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Resurrecting the Argument for Judicial Empathy: Can a Dead Duck be Successfully Repackaged for Sale to a Skeptical Public?

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Resurrecting the Argument for Judicial Empathy

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Tobin A. Sparling

President Obama's campaign to promote judicial empathy has proved a failure, rejected by his own judicial nominees and the public at large. Based on an examination of current popular conceptions of justice and a survey of scientific understanding of what empathy is and how it works, this article examines whether judicial empathy is a cause worth saving and, if so, whether it can, indeed, be saved. It argues that the advocacy of judicial empathy can and should be revived and suggests a strategy for politicians, judges, and others who desire to promote it. This strategy operates from two basic presumptions. First, judicial empathy is not in any sense a panacea for the disparities of the justice system. Rather, empathy is simply a tool, which if properly directed, may allow some judges to gain a fuller understanding of the cases before them. Like any other tool, its effectiveness depends in good measure on the skills of the user. The benefits of judicial empathy should not, therefore, be overstated to a public that is already skeptical about its appropriateness. Second, advocates of judicial empathy must recognize that

the reasons why judicial empathy is attractive to them are probably not shared by the public at large. If the advocacy of judicial empathy is to achieve any success, it must tap into the public's conceptions of and concerns about the justice system and demonstrate how empathy advances the former and addresses the latter.

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Introduction

In 2009, shortly before his nomination of Judge Sonia Sotomayor to the United Supreme Court, President Obama announced that empathy was high on the list of qualities he sought in judicial appointments.¹ The President's remarks sparked a spirited debate on the appropriateness of empathy in judicial decision-making. The President had earlier argued that empathizing judges were better able to comprehend the situations of minorities and others in society who had less of a voice than those in the mainstream.² Critics of judicial empathy equated it with prejudice, a view that received considerable public endorsement.³ When Judge Sotomayor repudiated the President's statements supporting judicial empathy during her confirmation hearings, it was clear to all that the campaign to promote judicial empathy had spectacularly crashed and burned.⁴

This article asserts that the advocacy of judicial empathy can and should be rescued from the ashes and offers a strategy for politicians, judges, and others who desire to promote it. This strategy operates from two basic presumptions. First, judicial empathy is not in any sense a panacea for the disparities of the justice system. Rather, empathy is simply a tool, which if properly directed, may allow some judges to gain a fuller understanding of the cases before them. Like any other tool, its effectiveness depends in good measure on the skills of the user. The benefits of judicial empathy should not, therefore, be overstated to a public that is already skeptical about its appropriateness. Second, advocates of judicial empathy must recognize that the reasons why judicial empathy is attractive to them are probably not shared by the public at large. If the advocacy of judicial empathy is to achieve any success, it must tap into the public's conceptions of and concerns about the justice system and demonstrate how empathy advances the former and addresses the latter.

Part I identifies and examines the predominate conceptions of justice in America today. It argues that Americans are conflicted. On the one hand, Blind Justice and the notion of the umpire-judge reveal a desire that judging be impersonal, dispassionate and mechanistic. On the

¹ The White House Blog, *The President's Remarks on Justice Souter*, available at <http://www.whitehouse.gov/blog/09/05/01/The-Presidents-Remarks-on-Justice-Souter/>.

² Abby Livingston & Mark Murray, *Context of Obama's 'empathy remark'*, First Read from NBC News, May 1, 2009, available at http://firstread.msnbc.msn.com/_news/2009/05/01/4430634-context-of-obamas-empathy-remark.

³ See, e.g., Jeff Jacoby, *Lady Justice's Blindfold*, The Boston Globe, May 10, 2009, available at http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/05/10/lady_justices_blindfold/; Mario Diaz, *Life and Death of the 'Empathy Standard'*, Human Events.com, Aug. 8, 2009, available at <http://www.humanevents.com/article.php?id=33042> (quoting Republican Senator Jeff Sessions of Alabama).

⁴ Peter Baker, *In Court Nominees, Is Obama Looking for Empathy by Another Name?*, The New York Times, April 25, 2010, available at <http://www.nytimes.com/2010/04/26/us/politics/26memo.html> (quoting Judge Sotomayor as asserting, "judges can't rely on what's in their heart").

other hand, Americans also harbor an ideal of a more engaged judge who respects individual dignity and attends closely to the arguments of the parties. Part II discusses scientific understanding of empathy and its positive and negative effects. Part III analyzes the arguments that were made for and against judicial empathy to ascertain why the former failed and the latter succeeded in garnering public support. It concludes that the arguments of empathy's supporters were too abstract and out of touch with people's basic conceptions of justice. Part IV inquires whether the cause of judicial empathy is worthy of further promotion in light of public attitudes about justice and the current scientific understanding of empathy. It asserts that the cognitive aspect of empathy, perspective taking, harmonizes with public thinking and, from a psychological standpoint, is likely to promote fairer decision making. Part V criticizes President Obama's most recent attempt to promote judicial empathy as a misguided endorsement of a type of emotion-based empathy, which the public has already rejected as overly partial and ideological. Part V also argues that the better way forward is to advocate that perspective taking be performed with respect to all of the parties to an action with no other agenda than to promote better understanding of everyone's arguments. The Conclusion responds to possible objections to the advocacy of judicial empathy as perspective taking and concludes that, while this approach may be somewhat limited in scope, it presents the best chance of engendering public support.

Part I: The Predominant Conceptions of Justice in America

Every good lawyer (and advertising executive) understands that a persuasive argument considers the audience and "pushes its buttons." Nor can the mind of an audience be changed if one does not know its current state of mind. To breathe new life into the argument for judicial empathy it is imperative to have some understanding of what Americans think about justice. As discussed below, cognitive psychology supports the observation of Professor Patricia Cain, made over twenty years ago, that we Americans are conflicted about our judges.⁵ On the one hand, we want judges to be unbiased, independent, and remote.⁶ Yet, on the other hand, we desire interested and engaged judges who care about us and strive to see legal issues from a variety of perspectives.⁷ The successful argument for judicial empathy must take into account both strands.

The Belief in a Just World and Blind Justice and the Umpire-Judge

The American world view is predisposed toward a cognitive phenomenon called "the belief in a just world."⁸ The psychologist, Melvin Lerner, observed that people, generally, will

⁵ Patricia A. Cain, *Good and Bad Bias: A Comment on Feminist Theory and Judging*, 61 S. Cal. L. Rev. 1945, 1945-46 (1988).

⁶ *Id.* at 1945.

⁷ *Id.* at 1946.

⁸ Roland Bénabou & Jean Tirole, *Belief in a Just World and Redistributive Politics*, 1-2 (2004) available at http://emlab.berkeley.edu/users/webfac/saez/e291_s04/benabou.pdf.

interpret life's events from a perspective that the world is just.⁹ The belief in a just world obviously influences the way people conceive and sense justice.¹⁰ Given the prevalence of just world thinking in American life, an understanding of just world theory is essential to gauging the average American's conception of justice.

According to Lerner, the human desire for justice springs from a "primordial" need to believe the world is a fair and just place where people get what they deserve.¹¹ The mythological nature of this world view does not diminish its power. In response to the ambiguities of life, people unconsciously impose order upon chaos through the development of causal explanations that make the world seem more predictable and, consequently, more comfortable to live in. Although such constructions often lack empirical support and are, in fact, illusions, they exert a strong hold if they effectively counter the unending stream of ambiguities in people's environments.¹² In his seminal work, *The Belief in a Just World*, Lerner explains how basic notions of justice are rooted in such a process of delusion.¹³

At its crux, "[t]he 'belief in a just world' refers to those more or less articulated assumptions which underlie the way people orient themselves to their environment."¹⁴ In part, these assumptions relate to the desire to make the world more orderly and predictable.¹⁵ However, just world assumptions also factor in a third dimension: the sense of appropriateness. Although standards of appropriateness vary among cultures, the evaluation of appropriateness, or justice, is a universal human process.¹⁶ Lerner observes that "evaluative judgments of what 'ought' to be the outcome in any event are a natural and inevitable part of the human response to the environment."¹⁷ Moreover, "one of the most commonly observed characteristics of social existence is that people imbue social regularities with an 'ought' quality."¹⁸ When an "ought" is violated, people often become disturbed. This emotional disturbance, which may be the sense of injustice, can induce action to restore the norm or status quo or, in other words, to see that justice is done.¹⁹

To varying degrees, most cultures and societies are naturally inclined to believe that the world is just in the sense that everyone is appropriately rewarded or punished according to their

⁹ David O. Friedrichs, *Book Review* of *The Justice Motive in Everyday Life* (Michael Ross & Dale Miller eds., 2004), 18 No. 2 *Can. J.L. & Soc'y* 147, 148 (2003).

¹⁰ *Id.* at 147-48.

¹¹ Leo Montada, *Doing Justice to the Justice Motive* in *The Justice Motive T. in Everyday Life* 41 (Michael Ross & Dale Miller eds., 2004); Melvin J. Lerner, *The Belief in a Just World* 11 (1980).

¹² Donald C. Langevoort, *Taking Myths Seriously: An Essay for Lawyers*, 74 *Chi.-Kent L. Rev.* 1569, 1571 (2000).

¹³ Lerner, *supra* note 11 at

¹⁴ *Id.* at 9.

¹⁵ *Id.*

¹⁶ *Id.* at 10.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

conduct or attributes.²⁰ America is particularly so inclined.²¹ Because people cognitively associate positive and good things together in one unit of their minds and segregate negative and bad things in another, they are predisposed to link good outcomes with good behavior or characteristics and bad outcomes with bad.²² The judgment of good and bad will be determined by cultural norms.²³ Yet, notwithstanding cultural differences, people, universally, demonstrate such an intense emotional investment in the belief in a just world as to appear to need to see the good rewarded and the bad punished.²⁴ The sense of justice is manifested when people express joy at a bad person coming to a bad end.²⁵ On the other hand, E. Cahn notes that, when an observer watches an innocent person suffer, the arousal of the sense of injustice stimulates the same "affections of the viscera and abnormal secretions of the adrenals that prepare the human to resist attack."²⁶ Accordingly, "[n]ature has thus equipped all men to regard injustice to another as personal aggression."²⁷

The belief in a just world, therefore, serves a functional purpose because it provides hope to individuals in an uncertain world that the rewards of life are within their means if only they engage in appropriate behavior.²⁸ When justice is viewed in this respect, as a "motivationally induced way of adapting to a world in which one is relatively helpless," it and the institutions that mete out justice become important to one's survival.²⁹ Consequently, "[t]he individual seeks stability in his world by attributing absolute virtue to the legal system."³⁰

Justice, so conceived in just world terms, is un-nuanced and mechanistic. Actions are either intrinsically good or bad; there are no shades of grey. Deserving (good) people are rewarded and undeserving (bad) people are punished, not by the judgments of men, but through the operation of the natural world order. Thus, in the just world, justice is preordained rather than a product of human deliberation with all of the human frailties—bias, sympathy, emotionalism—which that encompasses.

The enduring power of just world beliefs in twenty-first century America is demonstrated by the United States' most ubiquitous symbols of justice: Blind Justice and the umpire.

²⁰ *Id.* at 11-12; Friedrichs, *supra* note 9 at 148.

²¹ Bénabou & Tirole, *supra* note 8 (noting the prevalence of just world ideology in the United States).

²² Lerner, *supra* note 11 at 14.

²³ *Id.* at 15.

²⁴ *Id.*

²⁵ *Id.*

²⁶ E. Cahn, *The Sense of Injustice* 24 (1949), discussed and quoted in Lerner, *supra* note 11 at 15.

²⁷ *Id.*

²⁸ Lerner, *supra* note 11 at 14.

²⁹ R.D. Hess & J.V. Torney, *The Development of Political Attitudes in Children*, 52 (1967), discussed and quoted in Lerner, *supra* note 4 at 15.

³⁰ *Id.* Sometimes this leads to unfortunate and unfair results. The need of just world believers to affirm the infallibility of just world justice (i.e. that people always get what they deserve) can be so strong that they may erroneously equate misfortune with bad conduct. This phenomenon is observed, for example, when a rape victim is deemed to have provoked her fate through actions or dress.

A representation of Blind Justice appears in nearly every courthouse in the United States.³¹ As portrayed, Blind Justice evokes the otherworldly nature of the American ideal of justice.³² Judith Resnik describes the estranged qualities of this pervasive symbol:

The goddess herself – aloof and stoic – represents the physical and psychological distance between the judge and the litigants. Sometimes described as a virgin, Justice is unapproachable and incorruptible. The scales reflect evenhandedness and absolutism. The sword is a symbol of power and, like the scales, executes decisions without sympathy or compromise. Finally, the blindfold protects Justice from distractions and from information that could bias or corrupt her. Masked, Justice is immune from sights that could evoke sympathy in an ordinary spectator.³³

A force which transcends mortal weaknesses, Blind Justice carries justice to a plane higher than ordinary human interaction.

Whereas Blind Justice evokes the detachment from human influences that characterizes just world justice, the umpire symbolizes its mechanistic nature. No less an authority than the American Bar Association describes the role of the judge in purely mechanistic terms:

Judges are like umpires in baseball or referees in football or basketball. Their role is to see that the rules of court procedures are followed by both sides. Like the ump, they call 'em as they see 'em, according to the facts and law—without regard to which side is popular (no home field advantage), without regard to who is "favored," without regard to what the spectators want, and without regard to whether the judge agrees with the law.³⁴

Pushing the umpire analogy still further, Chief Justice John Roberts of the United States Supreme Court has portrayed judging as a non-discretionary act:

Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role.³⁵

The imagery of the ABA and the Chief Justice—of umpire-judges following preset rules to their foreordained conclusions—comports fully with just world ideology. It leaves the natural order of just world justice undisturbed. Umpire-judges merely facilitate the natural order; they neither alter its rules nor impress their personalities upon it.

Thus, in one respect, the American conception of ideal justice is impersonal. Probably owing in large part to just world ideology, human elements of the judicial process are negated. Seemingly hardwired into the American mindset, Blind Justice and the umpire-judge are

³¹ Judith Shklar, Comment, *Giving Injustice Its Due*, 98 Yale L.J. 1135, 1135 (1989).

³² Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374, 383 (1982).

³³ *Id.*

³⁴ American Bar Association Division for Public Education, *How Courts Work, Courts and Legal Procedure, The Role of Judges*, available at http://www.abanet.org/publiced/courts/judge_role.html.

³⁵ Bruce Weber, *The Deciders, Umpires v. Judges*, N.Y. Times, July 11, 2009 at <http://www.nytimes.com/2009/07/12/weekinreview/12weber.html>.

unbiased and independent, but also disinterested and disengaged.³⁶ Commentators, who urge that the conception of Justice should be altered by, for example, removing her blindfold so as to better reflect reality, overlook the fact that the power of myths lies in their ability to satisfy the deep-seated needs of human beings for cohesion and stability.³⁷ The prevalence of umpire-judge imagery in America today demonstrates its continued viability and the degree to which it is impervious to reason.³⁸ Given the resilience of Blind Justice and the umpire-judge, one must consider whether the cause of judicial empathy may be furthered more through accommodation to this facet of the American ideal of justice than by doing battle with it.

Procedural Fairness and the Dignitary Components of Justice

The impersonal images of Blind Justice and the umpire-judge are probably what come to mind when people think of justice in the abstract. However, studies suggest that people personally involved with the justice system value greater personal engagement from the administrators of justice.³⁹ Moreover, people's estimation of the procedural fairness of the system is likely to be influenced by the way judges and other legal authorities interact with them.⁴⁰

People assess procedural fairness on the basis of their treatment by legal authorities and the degree to which they believe decisions were reached fairly.⁴¹ In terms of personal treatment, people want legal authorities to treat them with dignity and care about their concerns.⁴² Research indicates that "[i]f [people] feel that legal authorities are polite and respectful, sincere and

³⁶ Cain, *supra* note 5 at 1946.

³⁷ See Linda C. McClain, *Supreme Court Justices, Empathy, & Social Change: A Comment on Lani Guinier's Demosprudence Through Dissent*, 89 Boston L.R. 589, 600 (2009) (noting the growing body of literature that argues for a transformation of the imagery of Justice to bring it more in line with the needs and realities of contemporary society); Langevoort, *supra* note 12 at 1571 (describing myths as "anxiety buffers"), 1574-75 ("If strong inferences and beliefs are adaptive because they are stress-reducing and confidence building, then the kinds of illusory inferences that are most likely to develop and persist are those that best play a similar motivational role"), 1581-82 (noting that legally-trained people are so deeply invested in their rationalist rhetoric that they often project it onto others, which results in a tendency to misunderstand and trivialize others' myths and illusions).

³⁸ See, e.g., *GOP's Jeff Sessions' Opening Remarks on Nominee Elena Kagan*, June 28, 2010, available at <http://www.opposingviews.com/i/gop-s-jeff-sessions-opening-remarks-on-nominee-elena-kagan> (in which Senator Jeff Sessions, the ranking Republican member of the Senate Judiciary Committee criticizes Supreme Court nominee Elena Kagan's association with and admiration of judges who "openly oppose the idea of a judge as a neutral umpire").

³⁹ See T.R. Tyler, *Public Confidence in Legal Authorities: What Do Majority and Minority Members Want from the Law and Legal Institutions?*, 19 Behav. Sci. & L. 215, 216, 234 (2001) (noting the value people place on being treated with dignity by legal authorities and on such qualities as politeness, respectfulness, sincerity, and benevolence).

⁴⁰ *Id.* at 215.

⁴¹ *Id.*

⁴² *Id.* at 216.

benevolent, and do not harass or stigmatize community residents, they are more supportive of law and legal authorities."⁴³

People's assessment of the fairness of judicial decision-making is also influenced by the way the judge interacts with the parties. In particular, people assess whether or not the judge allows the parties to express themselves.⁴⁴ People want to tell their stories and make their arguments.⁴⁵ When parties are accorded this opportunity, they generally express satisfaction with the legal process—with one caveat. Litigants also expect the judge to listen to and consider the views they express.⁴⁶ The judge who does so will likely be deemed fair.⁴⁷ Parties will even approve of a procedure with a judge they consider biased if the judge manifestly demonstrates a thorough consideration of everyone's arguments.⁴⁸

Because the ideal of procedural fairness presupposes a measure of judicial engagement with the parties before the court, it presents on its face more fertile ground to base an appeal for judicial empathy. However, given the linkage of procedural fairness to direct, personal involvement with the judicial process, procedural fairness may not be a matter of sufficient universal concern to the public at large. An appeal for judicial empathy founded on procedural fairness needs to take this disconnect into account. In some way, it will have to invite the target audience to step into the shoes of persons appearing before a court. In short, to argue for empathy, the appeal must engender the empathy of its listeners.

Part II: The Scientific Understanding of Empathy

The derivational meaning of empathy is "feeling into."⁴⁹ Martin Hoffman notably described empathy as "the spark of human concern for others, the glue that makes social life possible."⁵⁰ Although empathy has been much studied over the last forty years and is generally agreed to be an important component in the development of prosocial behavior, it remains an elusive concept not subject to easy definition.⁵¹ Many theorists now view empathy as a multi-dimensional construct incorporating both cognitive (non-emotional) and affective (emotional)

⁴³ *Id.* at 234.

⁴⁴ E. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* 106 (1988).

⁴⁵ *Id.* at 101.

⁴⁶ *Id.*

⁴⁷ *Id.* at 106.

⁴⁸ *Id.*

⁴⁹ C. Shamasundar, *Understanding Empathy and Related Phenomena*, 53 *Am. J. Psychotherapy* 232, 234 (1999).

⁵⁰ M.L. Hoffman, *Empathy and Moral Development* 3 (2000).

⁵¹ Nancy Eisenberg & Amanda Sheffield Morris, *The Origins and Social Significance of Empathy-Related Responding. A Review of Empathy and Moral Development: Implications for Caring and Justice* by M.L. Hoffman, 14 *Soc. Just. Res.* 95, 101 (2001) ("Empathy is also important because of its relation to prosocial behavior"); Guy D. Vitaglione & Mark Barnett, *Assessing a New Dimension of Empathy: Empathic Anger as a Predictor of Helping and Punishing Desires*, 27 *Motivation and Emotion* 301, 302 (2003) (noting the arguments about the meaning of empathy over the years).

elements.⁵² Thus, in general terms, empathy refers to the human ability to understand how another thinks, to feel how she feels, and to respond sympathetically.⁵³

The cognitive aspect of empathy is referred to as perspective taking.⁵⁴ Perspective taking occurs when an individual steps into another person's shoes to experience that person's point of view.⁵⁵ The individual imagines the other person's situation and attempts to think how that person thinks or understand how the person feels.⁵⁶ People may also engage in perspective taking through means other than role playing. Having observed the subject, the perspective taker may refer to previously stored knowledge, as for example, her understanding of the things that motivate people in certain situations.⁵⁷

Perspective taking also occurs in relation to groups of people when, for example, an individual imagines the point of view of "generalized others," such as members of a racial minority or people of a different sexual orientation.⁵⁸ In this instance, the perspective taker presumably draws upon her cache of perspectives of individual members of the group. The accuracy of generalized perspective taking, or stereotyping, probably increases with the number of individual perspectives on which the stereotype is based.⁵⁹

Perspective taking does not encompass a perceptible emotional reaction.⁶⁰ The perspective taker remains detached. She neither confuses her feelings with the subject's nor feels as the subject feels.⁶¹ In fact, a number of models of perspective taking emphasize its self-referential nature. An observer's inference of another person's thoughts or feelings is probably

⁵² Christina Cliffordson, *The Hierarchical Structure of Empathy: Dimensional Organization and Relations to Social Functioning*, 43 *Scandinavian J. Psychol.* 49, 49-50 (2002) (describing support for the multidimensional conception).

⁵³ Nancy Eisenberg, *Values, Sympathy, and Individual Differences: Toward a Pluralism of Factors Influencing Altruism and Empathy*, 2 *Psychol. Inquiry* 128, 129 (1991) (noting that empathy encompasses three processes—thinking, feeling, and responding).

⁵⁴ *Id.*

⁵⁵ Mark H. Davis, *The Effects of Dispositional Empathy on Emotional Reactions and Helping: A Multidimensional Approach*, 51 *J. Personality* 167, 169 (1983).

⁵⁶ Patricia A. Oswald, *The Effects of Cognitive and Affective Perspective Taking on Empathic Concern and Altruistic Helping*, 136 *J. Soc. Psychol.* 613, 614 (explaining that cognitive perspective taking involves understanding the thoughts of others and affective perspective taking is the ability to understand how another feels).

⁵⁷ Eisenberg, *supra* note 53 at 129-30.

⁵⁸ William M. Bernstein & Mark H. Davis, *Perspective-Taking, Self-Consciousness, and Accuracy in Person Perception*, 3 *Basic & Applied Soc. Psychol.* 1, 17 (1982).

⁵⁹ *Id.*

⁶⁰ Eisenberg, *supra* note 53 at 129 (defining perspective taking as purely cognitive); *but see* Cliffordson, *supra* note 52 at 56-56 (asserting that neurological research indicates there is some overlap between the cognitive and affective aspects of empathy).

⁶¹ Perrine Ruby & Jean Decety, *How Would You Feel versus How Do You Think She Would Feel? A Neuroimaging Study of Perspective-Taking with Social Emotions*, 16 *J. Cognitive Neuroscience* 988, 988 (noting that perspective taking does not confuse "the feelings experienced by the self versus feelings experienced by the other person").

influenced by the observer's own self-perspective. Inaccurate perspective taking may result from the observer's inability to suppress sufficiently her own perspective.⁶²

People are not good judges of their own perspective taking abilities.⁶³ As with any human activity, some people are better at perspective taking than others. Different individuals also exhibit stronger or lesser tendencies to engage in perspective taking. Frequent perspective takers probably are more accurate at stereotypic perspective taking because they have a greater number of individual perspectives on which to draw.⁶⁴

Perspective taking often, but not necessarily, proceeds to the affective or emotional elements of empathy, which encompass sharing the feelings of the other person (as opposed to merely understanding what the person's feelings are) and, perhaps, responding with concern.⁶⁵ There is considerable confusion of terminology describing these affective aspects. The sharing of another's feelings is variously described as "empathic response" or, simply, "empathy."⁶⁶ At this level, the individual remains at least minimally aware of the differentiation between her own self and that of the other person.⁶⁷ This "empathic response" stage probably cannot be deemed strictly moral in nature; after all, one could experience another's pain and take pleasure from it.⁶⁸

The stage that sometimes follows does, however, encompass a moral dimension as it presupposes concern at the sufferer's condition.⁶⁹ Although this reaction is often termed "sympathy" in the scientific literature, it can also include feelings of anger.⁷⁰ Empathic emotions, whatever their nature, may activate otherwise abstract moral principles, such as justice, and charge them with motivational force.⁷¹ Thus, the empathic emotions experienced "[provide] the motive for rectifying violations of justice."⁷² The nature of the empathic response to the victim is influenced by the observer's assessment of the cause of the sufferer's distress. Presumably, anger occurs when the blame falls upon a third person or entity.⁷³ Empathic sympathy, or sadness, tends to foster the desire to help and care for the victim. Empathic anger,

⁶² *Id.* at 988.

⁶³ William Ickes, *Empathic Accuracy*, 61 *J. Personality* 587, 603-04 (1993).

⁶⁴ *Id.* at 17-18.

⁶⁵ Eisenberg, *supra* note 53 at 129.

⁶⁶ Kristján Kristjánsson, *Empathy, Sympathy, Justice and the Child*, 33 *J. Moral Educ.* 291, 298 (2004) (noting Hoffman's use of the term "empathic response"); Eisenberg, *supra* note 50 at 129 (utilizing "empathy").

⁶⁷ Eisenberg, *supra* note 53 at 129.

⁶⁸ Kristjánsson, *supra* note 66 at 298.

⁶⁹ *Id.* at 299.

⁷⁰ *See e.g.* Eisenberg, *supra* note 53 at 129 (explaining and defining the response in terms of "sympathy"); Vitaglione, *supra* note 51 at 321.

⁷¹ Kristjánsson, *supra* note 66 at 301.

⁷² *Id.*

⁷³ Vitaglione & Barnett, *supra* note 51 at 303.

on the other hand, appears to motivate not only help for the sufferer but also to generate a desire to punish the transgressor.⁷⁴

Heredity and environmental factors probably account in some measure for the different tendencies of individuals to engage, generally, in the emotional aspects of empathy.⁷⁵ Yet, even a person prone to empathize does not experience empathy indiscriminately. Some situations typically motivate empathy more than others.⁷⁶

Socialization factors appear to exert an important influence in this respect. People empathize more readily with members of their own perceived groups than they do with outsiders.⁷⁷ They find it easier to empathize with people about whom they already care.⁷⁸ Studies suggest that people interpret identical suffering differently depending on the sufferer's in-group or out-group status, tending to minimize the distress of the outsider.⁷⁹ Notably, empathy with out-group members equals that for in-group members when in-group norms prescribe an empathic response to the plight of outsiders.⁸⁰

The nature of the emotions displayed also influences the probability of empathy. One factor is familiarity. Observers appear more susceptible to commonly-experienced emotions than those with which they are less familiar.⁸¹ They also tend to respond if they, themselves, have shared a similar experience.⁸² An overly intense emotion, however, may present a barrier to empathic response. People seem less willing to vicariously experience emotions of ascending unpleasantness.⁸³ Indeed, if the vicarious experience becomes too unbearable, the observer may focus again upon herself and strive to avoid the distressed person altogether.⁸⁴

Affective empathy can have beneficial side effects. It may, as noted, ignite moral precepts like a spark plug fires an engine.⁸⁵ Empathy is often a precursor to altruistic helping.⁸⁶

⁷⁴ *Id.* at 321.

⁷⁵ Eisenberg & Morris, *supra* note 51 at 105-06.

⁷⁶ Changming Duan, *Being Empathic: The Role of Motivation to Empathize and the Nature of Target Emotions*, 24 *Motivation & Emotion* 29, 30 (2000).

⁷⁷ Mark Tarrant et al., *Social Categorization and Empathy for Outgroup Members*, 48 *Brit. J. Soc. Psychol.* 427, 430 (2009).

⁷⁸ D.A. Pizarro, *Nothing more than feelings? The Role of Emotions in Moral Judgment*, 30 *J. for the Theory of Soc. Behav.* 355, 356 (2000).

⁷⁹ Tarrant et al., *supra* note 77 at 439.

⁸⁰ *Id.* at 435-36.

⁸¹ Duan, *supra* note 76 at 46.

⁸² Mark A. Barnett et al., *Similarity and Empathy: The Experience of Rape*, 126 *J. Soc. Psychol.* 47, 48 (2001).

⁸³ Duan, *supra* note 76 at 46.

⁸⁴ Eisenberg & Morris, *supra* note 51 at 97.

⁸⁵ Kristjánsson, *supra* note 66 at 301.

⁸⁶ Jakob Håkanson, *Exploring the Phenomenon of Empathy* 14 (2003) (unpublished Ph.D. dissertation, Department of Psychology, Stockholm University) (available at <http://www.emotionalcompetency.com/papers/empathydissertation.pdf>) (discussing studies by C.D. Batson and others that relate empathy to altruistic behavior).

Vicariously experiencing another person's distress may, in addition, override just world tendencies to blame victims for their bad situations.⁸⁷ Given a foothold, empathy can also mediate people's innate distrust of outsiders. Studies show that an individual's empathy for one member of an out-group will often, if the member is representative of the group, lead to empathy for the group as a whole. When this occurs, the individual thinks about the group more positively and supports efforts taken on its behalf. Thus, empathy can ultimately lead to greater acceptance of outsiders in society.⁸⁸

Affective empathy is not, however, without its downside. Empathy sometimes results in partiality and injustice.⁸⁹ Empathy can cause a single-minded focus on the person in distress at the expense of the big picture. So great becomes the desire to help one particular sufferer that aid is given to them, notwithstanding others are demonstrably more deserving. The danger of injustice obviously arises if empathy leads to the neglect of the fairest allocations of scarce resources and favors a chosen few over the many in need.⁹⁰ Yet, research indicates that the biasing effects of empathy can be averted when people are explicitly reminded of the norms of fairness and impartiality.⁹¹ The desire to be fair apparently overpowers empathy-motivated partiality.⁹²

Even this brief summary of the scientific understanding of empathy demonstrates that empathy is a complex phenomenon of multiple dimensions, partly cognitive and partly emotional. Little research has been done on the relative efficacy of perspective taking (cognitive empathy) versus empathic response (emotional empathy) in decision-making.⁹³ However, a recent comparison of the value of the two processes in competitive business negotiations is at least suggestive.⁹⁴ Perspective taking proved much more useful in reaching a successful conclusion than empathizing with one's opponent. As the researchers explained, "[p]erspective takers were able to uncover underlying interests to generate creative solutions when a prima facie deal was not possible and crafted more efficient deals with greater collective and individual gain than did empathizers and control participants."⁹⁵ The competitiveness of negotiating a deal is, of course, quite different from the supposedly collegial process through which judicial decisions are made. And the researchers do posit that empathy might prove useful in mediation where the

⁸⁷ David Alderman et al., *Effect of Emotional Empathy on Attribution of Responsibility*, 43 J. Personality 156, 165 (2006).

⁸⁸ Tarrant et al., *supra* note 77 at 427.

⁸⁹ Luis Oceja, *Overcoming Empathy-Induced Partiality: Two Rules of Thumb*, 30 Basic & Applied Soc. Psychol. 176, 181 (2008).

⁹⁰ *Id.* at 176-77.

⁹¹ *Id.* at 181.

⁹² *Id.*

⁹³ Adam D. Galinsky, *Why It Pays to Get Inside the Head of Your Opponent. The Differential Effects of Perspective Taking and Empathy in Negotiations*, 19 Psychol. Sci. 378, 379 (2008).

⁹⁴ *See generally id.* at 378-384.

⁹⁵ *Id.* at 383.

parties "often need to be satisfied with the process before agreeing to a deal."⁹⁶ Even so, given the adversarial nature of the American legal system, in general, and the increasingly adversarial tone of many judicial opinions and dissents⁹⁷, the findings of this study pose food for thought.

Part III: The Popular Arguments for and Against Judicial Empathy: A Post-Game Analysis

To say the campaign for judicial empathy was misguided would be an understatement. It can only be described as a public relations disaster. Why it went so wrong is, however, instructive, as are the reasons for the success of the opposition. Both offer lessons from which any attempt to resurrect judicial empathy as a viable concept could profit.

Because remarks made by President Obama instigated the debate about judicial empathy and served as a rallying point for its proponents and opponents, they warrant quotation in full.

On May 1, 2009, President Obama expressed his belief in the value of judicial empathy during his discussion of the retirement of Associate Justice David Souter:

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

I view that quality of empathy, of understanding and identifying with people's hopes and struggles as an essential ingredient for arriving at just decisions and outcomes. I will seek somebody who is dedicated to the rule of law, who honors our constitutional traditions, who respects the integrity of the judicial process and the appropriate limits of the judicial role. I will seek somebody who shares my respect for constitutional values on which this nation was founded, and who brings a thoughtful understanding of how to apply them in our time.⁹⁸

The President's remarks refocused attention on a campaign speech he had made on July 17, 2007 to a convention of Planned Parenthood:

I also think it's important to understand that there is nothing wrong in voting against [judicial] nominees who don't appear to share a broader vision of what the constitution is about. I think the Constitution can be interpreted in so many ways. And one way is a cramped and narrow way in which the Constitution and the courts essentially become the rubber stamps of the powerful in society.

⁹⁶ *Id.*

⁹⁷ Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 Tex. L. Rev. 1307, 1391 (1995) (discussing the incivility of judges towards their colleagues that is found in many opinions and extrajudicial writings today).

⁹⁸ The White House Blog, *supra* note 1.

And then there's another vision of the court that says that the courts are the refuge of the powerless, because oftentimes they may lose in the democratic back-and-forth. They may be locked out and prevented from fully participating in the democratic process.

That's one of the reasons that I opposed Alito as well as Justice Roberts. When Roberts came up, and everybody was saying, 'You know, he's very smart and he seems like a very decent man and he loves his wife and you know he's good to his dogs. He's so well qualified.' I said, 'Look, that's absolutely true, and most Supreme Court dec—in the overwhelming number of Supreme Court decisions, that's enough. Good intellect. You read the statute. You look at the case law, and most of the time the law is pretty—95% of the time.

Justice Ginsburg, Justice Thomas, Justice Scalia—they're all gonna agree on the outcome. But it's those 5% of the cases that really count. And in those 5% of the cases what you got to look at is: What is in the justice's heart? What's their broader vision of what America should be.

You know, Justice Roberts said he saw himself just as an umpire. But the issues that come before the court are not sport. They're life and death. And we need somebody who's got the empathy to recognize what it's like to be a young, teenaged mom; the empathy to understand what it's like to be poor or African-American or gay or disabled or old. And that's the criteria by which I'm going to be selecting my judges.⁹⁹

The arguments of those who carried the banner of judicial empathy forward were probably doomed from the start. President Obama's remarks proved a hindrance to the mission. He had envisioned judicial empathy as directed towards the outsiders or "little guys" of society. Because that smacked of favoritism, the proponents found themselves faced off against the popular notion of Blind Justice. They had a lot of explaining to do, which ultimately proved fatal to the immediacy of their message.

The headline, "'Empathy' not a dirty word for a judge," sums up the proponents' defensive and apologetic tone.¹⁰⁰ Indeed, before the proponents could talk about the benefits of empathy, they needed to refute a number of popular assumptions: Judges, in fact, are not umpires.¹⁰¹ The notion that justice is entirely a matter of objective reasoning is a "myth."¹⁰² Because there is not always a "right" answer, judges frequently draw on their life experiences and personal vision of American society.¹⁰³ Conservative justices empathize too; they just do it for the well-connected

⁹⁹ Livingston & Murray, *supra* note 2.

¹⁰⁰ Gloria Borger, *'Empathy' not a dirty word for a judge*, CNN.com, available at <http://www.cnn.com/2009/POLITICS/05/28/borger.sotomayor/index.html>.

¹⁰¹ Ruth Marcus, *Behind Justice's Blindfold: Should the judge be an umpire or an empathizer?*, The Washington Post, May 6, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/05/AR2009050502928.html>.

¹⁰² Ellen Goodman, *What's so bad about empathy?*, The Boston Globe, May 22, 2009, available at http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/05/22/whats_so_bad_about_empathy/.

¹⁰³ Marcus, *supra* note 101.

and powerful.¹⁰⁴ Empathy should not be confused with sympathy.¹⁰⁵ An empathic judge merely steps into the shoes of the parties.¹⁰⁶ Thus, empathy is not synonymous with partiality; a judge can empathize with both sides in a case.¹⁰⁷

Somewhere amongst their litany of the public's erroneous assumptions about judging and empathy, the proponents cited ways in which judicial empathy enriched decision-making: Empathy, for example, brings a sense of the individual back into what otherwise might be a purely theoretical discussion.¹⁰⁸ It helps judges better understand “what’s at stake for all the litigants.”¹⁰⁹ Far from encouraging bias, empathy can be a tool to ward off the human propensity to favor the familiar. Judges who stand in each party’s shoes gain perspectives wider than their own. These broader perspectives may, in turn, lead judges to greater wisdom.¹¹⁰ “After all,” as one proponent noted, “sound judgment is based upon considering all possible information that is available, rather than discarding observations or feelings that aren’t strictly ‘reason-based’.”¹¹¹ The appeal, if any, of such arguments was theoretical rather than instinctual. Indeed, to the extent they were not crowded out by the assertions of what justice and empathy were *not*, these arguments tended to seem more clever than compelling.

By contrast, the arguments of the opponents of judicial empathy won hands-down in terms of promotional effectiveness. The message was positive. It took the offense. It was simple and direct. It seemed immediately intuitive. It did not require paragraphs of explanation. It played to its audience. In short, the opponents' message took the powerful, popular conception of Blind Justice and ran with it.

¹⁰⁴ *Id.*

¹⁰⁵ Goodman, *supra* note 102.

¹⁰⁶ *Id.*

¹⁰⁷ Douglas W. Kmiec, *The Case for Empathy, Why a much maligned value is a crucial qualification for the Supreme Court*, America Magazine, May 11, 2009, available at http://www.americamagazine.org/content/article.cfm?article_id=11649.

¹⁰⁸ *Id.*

¹⁰⁹ Goodman, *supra* note 102 (quoting Susan Bandes, author of *Passions of the Law*).

¹¹⁰ Margaret Russell & Marilyn Edelstein, *Empathy is important in making judgments*, Oakland Tribune, August 5, 2009, available at <http://www.eaualjusticesociety.org/2009/08/op-ed-empathy-is-important-in-making-judgments/>.

¹¹¹ Robert Burton, *A judge without empathy is inhuman: The anti-Obama rallying cry that a Supreme Court justice must rule by reason alone is ignorant of how our minds and bodies work*, Mind Reader, Salon.com, May 12, 2009, available at http://www.salon.com/news/environment/mind_reader/2009/05/12/obama_empathy.

The opponents accused President Obama and the advocates of judicial empathy of "forsaking this conception of blindness to focus on the vulnerabilities of the preferred."¹¹² As a sales pitch, the argument that empathy played favorites could not have been more perfect. Capable of expression in a few words, it struck a chord with people's most basic notions of fairness and unfairness. Indeed, the opponents had no shortage of catchy lines: "Lady Justice wears a blindfold not because she has no empathy for certain litigants or groups of people, but because there is no role for such empathy in a courtroom."¹¹³ "I don't need some judge sitting up there feeling bad for my opponent because of their life circumstances or their condition. And short changing me and my opportunity to get fair treatment under the law."¹¹⁴ "Figuratively and literally, justice wears a blindfold. It cannot be a respecter of persons. Everyone must stand equally before the law, black or white, rich or poor, advantaged or not."¹¹⁵ "If empathy causes respect of persons in judgment, it leads to injustice. It causes oppression."¹¹⁶ Thus, boiled down to basics, the opponents' arguments asserted that "[e]mpathy for one party is always prejudice against another."¹¹⁷ Measured by the public's receptivity to these arguments, the proponents of Blind Justice and the umpire-judge scored a home-run.¹¹⁸

Part IV: Is Judicial Empathy Worth Fighting For?

In light of the scientific knowledge about empathy in general and the arguments for and against judicial empathy in particular, it is reasonable, as an initial matter, to ask whether the promotion of judicial empathy is worthy of further effort.

President Obama's remarks led to a public debate that characterized judicial empathy in extremes. Proponents praised judicial empathy as a vehicle for better understanding and

¹¹² Richard A. Epstein, *Beware of Empathy*, Forbes.com, May 5, 2009, available at <http://www.forbes.com/2009/05/04/supreme-court-justice-opinions-columnists-epstein.html>.

¹¹³ Jacoby, *supra* note 3.

¹¹⁴ Matt Corley, *Steele on judges with 'empathy': 'I'll give you empathy. Empathize right on your behind!'*, Think Progress, May 8, 2009, available at <http://thinkprogress.org/2009/05/08/steele-empathize-behin/> (quoting the remarks of Republican National Committee Chairman, Michael Steele).

¹¹⁵ Charles Krauthammer, *Sotomayor: Rebut, Then Confirm*, The Washington Post, May 29, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/28/AR2009052803613.html>.

¹¹⁶ Joel Hilliker, *Empathy v. Justice, President Obama's coming Supreme Court choice has commentators dusting off a venerable old law book*, theTrumpet.com, May 13, 2009, available at <http://www.thetrumpet.com/index.php?q=6171.4596.0.0>.

¹¹⁷ Diaz, *supra* note 3 (quoting Republican Senator Jeff Sessions of Alabama).

¹¹⁸ Baker, *supra* note 4 (noting that "[e]mpathy is out").

fairness,¹¹⁹ while opponents tarred it as synonymous with prejudice.¹²⁰ Psychological research does not entirely support either view. Studies indicate that empathy sometimes promotes fairness and, at other times, hinders it.¹²¹ Studies also suggest that different levels of empathy—cognitive vs. affective—involve different degrees of identification with the target subject.¹²² Thus, one must look beyond the oversimplifications of the public debate to assess whether judicial empathy is, indeed, worth fighting for.

Of the two levels of empathy, affective or emotional empathy seems the more problematic in terms of both judicial decision-making and public acceptance. As discussed above, the affective empathizer actually experiences the emotion of the other person.¹²³ Consequently, the affective empathizer may be less aware of the differentiation between her own self and that of the other than would a cognitive empathizer, or perspective taker, who simply understands how the other person feels.¹²⁴ The extent to which the affective empathizer assumes the other person's self seems at odds with the ideal of the judge as a neutral third party. Affective empathy is often linked to taking sides. The angry empathizer frequently attempts to punish the afflicted person's transgressor while the saddened empathizer may attempt to alleviate the other person's suffering.¹²⁵ The uni-directional nature of affective empathy can, as has been noted, subvert fairness. Too much identification with one person's needs may create a tunnel vision that prevents the empathizer from taking the measure of the needs of society at large.¹²⁶ Thus, the danger arises that affective empathy may cause favoritism, the antithesis of fairness and justice. While, in theory, a judge could attempt to affectively empathize with both sides in a case, the likelihood of this actually occurring appears slight, given the prevailing characterization of

¹¹⁹ See, e.g., Goodman, *supra* note 102; Russell & Epstein, *supra* note 110.

¹²⁰ See, e.g., Diaz, *supra* note 3 (quoting Senator Jeff Sessions); Corley, *supra* note 114 (quoting Michael Steele).

¹²¹ Compare Tarrant et al, *supra* note 77 at 427 (explaining how empathy may mediate the distrust of outsiders) with Oceja, *supra* note 89 at 176, 181 (explaining how empathy may lead to favoritism).

¹²² Oswald, *supra* note 56 at 614 (noting that cognitive perspective-taking implicates merely understanding the feelings of another as opposed to affective empathy, wherein the empathizer actually feels as the other feels)

¹²³ Eisenberg, *supra* note 53 at 129.

¹²⁴ See Ruby & Decety, *supra* note 61 at 988 (noting that the perspective taker remains fully aware of her own self); Eisenberg, *supra* note 53 at 129 (noting that the affective empathizer remains at least minimally aware of her self).

¹²⁵ Vitaglione & Barnett, *supra* note 51 at 321.

¹²⁶ Oceja, *supra* note 89 at 176-77.

affective empathy in the scientific literature as an "us" versus "them" mentality.¹²⁷ And the greater readiness of observers to affectively empathize with individuals whose characteristics are like their own or who are in situations which they, themselves, have experienced further undermines the probability that a judge could engage effectively in dual affective empathy even if she were inclined do so at all.¹²⁸

Notwithstanding the positive outcomes of affective empathy—as explained in Part II, it induces altruism and counterbalances some of the distortions of just world thinking—its inherent one-sidedness seemingly disqualifies it as a judicial ideal.¹²⁹ This is no abstract notion. People apparently have an innate sense that fairness and affective empathy uneasily coexist. Notably, studies have shown that partiality induced by affective empathy is overcome when principles of fairness are stressed.¹³⁰ Thus, people seem instinctively to recognize that affective empathy is to justice as oil is to water.

Indeed, it was affective empathy to which the opponents of judicial empathy so successfully objected, although they did not identify it as such. Affective empathy is foreign to both of the popular conceptions of American justice. Blind Justice cannot, by her very definition, be an affective empathizer who identifies with and, perhaps, feels sympathy for one of the parties. Nor is affective empathy a necessary component of the alternative ideal of justice as being procedurally fair and respectful of personal dignity. As previously discussed, people generally express satisfaction with the justice system when their judge has listened to them and considered their arguments; the findings that satisfaction occurs under such conditions regardless of the outcome suggests that it matters more to litigants that judges consider their arguments than

¹²⁷ See Vitaglione and Barnett, *supra* note 51 at 321 (asserting that common affective responses are anger directed against the victim's oppressor or sympathy and a desire to help the victim overcome her oppression. In either instance, there is a strong identification with the victim against the oppressor.

¹²⁸ Duan, *supra* note 76 at 46 (noting empathy is more likely when the empathizer has shared the target's emotion); Tarrant et al, *supra* note 77 at 430 (noting it is easier to empathize with members of one's own group).

¹²⁹ Håkanson, *supra* note 86 at 14 (noting the link between affective empathy and altruism); Alderman et al., *supra* note 87 at 165 (asserting that affective empathy mediates just world biases).

¹³⁰ See Oceja, *supra* note 89 at 181 (explaining that the biasing affects of emotional empathy are superseded when fairness principles are stressed).

that they feel their pain.¹³¹ Thus, affective judicial empathy, considered purely in terms of the likelihood of the public's lack of receptivity to it, must be deemed a non-starter.

Given the potentially prejudicial effects of affective empathy and the discordance of affective empathy with Americans' two most basic conceptions of justice, a campaign to promote affective judicial empathy appears neither prudent nor worthwhile. Cognitive empathy or perspective taking, on the other hand, presents a more favorable picture in both respects.

Perspective taking, which involves stepping into another person's shoes, is more consistent with the norms of the judicial process and the role of the judge as an unbiased arbiter.¹³² Unlike the affective empathizer, the perspective taker's sense of self remains fully distinguishable from that of the other person.¹³³ The goal is not to feel as the other person feels or to sympathize with her, but rather to understand what she feels.¹³⁴ Thus, the crucial difference between cognitive and affective empathy is that cognitive empathy is essentially an information-gathering tool that implicates little or no sense of emotional attachment on the part of the empathizer, although affective empathy can, but need not necessarily, follow.¹³⁵ The absence of such attachment allows the cognitive empathizer to take the perspective of multiple actors in a situation without taking sides. And, by so doing, the cognitive empathizer may achieve a more nuanced understanding of that situation than would the affective empathizer who is likely to be emotionally attached to one of the sides.¹³⁶ So viewed, judicial perspective taking simply becomes one more discovery mechanism at a judge's disposal and, like other information-gathering tools, may enhance judicial objectivity through the provision of additional knowledge and understanding.

Because judicial perspective taking is directed towards attaining a greater understanding of the parties as opposed to the expression of personal feeling or partiality for any one of them, it

¹³¹ Lind & Tyler, *supra* note 44 at 106 (noting the importance of judicial consideration as a factor of litigants' satisfaction with the justice system, regardless of outcome).

¹³² Davis, *supra* note 55 at 169 (describing cognitive empathy in terms of stepping into the other person's shoes).

¹³³ Ruby & Decety, *supra* note 61 at 988 (noting the cognitive empathizer's detachment from the self of the other person).

¹³⁴ Oswald, *supra* note 56 at 614.

¹³⁵ Eisenberg, *supra* note 53 at 129.

¹³⁶ See Galinsky, *supra* note 93 at 383 (describing the greater value of perspective taking in business negotiations in terms of the perspective taker's enhanced facility ability to ascertain underlying interests as compared to the affective empathizer's).

avoids the disconnect that was observed between affective empathy and the predominate American ideals of justice. Indeed, judicial perspective taking plays directly to those ideals. Its cognitive nature and neutral, emotionally-uninvolved stance are precisely the qualities Blind Justice symbolizes. Its provision of a fuller picture of the situation at hand aids the umpire-judge who, after all, must see the play before applying the rules. Likewise, its aspect of standing in others' shoes resonates with the desire of litigants that their arguments be listened to and considered, which is so central to the alternative ideal of procedural fairness and respect for human dignity.

If—and it is a big if—judicial perspective taking could be divorced from the stigma surrounding the word "empathy" in general, it could prove useful in judicial decision-making and achieve public acceptance. The following section will discuss how a campaign to promote judicial perspective taking should and should not be addressed.

Part V: The Road Forward

President Obama has soft-pedaled the cause of judicial empathy in the wake of the public relations debacle that occurred after the resignation of Justice Souter. This section analyzes critically the President's reframing of the message and suggests a different road forward.

The announcement of the retirement of Justice John Paul Stevens in April 2010 gave President Obama another opportunity to enumerate the qualities he desires in judicial nominees. "I will seek," stated President Obama, "someone in the coming weeks with... an independent mind, a record of excellence and integrity, a fierce dedication to the rule of law, and a keen understanding of how the law affects the daily lives of the American people. It will also be someone who... knows that in a democracy, powerful interests must not be allowed to drown out the voices of ordinary citizens."¹³⁷ Notably, "empathy" did not appear on the President's list. Yet, one columnist echoed the thoughts of many others when he inquired, "In Court Nominees, Is Obama Looking for Empathy by Another Name?"¹³⁸

¹³⁷ Remarks by the President on the Retirement of Justice Stevens and on the West Virginia Mining Tragedy, April 9, 2010, available at <http://www.whitehouse.gov/the-press-office/remarks-president-retirement-justice-stevens-and-west-virginia-mining-tragedy>.

¹³⁸ Baker, *supra* note 4.

Assuming the President, in fact, intended to place the old message in a new bottle, his decision to banish the word "empathy" from it was wise. As explained in Part IV, "empathy," in the public's mind, evokes the qualities of affective or emotional empathy, such as partiality or sympathy, which most people agree should not be the bases of legal judgments. The connotation of "empathy" with such qualities is probably now so entrenched that the word is best avoided. The alternative, to redefine "empathy" to the public, must be discounted, having failed so miserably as a strategy in the initial public debate.

Yet, after deciding to abandon "empathy," President Obama substitutes for it phraseology that again evokes the qualities of affective empathy that made "empathy" so poisonous in the first place. Whether or not the President realizes that "a keen understanding of how the law affects the daily lives of the American people" and "know[ing] that in a democracy, powerful interests must not be allowed to drown out the voices of ordinary citizens" are code words for sympathy and partiality, the public assuredly does.

The problem is twofold. On the one hand, these words suggest that empathy [or at least some kind of judicial consideration] should be focused in one direction toward particular kinds of people—"ordinary citizens"—and not others—"powerful interests." That specialized focus, whatever it is, plainly offends Blind Justice, who does not pick favorites. But it equally offends the dignitary ideal of justice. It implies that some people are more entitled to the judge's ear and the judge's consideration than others. Compounding the problem is the President's failure to explain whose interests are "ordinary" and whose are "powerful." The absence of explanation breeds uncertainty because people may not fall neatly into one category or the other. For example, are the interests of an unemployed autoworker who belongs to the National Rifle Association and hunts to put additional food on the table "ordinary" or "powerful?" The lack of explanation also injects the possibility of partisanship. Are "ordinary citizens" people whom the President and his party like and "powerful interests" those whom they do not? The answers to such questions are really beside the point. That the President's remarks should even evoke such questions goes to the root of the problem: some people apparently are going to receive different judicial attention than others and this offends people's basic notions of fairness.

On the other hand, President Obama's phraseology is also problematic because it ties empathy to a specific judicial point of view about law and society, namely, that underdogs sometimes need a leg up. Although, as discussed above, any viewpoint linked to partiality is itself problematic, the broader concern now is whether empathy should be allied to *any* point of view at all. Here the umpire-judge, who has *no* point of view, comes into play. That the umpire-judge is a figment of people's imagination has no bearing on her power. She exists as a force with whom any proponent of empathy must reckon. Pretending that she is not a figure on the American landscape or ignoring her because she is not "real," as President Obama appears to have done, is a fatal error. The umpire-judge has captured the public's imagination and she does not countenance judicial ideology. Until she releases her hold on the public, an appeal such as President Obama's, which negates the umpire-judge and directly associates empathy with judicial ideology (and a highly controversial viewpoint at that), is doomed.

In fact, all evidence indicates that President Obama's second attempt to advance the cause of judicial empathy also failed. His remarks generated the same criticisms as before and few expressions of support in the media.¹³⁹ There appeared no perceptible groundswell of support.¹⁴⁰ In light of the dismal record of this and the President's prior endorsement of judicial empathy, one must conclude that his approach to instill public interest in the concept has reached a dead end.

If the promotion of judicial empathy is to make any inroads in terms of public acceptance, a change in the strategy and mindset of its proponents is required. Success will depend on whether or not the following considerations are taken to heart:

1) Blind Justice and the umpire-judge speak to innate human notions of fairness that are grounded in just world ideology's belief that the deserving shall receive their appropriate reward. Thus, because Blind Justice and the umpire-judge are embedded in the human psyche, they are

¹³⁹ See The Center for Building a Culture of Empathy, *Articles about the Role of Empathy to the Supreme Court and to Justice*, available at <http://www.humanityquest.com/projects/progressivevalues/empathy/References/Articles-Conservatives-E...> (In this compilation of articles in the media addressing empathy and the Supreme Court, articles criticizing empathy for the reasons noted above outnumber the several articles in its defense).

¹⁴⁰ Chris Edelson, *It's Ok for Supreme Court Justices to Be Human Beings*, July 5, 2010, available at <http://seminal.firedoglake.com/diary/57970> (noting that nobody spoke in defense of empathy at the confirmation hearings of Supreme Court nominee Elena Kagan).

as much a part of the human condition as are having two arms and two legs. Arguments by proponents of judicial empathy that Blind Justice needs to be reconfigured and the umpire-judge relegated to the trash-heap are, therefore, akin to assertions by, say, motion study experts that people's productivity would improve if they had three arms and their legs were discarded in favor of wheels. While, theoretically, having three arms and wheels might make people more productive, realistically, this is unlikely to happen. In the same way, it is unrealistic to assume that people are going to abandon conceptions of justice that are fundamental to the way they view the world. Just as motion study experts must accommodate their proposals for increasing productivity to the fact that most people have two arms and two legs, so must proponents of judicial empathy accommodate their appeals to the reality that Blind Justice and the umpire-judge are embedded in many people's mindsets and are not subject to change.

2) Affective or emotional empathy is antithetical to many people's fundamental conception of fairness. Just world ideology presupposes that people receive the treatment they deserve based on their actions.¹⁴¹ This creates a sense of order in a chaotic world, making life seem more predictable and subject to individual control.¹⁴² Affective empathy upsets that equation by adding elements other than conduct to the determination of what is just. When sympathy, neediness, and other considerations linked to affective empathy are taken into the consideration of justice, good conduct is no longer determinative of and, indeed, may not even factor into the outcome. Because that is not how the just world works, people view the process as unfair. Moreover, given how ingrained just world ideology is in the human mind and its prevalence in America, the sense of unfairness is likely to be deeply felt and widespread. People may even feel threatened.¹⁴³ Accordingly, resistance to proposals for judges to engage in affective or emotional empathy will probably be strong and sustained.

3) The American public so thoroughly equates the word "empathy" with affective or emotional empathy that the word itself has become toxic. Its use should be abandoned.

¹⁴¹ Lerner, *supra* note 11 at 11-12; Friedrichs, *supra* note 9 at 148.

¹⁴² Lerner, *supra* note 11 at 9 (linking the belief in a just world to the human desire for order and predictability).

¹⁴³ Cahn, *supra* note 26 at 24, discussed and quoted in Lerner, *supra* note 11 at 15 (noting that the sense of injustice activates the same physiological responses as the apprehension of aggression toward oneself).

4) Americans are more likely to be receptive to cognitive empathy, but with several important caveats. Proponents of judicial empathy should probably avoid describing cognitive empathy as the process of "stepping into another person's shoes." Because the phrase was employed frequently in the prior unsuccessful attempts to persuade the public to accept judicial empathy generally, it may, like the word "empathy," have become tainted with affective or emotional associations. Indeed, it would be reasonable for a layperson to mistakenly assume that "stepping into another person's shoes" encompasses feeling how that person feels and acting upon that feeling.

For these reasons, use of the scientific term "perspective taking" is preferable. It has not suffered from overexposure. Nor does it suggest an emotional connection on the part of the observer with the observed. Rather, "perspective taking" ties in smoothly with people's belief that judges should listen to people's arguments and take them under serious consideration. Its implication that people's perspectives are worth taking directly addresses the dignitary ideal of justice.

Proponents of judicial empathy must be careful, however, to describe perspective taking in strictly neutral terms. This will require proponents to shift away from, or at least refrain from expressing, their commonly-shared belief that judicial empathy is needed to redress an imbalance in the justice system that disadvantages society's outsiders and the powerless.¹⁴⁴ Judicial empathy of any kind will never gain public acceptance if it is perceived to give some people an advantage over others. Arguments for judicial empathy which take that route face immediate blockage by the specter of Blind Justice, who countenances no such favoritism. The public will accept perspective taking only if it is explained as a tool to be applied to all parties across the board to provide judges with a better understanding of everyone's arguments. Portraying perspective taking as an information-gathering tool of universal application plainly differentiates it from affective or emotional empathy with its many one-sided implications. This approach harmonizes perspective taking with Blind Justice because at its core lies the belief that justice is

¹⁴⁴ See Livingston & Murray, *supra* note 2 (quoting candidate Obama's remarks on empathy in which he asserts the importance of having judges who can empathize with the "young, teenaged mom" and the "poor or African-American or gay or disabled or old").

better served if the perspectives of all parties are explored equally and given the court's dispassionate consideration.

Finally, proponents of judicial perspective taking must refrain from implying that it serves any agenda other than promoting a better understanding by the judge of the position of each and every party before the court. In short, with a nod to the umpire-judge, it must be totally divorced from any social, cultural, or political ideology. Perspective taking must be seen simply as a way for the judge to more fully understand the parties' arguments before she applies the law to the facts of the case, not as a strategy the judge takes into the courtroom to achieve some pre-conceived goal.

5) Finally, the message must be intuitive, short, and framed in terms so people "get it" immediately. It should require no explanation, be devoid of abstraction, and touch what people most want to believe about judges and justice. It must create an "aha" moment. It must encourage people to stand in the shoes of the litigants appearing before the court.

Taking the above into account, President Obama might have said the following:

Think about the kind of judge you'd want to see on the bench if your case were being tried before the Supreme Court. Wouldn't you want a judge who, like Blind Justice, approaches each case dispassionately, with no preconceived agenda, someone who treats every party equally and with dignity? But Justice's blindness does not, of course, affect her ability to listen to and comprehend the arguments of the parties, which is critical to the balancing process from which her decision comes. Like Blind Justice, my nominee to the Court will be a judge who, before applying the law, listens to all the arguments and examines the case from each party's perspective so that, when the decision is announced, every party knows their case received full and equal consideration.

Conclusion

Judicial empathy can be presented to the public in a way they will accept and even embrace. Proponents of judicial empathy may argue that the approach suggested here is too limited in scope and downplays too many of the principles of redistributive justice on which their interest in empathy has often been based. They may also argue that it panders to popular

misconceptions of the way justice works, symbolized by Blind Justice and the umpire-judge, which are better discarded than accommodated. Several points can be made in response.

If empathy is, indeed, a valuable tool in judicial decision-making, surely it should be applied across the board to all litigants, regardless of their social status or power. Promoting empathy in terms of its universal application does not negate the fact that many litigants in our justice system have been disadvantaged by their outsider status. If the universal approach gains favor, they will benefit from it, perhaps even disproportionately so to the extent insiders and the powerful have previously benefited from judicial empathy at their expense. Proponents who associate judicial empathy with redistributive justice must ask themselves whether making a stand is more important than achieving results. Realistically, the universal approach presents the greatest opportunity for judicial empathy gaining public favor.

Admittedly, the scope of the approach advocated here is limited to perspective taking, owing, in part, to the public's evident rejection of judicial empathy when it is defined in affective or emotional terms. Many proponents of judicial empathy probably embrace it because of their own affective empathy with individuals who traditionally have not received equal consideration from the justice system.¹⁴⁵ That does not mean, however, that perspective taking should be considered second-best. It is a different aspect of empathy, but one that, according to the scientific literature, may positively affect one's understanding of others.¹⁴⁶ Nor does the concentration upon perspective taking imply it is wrong to care about or sympathize with persons whom one believes the justice system has disadvantaged. At most, it suggests that care and sympathy is better directed in other avenues than as the basis of judicial decision making.

Another possible limitation of the approach taken here is its conscious avoidance of presenting judicial empathy as either a panacea for the ills of the justice system or an opener of minds. Judicial empathy is not a magic bullet. Some people are more prone to empathize than

¹⁴⁵ See, e.g., Cain, *supra* note 5 at 1954 (speaking sympathetically of the back-stories of gay and lesbian people that were not heard by the Supreme Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986)); Lynn Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574, 1629 (1987) (addressing the unvoiced stories of women facing unwanted pregnancies in the context of the Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁴⁶ Galinsky, *supra* note 93 at 379 (reporting that perspective taking led to creative solutions in negotiations).

others.¹⁴⁷ Not everyone is equally good at it.¹⁴⁸ Indeed, the powerful, which include judges, are often particularly poor empathizers.¹⁴⁹ Thus, while empathy may be a tool to better understanding, it is not a sure one.

Finally, even though Blind Justice and the umpire-judge misrepresent the realities of the judicial process, both are popularly identified with something unequivocally good: fairness. Allying these symbols to the cause of judicial empathy greatly increases its public acceptability. If the public accepts perspective taking, it is more likely to be employed in the courtroom where, in reality, it may promote fairness. In prior attempts to promote judicial empathy, efforts to expose Blind Justice and the umpire judge as myths have diluted the message and adversely impacted public receptiveness to it. If such exposure is desirable, it is best undertaken as an independent project rather than risk muddying the waters.

In sum, the cause of judicial empathy can be resurrected and sold successfully to the public if it advocates that perspective taking be performed in a universal manner with no other agenda than to promote better understanding of the arguments of the parties. Although this approach may not be all that President Obama and other proponents of judicial empathy hoped for, it is the one most likely to garner public acceptance and create a positive impact.

¹⁴⁷ See Ickes, *supra* note 63 at 603-04; Eisenberg & Morris, *supra* note 51 at 105-106 (noting people have different tendencies to engage in empathy)

¹⁴⁸ *Id.*

¹⁴⁹ Adam Galinsky et al, *Power and Perspectives Not Taken*, 17 Psychol. Sci. 1068, 1068 (2006) ("[P]ower is associated with increased difficulty in taking other individuals' perspectives. Individuals primed with power anchor too heavily on their own vantage points and demonstrate reduced accuracy when assessing the emotions and thoughts of others").