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## Lies, Damned Lies, and Judicial Empathy

Mary Anne Franks\*

In the wake of Justice Souter's 2009 announcement that he was retiring from the Supreme Court,<sup>1</sup> President Barack Obama made statements extolling the value of judicial empathy, sparking a national debate about how judges should make their decisions.<sup>2</sup> What had the potential to become a productive discussion about the role empathy should play in our moral imagination and in our courts quickly devolved into a pitched battle between two caricatures: the activist judge who decides cases based on his feelings and political agenda and the impartial judge who dispassionately applies the rules of law. The supposed contrast was only heightened by the visuals of the Supreme Court confirmation hearings that followed President Obama's first nomination: future Justice Sotomayor didn't just stand out because of her "wise Latina" comments,<sup>3</sup> she stood out because she *looked* so different, not just from her primarily male, primarily white interrogators on the Senate Judiciary Committee, but also from so many of the nominees who preceded her. The image of Sotomayor fending off accusations of bias provided an intriguing visual contrast to Chief Justice Roberts in the same seat a few years prior, calmly expounding on his theory that judges are mere "umpires" who "don't make the rules, they apply them."<sup>4</sup> The principal characters of the empathy soap opera were cast in the weeks and months following President Obama's remarks: President Obama himself, Sotomayor, and President Obama's next Supreme Court nominee, Elena Kagan (liberal, racial and/or gender minorities associated with the concept of empathy) on one side, Chief Justice Roberts, Senator Orrin Hatch, and Senator Jeff Sessions (conservative white men associated with judicial impartiality) on the other. Were the race and gender of the characters merely a coincidence, or did they have something to do with the way the battle over empathy took such a misguided turn? Because turn it

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1. Peter Baker & Jeff Zeleny, *Souter's Exit to Give Obama First Opening*, N.Y. TIMES, May 1, 2009, <http://www.nytimes.com/2009/05/02/us/02souter.html>.

2. See, e.g., *Obama's Remarks on the Resignation of Justice Souter*, N.Y. TIMES, May 1, 2009, <http://www.nytimes.com/2009/05/01/us/politics/01souter.text.html> [hereinafter *Obama's Remarks*].

3. See Charlie Savage, *A Judge's View of Judging Is on the Record*, N.Y. TIMES, May 14, 2009, <http://www.nytimes.com/2009/05/15/us/15judge.html>.

4. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) [hereinafter *Confirmation Hearing*] (statement of John G. Roberts, Jr.).

did: within days, judicial empathy and judicial impartiality were presented as polar opposites, with the former associated with progressives and the latter with conservatives.<sup>5</sup> This narrative about empathy and impartiality has kept its grip on the national discourse despite the fact that it is, to put it plainly, a lie.

First, it is simply not the case that empathy and impartiality are mutually exclusive either in definition or application. To claim this is to misconstrue both terms. The supposed opposition between empathy and impartiality only succeeds by being mapped on to the supposed divide between progressives and conservatives. Conservatives seized on the word empathy because they saw an opportunity to impose a label that made progressives look biased—not a new technique, by any means. And they seized on the image of impartiality for themselves because it made conservatives look neutral—also not a new technique.<sup>6</sup> Empathy is not, as many scholars have pointed out, an intuitive concept or one with clearly defined contours.<sup>7</sup> It sounds vague and indistinct and dangerously open—and thus is an ideal term for discrediting a group. Given that empathy has, perhaps unfortunately, taken such a prominent role in our national conversation about judging, it is worth trying to develop a more precise working definition of judicial empathy, which I will attempt to do later in this Essay.

But the necessarily prior and more important task, in my view, is to attack the truly shameful aspect of the empathy wars: the conservative claim to empathy's supposed opposite, impartiality. This is the foundation on which the other, smaller lies are told, and as such must be addressed before any new working definition of empathy can be advocated or indeed genuinely heard. As Susan Bandes writes, the exaltation of impartiality and the denigration of empathy flies in the face of judicial reality, and is the product of "deep anxiety about the power of judges."<sup>8</sup> Though it has been said many times before, it needs to be said again: the judiciary, broadly speaking, and indeed the law itself, is rife with bias.<sup>9</sup> It reflects the interests and prejudices of the powerful and those who most resemble the powerful. This should come as no surprise, given that through the greater part of our history, the process of writing, executing, and interpreting our laws *explicitly* excluded women and African Americans, and *implicitly* excluded other minorities and the poor.

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5. See Charlie Savage, *Scouring Obama's Past for Clues on Judiciary*, N.Y. TIMES, May 9, 2009, <http://www.nytimes.com/2009/05/10/us/politics/10court.html> (quoting Sen. Orrin Hatch as calling "empathy a 'code' for liberal activism, in contrast to a judge who is impartially 'fair to the rich, the poor, the weak, the strong' alike").

6. See, e.g., FOX NEWS, <http://www.foxnews.com> (last visited Jan. 11, 2012) (displaying the network's "Fair & Balanced" slogan).

7. See, e.g., Susan A. Bandes, *Moral Imagination in Judging*, 51 WASHBURN L.J. 1, 6–7 (2011).

8. *Id.* at 7.

9. See, e.g., Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629 (2011).

Though our law is evolving, it will be some time before the impact of a racist, sexist, and classist legal edifice can truly be undone. That edifice has impoverished the moral imagination of society as a whole, and its effects on the judicial moral imagination are a particular cause for concern.

This recognition does not require fatalism. It does not mean that the law itself and the judicial system are rotten to the core. At the heart of the American legal system, in the U.S. Constitution, are noble and enduring structures within which a just legal system can develop. But this possibility is contingent upon the recognition of the law's historic and continuing biases. To speak of the law or of the judiciary as impartial in a descriptive, as opposed to an aspirational, way is to lie. It is a very effective lie for the defenders of the status quo, because it makes the status quo seem both natural and right. And if the status quo is natural and right, any attempt to change it will be viewed as unnatural and wrong. This is precisely what has happened in the debate over judicial empathy. If one recognizes, on the other hand, that the status quo is itself biased and partial, then promoting a quality of open-mindedness, of diversifying the moral imagination, may not be dismissed out of hand. Moreover, such a quality can be more sharply defined, and thus more usefully deployed, once we have a realistic picture of the judicial landscape.

#### I. THE LIE THAT WON'T DIE: THE CONSERVATIVE-IMPARTIAL-UNIVERSAL CLUSTER

With regard to judicial values, as with many issues, President Obama seems to follow an "accentuate the positive eliminate the negative" approach. President Obama tends to speak in terms of idealism and ambition, delicately avoiding criticism of the status quo, assuming (hoping?) that his audience will appreciate what is not being said. This approach has done him no favors either with the political right or the public. President Obama tried to propose empathy as a corrective to the judiciary without first making clear why the judiciary might be in need of a corrective.

Let us imagine that President Obama, while a U.S. Senator faced with future Chief Justice Roberts's insouciant characterization of judges as umpires who merely apply rules,<sup>10</sup> responded not with an encomium to the virtues of broad perspectives and deep values but rather with an outright repudiation of Roberts's claim. Let us imagine that he had said something along the lines of:

It is assuredly right that judges should aspire to apply the law fairly and without respect to the prestige, power, or influence of persons. But it would be a malicious and blatant lie to assert that this is what the judiciary in fact does consistently. Rather, judges, like most people, are driven by prejudice, bias, and

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10. See *Confirmation Hearing*, *supra* note 4, at 55.

self-interest. The greatest danger to justice is not that judges should be so imperfect, but that they should not recognize their imperfections and strive to correct them. It is precisely because of his casual assertion that judges *are* objective, as opposed to the conviction that judges *should strive to be* objective, that makes me unable to vote for the confirmation of John Roberts as a Supreme Court Justice.

If this critique had laid the foundation for President Obama's judicial philosophy, perhaps the public could have been spared Senator Sessions's rehash of Chief Justice Roberts's facile "judges-as-umpires" metaphor when describing the virtues of Supreme Court nominees: "The core strength of American law is that a judge puts on that robe and he says, 'I am unbiased; I'm going to call the balls and strikes based on where the pitch is placed, not on whose side I'm on. I don't take sides in the game.'" <sup>11</sup> Perhaps we would never have had to hear another declaration (as opposed to demonstration) of judicial impartiality even as courts disregarded women's rights over their own bodies, <sup>12</sup> presumed that innocent people never run from police, <sup>13</sup> or maintained that biological fathers have no rights to a relationship with children they love and support if the children's mother is married to someone else. <sup>14</sup> Even if one were to believe that judges can and do simply apply the rules of law, it would be necessary to point out that in many cases, *the law itself takes sides*. The law is a product of the biases, assumptions, and self-interest of those who write it, enforce it, and uphold it. One hopes that the law is much more than this, but it must be recognized that this is its foundation. To refuse to recognize that the law is itself marked by bias is to naturalize those biases and insulate them from critique or correction.

Consider, as one example, the law's continuing sympathy toward men who kill their intimate partners or ex-partners out of jealousy or anger at separation in the form of provocation defenses. <sup>15</sup> Contrast this to the struggle to even allow evidence of Battered Women's Syndrome to be admitted in cases where women have killed their partners or ex-partners after years of abuse, <sup>16</sup> to say nothing of the harshness with which such women are treated compared to men who kill out of jealousy or anger. The law clearly takes sides with men's interests over women's in much of the law on domestic violence, as well as laws regarding sexual assault, reproduction, and

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11. Sessions Says He's Looking for Judicial Restraint, NATIONAL JOURNAL (May 7, 2009), <http://www.nationaljournal.com/njonline/sessions-says-he-s-looking-for-judicial-restraint-20090507>.

12. See *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007).

13. See *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000); *California v. Hodari D.*, 499 U.S. 621, 647 (1991).

14. See *Michael H. v. Gerald D.*, 491 U.S. 110, 131 (1989).

15. See, e.g., Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUDIES 71, 72 (1992); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 3 (1991); Laurie J. Taylor, Comment, *Provoked Reasoning in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L. REV. 1679, 1682 (1986).

16. See Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1334, 1355 (1997).

harassment. To be clear, it is not the fact that the law is biased in this way that is the real danger. The real cause for concern is when the law that includes such shameless partiality is called, with a straight face, “objective” or “impartial.” The claim of legal impartiality demonstrates just how successfully the interests of some have been coded as the interests of all. When the particular is coded as the universal, it is immunized from attack. Those who would criticize or reform it are dismissed as “biased.”

If the lie of the impartial judiciary is believed, introducing a quality such as empathy will seem like a dangerous and unnecessary add-on. President Obama missed the opportunity to lay claim to the real terms of the debate, namely, that those who insist that the judicial status quo is objective are delusional at best and liars at worst. President Obama’s decision to open with a call for judicial empathy played directly into the hands of the right, which has mastered the art of professed neutrality. The other clichéd divisions line up from there: the right is rational, the left is emotional; the right is impartial, the left is biased; the right acts on behalf of the universal, the left on behalf of favoritism. President Obama, and progressives generally, constantly fall into the trap of defending the territory of emotion and uncertainty. In our political setting, where false binaries between emotion and reason dominate, being on the side of emotion is a costly thing. The left should not let itself be aligned with the right’s caricature of emotion and bias, and should not concede the high ground of aspirationally impartial judging.

Does this mean President Obama should never have spoken of empathy? No. But he should have done so only after explicitly describing the rampant self-interest that defines so much of our society, our politics, and our law. Only then does it become clear what role empathy can play and how it should be separated from mere emotion or sympathy. Once we diagnose the judiciary as suffering from an overabundance of self-interest—which it refuses to recognize as self-interest—then we can see that the proper treatment must target the process whereby particular interests are coded as universal interests. This is the move from the descriptive to the aspirational in judging—we are all subject to the influence of self-interest, but in judging we must consciously attempt to recognize and evaluate that self-interest. One way of doing the latter is through empathy.

## II. THE PARTISAN (MIS)TRANSLATION OF EMPATHY

As we saw, however, President Obama did not begin the conversation on judicial values with a critique of the status quo. He began instead by praising empathy as an admirable characteristic in a Supreme Court Justice: “I view that quality of empathy, of understanding and identifying with people’s hopes

and struggles as an essential ingredient for arriving at just decisions and outcomes.”<sup>17</sup> The way the political right translated this statement was depressingly predictable. President Obama of course did not say, or even suggest, that judges should “go on feeling” or “side with the little guy.” It would have been surprising if he had, given that such a definition of empathy would indicate that President Obama is either stupid or remarkably unsophisticated (and even his detractors would have a hard time making that claim). Nor did he indicate that empathy was outcome-determinative: as he went on to say, “I will seek somebody who is dedicated to the rule of law, who honors our constitutional traditions, who respects the integrity of the judicial process and the appropriate limits of the judicial role.”<sup>18</sup> On their face, President Obama’s statements were fairly straightforward—nothing he said regarding judicial values was mysterious or unintelligible. President Obama could have provided more clarity or precision as to just how empathy should be defined and deployed in judging, of course, but no political figures were particularly interested in asking him.

Instead, conservative members of Congress took to the media to “translate” President Obama’s words for the (ignorant?) people. Senator Hatch claimed that when President Obama uses it, empathy is “[u]sually . . . a code word for an activist judge.”<sup>19</sup> President Obama “said he favored judges who have an appreciation for ‘how our laws affect the daily realities of people’s lives,’ but what he really meant was that he would select judges based not on merit but ‘on the basis of their personal politics, their personal feelings, their personal preferences.’ ”<sup>20</sup> Senator Sessions, when asked about President Obama’s empathy standard, acknowledged the rather obvious point that President Obama had said things in his remarks on Justice Souter’s replacement that indicated the “classical independence of the judiciary, and that [judges] should follow the Constitution.”<sup>21</sup> And yet Senator Sessions insisted:

I don’t know what he means [by empathy]. And it’s dangerous, because I don’t know what empathy means. So I’m one judge and I have empathy for you and not this party, and so I’m going to rule for the one I have empathy with? So what if the guy doesn’t like your haircut, or for some reason doesn’t like you, is he now free to rule one way or the other based on likes, predilections, politics, personal values?<sup>22</sup>

Empathy was transformed into a synonym for arbitrariness and caprice.

17. *Obama’s Remarks*, *supra* note 2.

18. *Id.*

19. ‘*This Week*’ Transcript: *Sens. Leahy and Hatch*, ABC NEWS (May 3, 2009), <http://abcnews.go.com/ThisWeek/story?id=7491153&page=1>.

20. John Paul Rollert, *Reversed on Appeal: The Uncertain Future of President Obama’s “Empathy Standard,”* 120 YALE L.J. ONLINE 89, 91 (2010), <http://yalelawjournal.org/2010/10/13/rollert.html>.

21. *Sessions Says He’s Looking For Judicial Restraint*, *supra* note 11.

22. *Id.*

Can some motivation other than pure partisan gamesmanship account for the Republicans' rush to decode President Obama's "empathy-as-judicial-value" as "empathy-as-outcome-determinative bias"? Is it possible that this was simply a case of honest misunderstanding? President Obama could have been more precise about how empathy works as a mechanism in the judicial process, certainly, a point that will be addressed below. But compare the Republican response to Obama's statements with the response, Republican or otherwise, to President George H.W. Bush's announcement of Clarence Thomas as his Supreme Court nominee. President Bush stated, "He is a delightful and warm, intelligent person who has great empathy and a wonderful sense of humor. He's also a fiercely independent thinker with an excellent legal mind, who believes passionately in equal opportunity for all Americans."<sup>23</sup> To the extent that President Bush offered some illuminating limit to the concept of empathy in his remarks, it was remarkably similar to President Obama's: "[Thomas] will approach the cases that come before the Court with a commitment to deciding them fairly, as the facts and the law require."<sup>24</sup> Yet politicians and pundits didn't go rushing to the media to denounce President Bush's coded announcement of judicial activism and bias.

Many scholars and commentators have pointed out the way President Obama's critics take a Humpty Dumpty approach<sup>25</sup> to the word empathy.<sup>26</sup> This Essay is more concerned with the highly selective motivation for why they do so, and why the sloppy and often nonsensical definitions of empathy these critics promote continue to exert such influence. The influence is so strong that future Justice Sotomayor found herself battling the specter of empathy at numerous turns during her confirmation hearings, finally distancing herself from President Obama by rejecting the idea that a judge should rely on his "heart" to decide certain cases.<sup>27</sup> Even more tellingly, the abuse of the definition of empathy seems to have prompted President Obama himself to stop using the word. In a statement following the announcement of Justice Stevens's retirement, President Obama said his next nominee should be someone with "a fierce dedication to the rule of law and a keen understanding of how the law affects the daily lives of the American

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23. *Media Obsess Over Obama's Comments, Ignore Bush's Highlighting of Thomas' "Great Empathy,"* MEDIA MATTERS FOR AMERICA (May 26, 2009), <http://mediamatters.org/research/200905260034>.

24. *Id.* Compare to President Obama's statement that he "will seek somebody who is dedicated to the rule of law, who honors our constitutional traditions, who respects the integrity of the judicial process and the appropriate limits of the judicial role." *Obama's Remarks*, *supra* note 2.

25. "'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'" LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 124 (1875).

26. See, e.g., Bandes, *Moral Imagination in Judging*, *supra* note 7, 4; Rollert, *supra* note 20, at 91–92; Kim McLane Wardlaw, *Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1631 (2010); Chris Weigant, *Is The Media Misinterpreting Obama's "Empathy" Dog Whistle?*, HUFFINGTON POST (May 7, 2009, 2:14 a.m.), [http://www.huffingtonpost.com/chris-weigant/is-the-media-misinterpret\\_b\\_198389.html](http://www.huffingtonpost.com/chris-weigant/is-the-media-misinterpret_b_198389.html).

27. Ari Shapiro, *Sotomayor Differs With Obama On "Empathy" Issue*, NPR (July 14, 2009), <http://www.npr.org/templates/story/story.php?storyId=106569335>.

people.’ ”<sup>28</sup> But neither Justice Sotomayor’s nor President Obama’s efforts to distance themselves from the word empathy have done much to appease their critics. Regarding President Obama’s shift from “empathy” to “life experience,” Senator Sessions remarked, “I’m not sure it’s much different . . . . It seems to be calling again for judges to be less committed to fidelity to the law and calling for them to reach decisions that somehow endeavor to decide who ought to win.’ ”<sup>29</sup> In other words, no matter what word or expression President Obama uses to describe what he values in judicial appointees, the political right will interpret it as bias.

President Obama’s statements on empathy were not stupid, nor were they, on their face, particularly alarming. They did, however, seem to presume an audience that would listen in good faith and with an understanding of the flaws of the status quo. He was wrong. The right has managed to turn “empathy” into a dirty word, and no manner of reasonable restatement is likely to undo that. Perhaps this would be no great loss if the effect were limited to a demographic concerned only with talking to itself, but unfortunately partisan controversy often sets the tone and the shape of public debate more broadly.

### III. EMPATHY REVISITED

Is it worth it, then, to try to salvage empathy? Empathy, however defined, is surely not the only, or even the key, characteristic of good judging. Good judging is a complex and context-sensitive practice, and there is likely no need to make empathy into a judicial meta-value, especially given the controversy over its definition. But there is value to the concept for those genuinely invested in thinking critically about the judicial process, and so I offer some thoughts here about how to sharpen and define empathy in the context of judging.

Many scholars and commentators have discussed at length the confusion over what empathy precisely means and how it is different from sympathy.<sup>30</sup> I propose a simple definition here: empathy is the exercise of our moral imagination against, or at least indifferent to, our own self-interest. Sympathy, by contrast, is the emotion we feel when others remind us of ourselves or of situations we have ourselves experienced. In other words,

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28. Robert Barnes, *Justice John Paul Stevens Announces his Retirement from Supreme Court*, WASH. POST, Apr. 10, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/09/AR2010040902312.html>.

29. Peter Baker, *In Court Nominees, Is Obama Looking for Empathy by Another Name?*, N.Y. TIMES, Apr. 25, 2010, <http://www.nytimes.com/2010/04/26/us/politics/26memo.html>. This is an odd statement; surely it is often precisely the job of judges to “endeavor to decide who ought to win.”

30. See, e.g., Bandes, *Moral Imagination in Judging*, *supra* note 7, at 7–11; Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 CARDOZO L. REV. DE NOVO 133, 134, [http://www.cardozolawreview.com/content/denovo/BANDES\\_2009\\_133.pdf](http://www.cardozolawreview.com/content/denovo/BANDES_2009_133.pdf); Martha C. Nussbaum, *Emotion in the Language of Judging*, 70 ST. JOHN’S L. REV. 23, 25 (1996).

empathy is ego-alienating, whereas sympathy is ego-validating. Empathy forces us to imagine and to have concern for those who are radically different from, even threatening to, ourselves and our values. Sympathy allows us to feel that we are the centers of our own worlds and that we can dole out pity and compassion to those who remind us of ourselves and our values. Sympathy is easy, as it involves little or no cognitive dissonance, whereas empathy is hard, requiring at least a temporary embrace of cognitive dissonance.<sup>31</sup>

The primary virtue of empathy is that it tells us not to assume that we are right, or objective, or impartial. It opens up a window of humility that can help guide a decision-maker to the correct outcome. Empathy itself does not dictate any outcome;<sup>32</sup> it simply insists that we subject our presumptions and biases to facts and evidence and forces us to consider more interests than our own.

There are limits to empathy, of course. It would be strange to demand that judges attempt to empathize with every party in a given case, including empathizing with murderers, rapists, wife beaters, and child abusers. It would be stranger still to suggest that judicial empathy for any of these groups should result in, say, lower sentences. My suggestion would be that judges should incorporate Victoria Nourse's concept of "normative equality" with regard to empathetic deliberations.<sup>33</sup> In the context of "passion" defenses, Nourse proposes that the defense be retained

only in the limited set of cases in which the defendant and the victim stand on an equal emotional and normative plane. When a man kills his wife's rapist, his emotional judgments are inspired by a belief in a "wrong" that is no different from the law's own: *Ex ante*, there is no doubt that rape is wrong both for the defendant and the victim and that the defendant's "outrage" is "understandable" from this perspective. When a man kills his departing wife, claiming that her departure outraged him, this normative equality disappears. There is no reason to suspect that the victim would have agreed to a regime in which "leaving" was a wrong that the law would punish.<sup>34</sup>

Similarly, I suggest that judges' empathetic resources should be reserved only for those parties who stand in normative equality. For empathy to retain a moral character, it cannot treat the voluntary actions of all individuals equally, especially given that our law already makes many reasonable distinctions regarding human behavior: those who kill, assault, cheat, and

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31. Thus my definition of empathy is similar to Susan Bandes's definition of moral imagination: Moral imagination is the ability to understand one's own limitations, the limitations of perspective, the range of values at stake, and the possibilities for change inherent in the situation. It is the ability to understand that things might be ordered differently, a way out of arid formalism and closed systems.

Bandes, *Moral Imagination in Judging*, *supra* note 7, at 24.

32. See Susan Bandes's helpful distinction between "reasoning" and "reasons." *Id.* at 3.

33. Nourse, *supra* note 16, at 1337-38.

34. *Id.*

abuse do not stand in the same place as those who do not, and there is no morally intelligible reason why they should.<sup>35</sup>

Let us consider two Fourth Amendment cases, *California v. Hodari D.*<sup>36</sup> and *Illinois v. Wardlow*,<sup>37</sup> in the context of judicial empathy. In *Hodari D.*, Justice Scalia muses on a question not actually before the Court: whether it would be unreasonable for police to stop someone purely on the basis that the person ran when they saw the officer.<sup>38</sup> Justice Scalia thinks the answer is no, basing this answer on the Bible: “See Proverbs 28:1 (‘The wicked flee when no man pursueth’).”<sup>39</sup> In *Wardlow*, Chief Justice Rehnquist gets to address the question directly, and decides that “[h]eadlong flight—wherever it occurs—is the consummate act of evasion . . . .”<sup>40</sup> When I teach this case to my criminal procedure students, I ask them if there are any good reasons that people might flee the police even if they are not involved in any wrongdoing. Invariably, some students generate very compelling answers in the affirmative, ranging from growing up in a neighborhood where being seen with cops could put you or your loved ones at risk of retaliation by gangs, to being a member of a class and race that increases your chances of experiencing brutality by the police even if you’ve done nothing wrong. Those who answer in the negative generally all say the same thing: “I wouldn’t run from police if I weren’t doing anything wrong.” It is a fascinating failure of empathy that happens right before my eyes—even after hearing compelling stories from peers who have grown up in very different circumstances from theirs, some students will simply insist that the proper way to decide the question is to imagine whether they themselves, with their particular background and their experiences, would ever run from the police. Their reaction is similar, that is, to that of Justice Scalia and Chief Justice Rehnquist.

The point here is not that the experience of one group trumps the experience of another group. It is the refusal on the part of one group to acknowledge that there are other reasonable and compelling experiences of the world besides its own, or to even recognize that it treats the universal (that is, the world of reasonable people) synonymously with the “I.” That failure of empathy leads, in this case, to an objectively unintelligible answer. Answering the question, “Are there good reasons for someone to run from the police even if he’s done nothing wrong?” with “no, because I wouldn’t” should be an obvious non sequitur. The failure of logic here is, I suggest, intimately connected to the failure of empathy. If a person over-identifies so

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35. Assuming that there is no appreciable doubt about whether such crimes were committed.

36. 499 U.S. 621 (1991).

37. 528 U.S. 119 (2000).

38. See 499 U.S. at 623 n.1.

39. *Id.*

40. 528 U.S. at 124.

much with his own experiences that he assumes them to be universal, then he not only cannot hear the experiences of others in any meaningful way, but he also may be unable to hear the question actually being asked.

Or let us consider a different failure of empathy, Justice Kennedy's seemingly "empathetic" consideration of women seeking late-term abortions in *Gonzales v. Carhart*.<sup>41</sup> Justice Kennedy would have us imagine how traumatic the experience of undergoing an intact dilation and extraction procedure would be for women, especially if they are not fully informed about the details of the procedure beforehand.<sup>42</sup> Justice Kennedy does seem to be making an attempt to imagine what it is like to be a woman in such circumstances, but as many scholars have pointed out, it is an oddly selective attempt.<sup>43</sup> Justice Kennedy is moved by the possibility that some women may be traumatized by the procedure, but apparently not by the plight of women forced to undergo an unwanted birth. Less often discussed is how thoroughly Justice Ginsburg deconstructs each one of Justice Kennedy's "empathetic" points using empirical evidence and basic logic.<sup>44</sup> For example, she queries how the legitimate concern that women should receive accurate information about a medical procedure is in any way addressed by *prohibiting* the medical procedure, rather than, say, requiring the disclosure of such information.<sup>45</sup> It is as though Justice Kennedy has latched on to one vision of what a woman facing an intact dilation and extraction procedure might feel and decided to extrapolate from that the decisive answer to the question of whether the procedure can be banned. Justice Kennedy could be said to have made at least an attempt to expand his moral imagination by stepping into the shoes of a woman facing a late-term abortion, but this attempt is undermined by his attachment to one partial vision of this experience—likely the one he finds most sympathetic. Justice Kennedy's failure to subject his empathetic effort to critical evaluation demonstrates the shallowness of his imaginative attempt and serves as a reminder that not all empathetic efforts are successful.

There is a final point. If empathy should mean, as I have proposed, the general practice of looking beyond one's self-interest, subject to the limitation of normative equality, then is it a fair criticism of President Obama and Justice Sotomayor that they are wrong to suggest that people with certain experiences or backgrounds are better at empathy than others? Does the proper way for minorities to practice empathy involve standing in the shoes of white, straight males? I would argue that there are two reasons why this is not

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41. 550 U.S. 124 (2007).

42. *See id.* at 159–60.

43. *See* Bandes, *Empathetic Judging*, *supra* note 30, at 145; Clare Huntington, *Familial Norms and Normality*, EMORY L.J. 1136, 1136–37 (2010); Terry Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851, 853–54 (2009); Reva Siegel, *Dignity and the Politics of Protection: Abortion Restrictions under Casey/Carhart*, 117 YALE L.J. 1694, 1732–33 (2008).

44. *See id.* at 171–72 (Ginsburg, J., dissenting).

45. *See id.* at 172–74.

the case. First, the current power structures in this country are still dominated by white, straight males whose self-interested biases not only shape our laws and institutions, but are coded as “natural” and “universal.” The limits of the judiciary’s collective moral imagination are set by those interests and biases. The judiciary as a whole would not be particularly well served by more of the same, when the same is itself part of the problem. What minority judges, as well as non-minority judges with strong capacities for empathy, may be able to do is to contribute other interests and views to the judiciary’s collective moral imagination. None of these interests, of course, should by themselves determine the outcome of any case, but they may provide for a fuller deliberative experience. The second reason is that society as a whole, not simply its structures, is dominated by its most privileged members. One result of this is that those who are not similarly privileged have been encouraged, if not forced, to constantly take those interests for their own, or in preference for their own. That is to say, the people with relatively less privilege in our society—racial minorities, women, gays, the poor—have by virtue of their life experiences been forced into empathy all of their lives. They have had to accommodate the interests and demands of those with greater power and prestige in order to survive. They have often been at the mercy of economic, educational, and cultural networks that do not value or in some cases even recognize them. That is why, as unpopular a sentiment it might be, it may well be possible that a “wise Latina” has a greater capacity for empathy, and a larger moral imagination, than someone who has never been forced to look beyond his own self-interest.