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## Judging Judges: Empathy as the Litmus Test for Impartiality

Rebecca K. Lee

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JUDGING JUDGES:  
EMPATHY AS THE LITMUS TEST FOR IMPARTIALITY

*Rebecca K. Lee\**

*This Article examines the role of empathy in judging, which has been directly raised and questioned in recent years, in light of the discussion surrounding judicial nominations and appointments to the Supreme Court. President Barack Obama was right to emphasize that empathy is an important quality to be found in a judicial nominee, but his public support for empathetic judging was unfortunately cut short due to the political controversy and misunderstanding surrounding what empathy means. The opportunity remains, however, for a renewed discussion regarding judicial empathy by expressly connecting it to our vision of judicial impartiality. This Article makes an affirmative case for empathetic decisionmaking and argues that empathetic judging is necessary for objective adjudication. Consequently, when evaluating judicial candidates and judges, their exercise of empathy should be used as a litmus test to determine whether they will or do engage in impartial decisionmaking. Such a test would recognize that judges have their own tendencies in how they view various types of cases and with which party they tend to identify. This tendency particularly matters in cases that raise questions of inequality and perspective, and also involve a highly factual inquiry in applying the law, such as employment discrimination cases. These cases importantly depend upon how the judge hears the litigants' stories. Further, since many workplace discrimination suits do not make it to a jury and instead are decided solely by the judge on summary judgment, it is imperative that judges fully consider each party's side with empathic effort. To illustrate, this Article examines case examples in the employment discrimination context and concludes with proposals to require and enhance the use of empathy in adjudication.*

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\* Associate Professor of Law, Thomas Jefferson School of Law. B.A., University of Chicago; M.P.P., Harvard Kennedy School; J.D., Georgetown University Law Center. I would like to especially thank Susan Bisom-Rapp, Robert Chang, Stuart Chinn, Cynthia Lee, Eumi Lee, Nancy Leong, Orly Lobel, Ann McGinley, Sandra Park, Victor Quintanilla, Shruti Rana, L. Song Richardson, Ted Seto, Charles Sullivan, Robert Tsai, Ellen Waldman, and Robin West for their comments on this work. I further thank all the participants at the meetings of the Conference of Asian Pacific American Law Faculty and Western Law Teachers of Color at the University of Hawaii Richardson School of Law and UC Hastings College of Law; the Annual Meeting of the Law and Society Association; the Labor and Employment Law Colloquium co-hosted by Loyola Law School, Southwestern Law School, and UCLA School of Law; Thomas Jefferson School of Law's Faculty Workshop; and Orly Lobel's Work, Welfare and Justice seminar at the University of San Diego School of Law, where I presented drafts of this paper.

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## I. INTRODUCTION

What does it mean for a judge to be impartial when deciding cases, and how can impartiality be assessed? It is well-established and uncontroversial to say that judges must decide cases objectively to be fair. Impartiality is a central tenet of judicial decisionmaking. It is apparently controversial, however, to say that judges must also be empathetic;<sup>1</sup> the use of empathy has been mischaracterized as something that undermines the impartial and detached ideal of judging.<sup>2</sup> This issue has been directly raised and questioned on the national stage in recent

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1. See discussion *infra* Part III.A. See also Robin West, *The Anti-Empathic Turn*, in *PASSIONS AND EMOTIONS* 243, 244, 246 (James E. Fleming ed., 2012) (pointing out that the notion of empathy in judging, a familiar and basic concept during much of the twentieth and nineteenth centuries, has become tainted in the last decade during Supreme Court confirmation hearings).

2. See *id.* at 246. See also Mary Anne Franks, *Lies, Damned Lies, and Judicial Empathy*, 51 *WASHBURN L. J.* 61, 61–62 (2011) (noting that “judicial empathy and judicial impartiality were presented as polar opposites” in the aftermath of President Obama’s comments concerning the value of empathy in a Justice and pointing out that empathy and impartiality are not mutually exclusive).

years, prompted by certain remarks made by President Barack Obama, first as Senator and presidential candidate and then as President, regarding the empathic qualities he would look for in a judicial nominee, including a nominee for the U.S. Supreme Court.<sup>3</sup> Critics skeptical of the use of empathy charged that empathetic judging would mean emotional judging and irrational judging, and they believed it would lead to favoritism for one side over another.<sup>4</sup> Despite the dissenters, President Obama recognized that empathetic judges would better understand the range of perspectives and conflicts brought before them.<sup>5</sup> But his public support for empathy was unfortunately short-lived, it seems due to resistance in the Senate and the political necessity of needing Senate approval for federal court nominations. Obama thus stopped short of making empathic ability a clear and continuous requirement to be nominated for a federal judgeship, and the Senate failed to give empathy a positive place in the judicial confirmation process.

The discussion, however, should not end here. And with Justice Sonia Sotomayor's recently published memoir, in which she talks about her own efforts in using empathy in various areas of her life, the topic has once again been brought to the surface, this time by a sitting Supreme Court Justice.<sup>6</sup> In further support of judicial empathy, Justice Stephen Breyer in a recent interview also used the term "empathy" to refer to a "crucial quality [to have] in a judge."<sup>7</sup> Empathy in judging matters, and for good reason.<sup>8</sup> We must renew our vision of judicial empathy by expressly linking it to other requirements for judicial office,

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3. See, e.g., Joseph Williams, *Obama May Break with Tradition for High Court Pick; Retirement of Souter Opens Opportunities*, BOSTON GLOBE, May 2, 2009, [http://www.boston.com/news/nation/washington/articles/2009/05/02/obama\\_may\\_break\\_with\\_tradition\\_for\\_high\\_court\\_pick/](http://www.boston.com/news/nation/washington/articles/2009/05/02/obama_may_break_with_tradition_for_high_court_pick/); Alec MacGillis, *Obama Expands on Criteria for New Justice*, WASH. POST, May 24, 2009, [http://articles.washingtonpost.com/2009-05-24/news/36782429\\_1\\_common-touch-common-sense-federal-appeals-court](http://articles.washingtonpost.com/2009-05-24/news/36782429_1_common-touch-common-sense-federal-appeals-court). See also discussion *infra* Part III.A.

4. See discussion *infra* Part III.A.

5. See, e.g., Williams, *supra* note 3; MacGillis, *supra* note 3. See also discussion *infra* Part III.A.

6. See generally SONIA SOTOMAYOR, *MY BELOVED WORLD* (2013) (sharing aspects of her life story and career that show her ability to see the world through the eyes of others, to listen to and learn from others, and to feel their pain).

7. Joanna Kohler, *On Reading Proust: Justice Stephen Breyer*, interviewed by Joanna Kohler, N.Y. Rev. of Books, Nov. 7, 2013, available at <http://www.nybooks.com/articles/archives/2013/nov/07/reading-proust/> (last visited Dec. 2, 2013) ("this empathy, this ability to envision the practical consequences on one's contemporaries of a law or a legal decision, seems to me to [be] a crucial quality in a judge").

8. See generally Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944 (2012) (offering a scholarly defense of President Obama's call for judicial empathy by looking at the differences between empathy and umpiring and between empathy and sympathy, and how empathy contributes to good and impartial judging).

and by extension, expressly require empathy as a qualification for the work of judging. This Article makes an affirmative case for empathic ability as an important criterion in judicial selection and evaluation in order to further judicial impartiality.<sup>9</sup> Rather than suppress empathy in adjudication, judges ought to develop their capacity for empathy in order to truly engage in evenhanded and thorough decisionmaking. Judicial empathy would not only improve the process of adjudication, but is indeed required for judging to be impartial.

Contrary to the often expressed view that empathy means swift or targeted sympathy for a certain side or type of litigant, especially for the side that most resembles the adjudicator, or most shares the adjudicator's own experiences or beliefs, empathy should be thought of as an effort to understand, as much as possible, the perspectives of others, especially others who are different from the jurist in some way that is relevant to the dispute.<sup>10</sup> Without the use of empathy in judging, it is more likely that judges will gravitate, unconsciously or nearly automatically, toward the claims of parties more familiar to them and more similar to the way they perceive the world. Judges, relying on their own assumptions and experiences, may too easily favor the more familiar story without aiming to better understand the situation of the less familiar party, and in this way exhibit partiality toward one side. As a result, judges may not seek to fully learn about and fully comprehend the situation of each of the litigants in the dispute and all that is at stake. In order to truly maintain objectivity in adjudication, the court must use a process of empathizing to fully consider the views of all parties who come before it.

Judges are already shaped and influenced by their past experiences—experiences and observations stemming from their upbringing, their schooling, their previous legal careers, and so on.<sup>11</sup> Admittedly, then, we cannot expect judges to entirely jettison all of their biases and perspectives about the world upon stepping into their judicial roles because meeting such a standard would be a super-human feat.<sup>12</sup> But we can and should expect judges to be mindful of their inclinations and use conscious effort when hearing different views and different stories. Judges, like everyone else, have their own tendencies concerning how

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9. I have previously examined the importance of empathy for effective leadership in organizational settings made up of diverse groups, and argued that empathetic leadership is needed to advance a culture of core diversity and substantive equality. See generally Rebecca K. Lee, *Implementing Grutter's Diversity Rationale: Diversity and Empathy in Leadership*, 19 DUKE J. GENDER L. & POL'Y 133 (2011).

10. See discussion *infra* Parts II.B and III.A.

11. See discussion *infra* Part II.B.

12. See The Honorable Diane S. Sykes, *Gender and Judging*, 94 MARQ. L. REV. 1381, 1388 (2011). Judge Sykes is a federal appellate judge on the U.S. Court of Appeals for the Seventh Circuit.

they view various types of cases, with which party they tend to identify, and whose claims more easily resonate with them, both cognitively and emotionally. This tendency matters when deciding cases that involve claims of competing perspectives and entail a highly factual inquiry in applying the law, such as employment discrimination cases. These cases often largely depend on how the judge sees the facts,<sup>13</sup> and therefore judges frequently disagree on the outcome in such cases.<sup>14</sup> Because the facts involve more than one story, judges must hear all of the stories carefully to be able to weigh one story against another. Further, many workplace discrimination suits do not find their way to a jury and instead are decided solely by the judge on summary judgment,<sup>15</sup> rendering it imperative for jurists to give thorough consideration to the parties' accounts.

To fully uphold the ideal of judicial impartiality, this Article asserts that judges ought to develop their ability to empathize as a necessary component of the work of judging. Under this view, judicial impartiality requires judicial empathy in order to give equal and objective consideration to the claims of the disputant whose lived experience differs the most from that of the adjudicator.<sup>16</sup> This sort of empathizing is necessary to deal with any unconscious bias that a judge may hold against the litigant she least identifies with.<sup>17</sup> Judges are an elite group in many respects, and as such they may find it easier to relate to the advantaged party's view of the dispute. Judges may identify less with outsider perspectives and therefore must especially attend to the perspective of the disadvantaged side.<sup>18</sup> If judges are to exercise

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13. In cases where the jury acts as the fact finder, it would matter how the judge uses empathy in instructing the jury. But since many employment discrimination cases have to first survive the summary judgment hurdle in order to even proceed to trial, the judge, at the summary judgment stage, must aim to fully understand the facts from both sides in deciding whether there remain any genuine issues of material fact.

14. See Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 338–39 (2012) (reporting the results of an empirical study using data from a large random sample of federal district court filings of employment civil rights cases between 1988–2003 in 7 cities: Atlanta, Chicago, Dallas, New Orleans, New York City, Philadelphia, and San Francisco, and finding that white judges ruled for the defendant employer on a motion for summary judgment in 61% of cases while minority judges did the same in only 38% of cases, and that this difference is statistically significant).

15. *Id.* at 331–32 (finding that only 100 out of 1,672 cases made it to trial).

16. See *id.* at 324 (defining “empathy” as “the world views of judges that are formed, at least in part, by the social location they occupy” and arguing that empathy matters in cases that are “emotionally charged and morally consequential,” such as employment civil rights cases).

17. But see MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 90 (1995) (contending that “though empathy with the actors will usually be one important part of the process of judicious spectatorship, through which the judge takes the measure of the suffering of the people[,] [t]he judicious spectator must go beyond empathy, assessing from her own spectatorial viewpoint the meaning of those sufferings and their implications for the lives involved”).

18. See Catherine Gage O’Grady, *Empathy and Perspective in Judging: The Honorable William*

objectivity when hearing the claims of historically disfavored parties, they must take care to put more thought into considering these parties' claims and to place their accounts on equal footing with the accounts of the more powerful and privileged party.<sup>19</sup>

Part II of this Article discusses the relevance of emotions to legal decisionmaking and situates empathy within this discussion, demonstrating that the ability to empathize is an essential skill for impartial judging. Part III looks at how we might cultivate a more empathic judiciary and how diversity on the bench could support this effort. Part IV examines cases in the employment discrimination context to illustrate judicial partiality or impartiality in understanding and resolving a dispute, depending on the extent to which the presiding judges deployed empathy in deciding the case. Finally, Part V recommends several proposals that would better ensure that judges conduct an impartial review of cases with empathic effort and skill.

## II. EMOTIONS, EMPATHY, AND LEGAL DECISIONMAKING

Empathy consists of mental and emotional components, both of which are relevant to legal decisionmaking.<sup>20</sup> Although emotions, broadly speaking, have been popularly described as being incompatible with reason, and especially viewed as incompatible with legal reasoning, scholars studying law and emotions have demonstrated that emotions are in fact manifested in both feeling and thinking.<sup>21</sup> Emotional and rational responses are not separate forces but represent largely overlapping spheres of ways to process information.<sup>22</sup> Given that emotions contribute to the way in which one sees and feels about something, this perceiving aspect of emotions is important.<sup>23</sup> Challenging, then, the long-held conception of legal reasoning as a purely rational process, researchers have shown that emotions inevitably influence legal players and the decisions they produce, even if legal players choose not to acknowledge this, and moreover that emotions

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C. Canby, Jr., 33 ARIZ. ST. L.J. 4, 5–6 (2001).

19. See NUSSBAUM, *supra* note 17, at 86–87.

20. See, e.g., Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1592 (1987).

21. See generally Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997 (2010). See also *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 40 (2009) (statement of Senator Tom Coburn) (“Aristotle defined law as ‘reason free from passion’”); NUSSBAUM, *supra* note 17, at 60; Franks, *supra* note 2, at 65; David Brooks, *The New Humanism*, N.Y. TIMES, Mar. 7, 2011, <http://www.nytimes.com/2011/03/08/opinion/08brooks.html>.

22. Abrams & Keren, *supra* note 21, at 1999–2000. See also Brooks, *supra* note 21.

23. See NUSSBAUM, *supra* note 17, at 60–61.

should be both acknowledged and relied upon to improve legal decisionmaking.<sup>24</sup> But there is a continuing belief that legal processes must remain mostly unaffected by affective elements,<sup>25</sup> even while recognizing that emotions should play some part in the deliberative process. This Article examines the role of empathy in particular within the field of law and emotions, and argues unreservedly for a particular understanding of empathy as essential to the task of impartial judging.

### A. Defining Empathy

Although it has been commonly characterized as an emotional response that percolates in “the heart,”<sup>26</sup> empathy actually involves much mental skill and openness, as well as feeling.<sup>27</sup> Empathy has been defined in a number of ways, from the psychological to the cognitive neuroscience literature.<sup>28</sup> An examination of law and emotions, including the study of empathy, has emerged in recent decades, adding to our understanding of emotions as they relate to the law.<sup>29</sup> Generally

24. See, e.g., *id.* at 60; Henderson, *supra* note 20, at 1574; THE PASSIONS OF LAW (Susan Bandes ed., 1999); Abrams & Keren, *supra* note 21, at 2000. Emotional intelligence has also been recognized as important for successful lawyering. Jan Salisbury, *Emotional Intelligence in Law Practice*, 53 THE ADVOCATE 38 (2010).

25. See, e.g., Ellen Waldman, *Mindfulness, Emotions, and Ethics: The Right Stuff?*, 10 NEV. L.J. 513, 514 (2010) (stating that “[i]n the mediation world, scholars and practitioners frequently treat emotion as the unruly step-child of the problem-solving mind. . . . [L]eading mediation theorists present emotion as a force to be blunted, manipulated, or leveraged in the service of ‘getting to yes’”) (citations omitted). See also Leonard L. Riskin, *Further Beyond Reason: Emotions, the Core Concerns, and Mindfulness in Negotiation*, 10 NEV. L.J. 289 (2010) (depicting emotion as something that can derail negotiations and advocating for mindful awareness to contain the influence of negative emotions).

26. See Dahlia Lithwick, *Book Review: ‘My Beloved World’ by Sonia Sotomayor*, WASH. POST, Jan. 11, 2013, [http://www.washingtonpost.com/opinions/book-review-my-beloved-world-by-sonia-sotomayor/2013/01/11/7a93dcd6-55cd-11e2-bf3e-76c0a789346f\\_story.html](http://www.washingtonpost.com/opinions/book-review-my-beloved-world-by-sonia-sotomayor/2013/01/11/7a93dcd6-55cd-11e2-bf3e-76c0a789346f_story.html) (describing Justice Sotomayor’s memoir as “a powerful brief in defense of empathy, her long awaited closing argument in the trial of Mind v. Heart”); Peter Slevin, *Obama Makes Empathy a Requirement for Court*, WASH. POST, May 13, 2009, <http://www.washingtonpost.com/wpdyn/content/article/2009/05/12/AR2009051203515.html?sid=ST2009051203561> (referring to Obama’s comments in 2007, when he said that in “those 5 percent of [Supreme Court] cases that really count . . . what you’ve got to look at is: [w]hat is in the justice’s heart?”).

27. See Lian T. Rameson et al., *The Neural Correlates of Empathy: Experience, Automaticity, and Prosocial Behavior*, 24 J. OF COGNITIVE NEUROSCIENCE 235, 235 (2011); Jean Decety & Philip L. Jackson, *The Functional Architecture of Human Empathy*, 3 BEHAVIORAL AND COGNITIVE NEUROSCIENCE REVIEWS 71, 73 (2004) (“[E]mpathy requires both the ability to share the emotional experience of the other person (affective component) and an understanding of the other person’s experience (cognitive component).”).

28. See, e.g., Nancy Eisenberg & Janet Strayer, *Critical Issues in the Study of Empathy, in EMPATHY AND ITS DEVELOPMENT* 3, 3–11 (Nancy Eisenberg & Janet Strayer eds., 1987); Decety & Jackson, *supra* note 27, at 73–75.

29. See generally Henderson, *supra* note 20; THE PASSIONS OF LAW, *supra* note 24; Abrams & Keren, *supra* note 22. But see Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2107–08 (1989) (arguing that empathy has more

situated within the broader realm of emotions, empathy is in one sense a form of emotion, but contrary to public perception, it is not at odds with rationality and reason.<sup>30</sup> Rather, empathy is also a form of cognitive understanding,<sup>31</sup> that is, empathy is an expression of both thought and emotion.<sup>32</sup>

Consistent with this understanding, “empathy” as used in this Article refers to our capacity to better comprehend—through both knowledge and feeling—another’s perspective by trying to view the world from that person’s position, rather than simply observing another’s position from where we stand.<sup>33</sup> While individuals may draw upon their own experiences in empathizing with others, I argue that a thick use of empathy entails actively imagining another person’s situation, in an attempt to fully consider that person’s experiences in light of her or his circumstances.<sup>34</sup> Martha Nussbaum has referred to this type of empathizing as the “judicial spectator” approach, first described by Adam Smith.<sup>35</sup>

[T]he [judicious] spectator must . . . endeavor, as much as he can, to put

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meaning and application in the area of psychology than law, due to their different purposes).

30. Henderson, *supra* note 20, at 1576.

31. See Rameson et al., *supra* note 27, at 241 (conducting an empirical study and providing whole-brain analyses showing that “a relatively consistent set of regions [of the brain] were associated with empathic processes,” including the medial prefrontal cortex (MPFC), the dorsomedial prefrontal cortex (DMPFC), the ventromedial prefrontal cortex/subgenual anterior cingulate cortex (VMPFC/subACC), the superior temporal sulcus (STS), precuneus, and lateral parietal regions).

32. See *id.* at 235 (“Incorporating the cognitive and emotional talents of humans, empathy requires both the ability to comprehend others’ thoughts and feelings as well as resonate affectively with their emotions.”); Decety & Jackson, *supra* note 27, at 73 (“Empathy is a complex form of psychological inference in which observation, memory, knowledge, and reasoning are combined to yield insights into the thoughts and feelings of others.”).

33. See Rameson et al., *supra* note 27, at 235; Decety & Jackson, *supra* note 27, at 73 (noting that “there is broad agreement on three primary components [of empathy]: (a) an affective response to another person, which often, but not always, entails sharing that person’s emotional state; (b) a cognitive capacity to take the perspective of the other person; and (c) some regulatory mechanisms that keep track of the origins of self- and other-feelings”); Henderson, *supra* note 20, at 1578–79 (arguing that “empathy is a phenomenon that exists to expand understanding of others” and includes “understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other”); BARACK OBAMA, THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM 66 (2006) (referring to empathy as “a call to stand in somebody else’s shoes and see through their eyes”); Colby, *supra* note 8, at 1958 (referring to empathy as “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”).

34. See Rameson et al., *supra* note 27, at 242–43 (in an empirical study of empathy-related neural activity, finding that the medial prefrontal cortex (MPFC) region of the brain plays a significant role in empathic processes and noting that the MPFC “has been associated with thinking about one’s past . . . and possible future experiences . . . two processes pivotal to constructing a window into another’s emotional world. In fact, many participants [in this study] reported recalling similar events from their own lives to use as a template for understanding, as well as imagining how they might feel if they were in [a specified] situation”).

35. NUSSBAUM, *supra* note 17, at 72–73.

himself in the situation of the other, and to bring home to himself every little circumstance of distress which can possibly occur to the sufferer. He must adopt the whole case of his companion with all its minutest incidents; and strive to render as perfect as possible, that imaginary change of situation upon which his sympathy is founded.<sup>36</sup>

Smith, a forefather of contemporary economics, believed that rationality and public discourse should be informed by emotion rather than be empty of it.<sup>37</sup> Applying this concept to the juridical role, a judge must imagine the perspective and feelings of each litigant in light of that litigant's circumstances, in order to properly understand and assess the dispute involving that party. It is crucial to consider this information because such facts help put each side's claims into context and fully uncover what is at issue.<sup>38</sup> This is not a matter of the heart simply leading the mind, but rather a matter of using one's full faculties—emotional and mental—to comprehend and resolve a difficult situation.<sup>39</sup> The aim is not to encourage conscious generosity toward one side *per se*, but rather to ensure that a litigant does not unfairly benefit from unconscious or automatic credibility simply because a judge better understands, or is more familiar with, that party's story.<sup>40</sup> As Nussbaum points out, the judicious spectator or judge is a spectator rather than participant because she is not personally implicated in the situation before her; put differently, the judicious spectator has no personal stake in the matter.<sup>41</sup> But the spectator, as the adjudicator, nonetheless is connected to the situation and ought to demonstrate concern for those involved in the dispute and how the dispute should be resolved.<sup>42</sup>

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36. *Id.* at 73 (quoting ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (1759), conceiving the idea of the judicious spectator as it pertains to citizenship and public rationality).

37. *Id.* at 72–73.

38. *But see* Thomas Morawetz, *Empathy and Judgment*, 8 *YALE J.L. & HUMAN.* 517, 529 (1996) (reviewing MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* (1996)) (contending that such facts involving “the background, circumstances, and feelings of parties to the case . . . are not always relevant”).

39. *See* Rameson et al., *supra* note 27, at 236 (noting that neurodegenerative disease or lesions in empathy-related regions of the brain are associated with empathic deficiencies, and that empathic accuracy involves accurate interpersonal judgments); ANTONIO R. DAMASIO, *DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* 3–58 (1994) (recounting the situations of individuals who all suffered similar injuries to the brain's prefrontal cortex and as a result were emotionally impaired though cognitively capable, and explaining that the lack of feeling and emotional direction hampered their abilities to empathize and make social as well as personal decisions).

40. *See* Morawetz, *supra* note 38, at 529–30 (arguing that taking into account the background, circumstances, and feelings of the parties do not always inspire generosity).

41. NUSSBAUM, *supra* note 17, at 73.

42. *Id.* at 73. *See generally* ROBIN WEST, *CARING FOR JUSTICE* (1997) [hereinafter WEST, *CARING FOR JUSTICE*] (making the point that judges should show individualized care toward the litigants who come before them).

From a psychological standpoint, empathy allows us to take a deeper glimpse into the lives of others and try to see things as they do.<sup>43</sup> While the psychologist and judge each have different roles, they both nonetheless seek to understand the person in front of them and that person's actions.<sup>44</sup> They both receive and rely on information that informs the empathic process, albeit in different ways in accordance with the setting and norms for each profession.<sup>45</sup> Judges, of course, are more constrained in terms of time, but as part of their deliberations, they can and should engage in empathetic reasoning both in and out of the courtroom.<sup>46</sup> As former Supreme Court Justice William Brennan has said: “. . . the task of human judgment is not to transcend the self or human nature, but to use all helpful aspects of it; not to close off reactions but to reflect upon them; not to give in to all intuitions but to test them, and then test the tests, against their meanings in the actual lives of others.”<sup>47</sup>

### B. Empathy and Objectivity

The use of empathy in juridical decisionmaking means trying to picture the situations of the parties and their perceptions based on their particular experiences, especially from a less privileged viewpoint.<sup>48</sup> Without empathy, people in general tend to view others and the world, consciously and unconsciously, from a certain vantage point depending on what they are accustomed to and how they are situated in society.<sup>49</sup> Demonstrating empathy thus requires that individuals be cognizant of their own predisposed positions, taking into account their race, gender, class, and all other relevant considerations that have contributed to their specific life and career opportunities.<sup>50</sup> Judges, then, must try to step

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43. See Weinberg & Nielsen, *supra* note 14, at 350 (referring to psychological research which “consistently shows that empathetic induction helps individuals recognize more nuanced, situational narratives that are distinct from their own”).

44. *But see* Massaro, *supra* note 29, at 2107–08 (pointing out the differences between the functions of the mental health counselor and judge).

45. *But see id.* (pointing out the different settings found in law and psychology).

46. *But see id.* (noting the different time limitations in the legal and psychological contexts).

47. Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 48 (1988) (discussing William J. Brennan Jr., *Reason, Passion, and “The Progress of the Law”*, 10 CARDOZO L. REV. 3, 4–5 (1988)).

48. See O’Grady, *supra* note 18, at 5–6 (discussing the judicial approach of Judge William Canby, a long-serving appellate judge on the Ninth Circuit Court of Appeals).

49. See Decety & Jackson, *supra* note 27, at 84 (stating that “people are fundamentally egocentric and have difficulty getting beyond their own perspective when anticipating what others are thinking or feeling”); PETER G. NORTHOUSE, *LEADERSHIP: THEORY AND PRACTICE* 15, 337 (5th ed. 2010) (stating the universal tendency to engage in ethnocentrism).

50. See Chris Chambers Goodman, *Retaining Diversity in the Classroom: Strategies for Maximizing the Benefits that Flow From a Diverse Student Body*, 35 PEPP. L. REV. 663, 669 (2008)

outside of their own worlds in order to consider different kinds of thinking and experience.<sup>51</sup> Particularly since individuals tend to empathize more easily, even reflexively, with others like themselves, judges are likely to make decisions that disproportionately benefit similarly-situated or familiarly-situated parties.<sup>52</sup> Stepping into another's world as she or he experiences it means that a judge must elicit the information needed to picture oneself in that person's situation.<sup>53</sup> Using one's imagination can help supplement our understanding of another's outlook, and tapping into one's own similarly-lived experiences and feelings can help render the imaginative aspect more concrete.<sup>54</sup> This process of empathizing provides a way to pursue knowledge removed from or outside of oneself, an understanding unmoored from one's own necessarily limited worldview and experience.<sup>55</sup> It is thus incumbent upon judges to put effort and thought into broadening their ability to empathize with those different from them, in order to adjudicate impartially and with equal attention to all parties.<sup>56</sup>

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(discussing the benefits that come from having diversity on campuses and stating that “the importance of developing empathy and understanding involves making students aware of the privileges they enjoy”).

51. See Decety & Jackson, *supra* note 27, at 84 (referring to a series of experiments demonstrating that “adult subjects exhibit a tendency to infer that others have the same knowledge (and beliefs) as they do, even when they are aware that the others have a different point of view”); NORTHOUSE, *supra* note 49, at 337.

52. See Henderson, *supra* note 20, at 1585; Weinberg & Nielsen, *supra* note 14, at 350 (referring to research which indicates that individuals display more empathy toward those who are similarly situated). See also Cheryl L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TUL. L. REV. 1461, 1464 (2002) (looking at the role of empathy in corporate governance and concluding that corporate officers and directors, most of whom are white and male, have too much empathy for privileged groups and too little empathy for employees of color, preventing them from adequately investigating and monitoring allegations of race discrimination in the workplace).

53. See Nannerl O. Keohane, *On Leadership*, 3 PERSP. ON POL. 705, 710 (2005) (citing Hannah Arendt's point that judgment “involves the use of ‘imagination’ and ‘enlarged thought,’ being able to put oneself into the situation of someone else”).

54. See Henderson, *supra* note 20, at 1581; Susan A. Bandes, *Moral Imagination in Judging*, 51 WASHBURN L.J. 1, 24 (2011) [hereinafter Bandes, *Moral Imagination*] (describing moral imagination as “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”). Cf. Franks, *supra* note 2, at 68–69 (Viewing empathy as “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. . . . Empathy forces us to imagine and to have concern for those who are radically different from, even threatening to, 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.”).

55. See OBAMA, *supra* note 33, at 68 (remarking that to empathize with others who are different from us is to be “forced beyond our limited vision”); Bandes, *Moral Imagination*, *supra* note 54, at 24.

56. See Sykes, *supra* note 12, at 1388 (stating that empathy is a judicial virtue because it “enables the judge to achieve a better understanding of the parties' circumstances without being

The position of judge does not automatically confer a universal perspective onto those who adjudicate, and judges must not assume that their views are objective simply because they have the privilege of issuing them from the bench.<sup>57</sup> The regularity with which judges disagree with their colleagues, when dissenting on appeal or when overturning a decision below, plainly show that judges do not always, or even often, speak with one mind. Judicial opinions, in a basic sense, express just that—the thoughts of a given judge or panel of judges. But their conclusions are consequential and precedential because judicial opinions become law. In light of this weighty responsibility, those stepping into a judgeship should approach their decisionmaking with an extra measure of humility rather than hubris, and maintain a disposition that prompts them to question and reflect rather than assume.<sup>58</sup> It is widely understood that a central feature of judicial opinion-making is judicial impartiality,<sup>59</sup> but impartiality will not result unless judges acknowledge their own partialities when judging.<sup>60</sup> Judges are not blank slates but themselves the products, to some degree, of their own backgrounds and circumstances. While judicial biases lie on a spectrum, there are jurists who hold firm ideological commitments,<sup>61</sup>

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predisposed toward one side or the other”).

57. Senator Jeff Sessions, for instance, made a statement that seemed to assume a judge could be clothed with objectivity simply by donning the robe: “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.’” *Sessions Says He’s Looking for Judicial Restraint*, NAT’L JOURNAL (May 7, 2009), <http://www.nationaljournal.com/njonline/sessions-says-he-s-looking-for-judicial-restraint-20090507>. See Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 CARDOZO L. REV. DE•NOVO 133, 139 (2009) [hereinafter Bandes, *Empathetic Judging*].

58. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225 (2009) (noting that “judges might be overconfident about their abilities to control their own [racial] biases,” based on data collected from a group of judges at a judicial education conference).

59. See, e.g., Model Code of Judicial Conduct, at Canon 2 (2008) (“A judge shall perform the duties of judicial office impartially, competently, and diligently.”).

60. See Rachlinski et al., *supra* note 58, at 1197, 1207–08, 1221 (discussing the results of a study of implicit racial bias among judges and finding that judges, like everyone else, hold implicit biases involving race, and that these biases can influence their judgment).

61. A particularly notable example is former Alabama Chief Justice Roy Moore, who defied a federal judge’s order to remove a Ten Commandments monument from the state Supreme Court building lobby on constitutional grounds and subsequently was removed from judicial office by the state’s judicial ethics panel in 2003. *Ten Commandments Judge Removed from Office*, CNN, Nov. 14, 2003, [http://articles.cnn.com/2003-11-13/justice/moore.tencommandments\\_1\\_ethics-panel-state-supreme-court-building-ethics-charges?\\_s=PM:LAW](http://articles.cnn.com/2003-11-13/justice/moore.tencommandments_1_ethics-panel-state-supreme-court-building-ethics-charges?_s=PM:LAW). On refusing to remove the religious monument, Moore stated that “‘God has chosen this time and this place so we can save our country and save our courts for our children.’” *Id.* In 2012, Moore was re-elected to the office of state Chief Justice, and upon his electoral victory, remarked to his supporters, “[g]o home with the knowledge that we are going to stand for the acknowledgment of God.” Kim Chandler, *‘10 Commandments Judge’ Roy Moore Wins His Old Job Back*, WASH. POST, Nov. 8, 2012, [http://articles.washingtonpost.com/2012-11-08/national/35505358\\_1\\_republican-moore-roy-moore-chief-justice](http://articles.washingtonpost.com/2012-11-08/national/35505358_1_republican-moore-roy-moore-chief-justice).

raising the need for greater empathy to temper these pre-existing and at times strong leanings. Judges must scrutinize their own tendencies and assumptions, as well as that of the parties, in striving for juristic objectivity.<sup>62</sup> Judicial standpoints are not entirely neutral, and, as the term suggests, are influenced by where a judge stands (or sits) and the experiences she or he has had in getting there.<sup>63</sup> Objectivity becomes a tricky thing once we see that other, additional and conflicting, perspectives exist, and achieving an objective understanding then requires recognizing different views and trying each of them on, in order to determine which one should prevail in light of all the relevant law and facts.<sup>64</sup>

To counteract their “subjective starting points,”<sup>65</sup> judges must consciously seek to maintain a detached stance to overcome their partialities in adjudication. This detachment, however, does not mean emotional detachment from the case; on the contrary, engaging one’s emotions along with one’s analytical and imaginative abilities in understanding the parties’ claims will allow judges to detach themselves from their own biases.<sup>66</sup> Judges must be careful not to give effect to their biases by immediately giving more weight to the arguments of those who are more similar in background and circumstance; this type of common identification entails little imaginative perspective-taking and does not contribute to, but rather takes away from, an impartial review. This is especially harmful when such biases exist due to animus or hostility toward an unfavored party.<sup>67</sup> But even an unintentional lack of careful attention to a party’s situation can undermine the objectivity of the judicial process.

This Article asserts that judicial impartiality requires empathy, understood as a conscious effort a judge must make to comprehend the perspective of another, whose life and situation may differ in various ways. Effortless forms of identification with another, on the other hand,

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62. See Rachlinski et al., *supra* note 58, at 1221 (based on a study of implicit racial bias among judges, finding that judges can counteract the effect of their implicit biases when making decisions if they are aware of their biases and try to restrain them).

63. See Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 906 (1987) (“A judge cannot be divorced ‘from what he has seen, has heard, has experienced, and has been.’”).

64. See Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 14–15 (1987) (questioning whether one viewpoint can be objective if multiple viewpoints are possible, and asserting that judges should identify and contrast different viewpoints to know which one should govern in a given instance).

65. THOMAS NAGEL, *THE VIEW FROM NOWHERE* 6 (1986).

66. See Ericka Rackley, *When Hercules Met the Happy Prince: Re-imagining the Judge*, 12 TEX. WESLEYAN L. REV. 213, 229–30 (2005) (asserting that a judge can engage in judicial detachment by fully letting in the experiences of the litigants).

67. See *id.* at 229 (referring to this as “bad empathy” and noting that “bad empathy not only fails as a matter of justice or fairness but also as empathy itself”).

amount to simple reaffirmation of one's own perspective rather than a searching empathic inquiry concerning other perspectives. Developing the capacity to empathize, and pursuing judicial objectivity, means that judges must "transcend [their] particular viewpoint[s] and develop an expanded consciousness that takes in the world more fully."<sup>68</sup>

To be clear, empathy is not results-driven but process-oriented, and in this respect, empathy alone does not determine the outcome.<sup>69</sup> At the same time, incorporating empathy into the decisionmaking process will support impartial judgment and better ensure that decisions are just and fair.<sup>70</sup> Empathic consideration for a litigant does not necessarily mean that party will win, but it does mean the judge has carefully thought about that side's claims in light of their human—that is, their real and lived—situation.<sup>71</sup> And based on the experiences of those who have used the judicial system, litigants will have more trust and confidence in the courts when judges demonstrate empathic understanding in hearing them and evaluating their cases.<sup>72</sup>

Additionally, judges cannot judge well using empathy alone: they undoubtedly must also have proficiency in understanding and interpreting the law. But the application of legal rules and concepts must be grounded in the full range of human experiences to achieve impartiality in the law.<sup>73</sup> Furthermore, one purpose of the law is to shape individual and societal conduct, and to do this judges must expand their use of empathy to better understand human behavior in applying the law.<sup>74</sup> Empathy encourages the judge to take in the human context

68. See NAGEL, *supra* note 65, at 5.

69. See Rackley, *supra* note 66, at 228 (understanding empathy "as a process, as opposed to an end" but also arguing that empathy can lead to either good or bad judgment); O'Grady, *supra* note 18, at 10 (stating that "[e]mpathy in judging is not predictive of outcome—it is part of a process, but it does not carry the day").

70. See Minow, *supra* note 64, at 60 ("The process of looking through other perspectives does not itself yield an answer, but it may lead to an answer different from the one that the judge would otherwise have reached."); Weinberg & Nielsen, *supra* note 14, at 350 (asserting that social science research can promote greater judicial empathy by helping judges better comprehend their cases). *But see* Rackley, *supra* note 66, at 228 (arguing that empathy can lead to either good or bad judgment).

71. See O'Grady, *supra* note 18, at 5–6 (noting that Judge Canby did not always vote in favor of the poor or the disenfranchised party, but he always attempted "seriously to appreciate the human context of their situation while applying legal rules and principles to the task of deciding their dispute").

72. See LYNN HECHT SCHAFFRAN & NORMA J. WIKLER, GENDER FAIRNESS IN THE COURTS: ACTION IN THE NEW MILLENNIUM 115 (2001), available at <http://www.legalmomentum.org/our-work/vaw/njep-reports-and-resources/gender-fairness-in-courts-millennium.pdf> (describing the results of the Wisconsin State Bar Public Trust and Confidence Project, which conducted focus groups around the state with people who recently had used the courts and found that a common complaint was that the courts lacked empathy with the parties).

73. See NUSSBAUM, *supra* note 17, at 121 (pointing out that while judges need technical legal knowledge, "to be fully rational, judges must also be capable of fancy and sympathy" and "must educate not only their technical capacities but also their capacity for humanity").

74. Bandes, *Empathetic Judging*, *supra* note 57, at 139.

of the litigants' claims and to carry out the process of adjudication as a human rather than as an automaton or solely abstract activity.<sup>75</sup>

As adjudication takes place at both the trial and appellate levels, empathy should be incorporated at every stage where decisions are made. Although President Obama's comments and the judicial confirmation hearings were focused on federal appellate court nominees, all judges—trial and appellate, state and federal—must strive for impartiality through the use of empathy. Trial judges in particular commonly serve as the sole audience who hear and decide claims at the summary judgment stage—before any possible trial by jury.<sup>76</sup> Consequently, it is critically important that they make an effort to envision the plaintiffs' stories in establishing the factual record and bring into view a clearer picture of what is at stake in a given case. Precisely because dismissing a case on summary judgment means that the plaintiff will not have the opportunity to present their case to a jury, the latter being the stage at which empathy more typically comes into play,<sup>77</sup> the judge must exercise empathy pretrial to properly determine whether a trial is merited. The trial judge's role and the jury's role, at least with respect to fact-finding, is the same.<sup>78</sup> The difference is that a judge can make factual findings that would otherwise be made by a group of twelve individuals, and in light of this responsibility, the judge must consider the parties' stories through their eyes and through the eyes of others, in order to step outside of one's limited field of view. Envisioning the plaintiffs' stories means fully listening to them and bringing out the details they have to share so that their voices are included in the judge's decision and opinion.<sup>79</sup>

Appellate judges also must engage in an empathic process of

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75. See Sophie H. Pirie, *John T. Noonan as Judge: What Can Empathic Judging Mean for Women?*, 12 J.L. & RELIGION 541, 550 (1995–96); Shirley S. Abrahamson, *Commentary on Jeffrey M. Shaman's The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 633, 640–41 (1996). Justice Abrahamson is a Justice on the Wisconsin Supreme Court.

76. See FED. R. CIV. PROC. 56.

77. See, e.g., Janeen Kerper, *The Art and Ethics of Jury Selection*, 24 AM. J. OF TRIAL ADVOCACY 1, 3–5 (2000) (explaining the importance of empathy in selecting jurors for a successful trial outcome); Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887, 911–16 (1996) (discussing the risks and benefits of juror empathy in criminal cases and concluding that “empathetic juries probably produce better outcomes than would a theoretical objective decision maker”); Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 68, 123–24 (1994) (Stating that “[h]istorically, juries have been viewed as more sympathetic to employee claims than judges. In discussing the value of requesting a jury in [Section] 1981 litigation, one attorney commented that judges tend to be jaded by their experiences and ‘may have limited empathy for victims of race discrimination.’ Jurors, on the other hand, may ‘understand better than judges appointed for life the anguish caused by loss of a job’”).

78. E.g., Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65, 68 n.9 (2008) (stating that “[f]actfinders’ [ ] refers to both judges and juries, but only in their factfinding capacity”).

79. See Abrahamson, *supra* note 75, at 640.

understanding since they will render the final decision in a given case on appeal.<sup>80</sup> But because jurists at the appellate level do not engage in fact-finding, they need to rely on the factual record below as well as on the appellate briefs and oral arguments to help them comprehend the parties' positions.<sup>81</sup> Attorneys can aid in the process by telling their clients' stories in a way that helps judges place themselves in the litigants' shoes and envision what it would be like to think and feel from the litigants' perspectives.<sup>82</sup> It is therefore advisable for lawyers at every stage of litigation to effectively convey their clients' viewpoints and human circumstances in a way that better stirs empathic understanding and imagination on the part of judges.<sup>83</sup> Judges can look to amicus briefs as additional sources of information that provide viewpoints offered by those who care about the issues in the litigation but who do not appear as parties before the court.<sup>84</sup>

Establishing a clearer understanding of empathy and how it contributes to impartiality can help address political concerns, with the goal of creating both political and judicial support for an empathy-incorporated approach to judging.<sup>85</sup> It is true that “[p]olitics has no place in the courtroom,”<sup>86</sup> and the vision of empathy described here is consistent with this goal by recognizing that judges may have their own political or other predispositions, and therefore must use empathy to keep their personal leanings in check when deciding cases. Some might say that “empathy” has become too controversial a word to use in connection with adjudication, but the concept should not be abandoned because of Congress’s and others’ past confusion regarding what empathy means and their resulting uneasiness concerning the use of it. Rather, the term should be clarified and its direct importance to judicial impartiality asserted. Given the centrality of empathy for objective adjudication and the unfinished national dialogue on the question of empathy in judging, we must advance the discussion so that empathy will be seen as the proper test in assessing impartiality for the role of

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80. O’Grady, *supra* note 18, at 14.

81. *Id.* at 14–15.

82. Minow, *supra* note 64, at 59 (noting that “Justice Harlan’s dissent in *Plessy v. Ferguson* may have been assisted by Homer Plessy’s attorney, who had urged the Justices to imagine themselves in the shoes of a black person”); Colby, *supra* note 8, at 1982 (stating that “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”).

83. O’Grady, *supra* note 18, at 15.

84. Minow, *supra* note 64, at 88.

85. See Colby, *supra* note 8, at 2006 (“Empathic judging is not *liberal* judging; it is *good* judging.”) (emphasis added).

86. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be an Associate Justice of the Supreme Court of the United States*, *supra* note 21, at 7 (statement of Senator Jeff Sessions).

judge.<sup>87</sup>

### *C. Empathy and Claims of Discrimination and Inequality*

It is important to keep in mind that because most judges are members of privileged groups (white, male, straight, able-bodied, affluent, etc.), they need to be especially attentive to litigants with less privileged backgrounds whose stories may resonate less easily with them than the stories of those with whom they share something in common.<sup>88</sup> To avoid gravitating toward the more familiar account, judges must expressly and consciously seek to understand and imagine the perspectives of the parties who come before them, especially those with less power.<sup>89</sup> This is particularly important in cases where the judges themselves are differently situated from the parties in terms of life opportunities and societal expectations. Since people tend to more easily and even automatically empathize with people like themselves—for instance, judges will empathize more easily with other judges, whites will empathize more easily with other whites, men will more easily empathize with other men, the religious majority will more easily empathize with others of similar faith—little imagination is needed for this type of near-automatic empathizing.<sup>90</sup> In fact, we may not want to call this kind of relating to others as empathy at all, since it is largely an unconscious reaction rather than a conscious perspective-taking.<sup>91</sup> Rather, a thick use of empathy is needed to engage in a conscious process of trying to understand others' experiences from their perspectives, using concerted effort, especially when empathizing with others who are differently situated in some way from the

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87. *Cf.*, Franks, *supra* note 2, at 68 (asserting that “[e]mpathy, however defined, is surely not the only, or even the key, characteristic of good judging” and that “[g]ood 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 also stating that “there is value to the concept for those genuinely invested in thinking critically about the judicial process . . .”).

88. *See* Weinberg & Nielsen, *supra* note 14, at 325–26 (stating that “[w]hether a person is more or less empathetic depends on common membership in a social category or group” and that “[o]ften these differences are based on race and gender categories”).

89. *See* Bandes, *Empathetic Judging*, *supra* note 57, at 141 (noting that the Justices on the U.S. Supreme Court often display empathy for powerful litigants, such as corporate defendants and government officials).

90. *See id.* (stating that judges frequently show empathy for other judges and government officials).

91. *See* Rameson et al., *supra* note 27, at 240–41 (conducting an empirical study of empathy-related neural activity and explaining that empathy appears *not to be* a completely automatic process because instructing subjects to intentionally empathize produced more neural activity compared to when they were not given the instruction and when they were given a cognitively distracting task while also not prompted to empathize).

decisionmaker.<sup>92</sup> It involves the process of imagining what another person thinks and feels in the given situation, and carefully taking this into account as part of the factual narrative.<sup>93</sup> Without developing their ability to explore other views, judges may make unconscious and biased judgments based on their personal tendencies and their own life experiences.<sup>94</sup> Judges who take note of their human impulses and their unconscious biases while judging will less likely fall trap to them.<sup>95</sup>

Further, jurists should pay greater care to members of traditionally-subordinated groups, whose viewpoints are less commonly understood and given less credit in larger society.<sup>96</sup> Such individuals, for instance, typically are involved in lawsuits dealing with some sort of alleged discrimination or unequal treatment. While empathy is certainly needed for impartial judging generally, it seems particularly necessary in discrimination cases where judges' unconscious biases can cloud the decisionmaking process if they do not exercise conscious empathy in listening to the traditionally- and socially-subordinated side.<sup>97</sup> As

92. *See id.* at 242 (analyzing the results of an empirical study on empathy-related neural activity and finding that “stronger neural responses were observed when participants were instructed to empathize, which suggests top-down effortful cognition may amplify empathic responses”); Decety & Jackson, *supra* note 27, at 84 (“There is plenty of evidence from various disciplines to suggest that the mental flexibility to adopt someone else’s point of view is an effortful and controlled process.”).

93. *See* Decety & Jackson, *supra* note 27, at 84 (describing experiments demonstrating that “deliberate acts of imagination produced a greater [empathic] response than just watching [the target person in a given situation],” and also showing “the effectiveness of perspective-taking instructions in inducing empathy”).

94. *See* Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1117–38 (2008) (describing perceptual segregation theory, which describes how outsiders (racial minorities and women) view allegations of discrimination differently than do insiders (whites and males). An extreme example of biased judgment can be found in a Maryland case involving a male criminal defendant who was sentenced to 18 months in a work release/home detention program for intentionally killing his wife three hours after finding her in an act of adultery. *See* WEST, CARING FOR JUSTICE, *supra* note 42, at 28. Statements made by the judge at the time of sentencing exposed the judge’s “deep sympathy for and identification with the defendant, and the judge’s belief that indeed no man, including the judge himself, would be able to walk away from the scene he had encountered without ‘inflicting corporal punishment.’” *Id.*

95. Abrahamson, *supra* note 75, at 645 (“As Judge Jerome Frank once warned, those judges gullible enough to imagine that they might transcend their human condition are all the more susceptible to their own prejudices, which grow stronger because they are unacknowledged and therefore unrecognized.”).

96. *See* Robinson, *supra* note 94, at 1154–55 (referring to an “insider bias” in the enforcement of antidiscrimination law under Title VII and noting that racial minorities and women thus are likely to view court rulings concerning discrimination as inaccurate and contrary to their life experiences); WEST, CARING FOR JUSTICE, *supra* note 42, at 24 (arguing that justice must be caring to succeed as a matter of justice, and that caring if not just will also not be caring).

97. *See* O’Grady, *supra* note 18, at 26–27 (pointing out that empathetic consideration of others’ situations seems particularly relevant when assessing cases involving discrimination against disadvantaged groups, and that taking into account the parties’ stories in a human sense would help judges overcome an unconscious dependence on stereotypical generalizations). *Cf.* Colby, *supra* note 8, at 1966–83 (explaining the importance and application of empathic judging to constitutional law cases

studies indicate, judges will be more or less inclined to detect discriminatory behavior depending on how strongly they identify with a socially disfavored group.<sup>98</sup> For instance, in cases involving allegations of employment discrimination, white judges are more likely to let some part of the plaintiff's case proceed past summary judgment when the plaintiff is white than when the plaintiff is a racial minority.<sup>99</sup> We have seen that judges, including Supreme Court Justices, have been more empathetic toward those who share their characteristics, and this common form of relating to others typically goes unnoticed and undermines a judicially impartial stance.<sup>100</sup>

By tapping into their capacity for empathy and imagination, judges would be affected less by any initial similarities or differences they may have with the parties and encouraged to notice more shared feelings and aspirations, as they aim to see disputes through different sets of eyes.<sup>101</sup> Research suggests that one's level of concern toward others increases when commonalities with them, even small ones, are discovered.<sup>102</sup> And finding such commonalities through an empathetic posture would help judges identify with the different litigants and their predicaments, allowing all sides to benefit from an equal degree of concern. The use of empathy, to be deployed equally and not selectively or automatically, must be deliberate. In light of all this, empathy is not just relevant but absolutely necessary for judging to take place in an objective fashion.<sup>103</sup>

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and beyond, including the full spectrum of legal doctrine).

98. See Weinberg & Nielsen, *supra* note 14, at 326 (referring to “research that suggests that individuals are more or less likely to perceive the presence of discrimination based on their identification with a stigmatized social group”).

99. *Id.* at 343 (reporting that “when a white judge decides a case involving a white plaintiff, the plaintiff's case (or some portion of it) has a 40 percent predicted probability of surviving a motion for summary judgment” and that “[w]hen a white judge adjudicates a case involving a minority plaintiff, however, the predicted probability of the plaintiff's case surviving summary judgment drops to roughly 34.43 percent”).

100. See Bandes, *Empathetic Judging*, *supra* note 57, at 148 (referring to then-Senator Barack Obama's assertion that the current Supreme Court is too one-sided in its empathy); Weinberg & Nielsen, *supra* note 14, at 350 (pointing to research showing that individuals display more empathy toward those who are similarly-situated). See also discussion *infra* Part IV.

101. See WEST, CARING FOR JUSTICE, *supra* note 42, at 89 (explaining that judges must employ empathic understanding to be able to look past surface differences and perceive deep commonalities at the heart of certain disputes).

102. David DeSteno, *Compassion Made Easy*, N.Y. TIMES, July 14, 2012, available at [http://www.nytimes.com/2012/07/15/opinion/sunday/the-science-of-compassion.html?\\_r=1&emc=eta1](http://www.nytimes.com/2012/07/15/opinion/sunday/the-science-of-compassion.html?_r=1&emc=eta1); Piercarlo Valdesolo & David DeSteno, *Synchrony and the Social Tuning of Compassion*, 11 EMOTION 262, 262–66 (2011), available at <http://www.socialemotions.org/page5/files/Valdesolo.DeSteno.2011.pdf> (describing a study which found that participants who perceived that they shared a trivial similarity with another person (in this case, a motor synchrony in music) were subsequently more often motivated to help that person than if they had not perceived this shared similarity). See also Weinberg & Nielsen, *supra* note 14, at 325 (referring to research demonstrating that people are more willing to help others if they empathize with them).

103. See O'Grady, *supra* note 18, at 11 (noting that the use of empathy “to acquire knowledge and

To paraphrase Martha Minow on the importance of wrestling with different perspectives, only by recognizing their partiality can judges strive for impartiality.<sup>104</sup>

#### *D. Empathy and Maintaining the Appearance of Propriety*

Taking an empathetic approach would help judges not only strive for impartiality but also avoid appearances of impropriety that could be viewed by some as compromising their impartiality. When a judge has some type of connection to a case over which she is set to preside, she must decide whether to recuse herself, a complicated ethical matter that judicial disqualification rules do not clearly answer.<sup>105</sup> Although the judge initially might think the association in question is sufficiently impersonal or indirect to justify her taking the case, she may reconsider her stance by thinking empathically about how others unfamiliar with her activities and connections as a judge would view, and feel about, the situation, and through such reflection preserve both the appearance of propriety and the appearance of judicial impartiality before the public.

Without an empathic view of the situation, a judge may fail to see the public's perspective of his extrajudicial activities as they relate to the pending dispute, as was the case when Supreme Court Justice Antonin Scalia refused to remove himself from a case involving then-Vice President Richard Cheney as a named defendant.<sup>106</sup> In *Cheney v. U.S. District Court*,<sup>107</sup> as the case was pending before the Supreme Court, the public learned that Justice Scalia had previously traveled with Vice President Cheney on his official plane, Air Force Two, to go duck hunting in Louisiana at the invitation of a businessman who organized the trip.<sup>108</sup> Justice Scalia knew Cheney from their time together working for former President Gerald Ford, and the Justice stated simply that both he and Cheney enjoyed the activity of duck hunting.<sup>109</sup> Scalia did not regard it as unusual for judges to socialize with government officials,

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enhance understanding is not inconsistent with objective, neutral, and rational judicial decisionmaking”).

104. See Minow, *supra* note 64, at 75 (stating that “[o]nly by admitting our partiality can we strive for impartiality”). But Minow does not see this “plea of judges to engage with perspectives that challenge their own” as a “call for sympathy or empathy . . .” *Id.* at 77.

105. Abrahamson, *supra* note 75, at 645 (noting that “to decide when a judge may not sit is to define what a judge is” and remarking on the lack of clear guidance concerning when judges ought to disqualify themselves).

106. See JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 128–30 (2011) (referring to *Cheney v. U.S. District Court*, 542 U.S. 367 (2004)).

107. *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367 (2004).

108. See RESNIK & CURTIS, *supra* note 106, at 129.

109. *Id.*

and since he had not discussed matters pertaining to the case during the trip, Scalia concluded that no conflict of interest existed to merit his recusal.<sup>110</sup> His decision, however, went against the public sentiment, which challenged his neutrality in hearing the case—in fact, twenty of the thirty largest newspapers publicly asked for his recusal.<sup>111</sup> Scalia failed to maintain an image of impartiality because he failed to use empathy in deciding whether he should participate in this particular case. He was not able to see outside his own viewpoint (and the viewpoint of others like him who socialize in rarefied circles), thereby neglecting to perceive that the larger public would, and did, view his activity with Cheney very differently.<sup>112</sup>

Judicial impartiality, however, requires more than remaining independent from the influence of political, religious, or special interest groups, and requires more than remaining disentangled from any personal investment in a case.<sup>113</sup> Judicial impartiality also calls for a consciously balanced approach to considering the claims of litigants so as to be equally mindful to all sides. Without proper attention given to each story, judges' general view of things and experiences may exert greater influence on how they hear the facts “[b]ecause no one is without perspective.”<sup>114</sup>

#### *E. Empathy, Impartiality, and Judicial Blindness*

To engage in empathetic and impartial decisionmaking, the judge must take in the specifics of the case, but one might then ask: isn't Justice supposed to be blind?<sup>115</sup> Judicial impartiality has been widely symbolized through the visual representation of Justice, depicted as a woman customarily wearing a blindfold and holding scales.<sup>116</sup> The blindfold, more so than the scales, has come to be understood as preserving neutrality in the adjudication process by preventing the judge from seeing the people involved in a case.<sup>117</sup> But the bandage can arguably have the opposite effect, by encouraging the judge to view the case too generally and to improperly compare it to other seemingly similar cases that in fact would be evidently dissimilar if the important

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110. *Id.* at 129–30.

111. *Id.* at 129.

112. *See id.* at 130.

113. *See* NUSSBAUM, *supra* note 17, at 86 (describing judicial neutrality).

114. *See* RESNIK & CURTIS, *supra* note 106, at 104.

115. *See id.* at 91.

116. *Id.*

117. *Id.*

specifics of each situation could be seen.<sup>118</sup> Ironically, the blindfold serves to undermine objective and fair judging because it creates an obstacle to seeing all of the pertinent information that would support full empathic decisionmaking.<sup>119</sup> The blindfold therefore must be shed to allow the judge to see, imagine, and know the particular stakes for the parties in the dispute.<sup>120</sup> Just as Justice's blindfold should be cast aside, the litigants should also be seen unmasked so that the judge can take into account their circumstances and perspectives based on their specific characteristics.<sup>121</sup> The need for judicial sight and consideration of context is even more critical in light of the historical inequities and exclusion of individuals based on race, ethnicity, gender, and so on, in larger society and in the judicial system.<sup>122</sup>

The notion of a blind Justice also resembles the notion of a "color-blind" Constitution, as articulated by Justice John Marshall Harlan in his dissent in the 1896 case of *Plessy v. Ferguson*,<sup>123</sup> with the understanding that at that time, the law would otherwise be used to discriminate against blacks.<sup>124</sup> In *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>125</sup> decided in 2007, Chief Justice John Roberts invoked Justice Harlan's term to strike down an affirmative action plan implemented to boost racial and ethnic diversity in public schools in Seattle and St. Louis.<sup>126</sup> Justice Harlan, however, had initially used the term color-blindness because he *could see* that external conditions which existed at the time, namely widespread racism, would require the law, in the face of such racism, to be blind to the color of the disputants in order for the law to be applied equally. Chief Justice Roberts, however, used the term in a different sense—to require the law to ignore race and ethnicity, even when presented with evidence that one's color still contributes to disadvantage in our society, thus undermining the

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118. WEST, CARING FOR JUSTICE, *supra* note 42, at 55 (noting that judicial blindness and lack of care to the particulars of a given case could lead to improper comparisons of "unlike" cases, and also arguing against a view of impartiality that encourages such blindness).

119. *See id.* at 55–57. *See also* Rebecca K. Lee, *Justice for All?*, 65 VAND. L. REV. EN BANC 217, 222–23 (2012) (reviewing JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011)) [hereinafter Lee, *Justice for All?*].

120. *See* WEST, CARING FOR JUSTICE, *supra* note 42, at 57; Lee, *Justice for All?*, *supra* note 119, at 218.

121. *See* Pirie, *supra* note 75, at 549 (sharing that Judge John T. Noonan, Jr. would apply the law by using empathy "to see particular and individual persons, not masked," and not "faceless and contextless").

122. *See* RESNIK & CURTIS, *supra* note 106, at 91; Lee, *Justice for All?*, *supra* note 119, at 223–28.

123. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

124. RESNIK & CURTIS, *supra* note 106, at 102.

125. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

126. RESNIK & CURTIS, *supra* note 106, at 102.

core understanding of the Constitution's Equal Protection Clause as an anti-subordination provision.<sup>127</sup> Being "blind" to race to ensure equal treatment for the racially disadvantaged at a time when discrimination was overt is clearly unlike blindness to race in trying to ensure equal opportunity for the racially disadvantaged when discrimination has become covert. In the words of Justice Felix Frankfurter, the "blindness of indifference" is not the same thing as the "blindness of impartiality," and the prevailing societal practices must be taken into account in order to determine whether blindness furthers the pursuit of justice.<sup>128</sup> In fact, Supreme Court Justices in case after case have viewed judicial blindness as an uninformed and undesirable position from which to understand and interpret the law.<sup>129</sup> Ultimately, engaging with the particulars of a case does not undermine the broad commitment to judicial impartiality and fairness but in actuality upholds it.<sup>130</sup>

### III. CREATING AN EMPATHIC JUDICIARY

While empathic ability is to some degree an innate trait, it can be further developed and learned throughout one's life with awareness and practice.<sup>131</sup> Moreover, the capacity to empathize does not differ by

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127. See Hannah L. Weiner, *The Subordinated Meaning of "Color-Blind": How John Marshall Harlan's Words Have Been Erroneously Commandeered*, 11 J.L. & SOC. CHALLENGES 45, 46–47 (2009).

128. RESNIK & CURTIS, *supra* note 106, at 103.

129. See, e.g., *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 663 (1989) (Stevens, J., dissenting) ("Turning a blind eye to the meaning and purpose of Title VII, the majority's opinion perfunctorily rejects a longstanding rule of law . . ."); *Employment Div. v. Smith*, 494 U.S. 872, 919 (1990) (Blackmun, J., dissenting) ("[A]lthough . . . courts should refrain from delving into questions whether, as a matter of religious doctrine, a particular practice is 'central' to the religion . . . I do not think this means that the courts must turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion"); *Kelo v. City of New London*, 545 U.S. 469, 514 (2005) (Thomas, J., dissenting) ("The Court adopted its modern reading [of the Public Use Clause jurisprudence] blindly, with little discussion of the Clause's history and original meaning. . ."); *Younger v. Harris*, 401 U.S. 37, 44 (1971) (asserting that the concept of "'Our Federalism' . . . does not mean blind deference to 'States' Rights'"); *Printz v. United States*, 521 U.S. 898, 915 n.9 (1997) ("While overall The Federalist reflects a 'large area of agreement between Hamilton and Madison,' that is not the case with respect to the subject at hand. To choose Hamilton's view . . . is to turn a blind eye to the fact that it was Madison's—not Hamilton's—that prevailed, not only at the Constitutional Convention and in popular sentiment, but in the subsequent struggle to fix the meaning of the Constitution by early congressional practice.") (citations omitted); *Stefanelli v. Minard*, 342 U.S. 117, 121 (1951) (noting that Section 1983 "has given rise to differences of application" and that "[s]uch differences inhere in the attempt to construe the remaining fragments of a comprehensive enactment . . . loosely and blindly drafted in the first instance").

130. See Minow, *supra* note 64, at 92 (stating that "immersion in particulars does not require the relinquishment of general commitments" and that "[t]he struggle is not over the validity of principles and generalizations—it is over which ones should prevail in a given context").

131. See Decety & Jackson, *supra* note 27, at 93–94 (noting that "empathy is a motivated process that more often than commonly believed is triggered voluntarily" and that "[t]his makes empathy a

gender, meaning there is no biological reason that male and female judges could not equally employ empathy when deciding cases.<sup>132</sup> The ability to empathize also can be deepened by reading, and learning from, fictional literature.<sup>133</sup> This is because the activity of reading novels gives one a window into the lives of others, their thoughts and emotions, and exercises one's imagination when one steps outside of one's own experience to view situations from different vantage points.<sup>134</sup> The link between fiction reading and demonstrations of empathy may be additionally explained by the reader's frequent activity of becoming immersed in a narrative and entering the minds of a novel's characters.<sup>135</sup> As Justice Stephen Breyer remarked during his Senate confirmation proceedings and again in a recent interview, reading literature is very helpful in being able to notice and think about the different stories of people's lives.<sup>136</sup> It seems to follow that also reading

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flexible human capacity"); Rameson et al., *supra* note 27, at 242 (conducting an empirical study on empathy-related neural activity and explaining that the subjects' variability in trait empathy was not necessarily a function of a difference in ability or capacity to empathize, but at the same time that empathy appears to be more automatic for individuals high in trait empathy); Henderson, *supra* note 20, at 1583; Jane E. Brody, *Empathy's Natural, but Nurturing It Helps*, N.Y. TIMES, Feb. 15, 2010, <http://www.nytimes.com/2010/02/16/health/16brod.html>.

132. See Randy Lennon & Nancy Eisenberg, *Gender and Age Differences in Empathy and Sympathy*, in *EMPATHY AND ITS DEVELOPMENT* 195, 195–203 (Nancy Eisenberg & Janet Strayer eds., 1987); Henderson, *supra* note 20, at 1582–83.

133. See Decety & Jackson, *supra* note 27, at 84 (“Empathy may be initiated by a variety of situations—for instance . . . when one imagines someone else’s behavior, [or] by the reading of a narrative in a fiction book . . . in these conditions, empathy requires one to adopt more or less consciously the subjective point of view of the other.”); Raymond A. Mar et al., *Exploring the Link Between Reading Fiction and Empathy: Ruling Out Individual Differences and Examining Outcomes*, 34 COMMUNICATIONS: THE EUR. J. OF COMM., 407 (2009), available at [https://docs.google.com/file/d/0B4KSpqWRMt3KZTRjMDA3NjMtOTVhNi00YjI2LWlxMWUuOGZhNjM3ZDYyNzVm/edit?hl=en\\_US&pli=1](https://docs.google.com/file/d/0B4KSpqWRMt3KZTRjMDA3NjMtOTVhNi00YjI2LWlxMWUuOGZhNjM3ZDYyNzVm/edit?hl=en_US&pli=1); NUSSBAUM, *supra* note 17, at 3–6 (making the case for the relevance of fiction to the work of judging); Annie Murphy Paul, *Your Brain on Fiction*, N.Y. TIMES, March 17, 2012, [http://www.nytimes.com/2012/03/18/opinion/sunday/the-neuroscience-of-your-brain-on-fiction.html?pagewanted=1&\\_r=1](http://www.nytimes.com/2012/03/18/opinion/sunday/the-neuroscience-of-your-brain-on-fiction.html?pagewanted=1&_r=1).

134. Paul, *supra* note 133.

135. Mar et al., *supra* note 133.

136. *The Nomination of Stephen G. Breyer To Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 103d Cong. 232 (1994) (testimony of Judge Stephen Breyer). Judge Breyer stated:

I read something that moved me a lot not very long ago. I was reading something by Chesterton, and he was talking about . . . “Jane Eyre” . . . . He said if you want to know what that is like, you go and you look out at the city, he said—I think he was looking at London—and he said, you know, you see all those houses now, even at the end of the 19th century, and they look all as if they are the same. And you think all of those people are out there, going to work, and they are all the same. But, he says, what . . . Bronte tells you is they are not the same. Each one of those persons and each one of those houses and each one of those families is different, and they each have a story to tell. Each of those stories involves something about human passion. Each of those stories involves a man, a woman, children, families, work, lives. And you get that sense out of the book.

So sometimes, I have found literature very helpful as a way out of the tower.

nonfictional works such as memoirs and autobiographies may expand an individual's understanding of others' lives and perspectives.<sup>137</sup> Justice Sonia Sotomayor's memoir, for instance, is an evocative example of a book that familiarizes the reader with her particular life circumstances and story, and also shows the reader how Sotomayor, while growing up and later as a litigator, continually tried to see things as others saw them.<sup>138</sup> Judges thus could become more adept at empathizing by taking steps to expand their knowledge about the human condition, including reading more literature.

Individuals, including judges, concededly may not be able to empathize *completely* with others, because using one's imagination is not the same as actually being in another person's shoes and living the life that person has. Exercising empathy does not mean perfect understanding will be achieved; in fact, attempting to empathize with others may lead one to inaccurately or incompletely comprehend another's situation and that person's needs.<sup>139</sup> To lessen this possibility, judges can ask questions to improve upon their understanding of a given party's story and perspective.<sup>140</sup> Further, empathetic understanding of each party must be viewed within the overall context of the dispute from the judge's broader standpoint, because depending on the nature and severity of the dispute, the particular individuals involved may have difficulty accurately perceiving what happened to them.<sup>141</sup> For emotion to be useful and trustworthy as a source of information, it should be grounded on an accurate picture of the facts and how these facts contribute to the litigants' perceptions of the situation.<sup>142</sup>

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*Id.* at 232–33. Kohler, *supra* note 7 (interview with Justice Stephen Breyer) (“[W]hen you’re a judge and you spend your whole day in front of a computer screen, it’s important to be able to imagine what other people’s lives might be like, lives that your decisions will affect. People who are not only different from you, but also very different from each other. . . . [R]eading is a very good thing for a judge to do. Reading makes a judge capable of projecting himself into the lives of others, lives that have nothing in common with his own, even lives in completely different eras or cultures.”).

137. For instance, Kenji Yoshino's book and part memoir about the phenomenon of covering offers a deeply personal look into his life as a gay man, and serves as an example of the type of writing that can help others imagine what it may be like to be gay. See generally KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006).

138. See SOTOMAYOR, *supra* note 6. See also Rebecca K. Lee, *Sonia Sotomayor: Role Model of Empathy and Purposeful Ambition*, 98 MINN. L. REV. HEADNOTES 73 (2013) (reviewing SONIA SOTOMAYOR, MY BELOVED WORLD (2013)).

139. See Goodman, *supra* note 50, at 669–70 (quoting Stephanie Wildman, who was trying to find a way to help her white students understand what it is like to endure racial harassment: “Racial oppression is unique. Comparing oppressions may lead to a false sense of understanding.”).

140. See Henderson, *supra* note 20, at 1651 (noting that “empathic understanding takes practice and work” and that “[p]art of that practice can be accomplished in the form of questioning whether the received message is the correct one or asking for clarification”).

141. See NUSSBAUM, *supra* note 17, at 73–74.

142. See *id.*

Notwithstanding this limitation, however, judges ought to work at developing their capacity for empathy as much as possible.

#### *A. Empathic Ability as a Requirement for Judicial Appointment*

To form an empathic judiciary, empathic ability should be unequivocally added to the list of qualifications needed for judicial nomination and appointment.<sup>143</sup> The issue attracted public attention when Barack Obama explained during his 2008 presidential campaign that he would select judges who would apply law in real-life situations by drawing upon their ability to empathize with different types of litigants.<sup>144</sup> He introduced this criterion when discussing why as Senator he voted against then-Supreme Court nominees John Roberts and Samuel Alito: “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.”<sup>145</sup>

While preparing to fill a Supreme Court vacancy as President, Obama further expressed that he is looking for a candidate “‘who understands that justice isn’t about some abstract theory or footnote in a casebook’ but that it is also about ‘how our laws affect the daily realities of people’s lives. 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>146</sup> Obama thus seemed to be indicating that judges ought to try to understand the range of human experiences that would likely be at issue in the cases that come before them, particularly involving litigants who are or have been disadvantaged in some way. In selecting a Supreme Court nominee, President Obama wanted someone who would use their empathic skills to acquire a practical understanding of how society functions and how ordinary people live their everyday lives.<sup>147</sup> He recognized that empathy gives judges the ability to apply the law in a lived sense, fully aware of

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143. See Rameson et al., *supra* note 27, at 242 (in an empirical study on empathy-related neural activity, showing that empathy appears to be a more automatic experience for high-empathy individuals, especially when attentional resources are limited, but that normal, healthy individuals without a history of major psychiatric illness have a common capacity to empathize when specifically prompted to do so); Colby, *supra* note 8, at 1989–90 (“Since empathy is an essential tool for good judging, and since people naturally vary in their empathic abilities, it makes sense that the President should look for judges who possess strong empathic skills. . . . 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.”).

144. Williams, *supra* note 3.

145. *Id.*

146. *Id.*

147. MacGillis, *supra* note 3.

the law's effect on people in light of their individual situations.

But the use of empathy has been challenged by politicians who hold a narrow view of how judges ought to decide cases and misunderstand what is needed for judicial impartiality. In particular, empathy in judging became controversial among Republicans during the Senate confirmation process for each of Obama's two picks for the Supreme Court to date, Sonia Sotomayor and Elena Kagan.<sup>148</sup> In response to Obama's comments concerning what he wanted in a Supreme Court Justice, Republican legislators challenged the appropriateness of using empathy in judicial decisionmaking and commented that the President should look for a nominee who would adhere to the "rule of law" and not go beyond "interpreting the law."<sup>149</sup> During the Senate confirmation hearing of then-Second Circuit Judge Sonia Sotomayor, several Republican senators expressed concern that empathetic judging would undermine judicial impartiality because they viewed empathy as giving preference to one side, based on the judge's background, identity characteristics, or sympathies.<sup>150</sup> They equated empathy with

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148. See generally *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States*, *supra* note 21; *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. (2010). But see West, *The Anti-Empathic Turn*, in *PASSIONS AND EMOTIONS*, *supra* note 1, at 270–74 (arguing that beyond political battles, the anti-empathy turn is part of a larger paradigm-shift from traditional to scientific, and from reasoning based on analogy to reasoning based on incentive structures).

149. See Williams, *supra* note 3; Kenji Yoshino, *On Empathy in Judgment (Measure for Measure)*, 57 CLEV. ST. L. REV. 683, 683 (2009) [hereinafter Yoshino, *On Empathy in Judgment*].

150. See generally *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States*, *supra* note 21. For instance, Senator Jeff Sessions gave the following statement during the hearing:

I am afraid our system will only be further corrupted, I have to say, 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," as well as, his word, "their broader vision of what America should be."

...

I want to be clear:

I will not vote for—and no senator should vote for—an individual nominated by any President who is not fully committed to fairness and impartiality toward every person who appears before them.

I will not vote for—and no Senator should vote for—an individual nominated by any President who believes it is acceptable for a judge to allow their personal background, gender, prejudices, or sympathies to sway their decision in favor of, or against, parties before the court. In my view, such a philosophy is disqualifying.

Such an approach to judging means that the umpire calling the game is not neutral, but instead feels empowered to favor one team over the other.

Call it empathy, call it prejudice, or call it sympathy, but whatever it is, it is not law. In truth, it is more akin to politics, and politics has no place in the courtroom.

*Id.* at 6–7. In addition, Senator Charles Grassley gave the following statement:

President Obama said that he would nominate judges based on their ability to empathize in general and with certain groups in particular. This empathy standard is troubling to me. In fact, I am concerned that judging based on empathy is really just legislating from the bench.

favoritism—siding with the more sympathetic or more familiar side.<sup>151</sup> Disagreeing with their Republican counterparts, however, Democratic Senators expressed support for a broader and balanced view of empathy during Sotomayor’s confirmation hearing.<sup>152</sup>

Admittedly, Republican Senators focused on the empathy question not only because of Obama’s judicial criteria, but also due to remarks Sotomayor made during some of her speeches, the most famous of which included her comment that she ““would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion [as a judge].””<sup>153</sup> This

The Constitution requires that judges be free from personal politics, feelings, and preferences. President Obama’s empathy standard appears to encourage judges to make use of their personal politics, feelings, and preferences. This is contrary to what most of us understand to be the role of the judiciary.

President Obama clearly believes that you measure up to his empathy standard. That worries me. *Id.* at 17–18.

151. *See, e.g.*, Senator Tom Coburn’s statement:

Senator Obama referred his “empathy standard” when he voted against Chief Justice Roberts. He stated, “The tough cases can only be determined on the basis of one’s deepest values, one’s core concerns, one’s broader perspective on how the world works, and the depth and breadth of one’s empathy.”

I believe that standard is antithetical to the proper role of a judge. The American people expect their judges to treat all litigants equally, not to favor and not to enter the courtroom already prejudiced against one of the parties. That is why Lady Justice is always depicted blind and why Aristotle defined law as “reason free from passion.”

Do we expect a judge to merely call balls and strikes? Maybe so, maybe not. But we certainly do not expect them to sympathize with one party over the other, and that is where empathy comes from.

*Id.* at 40.

152. *See, e.g.*, Senator Sheldon Whitehouse’s statement:

I believe that your diverse life experience, your broad professional background, your expertise as a judge at each level of the system, will bring you [good] judgment. As Oliver Wendell Holmes famously said, the life of the law has not been logic, it has been experience.

If your wide experience brings life to a sense of the difficult circumstances faced by the less powerful among us: the woman shunted around the bank from voicemail to voicemail as she tries to avoid foreclosure for her family; the family struggling to get by in the neighborhood where the police only come with raid jackets on; the couple up late at the kitchen table after the kids are in bed sweating out how to make ends meet that month; the man who believes a little differently, or looks a little different, or thinks things should be different; if you have empathy for those people in this job, you are doing nothing wrong.

*Id.* at 37. *See also* Senator Dianne Feingold’s statement:

There’s been a lot of talk about this concept of empathy. In the context of your nomination, a judge’s ability to feel empathy does not mean the judge should rule one way or another, as you well explained. But I agree with President Obama that it’s a good thing for our country for judges to understand the real-world implications of their decisions and the effects on regular Americans, and to seek to understand both sides of an issue.

*Id.* at 116.

153. As Senator Orrin Hatch stated during Sotomayor’s Senate confirmation hearing: “President Obama says that personal empathy is an essential ingredient in judicial decisions. Today we are urged

comment generated many questions during Sotomayor's confirmation hearing, and she explained that the remark was meant to be a rhetorical variation of Justice Sandra Day O'Connor's statement that "a wise old man and a wise old woman" would reach the same conclusion when deciding a case—a rhetorical comparison that Sotomayor admitted had caused much misunderstanding.<sup>154</sup> Another Obama nominee for the Supreme Court, then-Solicitor General Elena Kagan, was also asked about the President's empathy standard during her Senate confirmation hearing.<sup>155</sup> Again, Republican Senators viewed empathy as giving preference to one side over another, rather than as a capacity to see all sides.<sup>156</sup> As a result, Kagan, like Sotomayor, disavowed any judicial philosophy involving empathy, at least in the political arena of the Senate floor.<sup>157</sup>

The question of empathy or impartiality, however, was not raised during the Senate confirmation hearing of then-Third Circuit Judge Samuel Alito, who preceded Sotomayor onto the Supreme Court bench, despite Alito's introductory statement discussing his father's immigrant and impoverished background and the influence that his parents have had on him.<sup>158</sup> In fact, Alito specifically stated

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to ignore Judge Sotomayor's speeches altogether and focus only on her judicial decisions, which are extensive. I do not believe that we should do just that." *Id.* at 12. Senator Charles Grassley also stated:

I have reviewed your record and have concerns about your judicial philosophy. For example, in one speech you doubted that a judge could ever be truly impartial. In another speech, you argued that it is a disservice both to law and society for judges to disregard personal views shaped by one's "differences as a woman or man of color."

In yet another speech, you proclaimed that the court of appeals is where policy is made. Your "wise Latina" comment starkly contradicts a statement by Justice O'Connor that a wise old man and a wise old woman would eventually reach the same conclusion in a case.

These statements go directly to your views of how a judge should use his or her background and experience when deciding cases. Unfortunately, I fear they do not comport with what I and many others believe is the proper role of a judge or an appropriate judicial method.

*Id.* at 18.

154. *Id.*

155. *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States*, *supra* note 148.

156. As Senator Charles E. Grassley stated during the hearing: "In nominating you to be an Associate Justice, President Obama clearly believes that you measured up to his judicial empathy standard, a judge's ability, in other words, to empathize with certain groups over others." *Id.* at 15.

157. *See id.* at 18, 103.

158. *See Confirmation Hearing on the Nomination of Samuel A. Alito, to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 54–55 (2006). Judge Alito's testimony during his Senate confirmation hearing included the following remarks:

I am who I am in the first place because of my parents and because of the things that they taught me, and I know from my own experience as a parent that parents probably teach most powerfully not through their words but through their deeds. And my parents taught me through the stories of their lives, and I don't take any credit for the things that they did or the things that they experienced. But they made a great impression on me.

My father was brought to this country as an infant. He lost his mother as a teenager. He grew

during his hearing that he thinks about his Italian ancestors when presiding over cases involving an immigrant, or more specifically about family members or friends and acquaintances when relevant to thinking through issues in a case.<sup>159</sup> But Alito, who was nominated by President George W. Bush, was not subject to the same degree of questioning by the Senate Judiciary Committee regarding his ability or commitment to judge objectively in light of his comments.<sup>160</sup>

Despite the charges of some legislators, it is apparent that judges of every ideological stripe use empathy when siding with one party rather than another, including so-called rule-bound judges who, despite being characterized as ruling objectively and rationally, in actuality tend to favor the views of those who share their backgrounds or leanings.<sup>161</sup> It

up in poverty. . . .

My mother is a first-generation American. Her father worked in the Roebling Steel Mill in Trenton, New Jersey. Her mother came from a culture in which women generally did not even leave the house alone, and yet my mother became the first person in her family to get a college degree. . . .

I got here in part because of the community in which I grew up. It was a warm but definitely an unpretentious, down-to-earth community. Most of the adults in the neighborhood were not college graduates. I attended the public schools.

*Id.*

159. *Id.* As Alito testified:

[I]n my opening statement, I tried to provide a little picture of who I am as a human being and how my background and my experiences have shaped me and brought me to this point. I don't come from an affluent background or a privileged background. My parents were both quite poor when they were growing up. . . . I think that children learn a lot from their parents and they learn from what the parents say, but I think they learn a lot more from what the parents do and from what they take from the stories of their parents' lives.

And that's why I went into that in my opening statement, because when a case comes before me involving, let's say, someone who is an immigrant, and we get an awful lot of immigration cases and naturalization cases, I can't help but think of my [Italian] ancestors because it wasn't that long ago when they were in that position. And so it's my job to apply the law. It's not my job to change the law or to bend the law to achieve any results, but I have to, when I look at those cases, I have to say to myself, and I do say to myself, 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.

When I have cases involving children, I can't help but think of my own children and think about my children being treated in the way the children may be treated in the case that's before me. And that goes down the line. When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender, and I do take that into account. When I have a case involving someone who's been subjected to discrimination because of disability, I have to think of people who I've known and admired very greatly who had disabilities and I've watched them struggle to overcome the barriers that society puts up, often just because it doesn't think of what it's doing, the barriers that it puts up to them.

*Id.* at 475.

160. *Id.*

161. See Susan Bandes, *Why is Empathy Controversial? Or Liberal?*, BALKINIZATION BLOG, May 25, 2009, <http://balkin.blogspot.com/2009/05/why-is-empathy-controversial-or-liberal.html> [hereinafter Bandes, *Why is Empathy Controversial?*].

appears the use of judicial empathy is seen as “activist” when it favors the disadvantaged, and invisible when it favors the elite.<sup>162</sup> Judges may claim, and have claimed, that they do not follow a particular judicial philosophy when deciding cases, but, in believing this, they fail to see when they gravitate toward the more familiar litigant’s account, without testing their assumptions against other views.<sup>163</sup> Because judges will likely view the facts from some standpoint—that is, they will have some empathy for one party, whether they try to or not—judges will be acting partially unless they actively think about what it is like to stand in the place of the party more differently situated from them.<sup>164</sup> Further, it is hardly the case that laws can be applied in a vacuum, without facts to give real-life meaning and context for legal interpretation, especially where one’s view of the facts can make the difference in outcome.<sup>165</sup>

It makes sense that a judge’s approach to adjudication matters in the truly difficult cases, where different minds can disagree depending on how they perceive the entire context of the dispute and the perspectives of the litigants. As then-Senator Obama explained when opposing John Roberts’ confirmation as Chief Justice:

[W]hile 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—what matters on the Supreme Court is those 5 percent of cases that are truly difficult. In those cases, adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon. The 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.<sup>166</sup>

Expressing a similar sentiment, at least one federal appellate judge has observed that judges reach the same outcome in 96 percent of cases, regardless of who the judge is, but that for the remainder of the cases, the individual makeup of the panel will determine the outcome.<sup>167</sup> The

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162. Bandes, *Empathetic Judging*, *supra* note 57, at 141. See *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States*, *supra* note 21, at 6 (statement of Senator Jeff Sessions) (“I fear that [President Obama’s] ‘empathy standard’ is another step down the road to a liberal activist, results-oriented, and relativistic world where laws lose their fixed meaning, unelected judges set policy . . .”).

163. See Bandes, *Empathetic Judging*, *supra* note 57, at 140–41 (discussing Supreme Court Chief Justice John Robert’s denial of having any legal philosophy).

164. See *discussion supra* Part II.B.

165. See *discussion supra* Parts II.B and II.C.

166. 151 CONG. REC. S10366 (daily ed. Sept. 22, 2005) (statement of Sen. Barack Obama).

167. JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW*, xiii (2002 ed.) (basing his observation on having ruled on over 3,000 federal appellate cases as a judge on the Ninth Circuit Court of Appeals and his own dissent rate of about 3.4 percent).

panel makeup, along with whether there is a strong dissent, also will largely determine whether the panel opinion will be reversed by an en banc court or be further considered by the Supreme Court.<sup>168</sup>

Obama's picture of the empathic judge concerned his critics, who feared that a judge acting on empathy would ignore legal rules in order to favor the side with whom she or he could better relate.<sup>169</sup> To the contrary, an empathic judge would seek to understand those who are less familiar to him, those for whom he must make extra effort to identify with. This is needed to counterbalance the unspoken empathy the judge will be inclined to have toward those he does easily identify with. In this respect, judicial empathy is indeed needed to achieve an impartial view of a given case, and to maintain the rule of law itself.

### *B. Diversifying the Bench for a More Empathic Judiciary*

Having judges who themselves have a diverse set of experiences and backgrounds would facilitate an empathic approach in the juridical role, as would having judges in general who would be more mindful to employ empathy to imagine the positions of others.<sup>170</sup> This is not to say that diverse judges are necessarily more empathic, but rather that a bench consisting of judges with diverse characteristics and from diverse life paths will better relate to a wider range of litigants. The identity of the jurist, it turns out, can and does matter in how she decides certain cases.<sup>171</sup> Cases that are close or difficult, or that lack clear or consistent case law on the issue, are the ones that will be decided differently depending on the adjudicator.<sup>172</sup> As Senior Ninth Circuit Judge John T. Noonan, Jr. has commented:

Any experienced judge on our court can predict what the result will be in such a case by knowing the names of the three members of the panel; so can any watcher of the court. The prediction will not have 100 percent accuracy but accuracy enough to demonstrate that the person of the judge has affected the selection of the rule.<sup>173</sup>

The identity of the judge matters because the judge's background and

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168. Wald, *supra* note 63, at 894.

169. Yoshino, *On Empathy in Judgment*, *supra* note 149, at 698–99.

170. Franks, *supra* note 2, at 72 (“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.”).

171. NOONAN, *supra* note 167.

172. *Id.*

173. *Id.*

lived experience contribute to the decisions they make.<sup>174</sup> In this respect, a diverse judiciary would better ensure that those who hear and decide claims will possess a range of experiences that will inform their decisionmaking.<sup>175</sup> Increasing diversity on the federal and state benches also would strengthen the public's faith in the fairness of the judiciary, and may further encourage litigants to more comfortably and fully share their stories so that they may be better heard.<sup>176</sup> "The life of the law . . . has been experience," as former Justice Oliver Wendell Holmes put it,<sup>177</sup> and we might add that to continue breathing life into the law, such experience must be broad and varied.

Yet the judiciary still largely lacks this breadth of experience and background. With regard to race and ethnicity, on the federal bench only 18.7% of all currently sitting federal judges are nonwhite, comprised of the following racial and ethnic groups: 9.9% are African American, 1.8% are Asian American, 6.9% are Hispanic, and 0.1% are either American Indian or Pacific Islander.<sup>178</sup> Of all the sitting chief judges on the federal courts, 13.2% are people of color: 9.3% are

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174. *See id.* Judge Patricia Wald, who served as a federal appellate judge on the U.S. Court of Appeals for the D.C. Circuit, has explained that a judge's background and experiences can and do influence her decisionmaking and decisions. As she recounts:

The maxim that a wise man and a wise woman come to the same conclusions is endlessly repeated, but I think it somewhat simplistic. And certainly different wise women will come to different conclusions. Nearer the truth, I think, is that being a woman and being treated by society as a woman can be a vital element of a judge's experience. That experience in turn can subtly affect the lens through which she views issues and solutions. I can think of a few cases where being a woman entered into my conscience, but I can think of just as many where having worked in a factory, having been a Legal Services lawyer and having been a government official who dealt with Congress affected my perspective just as much. A judge is the sum of her experiences and if she has suffered disadvantages or discrimination as a woman, she is apt to be sensitive to its subtle expressions or to paternalism.

Patricia M. Wald, *Six Not-So-Easy Pieces: One Woman Judge's Journey to the Bench and Beyond*, 36 U. TOL. L. REV. 979, 989 (2005) [hereinafter Wald, *One Woman Judge's Journey to the Bench*].

175. *See* NOONAN, *supra* note 167 (stating that "[m]y sense of the critical effect of the judge's own background, experience, and personality upon the judge's work has led me to appreciate the desirability of diversity in judicial appointments").

176. *See* Wald, *One Woman Judge's Journey to the Bench*, *supra* note 174, at 989 (stating the importance of the public's perception of the courts and that litigants and the larger public would have less confidence in a male-dominated or homogeneous bench).

177. Oliver Wendell Holmes, Jr., *The Common Law* (1881), reprinted in AMERICAN LEGAL REALISM 9 (William W. Fisher III et al., eds. 1993).

178. FEDERAL JUDICIAL CENTER, HISTORY OF THE FEDERAL JUDICIARY, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited December 2, 2013) (click on "Select research categories" hyperlink; then limit query to all sitting judges) (indicating that there are 1,334 sitting judges at the federal level); FEDERAL JUDICIAL CENTER, HISTORY OF THE FEDERAL JUDICIARY, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited December 2, 2013) (click on "Select research categories" hyperlink; then limit query to all sitting judges by race or ethnicity) (indicating that of all sitting judges at the federal level, 132 are African American, 1 is American Indian, 24 are Asian American, 92 are Hispanic, and 1 is Pacific Islander).

African American, 0.2% is American Indian, 0.7% are Asian American, and 2.9% are Hispanic.<sup>179</sup> On the federal appellate bench, minorities make up 17.5% of all sitting judges on the U.S. Courts of Appeals: 9.5% are African American, 1.8% are Asian American, and 6.2% are Hispanic.<sup>180</sup>

This racial and ethnic homogeneity may mean that white litigants who come before mostly white judges will receive a favorable outcome more often than minority litigants.<sup>181</sup> For instance, in cases where employment discrimination is alleged, research shows that white judges find in favor of the employer defendant on summary judgment much more often (more than half of the time) than minority judges do.<sup>182</sup> Yet white judges are more likely to deny the employer's motion for summary judgment and rule in favor of the plaintiff when the plaintiff is white and less likely to do so when the plaintiff is not white.<sup>183</sup> Minority

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179. FEDERAL JUDICIAL CENTER, HISTORY OF THE FEDERAL JUDICIARY, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited December 2, 2013) (click on "Select research categories" hyperlink; then limit query to all sitting judges and chief judges) (indicating a total of 409 Chief Judges currently sitting on the federal bench); FEDERAL JUDICIAL CENTER, HISTORY OF THE FEDERAL JUDICIARY, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited December 2, 2013) (click on "Select research categories" hyperlink; then limit query to all sitting judges and chief judges by race and ethnicity) (indicating that of all sitting Chief Judges at the federal level, 38 are African American, 1 is American Indian, 3 are Asian American, 12 are Hispanic, and 0 are Pacific Islander).

180. FEDERAL JUDICIAL CENTER, HISTORY OF THE FEDERAL JUDICIARY, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited December 2, 2013) (click on "Select research categories" hyperlink; then limit query to all sitting judges and court type U.S. Court of Appeals) (indicating that there are 274 sitting judges on the U.S. Court of Appeals); FEDERAL JUDICIAL CENTER, HISTORY OF THE FEDERAL JUDICIARY, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited December 2, 2013) (click on "Select research categories" hyperlink; then limit query to all sitting judges and court type U.S. Court of Appeals by race or ethnicity) (indicating that on the U.S. Court of Appeals, 26 sitting judges are African American, 0 sitting judges are American Indian, 5 sitting judges are Asian American, 17 sitting judges are Hispanic, and 0 are Pacific Islander).

181. See Weinberg & Nielsen, *supra* note 14, at 350 (pointing to research finding that individuals show more empathy toward those who are more similar to themselves).

182. *Id.* at 338–39 (reporting the results of an empirical study using data from a large random sample of federal district court filings of employment civil rights cases between 1988–2003 in 7 cities: Atlanta, Chicago, Dallas, New Orleans, New York City, Philadelphia, and San Francisco, and finding that white judges ruled for the defendant employer on a motion for summary judgment in 61% of cases while minority judges did the same in only 38% of cases, and that this difference is statistically significant).

183. *Id.* at 343. Specifically, the authors report the following findings from their study:

[W]hen a white judge decides a case involving a white plaintiff, the plaintiff's case (or some portion of it) has a 40 percent predicted probability of surviving a motion for summary judgment. When a white judge adjudicates a case involving a minority plaintiff, however, the predicted probability of the plaintiff's case surviving summary judgment drops to roughly 34.43 percent.

Minority judges are more likely to allow employment civil rights cases to continue past motions for summary judgment regardless of the race of the plaintiff. When a minority judge presides

judges, however, do not rule differently depending on the plaintiff's race.<sup>184</sup>

Given that federal judges in the U.S. are presidentially nominated, the chief executive mainly determines the presence or absence of heterogeneity in new federal judgeships as judicial openings arise. President Obama has already made his mark with his choice of Supreme Court nominees, having appointed two female Justices in a row, one of whom is a Latina. Additionally, at the federal appellate level, approximately 50% of Obama's nominees during his initial term as President were minorities and 40% were women—the most diverse group in the nation's history.<sup>185</sup> For example, half of the Asian American and Pacific Islander (AAPI) judges at the federal level—out of a total of 16—were nominated and confirmed during Obama's first term.<sup>186</sup>

With respect to gender, however, men continue to greatly outnumber women in the judiciary, and minority women are even less represented. At the federal level, only 23.5% of all currently sitting federal judges are women,<sup>187</sup> and only 6.1% are women of color.<sup>188</sup> Of all chief judges on

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over a case involving a minority plaintiff, the plaintiff's case (or some portion of it), has an 84.48 percent predicted probability of surviving summary judgment. And, consistent with prior research, our data demonstrates that a minority judge is likely to allow some portion of a white plaintiff's case to continue at nearly the same predicted probability (87.42 percent).

*Id.* 343–44.

184. *Id.*

185. ALLIANCE FOR JUSTICE, REPORTS ON THE JUDICIARY: THE CHANGING FACE OF THE FEDERAL CIRCUIT COURTS, <http://www.afj.org/judicial-selection/judicial-selection-reports.html> and <http://www.afj.org/judicial-selection/the-changing-face-of-the-federal-circuit-courts.pdf> (last visited July 29, 2012). See also *Alliance for Justice Data Highlights Effects on Gender, Racial, Professional, and Party Diversity of President Obama's Circuit Court Nominees*, ALLIANCE FOR JUSTICE, <http://www.afj.org/press/09082011.html> (noting that “90 percent of the [federal circuit] judges the Obama nominees are replacing are white and 80 percent are male—a harbinger of significant changes coming to the federal judiciary”).

186. Christopher Kang, *Federal Judges That Resemble the Nation They Serve*, THE WHITE HOUSE BLOG (March 29, 2012, 1:33 PM), <http://www.whitehouse.gov/blog/2012/03/29/federal-judges-resemble-nation-they-serve>. The White House Blog also provides the following information about Asian American and Pacific Islander (AAPI) federal judges:

When . . . President [Obama] took office, there were only eight AAPI Article III federal judges out of 874, and there hadn't been an AAPI judge on a U.S. Court of Appeals since 2004. Now, there are 16 AAPI judges on the federal bench and, in 2010, Judge Denny Chin was unanimously confirmed to the Second Circuit Court of Appeals. In all, almost six percent of President Obama's confirmed judges have been AAPI, compared to just one percent for Presidents Bush and Clinton.

*Id.* These include the first female judges of Chinese, Korean, South Asian, and Vietnamese descent, which increased the number of AAPI women judges in U.S. history by fourfold. *Id.* Of these new judges, Judge Jacqueline Nguyen is the first AAPI woman to ever serve on a federal appellate court. *Id.* See also Lisa Mascaro, *Jacqueline H. Nguyen of LA confirmed to U.S. 9th Circuit Court*, L.A. TIMES, May 7, 2012, <http://articles.latimes.com/2012/may/07/nation/la-na-nguyen-20120508>.

187. FEDERAL JUDICIAL CENTER, HISTORY OF THE FEDERAL JUDICIARY, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited

the federal courts, 19.5% are female and 3.2% are females of color.<sup>189</sup> At the federal appellate level, women make up 22.6% and minority women make up 4.4% of all sitting judges on the U.S. Courts of Appeals.<sup>190</sup> Women fare slightly better at the state judicial level, with women recently accounting for 27.1% of all state judges.<sup>191</sup>

This gender disparity should not be ignored because whether a case is heard by a female or male judge can make a difference to the outcome. Studies have shown that in cases involving sex discrimination, the

December 2, 2013) (click on “Select research categories” hyperlink; then limit query to all sitting judges) (indicating that there are 1,334 sitting judges at the federal level); FEDERAL JUDICIAL CENTER, HISTORY OF THE FEDERAL JUDICIARY, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited December 2, 2013) (click on “Select research categories” hyperlink; then limit query to all sitting judges by gender) (indicating that there are 313 female sitting judges at the federal level).

188. FEDERAL JUDICIAL CENTER, HISTORY OF THE FEDERAL JUDICIARY, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited December 2, 2013) (click on “Select research categories” hyperlink; then limit query to all sitting judges by gender and race or ethnicity) (indicating that out of a total of 1,334 judges who currently sit on the federal bench, 44 are African American women, 0 are American Indian women, 10 are Asian American women, and 27 are Hispanic women).

189. FEDERAL JUDICIAL CENTER, HISTORY OF THE FEDERAL JUDICIARY, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited December 2, 2013) (click on “Select research categories” hyperlink; then limit query to all sitting judges and chief judges) (indicating a total of 405 Chief Judges currently sitting on the federal bench); FEDERAL JUDICIAL CENTER, HISTORY OF THE FEDERAL JUDICIARY, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited December 2, 2013) (click on “Select research categories” hyperlink; then limit query to all sitting judges and chief judges by gender) (indicating a total of 79 female Chief Judges currently sitting on the federal bench); FEDERAL JUDICIAL CENTER, HISTORY OF THE FEDERAL JUDICIARY, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited December 2, 2013) (click on “Select research categories” hyperlink; then limit query to all sitting judges and chief judges by gender and race or ethnicity) (indicating that of all sitting Chief Judges at the federal level, 8 are African American women, 0 are American Indian women, 1 is an Asian American woman, 4 are Hispanic women, and 0 are Pacific Islander women).

190. FEDERAL JUDICIAL CENTER, HISTORY OF THE FEDERAL JUDICIARY, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited December 2, 2013) (click on “Select research categories” hyperlink; then limit query to all sitting judges and court type U.S. Court of Appeals) (indicating that there are 274 sitting judges on the U.S. Court of Appeals); FEDERAL JUDICIAL CENTER, HISTORY OF THE FEDERAL JUDICIARY, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited December 2, 2013) (click on “Select research categories” hyperlink; then limit query to all sitting judges and court type U.S. Court of Appeals by gender) (indicating that there are 62 female sitting judges on the U.S. Court of Appeals); FEDERAL JUDICIAL CENTER, HISTORY OF THE FEDERAL JUDICIARY, BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited December 2, 2013) (click on “Select research categories” hyperlink; then limit query to all sitting judges and court type U.S. Court of Appeals by gender and race or ethnicity) (indicating that on the U.S. Court of Appeals, 8 sitting judges are African American women, 0 sitting judges are American Indian women, 1 sitting judge is an Asian American woman, 3 sitting judges are Hispanic women, and 0 are Pacific Islander women).

191. *Forster-Long’s Gender Diversity Survey 2012 vs. 2011: By State*, in THE AMERICAN BENCH: JUDGES OF THE NATION (2012) (showing that in 2012, 5,349 state judges are female, out of a total of 19,763 state judges).

presence of one female judge on an appellate panel makes it more likely that the plaintiff will prevail, and the presence of two female judges on the panel increases the plaintiff's chances even further.<sup>192</sup> Moreover, having female judges on the panel also may have an effect on the way their male colleagues on the panel decide cases, and in fact male judges are more likely to vote in favor of plaintiffs in sex discrimination suits when a female judge is also part of the panel than when the panel is all men.<sup>193</sup> It appears that male judges are likely to acknowledge the different life experiences of female judges and thus may give greater weight to female jurists' understanding of a case when it involves gender discrimination.<sup>194</sup>

A diverse range of judges will better notice the various complexities and subtleties present in difficult cases, particularly those involving charges of inequity and exclusion. For judges to better understand litigants' experiences, it helps if judges have relevant experiences of their own. All judges, however, will preside over cases involving parties who are different from them in some way, making it important for each and every judge to use empathy in resolving disputes. No judge will have experienced firsthand every type of concern that will be decided by them, and thus judicial empathy and openness to the less familiar side remain essential in order for judging and judicial outcomes to be impartially informed.

#### IV. EMPATHY'S ROLE IN JUDGING: CASE EXAMPLES IN THE EMPLOYMENT DISCRIMINATION CONTEXT

To illustrate the argument that judicial impartiality requires judicial empathy, the following case examples in the employment discrimination context serve as good vehicles through which to examine empathy's role in judging. The use of empathy is particularly important in cases involving some form of discrimination because the perspective the judge takes in weighing the facts and exploring the litigants' stories often is central to how the case is decided, and whether it proceeds to trial. This

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192. See Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1767–68 (2005) (looking at 556 federal appellate decisions involving sex discrimination and harassment from 1999–2001 and finding that when a female judge was part of the appellate panel, plaintiffs won 34% of the time compared to 17% in front of an all-male panel, and plaintiffs won 43% of the time when two female judges were part of the panel); Christina L. Boyd et al., *Untangling the Causal Effect of Sex on Judging*, 54 AMER. J. POL. SCI. 389, 399–406 (examining various claims decided from 1995–2002 and finding that for sex discrimination claims, male judges on an all-male panel were 10% more likely to *rule against* plaintiffs, but when a female judge was part of the panel, the male judges were 15% more likely to *rule for* plaintiffs).

193. Peresie, *supra* note 192; Boyd et al., *supra* note 192.

194. Peresie, *supra* note 192; Boyd et al., *supra* note 192.

viewpoint, in turn, tends to be informed by the adjudicator's own characteristics and experiences, which further influences with which litigant the judge most identifies. But to engage in objective deliberation, judges must make genuine effort to see the perspective of the lesser-known side. With this goal in mind, the cases below demonstrate empathetic decisionmaking on a spectrum, the first presenting a more straightforward scenario and the second presenting a harder case.

A. *McGinest v. GTE Service Corporation* (9th Cir. 2002)<sup>195</sup>

*McGinest* provides contrasting examples of the use of judicial empathy at the trial and appellate levels. This case involves George McGinest, an African-American male plaintiff who brought claims against his employer, GTE Service Corporation (GTE),<sup>196</sup> under Title VII for racial hostile work environment, race discrimination in failure to promote, and retaliation due to race.<sup>197</sup> At the time he filed this lawsuit, McGinest had worked at the telecommunications company for more than twenty years, having been first hired as a lineman and then working as a plant construction worker and relief supervisor.<sup>198</sup> He continued to work at GTE during this litigation.<sup>199</sup>

To support his hostile work environment claim based on race, he described a number of incidents that took place over a period of fifteen years. The factual details can be found in the appellate court's decision, which carefully reviews all of the facts and organizes them by incident type.<sup>200</sup> The first set of discriminatory events is categorized as "concrete actions."<sup>201</sup> Many of these actions were committed by Jim Noson, McGinest's supervisor for a period of five to six years at a GTE worksite in Long Beach.<sup>202</sup> McGinest testified that Noson's harassing actions and comments toward him were all due to his race, although Noson did not necessarily make explicitly racial statements while engaging in this behavior.<sup>203</sup> As McGinest recounted, Noson required him to perform his work under hazardous circumstances, such as working without access to adequate equipment and without enough crew

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195. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103 (9th Cir. 2002).

196. The Court notes that GTE is now owned by Verizon. *Id.* at 1107 n.1.

197. *Id.* at 1106.

198. *Id.* at 1107.

199. *Id.*

200. *Id.* at 1107–12.

201. *Id.* at 1107–09.

202. *McGinest*, 360 F.3d at 1107–08.

203. *Id.* at 1107.

members to work safely.<sup>204</sup> Noson also used offensive and belittling language toward McGinest, and once remarked, upon seeing McGinest wearing a gold chain, that “only drug dealers can afford nice gold chains.”<sup>205</sup> Noson further said he wished he had the power to terminate McGinest.<sup>206</sup> McGinest noted that Noson had also acted disparagingly toward a white coworker who was a friend of McGinest’s, and that the coworker was targeted for abusive treatment typically when he was with McGinest.<sup>207</sup> McGinest first complained about Noson to Noson’s supervisor, Hank Bisnar, but after the situation failed to improve, McGinest made an internal complaint listing twelve discriminatory incidents involving Noson.<sup>208</sup> GTE responded by conducting an internal investigation and found that Noson had simply engaged in “shoptalk.”<sup>209</sup> Noson, however, was directed to make an apology to McGinest, which according to McGinest was never done.<sup>210</sup>

McGinest complained of other incidents as well. He alleged that for a period of two years, he was not permitted to collect overtime pay for overtime work as a relief supervisor, although non-black relief supervisors routinely received overtime compensation.<sup>211</sup> McGinest also experienced a serious problem with the upkeep of his company vehicle.<sup>212</sup> Noticing that one of the tires was worn out and needed to be replaced, he requested a new tire but this request was denied.<sup>213</sup> Soon thereafter, he suffered a major accident when the tire blew out while he was driving for work, causing him to crash into a wall and suffer injuries requiring a hospital visit.<sup>214</sup> McGinest testified that white employees did not face any problems in having their repair requests approved and pointed out that a white employee who had also asked for new tires at around the same time was able to obtain them.<sup>215</sup> A white coworker additionally testified that the garage mechanic and the foreman, who had received McGinest’s request for a new tire, treated McGinest and two other black employees worse than the white employees.<sup>216</sup>

The appellate court also discussed the use of racial insults by

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204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 1108.

208. *Id.*

209. *McGinest*, 360 F.3d at 1108.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 1108–09.

216. *McGinest*, 360 F.3d at 1109.

supervisors and coworkers directed at McGinest, including an incident in which a coworker, Tom Hughes, called McGinest a “stupid n[\*\*\*\*\*]’ to his face” and within earshot of another coworker.<sup>217</sup> Very upset, McGinest left the building after this episode and the following day told his immediate supervisor about the name-calling.<sup>218</sup> McGinest then filed a complaint with the Equal Employment Opportunity Commission (EEOC), prompting the company’s human resources manager, Jeff Nakamura, to commence an investigation.<sup>219</sup> But the investigation was dropped after Hughes denied making the racial comment and the EEOC refused to reveal the name of the coworker who had overheard the remark, leading to a wait of two years for Nakamura to re-open the investigation.<sup>220</sup> Once Nakamura confirmed that Hughes had used the racial slur, Hughes was “counseled against using such words, shown a video on *sexual* harassment, and received a disciplinary memo.”<sup>221</sup>

Other coworkers also made racially derogatory comments about McGinest, including statements such as “I’ll retire before I work for a Black man,” and “I refuse to work for that dumb son of a bitch,” all of which McGinest reported to his supervisor and manager.<sup>222</sup> Another coworker, Daniel DeLeon, gave Matt Ketchum, a white coworker who was friendly with McGinest, the nickname “Aunt Jemima,” and said McGinest was Ketchum’s “mammy.”<sup>223</sup> McGinest told DeLeon that he found the “Aunt Jemima” comment racially offensive and asked him not to use it, but DeLeon replied with “f[\*\*\*] you.”<sup>224</sup> Although McGinest brought the incident to the attention of his manager and supervisor, the human resources manager only investigated this incident after receiving a call from the EEOC.<sup>225</sup> Nakamura then questioned DeLeon and told him to no longer use that term.<sup>226</sup>

In laying out the facts, the appellate court also referred to the racist graffiti that could be found in the men’s bathroom at work and on work equipment on a regular basis, and which “included the word ‘n[\*\*\*\*\*],’ sometimes altered to ‘digger,’ and the phrase ‘white is right.’”<sup>227</sup> This graffiti remained fully visible for weeks at a time, in view of managers

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217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 1110.

223. *McGinest*, 360 F.3d at 1110.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

who also used these restrooms, with no censure made by the company.<sup>228</sup> McGinest (and a coworker) complained to management once about the graffiti, and McGinest also avoided using the bathroom so that he would not have to see the racist language.<sup>229</sup>

Although GTE had a written antidiscrimination policy, it did not include any consequences for violations of the policy.<sup>230</sup> Moreover, the policy briefly stated that an employee should talk to a supervisor or human resources representative if the employee had questions about equal employment opportunity, discrimination, or affirmative action, but failed to explain the steps an employee should take in response to any discriminatory treatment.<sup>231</sup>

The appellate court next explored the facts regarding McGinest's failure to promote claim. GTE had an opening for the position of Outside Plant Construction Installer Supervisor in September 1998, and McGinest sought a promotion by applying for the position.<sup>232</sup> Although he was chosen for this job after passing the required test and completing an interview conducted by supervisor Mike Begg, he was unable to move into the position due to a company-wide salary and hiring freeze, despite the fact that there was little evidence of a salary freeze during this time.<sup>233</sup> A different employee then filled the position laterally.<sup>234</sup> McGinest had filed his earlier EEOC complaint a year and a half before the company decided not to move him into the Installer Supervisor position.<sup>235</sup> McGinest argued that GTE had few African-Americans in its workforce and that they faced obstacles in moving up the company rungs.<sup>236</sup> At McGinest's facility in Huntington Beach, there were only five or six African-American employees out of a total of seventy, and there were no African-American supervisors.<sup>237</sup>

McGinest first filed a hostile work environment claim based on race with the EEOC, and then filed a second complaint for failure to promote based on race.<sup>238</sup> After receiving a right-to-sue letter from the EEOC, McGinest brought suit against GTE and supervisor Begg.<sup>239</sup> The federal district court granted GTE's and Begg's motions for summary judgment

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228. *Id.*

229. *Id.* at 1111.

230. *McGinest*, 360 F.3d at 1111.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *McGinest*, 360 F.3d at 1111.

238. *Id.* at 1111–12.

239. *Id.* at 1112.

on all claims, dismissing the hostile work environment claim based on race because the court found that the incidents were infrequent and mostly adequately remedied.<sup>240</sup> District Judge Christina Snyder believed GTE's view of the facts and concluded that there was little evidentiary support for the racial hostility alleged by McGinest.<sup>241</sup> In this regard, the district court judge demonstrated a surprising lack of empathy in trying to understand and see the various incidents from McGinest's standpoint as a black man, and without the benefit of a trial to better determine the facts, thereby failing to demonstrate objectivity in judging.

McGinest appealed the portion of the district court's judgment pertaining to GTE, asserting three claims under Title VII for hostile work environment race harassment, failure to promote due to race, and failure to promote due to retaliation.<sup>242</sup> The Ninth Circuit appellate panel assigned to the case consisted of Circuit Judges Stephen Reinhardt, Diarmuid O'Scannlain, and Richard Paez, and the majority opinion was written by Judge Paez, joined by Judge Reinhardt.<sup>243</sup> The appellate court conducted a de novo review of the summary judgment decision below, and began its review by highlighting the need to protect an employee's right to a trial in cases involving discrimination, explaining that such claims are typically hard to prove unless the opportunity is given to present and assess all of the evidence, including the credibility of witnesses.<sup>244</sup> The court thus expressed caution about deciding employment discrimination cases on summary judgment, recognizing the importance of understanding the full facts that make up discrimination claims before a ruling can be made.<sup>245</sup>

To prevail on his hostile work environment claim, McGinest had to show that the workplace involved racial harassment that was both objectively and subjectively hostile so as to alter the conditions of employment and thereby create an abusive work environment.<sup>246</sup> He had to further show that GTE neglected to take sufficient corrective or disciplinary measures.<sup>247</sup> The evidence easily established that the working environment was subjectively hostile to McGinest, as demonstrated by his unchallenged testimony and the numerous

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240. *Id.* at 1107–08, 1115 n.5.

241. *Id.* at 1115 n.5, 1116.

242. *Id.* at 1112.

243. *Id.* at 1106.

244. *McGinest*, 360 F.3d at 1112.

245. *Id.*

246. *Id.* As the Court points out, the harassment also must be sufficiently severe or pervasive to alter the conditions of employment for the plaintiff and create an abusive work environment. *Id.* at 1112–13.

247. *Id.* at 1112.

complaints made to supervisors at GTE and to the EEOC.<sup>248</sup> Judge Paez explained that whether the workplace is objectively hostile must be considered from the reasonable perspective of the target of the harassment—the plaintiff—and when evaluating a racially hostile workplace, “*from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.*”<sup>249</sup> Thus, in *McGinest*’s case, the perspective of a reasonable African-American man must be used to determine whether the work environment was hostile in an objective sense.<sup>250</sup> In articulating this standard, the Ninth Circuit referred to its decision in *Ellison v. Brady*,<sup>251</sup> a hostile work environment sex harassment case in which the court assessed objective hostility from the perspective of a reasonable woman.<sup>252</sup> Because the Supreme Court has stated that “[h]ostile work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment,”<sup>253</sup> the *McGinest* Court used the *Ellison* standard, adapting it for the racial harassment claims at issue.<sup>254</sup>

In *McGinest*, the Ninth Circuit perceived the need for judges to consider the plaintiff’s story from the reasonable perspective of someone who shares the plaintiff’s race or ethnicity to objectively determine whether the harassment was hostile. As the Court explained:

Racially motivated comments or actions may appear innocent or only mildly offensive to one who is not a member of the targeted group, but in reality be intolerably abusive or threatening when understood from the perspective of a plaintiff who is a member of the targeted group . . . . By considering both the existence and the severity of discrimination from the perspective of a reasonable person of the plaintiff’s race, we recognize forms of discrimination that are real and hurtful, and yet may be overlooked if considered solely from the perspective of an adjudicator belonging to a different group than the plaintiff.<sup>255</sup>

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248. *Id.* at 1113–14.

249. *Id.* at 1115.

250. *Id.* at 1112.

251. *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

252. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1115 (9th Cir. 2002).

253. *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 n.10 (2002).

254. *McGinest*, 360 F.3d at 1115. In *McGinest*, the Ninth Circuit adopted the *Ellison* standard for race harassment cases, even though it had earlier revised the *Ellison* standard as applied in the sex harassment context in *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995). In *Fuller*, the Ninth Circuit stated that “[w]hether the workplace is objectively hostile must be determined from the perspective of a reasonable person with the same fundamental characteristics.” *Id.* at 1527.

255. *McGinest*, 360 F.3d at 1116. According to the appellate court, the facts, when viewed in the light most favorable to *McGinest* as the nonmoving party, were adequate to survive a summary judgment motion. *Id.* at 1113–14. Given that GTE challenged *McGinest*’s view of the facts, such differences about material facts along with credibility questions required a resolution at trial. *Id.* at 1115 n.5.

In assessing plaintiff McGinest's hostile work environment claim, the Court noted that "[t]he omnipresence of race-based attitudes and experiences in the lives of black Americans [may cause] even nonviolent events to be interpreted as degrading, threatening, and offensive,"<sup>256</sup> and quoted several other cases to explain how African-Americans, as opposed to white observers, may view certain incidents and remarks.<sup>257</sup> Further explaining the effect of the word "n[\*\*\*\*]" and the racial violence it brings to mind, the Court stated that the "direct verbal attack on McGinest and the prevalence of graffiti containing a racial slur evocative of lynchings and racial hierarchy are significant exacerbating factors in evaluating the severity of the racial hostility."<sup>258</sup>

The Court in its majority decision thus found that McGinest compellingly showed the existence of a racially hostile workplace, enough to survive the employer's motion for summary judgment.<sup>259</sup> As for whether GTE took appropriate remedial and corrective action in response, the Court found that GTE was vicariously liable for the actions of McGinest's supervisors, as well as liable for the actions of McGinest's coworkers.<sup>260</sup> Regarding McGinest's failure to promote claim due to race discrimination, the Court again found that McGinest raised a genuine issue of material fact to survive summary judgment, but found the evidence insufficient to support his retaliation claim because his promotion denial came a year and a half after he had filed his initial EEOC complaint.<sup>261</sup>

The appellate court in its majority decision sought to better maintain judicial objectivity by trying to understand whether McGinest's

256. *Id.* at 1116 (quoting *Harris v. Int'l Paper Co.*, 765 F.Supp. 1509, 1516 (D. Me. 1991)).

257. *Id.*

258. *Id.*

259. *Id.* at 1118.

260. *McGinest*, 360 F.3d at 1118–21. Although an employer may assert an affirmative defense to avoid vicarious liability for a supervisor's conduct in creating a hostile work environment, GTE, while mentioning the affirmative defense in its summary judgment motion, did not raise the defense before the appellate court. *Id.* at 1119. Thus, the court assumed that GTE was liable for the supervisors' actions, but acknowledged that GTE could assert the defense on remand for the district court to assess. *Id.*

261. *Id.* at 1121–25. Judge O'Scannlain wrote separately, concurring in part and dissenting in part. He believed that McGinest's allegations regarding supervisor Noson were time barred, and that the evidence failed to support McGinest's allegations that the tire incident and claim of different bonus overtime pay were due to his race. *Id.* at 1125–32 (O'Scannlain, J., concurring in part and dissenting in part). Judge O'Scannlain thus declined to consider these allegations as part of McGinest's overall hostile work environment claim. *Id.* Conducting a separate analysis reviewing the remaining set of facts, Judge O'Scannlain concurred with the majority's judgment that McGinest still presented a triable issue of material fact as to whether he was subjected to a racially hostile work environment, viewing the incidents from the perspective of a reasonable African-American. *Id.* at 1133. Judge O'Scannlain, however, dissented with the majority's analysis and judgment of McGinest's claim for failure to promote based on race, stating he would affirm the district court's summary judgment dismissal of that claim. *Id.* at 1136–41. Finally, Judge O'Scannlain concurred with the majority's decision to affirm summary judgment for the employer on the retaliatory failure to promote claim. *Id.* at 1140–41.

workplace was hostile from the perspective of a reasonable African-American employee, rather than from the judges' own perspectives, leading them to conclude that the evidence demonstrated the existence of a racially hostile workplace.<sup>262</sup> The majority ruled that “[f]or purposes of summary judgment, McGinest *persuasively* demonstrates that he was subjected to a hostile work environment.”<sup>263</sup> This case, then, turned out differently at the trial level and on appeal. Despite what should have been an easy and predictable outcome in light of the highly racist nature of the incidents, the district court judge still surprisingly got it wrong. It was left to the federal appellate court to demonstrate the empathic consideration missing in the court’s analysis below, leading the appellate court to also infuse empathy into the reasonable person standard by making it more specific and relevant to the claim at issue, and accordingly reach a different decision.<sup>264</sup> Although this case did not require the exercise of much empathy to reach the proper result, it also shows the harmful effect of an empathy-deficient approach when deciding even a mostly non-controversial employment discrimination matter. And when deciding the harder cases, the degree of empathy used in adjudication may make an even greater difference.

#### B. Ricci v. DeStefano (*U.S. 2009*)<sup>265</sup>

A more difficult case can be found in *Ricci*, an employment discrimination case decided by the Supreme Court in a 5–4 decision. A comparison of the majority and dissenting opinions in *Ricci* provides examples of both partial judging and objective judging, based on the level of conscious empathy the Justices demonstrated in the opposing opinions. Given that the Supreme Court is the final forum for appeal, it is all the more imperative that the Justices use empathy to render fair and objective decisions that will have lasting force.

The facts in *Ricci* concern the promotion process for firefighters in the City of New Haven.<sup>266</sup> In 2003, 118 firefighters seeking promotion

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262. Judge O’Scannlain, although dissenting in part, also viewed McGinest’s allegations regarding the existence of a racially hostile work environment from the perspective of a reasonable African-American, stating that “the repeated invocation of highly offensive language in a variety of contexts may be understood to have created a humiliating atmosphere as seen from the objective perspective of a reasonable African-American.” *McGinest*, 360 F.3d at 1133 (O’Scannlain, J., concurring in part and dissenting in part).

263. *Id.* at 1118 (majority opinion) (emphasis added).

264. The dissent in *McGinest*, however, apparently viewed the facts surrounding McGinest’s hostile work environment race harassment claim as creating a “close case.” *Id.* at 1136 (O’Scannlain, J., concurring in part and dissenting in part).

265. *Ricci v. DeStefano*, 557 U.S. 557 (2009).

266. *Id.* at 561–62.

in New Haven's fire department took a qualifying exam.<sup>267</sup> The candidates needed to meet certain criteria to be eligible to take the examination for promotion to either lieutenant or captain.<sup>268</sup> The test for each position consisted of two parts: a written exam worth 60% and an oral exam worth 40% of a candidate's overall score.<sup>269</sup> The exam results were to be used to determine who would be considered for promotion over the following two-year period and the order in which the top-scoring firefighters would be considered for promotion.<sup>270</sup> Because the City of New Haven did not administer the promotion tests often, the exam results were very important for those who wished to be promoted in the near future.<sup>271</sup> According to the results, white candidates performed better on the tests than the African-American and Hispanic candidates.<sup>272</sup> Seventy-seven candidates sat for the lieutenant exam: 43 whites, 19 blacks, and 15 Hispanics.<sup>273</sup> Out of this pool, 34 candidates received passing scores: 25 whites, 6 blacks, and 3 Hispanics.<sup>274</sup> Translated into pass rates for each racial group, whites had a pass rate of 58.1%, while blacks had a pass rate of 31.6% and Hispanics had a pass rate of 20%.<sup>275</sup> Under the EEOC's 80% standard, federal enforcement agencies generally find evidence of disparate impact if a group's selection rate is less than 80% of the rate for the group with the highest selection rate, and the pass rates in *Ricci* for blacks and Hispanics were considerably below 80% of the pass rate for whites.<sup>276</sup> Using the City's "rule of three,"<sup>277</sup> the 10 top-scoring candidates were eligible for instant promotion to lieutenant to fill 8 lieutenant spots available at the time, and these 10 candidates were all white.<sup>278</sup> Additional vacancies would have permitted a minimum of 3 black candidates to be in the running for promotion to lieutenant.<sup>279</sup> Regarding the captain exam, 41 candidates sat for the test: 25 whites, 8 blacks, and 8 Hispanics.<sup>280</sup> Out of this pool, 22 candidates received passing scores: 16 whites, 3 blacks, and 3

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267. *Id.* at 562.

268. *Id.*

269. *Id.* at 564.

270. *Id.* at 562.

271. *Id.*

272. *Ricci*, 557 U.S. at 562.

273. *Id.* at 566.

274. *Id.*

275. *Id.* at 586.

276. *Id.*

277. Under this rule of three, the fire department must fill each vacancy by selecting one candidate from the three top-scoring candidates on the list. *Id.* at 564.

278. *Id.* at 566.

279. *Ricci*, 557 U.S. at 566.

280. *Id.*

Hispanics.<sup>281</sup> Putting this into pass rates, the pass rate for whites was 64%, while the pass rates for blacks and Hispanics were both 37.5%.<sup>282</sup> Therefore, the pass rates for the minority groups on the captain exam also fell below the EEOC's 80% standard.<sup>283</sup> Again using the rule of three, 9 of these candidates were eligible for instant promotion to captain to fill 7 available spots: 7 whites and 2 Hispanics.<sup>284</sup>

After a contentious public debate regarding whether to keep the test results, the City of New Haven decided to do away with them.<sup>285</sup> Thereafter 17 white firefighters and 1 Hispanic firefighter, who likely would have been promoted based on their strong exam performance, brought suit against the City of New Haven and some of the City's officials, alleging that the City and its officials by discarding the exam results intentionally discriminated against them based on race in violation of both Title VII and the Equal Protection Clause of the 14<sup>th</sup> Amendment.<sup>286</sup> In defense of their actions, the City and its officials asserted that if they had certified the results, they would have risked disparate impact liability under Title VII, given that minority firefighters performed disproportionately worse on the exam.<sup>287</sup> This case thus involved claims of disparate treatment discrimination and disparate impact discrimination, both of which are unlawful under Title VII.

The district court found in favor of the City and city officials on summary judgment, and the Court of Appeals for the Second Circuit affirmed.<sup>288</sup> The Supreme Court reversed, holding that the City's action in discarding the test results was race-based, and that under Title VII such race-based action is prohibited unless the City could show a strong basis in evidence that, had it not taken this action, it would have been liable for disparate impact discrimination.<sup>289</sup> The Court believed that the strong-basis-in-evidence standard used in assessing claims of discrimination under the Fourteenth Amendment's Equal Protection Clause should be further employed in the Title VII context as this standard would ensure that the statute's disparate treatment and disparate impact provisions are both enforced.<sup>290</sup> Specifically, this standard would permit an infringement on one provision in order to

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281. *Id.*

282. *Id.* at 586.

283. *Id.* at 586–87.

284. *Id.* at 565.

285. *Id.* at 562.

286. *Ricci*, 557 U.S. at 562–63.

287. *Id.* at 563.

288. *Id.*

289. *Id.*

290. *Id.* at 582–83.

uphold the other only in confined situations.<sup>291</sup> As the Court explained:

The standard leaves ample room for employers' voluntary compliance efforts, which are essential to the statutory scheme and to Congress's efforts to eradicate workplace discrimination. And the standard appropriately constrains employers' discretion in making race-based decisions: It limits that discretion to cases in which there is a strong basis in evidence of disparate-impact liability, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation.<sup>292</sup>

Since the case was decided under Title VII, the Court found that it was unnecessary to address the question under the Equal Protection Clause.<sup>293</sup>

Justice Anthony Kennedy wrote the majority opinion, joined by Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito.<sup>294</sup> In their analysis, they considered the process by which the exam was prepared by the New Haven Civil Service Board, the City's certifying authority,<sup>295</sup> as well as the views of various witnesses concerning the test.<sup>296</sup> While stating that "[m]any firefighters studied for months, at considerable personal and financial cost,"<sup>297</sup> the majority gave a more detailed account of the white firefighters' situation, focusing on the experience of Frank Ricci, the named plaintiff and a white firefighter, explaining that he had "'several learning disabilities,' including dyslexia," "had spent more than \$1,000 to purchase the materials and pay his neighbor to read them on tape so he could 'give it [his] best shot,'" and "had studied '8 to 13 hours a day to prepare' for the test."<sup>298</sup> The majority further quoted Ricci's statement to the City's certifying authority: "'I don't even know if I made it . . . [b]ut the people who passed should be promoted. When your life's on the line, second best may not be good enough.'"<sup>299</sup>

The majority provided little reflection, however, on the views or

291. *Id.*

292. *Id.* at 583 (citations omitted).

293. *Ricci*, 557 U.S. at 563.

294. *Id.* at 560. Justice Scalia wrote separately, joining the Court's opinion in full but raising the unsettled question regarding whether, or to what extent, Title VII's disparate impact provisions are consistent with the Constitution's Equal Protection Clause. *Id.* at 594–96 (Scalia, J., concurring). Justice Alito also wrote a concurrence, joined by Justices Scalia and Thomas, to point out that even if the Court were to adopt the "good cause" standard advocated by the dissent, a reasonable jury could nonetheless find that the City's asserted reason for discarding the test results to avoid disparate impact liability was pretextual and that the City's real reason was to appease a politically important racial constituency. *Id.* at 596–97 (Alito, J., concurring).

295. *Id.* at 563–66 (majority opinion).

296. *Id.* at 570–72.

297. *Id.* at 562.

298. *Ricci*, 557 U.S. at 568.

299. *Id.*

circumstances of the minority firefighters who argued against certifying the exam results, briefly stating that these firefighters “described the test questions as outdated or not relevant to firefighting practices in New Haven” and “criticized the test materials, a full set of which cost about \$500, for being too expensive and too long.”<sup>300</sup> Unlike with white plaintiff Ricci, the Court did not offer any personal details about any of the minority firefighters for whom the materials were too costly or difficult. Instead, the majority included only a non-personal quote by one nonwhite firefighter, who stated that the source materials for the test “came out of New York . . . . Their makeup of their city and everything is totally different than ours.”<sup>301</sup>

Based on the majority decision, these five Justices appeared to have more easily empathized with the white firefighters—delving specifically into the life story of one white firefighter, a sympathetic figure due to his learning challenges, while not taking the same step to explore the life story or experience of any of the minority firefighters. The Court understood that “some of the firefighters here invested substantial time, money, and personal commitment in preparing for the tests”<sup>302</sup> but primarily considered this from the perspective of the white firefighters who “saw their efforts invalidated by the City in sole reliance upon race-based statistics.”<sup>303</sup> The Court did not demonstrate an equal level of consideration concerning the efforts and aspirations of the minority firefighters, who also faced challenges in preparing for the exams and saw that their efforts would not help them pass an exam on which they disproportionately performed worse as a racial group. The majority Justices seemed to unconsciously or automatically empathize with the white firefighters—the party more familiar and similar to the Justices in terms of race—but did not demonstrate the same degree of empathy for the minority firefighters, with whom the majority of the Justices did not readily identify.<sup>304</sup> Because this case involved disappointing and

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300. *Id.*

301. *Id.*

302. *Id.* at 58–84.

303. *Id.* at 584. Justice Alito in his concurrence also only discussed the sacrifices that the plaintiff firefighters made to prepare for the tests, describing the efforts of petitioner Frank Ricci, a white firefighter, and petitioner Benjamin Vargas, a Hispanic firefighter. *Id.* at 607 (Alito, J., concurring).

304. See WEST, CARING FOR JUSTICE, *supra* note 42, at 85–86 (in discussing the Supreme Court’s other affirmative action cases involving white plaintiffs, noting that the Court “attended with care to the needs, concerns, and particularly the ‘guiltlessness’ of the (white) litigants before it” but did not provide the same level of care to the needs and concerns of racial and ethnic minorities whom the Court’s decision also affects). As West points out, even judges who support affirmative action can find it hard to not strongly empathize with guiltless white litigants:

Judge Sokorow, a liberal compassionate, fair-minded judge who is unquestionably a friend of affirmative action, once remarked that the only qualms he had about affirmative action programs stemmed from the intensely personal difficulty he had facing an essentially “blameless” white

frustrating results for all of the firefighters who worked hard to succeed on the exam, resolving the dispute depended heavily on a contextual understanding of Title VII's provisions and purposes and the extent to which judicial empathy was used to see both sides of the dispute.<sup>305</sup> That Justice Kennedy and his colleagues in the majority viewed the City's action in trying to avoid a disparate-impact violation as though the City were directly engaging in disparate treatment discrimination, without a viable defense,<sup>306</sup> tellingly indicates that they empathetically sided with the white firefighters who wanted the test results certified. The Court's decision therefore fails to uphold judicial impartiality and actually reflects judicial bias. As Robin West has cogently asserted in her examination of the Supreme Court's jurisprudence in other affirmative action cases:

What is fatal to the Court's attempt to do justice in the affirmative action cases, is not so much an excess of particularity—an undue regard for the dilemma of blameless whites—as its *coupling* of that particularized solicitude with its steadfast refusal to take up the *substantive* task . . . to determine whether the 'downside' advantage enjoyed by the one side is *causally related* to the 'upside' disadvantage suffered by the other . . . .<sup>307</sup>

It is further relevant to consider the identities of the actual parties in *Ricci*. The white firefighters brought suit against the City of New Haven and certain city officials, but the black firefighters were not parties in the case at all. Had the black firefighters joined the case as intervenors, they could have presented their experiences and perspectives concerning the exams and lack of promotion directly to the

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litigant, and denying the litigant his or her "place" in an apprenticeship program or applicant pool, so as to make space for a minority competitor.

*Id.* at 85.

305. Arguably, the evidence that Justice Alito details in his concurrence regarding the racial strife that existed in the City of New Haven both before and during the events in this case provides a difficult backdrop against which to assess the perspectives and motives of the parties, and further complicates the analysis. See *Ricci*, 557 U.S. at 597–606. Justice Ginsburg in her dissent, however, points out that the evidence presented by Justice Alito relies heavily on the petitioner-firefighters' statement of facts and places too much emphasis on the influence of certain actors, while giving too little recognition to the certifying authority's reasons for reaching its decision to discard the test results. *Id.* at 638–43 (Ginsburg, J., dissenting). Nonetheless, Justice Ginsburg argues that the racial politics in New Haven matters little in light of tests that appear to be flawed, given that better selection methods were available and used in other cities. *Id.* at 609 n.1. The question she raised was, "Why did such racially skewed results occur in New Haven, when better tests likely would have produced less disproportionate results?" *Id.*

306. *Id.* at 579.

307. WEST, CARING FOR JUSTICE, *supra* note 42, at 86 (discussing the Supreme Court's decisions in *University of California v. Bakke*, *Croson v. City of Richmond*, and *Adarand Constructors Inc. v. Pena*). See also Rebecca K. Lee, Fisher v. University of Texas at Austin: Promoting Full Judicial Review and Process in Applying Strict Scrutiny, 4 HOUS. L. REV. HLR 33 (2013) (discussing the Supreme Court's latest decision on affirmative action in university admissions).

Court. Given that they did not intervene, however, the City nonetheless could have highlighted the black firefighters' situations as further support for its defense and to more effectively display the other side of the story in response to the white plaintiffs' stories. But the City did not quite take this approach, and the reasons for its litigation strategy are unclear.<sup>308</sup> Whether intentional or not, the missing voices of the black firefighters could have made a difference in understanding the stakes in the case. To fully understand the exam results' disparate and deleterious impact on the minority firefighters, the Court needed to understand these firefighters' experiences, just as they needed to understand the particular context of the firefighting industry in New Haven and the City's demographics.

The majority opinion in *Ricci* is not the only instance in which Justices on the Supreme Court have selectively used empathy in deciding cases. Justice Scalia for example, who was in the majority in *Ricci*, strongly empathized with a white male plaintiff in another Title VII employment discrimination case, *Johnson v. Transportation Agency of Santa Clara County, California*.<sup>309</sup> In *Johnson*, plaintiff Paul Johnson alleged that his employer discriminated against him based on his sex in deciding to promote Diane Joyce over him for a road dispatcher position.<sup>310</sup> The Supreme Court, however, found that the employer did not violate Title VII by considering gender in making its promotion decision pursuant to an affirmative action plan.<sup>311</sup> Diane Joyce was not a party in the case, but the county employer in its merits brief provided details about her situation and perspective as they pertained to her application for the promotion at issue, noting:

Joyce believed that the interviewers on the second oral interview panel would not give her fair consideration. Her past experience with members of the panel led her to believe they were biased against her because of her sex. Previously, Joyce had filed a grievance against one of the panelists, James Baldanzi, because he repeatedly denied her requests for protective work clothing, although he routinely issued such clothing to male employees. Joyce sat on a safety committee with another member of the

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308. See generally Respondents' Brief on the Merits, *Ricci v. DeStefano*, 557 U.S. 557 (2009) (Nos. 07-1428, 08-328), 2009 WL 740763. It may be that the City did not bring the stories of the black firefighters to the fore because it was concerned about appearing to favor blacks and subjecting itself to the critique Justice Alito made in his concurrence. See *Ricci*, 557 U.S. at 597–606. At the same time, the City could have maintained a sense of neutrality by highlighting these firefighters' stories to present them as likely victims of disparate impact discrimination and the City's resulting need to obey the law. In any event, the party structure in *Ricci* demonstrates the conflict of interests that may exist between the interests of the employer and the interests of the employees the employer seeks to protect.

309. *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616 (1987).

310. *Id.* at 625.

311. *Id.* at 641–42.

panel, Glenn Foreman, and Joyce believed his continuous disagreements with her reflected his bias against her because of her sex. Joyce's concerns about this bias increased when the second oral interview was scheduled exactly at a time during which, as she had previously notified the Superintendent, she had planned to attend a work-related class. . . .

The second oral board recommended that Petitioner Johnson be hired. Baldanzi testified that he regarded Joyce as a "rebel rousing, skirtwearing person," and "not a lady."

Joyce called the County's Affirmative Action Office to express her concern that she might not be receiving fair consideration for the job. In addition to her misgivings about possible bias on the second panel, Joyce was concerned as a result of past experiences which she believed were discriminatory.<sup>312</sup>

These facts as well as others from the county employer's brief, demonstrating that Diane Joyce was not less qualified than Paul Johnson and actually had suffered much discrimination during her tenure with the county agency, made their way into the Court's majority opinion.<sup>313</sup> Justice Scalia, dissenting in this case however, lamented that "the only losers in the process are the Johnsons of the country, for whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals—predominately unknown, unaffluent, and unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent."<sup>314</sup> Justice Scalia easily empathized with Johnson, a white male, but did not make the extra effort to empathetically imagine the position of Joyce as the lone woman on the road crew job, who persevered despite ongoing harassment to qualify for the promotion to become a road dispatcher.<sup>315</sup> This is evident in his dissenting opinion, in which he discusses Johnson's endeavors and hopes on the job but fails to examine at all Joyce's work experiences and goals.<sup>316</sup> Like the majority opinion in *Ricci*, Justice Scalia's dissent in *Johnson* shows that Supreme Court Justices also have tended to immerse themselves in the stories of those with whom they share something in common, neglecting to expressly do the same for those who appear more different.<sup>317</sup> But unlike in *Ricci*, the

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312. Brief of Respondent, *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616 (1987) (No. 85-1129), 1986 WL 728165, at \*6-8 (citations omitted).

313. *Johnson*, 480 U.S. at 623-25, 638.

314. *Id.* at 677. Justice Scalia's dissent was joined by Chief Justice William Rehnquist and Justice Byron White.

315. See Minow, *supra* note 64, at 49-50 (making a similar point about Justice Scalia's sympathy for Johnson and lack of sympathy for Joyce in his dissent in this case).

316. *Johnson*, 480 U.S. at 661-62 (Scalia, J., dissenting).

317. See Bandes, *Why is Empathy Controversial?*, *supra* note 161.

respondent employer in *Johnson* brought forward Diane Joyce's story for the Court to consider, given the relevance of her situation even if she was not a party in the case.

The dissent in *Ricci*, authored by Justice Ruth Bader Ginsburg and joined by Justices John Paul Stevens, David Souter, and Stephen Breyer,<sup>318</sup> nonetheless offers an example of judicial empathy deployed in conscious fashion. Although Justice Ginsburg, like the majority, noted that the high-scoring white firefighters "attract the Court's sympathy,"<sup>319</sup> she did not stop there but included the other side of the story, making more effort to understand the effect of the Court's decision in the specific context of the City of New Haven, where the population consisted of more African-Americans and Hispanics than whites, and where the fire department had historically had very few racial and ethnic minorities in command posts.<sup>320</sup> She expressly took into account the context of the dispute, recognizing that Title VII was expanded by Congress in 1972 to cover state and local government employers to precisely address the rampant discrimination by municipalities against minorities in the firefighting industry.<sup>321</sup> Stating that the majority decision "leaves out important parts of the story,"<sup>322</sup> Ginsburg understood that a contextualized and evenhanded factual inquiry was needed to properly evaluate the dispute. She gave careful attention to the experience of the minority firefighters, many of whom were "first-generation firefighters" who did not have easy or equal access to the study materials and did not have family or friends in the firefighting profession who could help them prepare for the exam.<sup>323</sup> She showed that she could be affected by the white firefighters' situation but still rule for the other side after considering the factual circumstances of both parties in light of the law.<sup>324</sup> In also considering Title VII's full purposes and its case law, as well as Congress's intent in codifying the disparate impact provision, Ginsburg believed that a good cause standard, rather than the strong-basis-in-evidence standard, was the correct one to apply: "an employer who jettisons a selection device when its disproportionate racial impact becomes apparent does not violate Title VII's disparate-treatment bar automatically or at all, subject

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318. *Ricci v. DeStefano*, 557 U.S. 557, 608 (2009).

319. *Id.* Justice Ginsburg also noted that the good cause standard is supported by the EEOC's interpretive guidelines on Title VII compliance. *Id.* at 262.

320. *Id.* at 609.

321. *Id.*

322. *Id.*

323. *Id.* at 613–14.

324. See Minow, *supra* note 64, at 90–91 (explaining that competing views should not paralyze decisionmaking because judges can understand and be moved by a litigant's story and still decide to deny his or her claim).

to this key condition: The employer must have good cause to believe the device would not withstand examination for business necessity.”<sup>325</sup> Regarding whether the City and its officials satisfied this good cause standard, Justice Ginsburg stated she would remand the case for further proceedings rather than decide the case on summary judgment.<sup>326</sup> But if final judgment at this stage is proper, then she concluded that the City met this standard and did not engage in disparate treatment discrimination in violation of Title VII.<sup>327</sup>

Justice Ginsburg demonstrated in her *Ricci* dissent how a different result may be reached when judges engage in a conscious form of perspective-taking to better understand the experiences of the traditionally less privileged party, and the ramifications of the court’s decision for both sides. By considering the fuller story of the minority firefighters within the broader setting of the firefighting industry, Justice Ginsburg attempted to see their position from their perspectives and circumstances, providing an analysis that was missing from the majority opinion. Although Justice Ginsburg and her dissenting colleagues could have offered more discussion on the white firefighters’ efforts and perspectives, the majority opinion in any event supplied those details. By being attentive to the facts on the other side and attentive to the proper context for those facts understood through an empathetic lens, she engaged in a more overall balanced analysis, giving us a better example of judging and a better result with the goal of true impartiality.

#### V. UPHOLDING IMPARTIALITY IN JUDGING: PROPOSALS TO REQUIRE EMPATHY IN THE DECISIONMAKING PROCESS

To support impartial outcomes, several steps can be taken to better infuse judicial decisionmaking with an empathetic process of review. The following set of proposals address adjudication with respect to employment discrimination cases and also offer ways in which to encourage and prepare judges to expand and use their empathetic skills more broadly when deciding cases.

##### *A. Adopting a New Reasonable Person and Reasonableness Standard for Hostile Work Environment Discrimination Cases*

As shown earlier, discrimination cases alleging a hostile work environment by definition involve a difference of perspective due to individual characteristics protected under the law, such as race, color,

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325. *Ricci*, 557 U.S. at 625–26.

326. *Id.* at 630–31.

327. *Id.* at 632.

sex, national origin, and religion.<sup>328</sup> To ensure that judges carefully and empathetically consider the perspective of the party alleging harm and other germane factors when deciding a case involving hostile work environment under Title VII, courts should adopt a legal standard that clearly expresses this goal, building upon the Ninth Circuit's approach in *Ellison* and *McGinest*. Furthermore, the *Ellison* and *McGinest* standard should be extended to cover all hostile environment discrimination claims, so that these claims would be evaluated from the perspective of a reasonable person of the same subordinated group (e.g., the same gender or racial or ethnic group) as the plaintiff in the plaintiff's position. This standard should also be broadened to include consideration of other factors that inform whether the plaintiff's reaction was reasonable, including other relevant aspects of the plaintiff's identity and experiences, circumstances surrounding the harassment taking place at work (and outside of the work space if appropriate), and the workplace culture and context.<sup>329</sup> As Ann McGinley has argued,

In determining the proper objective standard for a hostile working environment, it is important to assure that we do not use men as a measuring stick of how a reasonable person would react, and that we do not engage in stereotyping when determining how men and women should or do react to a harassing environment. To avoid these problems, the law should allow fact-finders to consider variations in the context of the workplace, it should take into account different lived experiences of the victims, and it should reflect on power differentials at work and in society. But, most importantly, a new standard should recognize that there is a range of reasonable responses to the same set of behaviors.<sup>330</sup>

To determine whether the alleged behavior was objectively hostile, the legal standard should consider the reasonable perspective of someone who shares the party's identity that is the basis of the discrimination claim, along with the plaintiff's other characteristics as well as circumstances that shape her or his response to the harassment. This approach is needed for the analysis itself to be objective—that is, for the adjudicators to avoid making biased judgments, particularly when they may find it easier to, or automatically, empathize with a

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328. See 42 U.S.C. § 2000e (2000) (also known as “Title VII”). See also *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1112 (stating that to prevail on a Title VII hostile work environment claim, the plaintiff must both objectively and subjectively show that the alleged behavior negatively affected one's work conditions). See also discussion *supra* Part IV.A.

329. See Ann C. McGinley, *Reasonable Men?*, 45 CONN. L. REV. 1, 34–35 (2012) (arguing for a new objective standard for hostile work environment harassment claims under Title VII that focuses on whether the plaintiff's response was a reasonable one based on various factors, including the workplace dynamics, the harassing behaviors, and the plaintiff's identity, experiences, and position at the workplace).

330. *Id.* at 34.

white male plaintiff, but not with a female or minority plaintiff.<sup>331</sup> Further, by taking into account other aspects of a plaintiff's identity as well as life experiences that also inform a particular plaintiff's response, such an approach would lessen the likelihood of enforcing a stereotyped or essentialized expectation regarding how a given plaintiff would react. As intersectionality theory<sup>332</sup> and masculinities theory<sup>333</sup> have shown, individuals' identities and behaviors are shaped by multiple influences and intertwined experiences, and thus a simplified model of the "reasonable person" cannot serve as an accurate guide for a plaintiff's reasonable response without also considering other relevant factors. Discrimination claims, which focus on the protected aspect(s) of a person's identity rather than on the person's entire identity, already present a risk that courts will engage in some degree of essentializing by considering the protected trait(s) in a rather isolated way. To mitigate this risk, the objective standard ought to be revised to require a more individualized assessment of the plaintiff's response based on the plaintiff's protected trait and in light of the plaintiff's broader identity and the circumstances surrounding the harassment. In addition, having a more diversified bench, and more diverse law clerks to advise judges, would provide a wider range of perspectives concerning what may be seen as a reasonable reaction by a plaintiff in a harassment case.

The Supreme Court's decisions offer some precedent for the use of this type of objective and individualized standard when deciding workplace discrimination cases. For instance, in *Oncale v. Sundowner Offshore Services*, which involved a hostile environment sex harassment claim, the Supreme Court stressed that "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>334</sup>

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331. The reasonable person standard has been critiqued in the criminal law context as well, in light of racial and gender dynamics and norms that contribute to juror bias. See generally CAROLINE A. FORELL AND DONNA M. MATTHEWS, *A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN* (2000) (arguing for a reasonable woman standard in all cases implicating gender, such as in cases involving hostile environment sex harassment, stalking, domestic homicide, and rape); CYNTHIA LEE, *MURDER AND THE REASONABLE MAN* 204-07, 221-25 (2003) (examining the reasonable person standard in criminal law cases and arguing that in cases implicating masculine and heterosexual norms, jurors should engage in gender- and sexual-orientation switching (switching the gender or sexual orientation of the reasonable person in applying the reasonableness standard as part of the jury instruction) and in cases implicating race, jurors should engage in race-switching).

332. See generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL. F. 139 (1989).

333. See McGinley, *supra* note 329, at 18-20 (explaining that masculinities theory looks at the normative nature of certain masculine conduct and how masculine expectations harm both men and women, and can be further examined through a multidimensional lens as masculinities combine with race, sexual orientation, class, and gender, depending on the context).

334. 523 U.S. 75, 81 (1998).

The Supreme Court thus has recognized that an objective evaluation of a harassment or discrimination claim requires an understanding of the plaintiff's perspective and the circumstances that shape it, although the Court frames this perspective as simply that of a reasonable person in the plaintiff's shoes. In light of the existing legal standard, it seems the use of empathy in adjudication is actually already embedded in the law to some extent. The applicability of empathy should be drawn out explicitly, however, to ensure that it is recognized under its proper name as a judicial principle that goes hand in hand with impartial judging. By modifying the test to make clear that "the perspective of a reasonable person in the plaintiff's position" is that of someone who shares the plaintiff's protected characteristic which is the basis for the plaintiff's claim, while still taking into account the totality of the circumstances, the standard would better require judges to see things using an empathetic stance. To understand the litigants' claims, judges must try to empathize with the parties, especially with plaintiffs who differ from the adjudicator in some aspect relevant to the case. Empathetic inquiry and deliberation are necessary if impartial judging is the goal.

*B. Articulating Judicial Decisions Through Full Written Opinions that Consider All Perspectives*

Although we look to judicial opinions to understand a judge's reasoning for their decisions, federal judges increasingly have been writing fewer full opinions as their dockets have ballooned in size.<sup>335</sup> Moreover, judges in recent times often decide cases via unpublished opinions, which are less complete and not citable, or issue decisions by brief orders.<sup>336</sup> This kind of judicial efficiency, however, undermines judging as a deliberate process that requires careful writing as well as thinking, and frustrates the expectation that judges will explain and convince others of their judgment.<sup>337</sup>

As a result, judges should be required to write a full written opinion when rendering a decision on the merits of a case.<sup>338</sup> In their written decisions, judges should show how they considered all sides to the dispute, and aim for objectivity by demonstrating how they engaged in a

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335. See Wald, *supra* note 63, at 904.

336. *Id.*

337. See *id.* (noting that "the discipline of writing an opinion to persuade 'intelligent outsiders,' or even a higher court, no longer applies in about half of all federal appellate cases" and that "careful research, arduous rewriting, and open dialogue . . . inhibits idiosyncratic or overadventurous rulings").

338. See Steven Semararo, *A Reasoning-Process Review Model for Federal Habeas Corpus*, 94 J. CRIM. L. & CRIMINOLOGY 897, 927-30 (2004) (making a similar point in arguing for thoroughly reasoned decisions by state courts in the federal habeas context, to ensure that state courts take full account of the relevant federal law to receive deference by the habeas court on federal review).

process of conscious empathizing with those who have less power and are less like them—those who tend to be more easily dismissed. Requiring such written discussion as part of published decisions would better ensure that judges do not submit to or act on implicit or unconscious biases.<sup>339</sup> The task of judging comes with the responsibility to fully explain one’s rulings, and this duty should not be sacrificed in order to quickly dispose of a case. But in light of the reality of mounting judicial caseloads and the resulting decrease in time available for each case, it would help to explore ways in which to make the workloads of judges more manageable, such as making judicial system-wide changes that would provide judges with more time to render decisions.<sup>340</sup>

Moreover, while deliberating and drafting, judges can test how they view and understand a case through dialogue with other judges who may view things differently.<sup>341</sup> As Circuit Judge Patricia M. Wald has explained, “colleagues do serve as an important brake on an individual judge’s own predilections. On the court of appeals it takes at least two judges to reach a panel decision; a dissenter can provoke serious second thoughts and consequent modifications in a draft opinion.”<sup>342</sup> Judges care about what other judges think because their colleagues’ agreement or dissent is often the only type of concrete feedback they receive concerning their work.<sup>343</sup> In addition, judicial norms and collegiality-based factors, as well as strategic considerations, also limit the latitude that individual judges may take.<sup>344</sup> But this type of deliberation will not work well unless judges are willing to truly reflect on their own positions rather than merely defend them. We have seen, for instance, that appellate judges do not always display understanding of the other side’s perspective when writing their majority opinions and dissents, separate from their ultimate stance regarding how a case should be decided.<sup>345</sup>

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339. See Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 36–37 (2007) (“...the discipline of opinion writing might enable well-meaning judges to overcome their intuitive, impressionistic reactions” and “[t]he process of writing might challenge the judge to assess a decision more carefully, logically, and deductively”).

340. *Id.* at 35.

341. Bandes, *Empathetic Judging*, *supra* note 57, at 146.

342. Wald, *supra* note 63, at 906.

343. *Id.*

344. *Id.* at 905 (referring to Professor Lon Fuller’s comment regarding judges’ “mutually advantageous relations of reciprocity” as well as the following informal judicial norms identified by Judge Harry Edwards of the U.S. Court of Appeals for the District of Columbia: “the tradition, when views on the panel diverge, of reaching out for consensus to avoid split decisions; the etiquette of circulating and commenting on proposed opinions throughout the court; the oral argument and conferencing that involve judges alone”).

345. See, e.g., *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616 (1987) (Scalia,

Although trial judges, who do not decide cases as part of a panel, lack the same opportunity as their appellate counterparts to discuss and debate their views with judicial colleagues, they can nonetheless test their views with their judicial clerks, who work closely with them on cases. Similar to the value of having diverse decisionmakers on the bench, judges should seek diverse clerks with varied backgrounds to help provide different perspectives when reviewing a case.

Ultimately, the decisionmaking of all judges, both trial and appellate, state and federal, would improve if in their opinions they were expected to fully articulate the facts so as to convey an understanding of all sides, rather than only state the facts from the perspective of the prevailing party. Judges ought to demonstrate the degree to which they have attempted to empathize with each litigant's story. For legal decisions to be fair and objective, they should communicate more than the legal rationales for the judgment; they should also describe the human stories that must be first understood in order to properly apply the legal rules to the specific facts. There can be no careful application of the rules without a careful probing of the facts, and an incomplete or a partial factual foundation will only provide support for a likewise weak and partial legal analysis.

*C. Encouraging Judicial Dialogue, Information-Sharing, and Empathetic Decisionmaking Through Judicial Programs*

Since judges at both the state and federal levels participate in and help design professional education programs specifically geared for them regarding their judicial work and duties,<sup>346</sup> these programs could include sessions on how to strive for impartial judging using an empathetic approach.<sup>347</sup> Case examples and analysis of sample court opinions can be used and studies shared demonstrating differences in outcomes depending on the judges' experiences and backgrounds and their level of engagement with the parties' stories. Exercises can also be offered in which judges try to understand another's views and experiences. Such exercises can incorporate excerpts from novels, short stories, and memoirs to explore the contextualized thoughts and

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J., dissenting). See also discussion *supra* Part IV.A.

346. See, e.g., *State-Federal Judicial Education Programs*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/fsje/home.nsf>; AMERICAN BAR ASSOCIATION, JUDICIAL DIVISION, <http://www.americanbar.org/groups/judicial.html>.

347. See Decety & Jackson, *supra* note 27, at 94 (noting that empathy is "a flexible human capacity as well as a method of gaining knowledge of understanding another" and that empathy "is susceptible to social-cognitive intervention, such as through training or enhancement programs for targeting various goals"); Rachlinski et al, *supra* note 58, at 1228 (asserting that both new and sitting judges can significantly benefit from judicial training on the risks of implicit biases in decisionmaking).

emotions of someone different from the judges. This dialogue and learning can mimic the type of back-and-forth that takes place between judges on appellate panels when deciding cases, and can be useful to trial judges who do not have the same opportunities for debate with colleagues when hearing cases. Rather than make attendance at such training programs mandatory, these sessions can be offered at widely-attended judicial conferences and events.<sup>348</sup> Additionally, taking into account insights from behavioral economics when trying to bring about behavioral change, the way the message is framed can make a difference in either encouraging or discouraging certain behavior.<sup>349</sup> For instance, when putting on such programs, it may be more effective to place the focus on empathetic decisionmaking as necessary for judicial impartiality rather than to highlight unempathetic decisionmaking that is biased.<sup>350</sup> Similarly, to encourage judges to see themselves as decisionmakers with the relevant characteristics, communicating a message to judicial audiences that “they are empathetic and impartial jurists” may prompt a better change in approach than only suggesting that “they can be more empathetic as judges.”<sup>351</sup> Finally, providing voluntary testing opportunities that would allow judges to receive direct feedback on their levels of empathic effort when understanding different factual scenarios may aid in further motivating them to modify their decisionmaking approach.<sup>352</sup>

## VI. CONCLUSION

The political controversy over the use of empathy in judging, sparked by President Obama’s commentary on the desired attributes in a judicial nominee, provided an important occasion to consider the role of the judge as well as the process of judging to achieve both the actuality and appearance of an impartial stance. But the public discussion, rather than enlightening became muddled, as politicians and commentators who argued that judicial empathy would lead to favoritism for one side failed

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348. See SCHAFFRAN & WIKLER, *supra* note 72, at 30.

349. See Robert O’Neill, *Thinking Big in Small Ways: The Importance of How We Make Decisions*, Harvard Kennedy School Magazine, Winter 2013, at 24–28 (explaining lessons learned from behavioral economics and decision science research to help people make better decisions).

350. See *id.* (describing the example of getting more people to vote by using certain “experimentally validated behavioral interventions such as emphasizing high turnout rather than low turnout”).

351. See *id.* (providing the example of how to encourage more people to vote and finding that “emphasizing the identity that ‘you are a voter’ rather than ‘you can vote’” is more effective).

352. See Rachlinski et al, *supra* note 58, at 1228 (noting that judicial training currently does not include any testing of a judge’s vulnerability to implicit bias, and that this is a problem in getting judges to fully appreciate the harms of such bias).

to see the actual purpose of empathy in supporting judicial objectivity. This was a missed opportunity to explore how empathy supports judicial objectivity and fairness, concededly made difficult by the politics surrounding judicial appointments. But the opportunity is not entirely lost. What was seen as controversial can become well-accepted by reintroducing and reinvigorating the national dialogue on empathy's role in upholding judicial impartiality. It is time for an affirmative case for empathy to be made. To pick up where President Obama left off, the concept of empathy as a way of understanding different perspectives must be clarified and its necessary importance for judicial impartiality and for judicial selection expressly asserted.

Empathy, as used in this Article, refers to the action of taking the perspective of another by conceptually placing oneself in another's position—to better understand what the other person is thinking and feeling. Empathy encourages both cognitive and emotional understanding of others with different experiences, identities, and worldviews. It entails attempting to better understand all sides to a dispute, with care taken to understand the side with less power and less similarity vis-à-vis the adjudicator, to ensure that all sides are given full consideration. Empathy matters for judging because judges must expressly and consciously take into account the full positions of the parties, from where the parties stand, to avoid making unconscious and biased judgments. This is particularly important in cases where the judges are differently situated from the parties in terms of life opportunities and societal expectations. Impartial decisionmaking requires that judges attempt to carefully understand the experiences and perspectives of the parties who come before them (while also considering how future parties may be affected), paying more care to members of traditionally-subordinated groups whose views are less commonly heard and understood.<sup>353</sup> Such individuals, for instance, typically are involved in lawsuits involving some sort of alleged discrimination or unequal treatment. Since the bulk of discrimination lawsuits end at the summary judgment stage and hence never make it to trial, judges commonly serve as the only audience who hear and decide these cases, rendering it critically important that they make an effort to envision the litigants' stories and bring into view a fuller picture of what is at stake in a given case.

If the parties are to have their day in court and expect an impartial process, they must be heard with equal consideration. When presented with different stories in a case, which, based on the evidence, are

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353. See Colby, *supra* note 8, at 1998–99 (also making the argument that judges need to be able to see a given dispute from the perspectives of all of the parties, but without a full emphasis on having judges particularly attend to the views of those with traditionally less power).

different versions of reality as experienced by the disputants, it is imperative for judges to sort through these stories by adopting each of the disputant's perspectives for an impartial view of the facts. This includes empathetically trying to understand the disputants' individual and situational differences, and wrestling with such differences the greater they are.<sup>354</sup>

This Article makes various recommendations to better bring empathy into the adjudication process at various stages—at the judicial nomination and confirmation stages, the case hearing stage, the rule-making stage, the opinion-writing stage, and the professional training stage. All of these proposals can be implemented by judges and by those who select them and confirm them. In recognizing empathy's necessary role in impartial decisionmaking, the public should be concerned not when judicial empathy is used, but when it is absent or deficient.

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354. See Minow, *supra* note 64, at 17 (asserting that “our common humanity wins when the Court struggles with our differences” and making this point about cases where the Supreme Court engaged and struggled with multiple views of reality).