Thurgood brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match . . . [H]e told us much that we did not know due to the limitations of our own experience.").

284. See Boyd, *supra* note 222, at 406 ("[T]he likelihood of a male judge ruling in favor of the plaintiff increases by 12% to 14% when a female sits on the panel.").

285. Susan Bandes argues that empathy is not always useful and appropriate in the legal arena. See Bandes, *supra* note 226, at 365. She fears the "dark underbelly of empathy" when judges empathize with racists, spousal abusers, and the like. *Id.* at 376. In particular, she is concerned that, precisely because decision makers tend to favor their own perspective, allowing the judge to consider the emotional impact on all of the parties will just lead him to overvalue the emotional harm to persons with whom he identifies—since that is the harm that hits most close to home. "Often one story (usually the dominant story) drowns out or preempts another (usually the alternative story)." *Id.* at 386. Thus, "for the alternative story to be heard, sometimes the dominant story must be excluded." *Id.* Her point is not easily dismissed. But ultimately, it just goes to show the need for genuinely empathic judges. Like it or not, the judge will instinctively understand and value the dominant story, even if it is not explicitly told. What we need is a judge with the will and the capacity to ensure that the alternative story is heard and fully appreciated, regardless of how powerfully the dominant story resonates with his natural inclination to share the dominant perspective.

By the same token, Toni Massaro is certainly correct when she asserts

seek to overcome their own empathic blind spots by self-consciously endeavoring to understand the perspective of others.<sup>286</sup> For instance, in the case involving the reasonableness of the strip search of a 13-year-old girl at school, discussed above in Part IV.B.1, Justice Ginsburg was naturally able to empathize with the adolescent girl. She had “been a 13-year-old girl” herself.<sup>287</sup> But Justice Breyer found it difficult to understand just what the big deal was. At oral argument, Justice Breyer asked the girl’s attorney to help him to understand the girl’s perspective:

I’m trying to work out why is this a major thing to say strip down to your underclothes, which children do when they change for gym, they do fairly frequently, not to—you know, and there are only two women there. Is—how bad is this, underclothes? That’s what I’m trying to get at. I’m asking because I don’t know.<sup>288</sup>

Justice Breyer was actively seeking to overcome his own empathic blind spots. Having done so, he ultimately joined the Court’s opinion declaring the search unconstitutional upon a “careful balancing of [the] governmental and private interests,”

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that the law “cannot ‘empathize’ with everyone equally.” Massaro, *supra* note 64, at 2109. But this Article does not (or not precisely anyway) share her view that the “significant modern question[] . . . [is] not whether judges and ‘law’ should ‘empathize,’ . . . but with whom should we [selectively] empathize?” *Id.* at 2110. It is true that “all stories cannot dominate,” and that the law must ultimately establish substantive rules that tend to favor some interests over others. *Id.* at 2110, 2116. But it is not always true that the “concept of empathy cannot . . . assist us in making these hard choices.” *Id.* at 2116. In fact, empathy can help the judges who are making the law to better understand all perspectives before choosing which one to privilege. *See supra* Part IV.B.3. In this manner, it can at least “assist” in making the hard choices, even if it does not obviate the need for those choices altogether. And in any event, empathy can be an integral tool in applying substantive law (however skewed that law might be) in the most fair manner possible. It is possible to empathize in that process broadly, rather than selectively, and whether judges should actively try to do so remains an important issue in modern discourse.

286. *See* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 414 (1973) (arguing that judges must recognize their own prejudices and biases in order to nullify their effect); Miller, *supra* note 53, at 1001 (arguing that empathy “should be an accepted and meaningful tool for judges” because it “is a crucial cognitive mechanism that can help compensate for common cognitive bias”); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1166 (1999) (noting that “some legal commentators have suggested that the adoption of simple or commonsense mental devices, such as engaging in introspective self-criticism or attempting to feel empathy for people who are ‘different,’ will go a long way towards banishing cognitive bias from persons’ thinking”).

287. Biskupic, *supra* note 90 (quoting Justice Ginsburg).

288. Transcript of Oral Argument, *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009) (No. 08-479), 2009 WL 1064200 at \*48–49.

in which the Court recognized that, from the girl's perspective, the search was "embarrassing, frightening, and humiliating," that "adolescent vulnerability intensifies the patent intrusiveness of the exposure," and that the "degrading" emotional impact of such a search bears no resemblance to "[c]hanging for gym."<sup>289</sup> That is just what a judge should do.

### C. EMPATHY AND POLITICS

I hasten to add that this is not to say that empathic judging necessitates a decision for the girl, rather than the school. It is just to say that empathic judging requires a willingness and an ability to emotionally relate to the girl's side of the case, not just the administrators'. And more generally, this is not to say that empathic judging necessarily leads to liberal results, or is or should be the province of liberal judges alone. It is the President's critics who have sought to equate empathy with liberalism. In truth, conservatives are of course capable of empathy too,<sup>290</sup> and *all* judges should endeavor to empathize broadly in every case. Empathic judging is not *liberal* judging; it is *good* judging. Indeed, one can easily imagine a non-empathic liberal judge who naturally understands (and thus overvalues) the girl's perspective, but utterly fails to give fair weight to the substantial interest of the school administrators.<sup>291</sup> And stepping back, one could surely come up with examples of knee-jerk liberal judges who habitually and instinctively tend to see cases only from the perspective of the little guy and routinely fail to empathize with government, corporate, or wealthy actors.<sup>292</sup> We should all be able to agree that that is bad judging too.

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289. *Safford Unified Sch. Dist. No. 1*, 129 S. Ct. at 2639, 2641–42. Justice Thomas, by contrast, asked no questions at oral argument, and authored a dissent that repeatedly empathizes with the difficult position in which the school administrators were placed, but utterly fails to acknowledge the embarrassment visited upon the student. *See id.* at 2646–58 (Thomas, J., dissenting).

290. *But cf.* GEORGE LAKOFF, MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK 32–36 (2002) (suggesting that the liberal moral value system differs from the conservative one in that, to liberals, morality is heavily correlated with empathy).

291. Unlike Justice Souter, who made a conscious effort to empathize with the administrators. *See supra* note 92 and accompanying text.

292. This charge has, for instance, been leveled against Justice Brennan, who once explained, "What got me interested in people's rights and liberties was the kind of family and the kind of neighborhood I was brought up in. I saw all kinds of suffering—people had to struggle." Nat Hentoff, *The Constitutionalist*, NEW YORKER, Mar. 12, 1990, at 45, 46. As a child, Brennan "learned to sympathize with the underdog." SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 21 (2010). In law school, he served on the Legal

Indeed, one might wonder if the entire national debate about judicial empathy has been nothing more than an overblown semantic miscommunication.<sup>293</sup> Conservatives have mistakenly conflated empathy with sympathy—hardly an unforgivable sin, given that the two terms are often used interchangeably in popular discourse. As a result they have perceived a great rift in judicial philosophy that is not really there. In fact, everyone agrees that sympathy is an inappropriate basis for judicial decision making,<sup>294</sup> and maybe everyone agrees that empathy, properly defined, is a desirable quality in a judge. Perhaps we are all on the same page substantively; we just need to get our terms straight.

I would not go quite that far. We are probably all closer to one another than the tiresome partisan rhetoric would suggest, but at a fundamental level we do remain genuinely divided. Most conservatives, it seems, continue to accept the notion of judicial umpiring, and with it the belief that cases can and should virtually always be resolved without regard to the identity, feelings, and circumstances of the particular parties. As

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Aid Bureau, where he “was exposed . . . to . . . the plight of the poor” and came to empathically understand how the problems of the poor “can assume terrifying proportions for the people concerned.” *Id.* at 20 (quoting Justice Brennan). Some scholars have suggested that “Justice Brennan’s empathy for that suffering was one of the most important aspects of his greatness as a Justice.” Morton J. Horwitz, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 23, 24 (1997). But others have argued that, “when we say Brennan was empathetic, we mean he was empathetic to certain groups for which we feel empathy. The other justices may also be empathetic, but to groups that we do not readily notice or do not sympathize with.” Robert Nagel, *Will the Brennan Legacy Endure?*, 43 N.Y.L. SCH. L. REV. 177, 193 (1999) (providing the remarks of Robert Nagel). These critics charge, in other words, that Justice Brennan routinely empathized only with the sympathetic underdog. *Cf.* Frank I. Michelman, *Super Liberal Romance, Community, and Tradition in William J. Brennan, Jr.’s Constitutional Thought*, 77 VA. L. REV. 1261, 1279–80 (1991) (noting Justice Brennan’s “relative coldness toward managerial and bureaucratic interests in order, calculation, and control,” observing that, “[i]n a dizzying succession of doctrinal contexts . . . Justice Brennan has been the Court’s predictable anchor against allowing governments and their officials to fend off liability,” and suggesting that “this whole pack of opinions impliedly demurs to pleas that liability impairs governmental efficiency, deters governmental application, or, by rendering life in office unruly and uncomfortable, hinders the government’s ability to attract the best talent to public service”).

293. *See* West, *supra* note 84 (manuscript at 6–7) (noting the possibility that “the anti-empathy turn in our thinking about law might be proceeding apace on the basis of a sizable definitional mistake”).

294. *But see id.* at 33 (arguing that “the judge must embrace, not shy away from, his capacity for empathic and sympathetic engagement with the parties before him”).

discussed above, that vision can lead to selective empathy and bad judging. To be sure, conservative judges could overcome this shortcoming and still be judicial conservatives. Empathy need not, and should not, be the unique province of liberal judges. But at this point in time, it appears that most conservatives do not understand judging in this way.

#### D. THE RISKS OF EMPATHY

Is there a downside to broadly empathic judges? One might worry that judges who possess high degrees of empathy would also tend toward high degrees of sympathy. After all, it stands to reason that the more that one can truly understand and truly feel the pain and despair of another who is suffering, the more likely one would be to feel sorry for the sufferer. And one might further worry that judges who tend toward greater sympathy (as a result of their greater capacity for empathy) would also tend, whether consciously or subconsciously, to twist the law to help the downtrodden litigants for whom they feel most sorry, even when the law does not favor them. Having empathized with all of the parties, the judge may well sympathize with only one of them—the poor, oppressed, suffering victim. And then the judge may subconsciously allow that heartfelt sympathy to color her ultimate decision. In other words, even if in theory empathy and sympathy are conceptually distinct phenomena, perhaps in reality they go hand in hand. And thus, perhaps the President’s critics are ultimately right that a commitment to judicial empathy will inexorably lead to a judiciary that illegitimately decides cases on the basis of sympathy for the oppressed, rather than on the basis of law.

This is a nontrivial concern. For a possible example that also illustrates that judicial empathy is not a uniquely liberal phenomenon, consider Justice Alito’s solo dissents in two recent free speech cases—one involving revolting video depictions of animal cruelty, and the other involving reprehensible, malicious protesting at military funerals.<sup>295</sup> In his dissents, Justice Alito empathized with the speech victims. He felt the “incalculable loss” and “severe and lasting emotional injury” suffered “at a time of acute emotional vulnerability” by the grieving parent of the deceased soldier,<sup>296</sup> and he both stressed that the

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295. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1222–29 (2011) (Alito, J., dissenting); *United States v. Stevens*, 130 S. Ct. 1577, 1592–1602 (2010) (Alito, J., dissenting).

296. *Snyder*, 131 S. Ct. at 1222 (Alito, J., dissenting).

“animals used in [the cruel] videos are living creatures that experience excruciating pain,” and offered extensive descriptions of the horrible suffering that the animals endure.<sup>297</sup> In both of these cases, all eight of the other Justices—liberals and conservatives alike—had little problem finding that the law clearly favors the repulsive and unsympathetic animal torturers and protestors. As Michael Dorf explains, “[w]hat distinguishes Justice Alito’s position from that of the majority in both [cases] is the clear depth of feeling he expresses for the victims of the speech . . . Justice Alito feels more for the victims, or at least permits his feelings to play a larger role in his legal analysis than the rest of the Court does.”<sup>298</sup> Perhaps Justice Alito allowed his empathy to turn into sympathy, and then allowed his sympathy to lead him to results that were contrary to the law.

Indeed, we can draw a cautious lesson in this regard from two psychological studies published by professors at the University of Kansas in 1995.<sup>299</sup> In the first study, subjects believed that they were functioning as supervisors and were asked to assign subordinates to one of two tasks—a desirable one and an undesirable one. The subjects, who were divided into two groups, received an emotionally moving note ostensibly from one of the persons being assigned to a task. In the note, the subordinate explained that she was feeling depressed because her boyfriend had recently broken up with her and that she really needed something good to happen to her to cheer her up. One of the subject groups was instructed to “try to *take an objective perspective* toward what is described [in the note]. Try not to get caught up in how . . . she feels; just remain objective and detached.”<sup>300</sup> The other group was told to “try to imagine how [she] feels about what is described. Try to imagine how it has affected . . . her life and how . . . she feels as a result.”<sup>301</sup> Those subjects who were instructed to remain objective and avoid empathy assigned the woman to the desirable task only half of the time. The subjects who were told to empathize with the woman assigned her to the desirable task seventy-five per-

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297. *Stevens*, 130 S. Ct. at 1598–1602 (Alito, J., dissenting).

298. Mike Dorf, *Could Empathy Explain Justice Alito’s Lone Dissents in Free Speech Cases*, DORF ON LAW (Mar. 7, 2011, 12:22 AM), <http://www.dorfonlaw.org/2011/03/could-empathy-explain-justice-alitos.html>.

299. See C. Daniel Batson et al., *Immorality from Empathy-Induced Altruism: When Compassion and Justice Conflict*, 68 J. PERSONALITY & SOC. PSYCH. 1042–54 (1995).

300. *Id.* at 1044.

301. *Id.*

cent of the time.<sup>302</sup> Although many of the subjects who had been asked to empathize intentionally gave the downtrodden woman favorable treatment, they nonetheless were overwhelmingly of the belief that flipping a coin was the most fair way to assign the tasks.<sup>303</sup> This fact led the researchers to conclude “that although empathy induction introduced considerable partiality, it did not change participants’ perceptions of fairness or justice in the situation.”<sup>304</sup> In other words, the subjects who engaged in empathy found that it led them to sympathize with the woman—the study found that those who were asked to empathize were more likely to report feelings of sympathy and compassion<sup>305</sup>—and that sympathy, in turn, led them to reach a result that was counter to their own sense of fairness and justice.

In the second study, subjects were told that they were being asked to evaluate the effectiveness of radio advertisements for a (fictitious) charitable organization that was seeking donations to help improve quality of life for children with terminal illnesses. Subjects were divided into two groups, each of which was asked to adopt a particular perspective when listening to the fundraising advertisement. Subjects in the first group were asked to “try to *take an objective perspective*” and to “[t]ry not to get caught up in how the child [in the advertisement] . . . feels; just remain objective and detached.”<sup>306</sup> Subjects in the second group were told to “try to *imagine how the child . . . feels about what has happened and how it has affected this child’s life*. Try to feel the full impact of what this child has been through and how . . . she feels as a result.”<sup>307</sup> The advertisement featured a heartbreaking interview with “Sheri,” a (fictitious) ten-year-old girl who allegedly suffered from a fatal muscle-paralyzing disease that left her unable to walk more than a few steps in her heavy braces without falling down.<sup>308</sup> The advertisement explained that there was a drug that would allow Sheri full use of her arms and legs even as her fatal disease inevitably progressed.<sup>309</sup> Sheri spoke in her interview of how much she

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302. *Id.* at 1045.

303. *Id.* at 1045–46.

304. *Id.* at 1046.

305. *See id.* at 1045.

306. *Id.* at 1048.

307. *Id.*

308. *Id.* at 1049.

309. *Id.*

missed playing with her friends and how her mother had told her of a drug that would let her ride her bike and go to school again.<sup>310</sup> The advertisement explained that the drug was very expensive; the charitable organization was hoping to raise the money to provide it to Sheri.<sup>311</sup>

After listening to the advertisement, each subject was informed that there was a waitlist for charitable assistance, and that most children on the waitlist would die before they could be helped.<sup>312</sup> Each subject was then told that the charitable organization had agreed, as a way of thanking the subject for his or her assistance, to give him or her the power to move Sheri to the top of the waitlist.<sup>313</sup> The subjects were warned, however, “of the consequences of such a decision. Moving [Sheri] up . . . means that children who are currently higher on the Waiting List, due to earlier application, greater need, or shorter life expectancy will have to wait longer.”<sup>314</sup> Subjects who had been told to empathize with Sheri reported a greater degree of sympathy for her plight, and were far more likely to move her to the front of the waitlist, at the expense of other children who were in greater need.<sup>315</sup> The researchers concluded that, “[r]ather than producing a general sensitivity to the needs of all, empathy increased sensitivity to the need of the individual who was the target of empathy,” at the expense of the basic value of equal justice for all.<sup>316</sup>

These studies suggest that the concern that empathic judges might tend towards unjust sympathy should not be taken lightly. But it should also not be overstated. The subjects in these studies were asked to empathize with only one person—just the sort of selective empathy that empathic judging aims to avoid. The subjects were not asked or given the opportunity to empathize with all of the parties who would be affected by their decisions.<sup>317</sup> In addition, there is no evidence that the subjects

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310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* at 1049–50.

316. *Id.* at 1050.

317. Economists sometimes worry that policymakers overemphasize the immediate and obvious costs and benefits of their decisions—the “seen” effects—and underemphasize the remote and less obvious costs and benefits—the “unseen” effects. For instance, it is easy to appreciate the benefits to low income earners of raising the minimum wage, but harder to appreciate the po-

of these studies were unusually empathic people; they were not screened in any way for empathic abilities or proclivities. Thus, these studies give us no reason to think that highly empathic people (and judges) are any more likely to lapse into sympathy than less empathic people (and judges). To the contrary, neural imaging studies reveal that sympathy and empathy are controlled by different regions of the brain.<sup>318</sup> As such, they do not generally go hand in hand. Psychological experiments have found that many people are very sympathetic, but not particularly empathic—they “exhibit considerable concern for the plight of others, without experiencing congruent emotions.”<sup>319</sup> That is to say, they “have a tendency to be sympathetic but not empathetic.”<sup>320</sup> Many other people “are very empathetic but do not have a tendency to feel concern or pity for others in need.”<sup>321</sup> In other words, empirical research supports the propositions that “sympathy and empathy are statistically independent” and “that they reflect different psychological processes.”<sup>322</sup> Thus, the evidence that greater empathy leads people to be more likely to take action in favor of the sympathetic “is actually quite weak.”<sup>323</sup> An ideal empathic judge should surely be

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tential costs to persons whose jobs might be lost or never created, or to consumers who might end up paying higher prices to offset increased labor costs. Cf. Frédéric Bastiat, *What Is Seen and What Is Not Seen*, LIBRARY ECON. & LIBERTY, <http://www.econlib.org/library/Bastiat/basEss1.html> (last visited May 2, 2012) (“In the economic sphere . . . a law produces not only one effect, but a series of effects. Of these effects, the first alone is immediate; . . . *it is seen*. The other effects emerge only subsequently; *they are not seen*. . . . There is only one difference between a bad economist and a good one: the bad economist confines himself to the *visible* effect; the good economist takes into account both the effect that can be seen and those effects that must be *foreseen*.”). By the same token, it is important for empathic judges to avoid empathizing only with those whose plight is most obvious or apparent.

318. See Decety & Michalska, *supra* note 58, at 896 (presenting the results of a neural imaging study that “document[s] partially distinct neural mechanisms subserving empathy and sympathy”).

319. Richendoller & Weaver, *supra* note 59, at 309.

320. *Id.* at 310.

321. *Id.*

322. Rand J. Gruen & Gerald Mendelsohn, *Emotional Responses to Affective Displays in Others: The Distinction Between Empathy and Sympathy*, 51 J. PERSONALITY & SOC. PSYCH. 609, 613 (1986). Empathy for those in distress can sometimes produce sympathy (concern for and a desire to help the sufferer), but it can also produce what psychiatrists call “personal distress”—a self-oriented sense of personal discomfort. See N. Eisenberg & R.A. Fabes, *Empathy: Conceptualization, Measurement, and Relation to Prosocial Behavior*, 14 MOTIVATION & EMOTION 131, 131–49 (1990).

323. Jesse J. Printz, *Is Empathy Necessary for Morality?*, in EMPATHY: PHILOSOPHICAL AND PSYCHOLOGICAL PERSPECTIVES (P. Goldie & A. Coplan

aware of the dangers of excessive sympathy, and should take great pains to ensure that her empathy does not lead to subconscious sympathy-based judging. But there is no reason to think that judges with a high capacity or penchant for empathy are at a substantially greater risk than their peers of rendering improperly sympathetic rulings.<sup>324</sup> Indeed, highly empathic judges would probably be more likely to empathize broadly with all parties, rather than narrowly only with the obviously sympathetic sufferers—the low-hanging emotional fruit—which would actually lessen the risk of sympathetic decisions.

### CONCLUSION

In opposing the confirmation of Justice Sotomayor, Senator Charles Grassley insisted that empathy has no role to play in good judging:

Justice is blind. Empathy is not. Empathetic judges take off the blindfolds and look at the party instead of merely weighing the evidence in light of what the law is. Empathetic judges put their thumbs on the scales of justice, altering the balance that is delicately crafted by the law. Empathetic judges exceed their role as part of the judicial branch and improperly take extraneous, nonlegal factors into consideration. That is why President Obama's judicial standard of empathy is

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eds.) (forthcoming) (manuscript at 1, 8). Studies show no correlation between empathy and prosocial behavior in children; some studies actually show negative correlation. *See id.* Studies involving adults show only modest correlation. *See id.* (manuscript at 9). Indeed, not only does empathy not correlate with sympathy (and thus not lead to altruistic action), but also, the experimental evidence suggests that even *sympathy* may not correlate well with altruistic action. Compare Harvey Ginsburg & Tammy Silakowski, *Comparing Empathy and Selfish Rationales Motivating Preschool Children's Decisions About Wearing Vision-Obscuring Opaque Eyeglasses*, 3 J. EDUC. & HUMAN DEV. 1 (2009) (finding a link between sympathy and altruism), and Gruen & Mendelsohn, *supra* note 322, at 609 (recounting studies that have found such a link), with Christopher J. Einolf, *Empathic Concern and Prosocial Behaviors: A Test of Experimental Results Using Survey Data*, 34 SOC. SCI. RES. 1267–79 (2008) (concluding that people who are inherently more sympathetic are generally not more likely to engage in prosocial behavior).

324. That a capacity for empathy need not lead to sympathy can be illustrated by the work of the famous relative of one of the world's leading empathy scholars. Professor Simon Baron-Cohen's cousin is actor and comedian Sacha Baron-Cohen. *See* BARON-COHEN, *supra* note 56, at 113. Sacha Baron-Cohen's performances as the bumbling Borat depend on a masterful empathic ability to understand the uncomfortable feelings that his outrageous behavior causes in those around him, but he mercilessly takes no action to quell their misery. *See* BORAT: CULTURAL LEARNINGS OF AMERICA FOR MAKE BENEFIT GLORIOUS NATION OF KAZAKHSTAN (20th Century Fox 2006); DA ALI G SHOW (HBO television broadcast 2003–04).

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problematic . . . .<sup>325</sup>

That is exactly wrong—just about as wrong as it is possible to be. Empathic judges do not exceed their role as part of the judicial branch, and they do not improperly take nonlegal factors into consideration. They simply use empathy to ascertain and make sense of the relevant facts and to apply the relevant legal factors—thus fulfilling, rather than abdicating, their role within the judicial branch. They do not place their thumbs on one side of the scales of justice, altering the delicate balance crafted by the law. They simply use the tool of empathy to determine the proper weight to be placed on each side of the scale, so that they can properly decide cases according to the balance crafted by the law.

I therefore respectfully but emphatically disagree with Professor Kerr's assertion that President Obama's call for judicial empathy means that the President does not believe that a

judge must weigh the best legal arguments on one side and the best legal arguments for the other, and must pick the side that has the better of it, no matter how slight the advantage. If a case is 55/45, then there is a correct answer, because 55 is greater than 45.<sup>326</sup>

Empathic judges are no different. They too must always find in favor of the party that they perceive to have the stronger legal argument. The call for empathy in judging is not premised on a belief that, “[s]o long as there is some appreciable legal ambiguity . . . [m]aybe 70/30 is enough, or maybe even 75/25 will do . . . . [T]he judge can rule in a way that furthers whatever normative vision of the law that the judge happens to like.”<sup>327</sup>

That is not how an empathic judge (or any other judge committed to the rule of law) goes about deciding a case. Empathy comes into play in deciding which legal conclusion is stronger—in assigning the percentages, not in overriding them.

Those who support judicial empathy are just as committed to the rule of law as anyone else. We want judges who follow the law, too.<sup>328</sup> But we recognize that the law is often sufficient-

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325. 155 CONG. REC. S8,780 (Aug. 4, 2009) (statement of Sen. Grassley).

326. Kerr, *supra* note 42.

327. *Id.*

328. See *supra* notes 247–53, 263–64 and accompanying text. In a fascinating forthcoming essay, Robin West argues (and laments) that the “anti-empathic turn” in our legal thinking is the product of a “paradigm shift” . . . in our ideals of good judging.” West, *supra* note 84 (manuscript at 8). Whereas the traditional, common law view of judging was particularistic and backward-looking, the emerging post-Realist view of judging is general and forward-

ly ambiguous or open-ended that there is no objectively correct answer that can be discerned simply by calling balls and strikes. We want judges who acknowledge that reality, and who recognize that the failure to do so not only is arrogant and ignorant, but also undermines justice by facilitating unconscious favoritism. Empathy is not an obstacle to judicial neutrality; it is a requirement of judicial neutrality. Thus, we want judges who are capable of empathy and who seek to engage in it.

After all, a judge who cannot or will not empathize well is at a great disadvantage. How can she effectively apply (or craft) legal tests if she lacks the ability to accurately assign value to the relevant variables in the legal calculus? If “Lady Justice doesn’t have empathy for anyone,”<sup>329</sup> then she is a lousy judge.

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looking. We no longer understand the central task of the judge to be the resolution of a particular dispute between individual parties. Rather, we now understand the judge primarily to be in the business of making “social policy” by “act[ing] as a quasi-legislator within the interstices of rules laid down.” *Id.* at 36. And when it comes to undertaking that task, “[e]mpathy need not be in the toolkit.” *Id.* at 10. If this is correct, it is certainly ironic, given that the public critique of judicial empathy comes from those who rail against so-called “legislating from the bench.” *See supra* Parts I, II. But in any event, despite the views of some economists, *see West, supra* note 84 (manuscript at 40–43), even legislators need empathy to make good social policy. *See BARON-COHEN, supra* note 56, at 103–04.

329. Long, *supra* note 37.