

S SAVANNAH LAW REVIEW

VOLUME 4 | NUMBER 1

DIVERSIFYING THE LAW THROUGH AN ALL-MINORITY BENCH

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*Our minorities alone are in a position to know what the fathers of our
democracy were talking about.¹*

*Balance: verb. To equalize in number, force, or effect; to bring into
proportion.²*

I. Introduction

In his confirmation hearing before the Senate, now Chief Justice Roberts famously analogized the job of a Supreme Court Justice to an umpire who calls “balls and strikes.”³ Conversely, Justice Sotomayor spent much of her confirmation hearing having to defend a lecture she gave several years earlier discussing how she

* J.D., Savannah Law School. This Note would not have been possible without Caprice L. Roberts, Faculty Advisor for *Savannah Law Review*, and Elizabeth Berenguer, my Faculty Note Mentor, each of whom provided incredible mentorship, support, and guidance along the way. For invaluable help, feedback, and insight, I thank the following: James Binnall, Luke A. Boso, Vinay Harpalani, Lauren C. Niemiec, Chris Ogolla, and Andrew M. Wright. Thanks to Amanda Fisher, my Note Editor. A special thanks to those who offered feedback at the 2015 Annual Meeting of the Association for the Study of Law, Culture & the Humanities. Additional thanks to *Savannah Law Review* for the opportunity to present an earlier version of this Note at the 2015 Notes Roundtable, and to receive the helpful comments and insights from those in attendance.

¹ SARAH PATTON BOYLE, *THE DESEGREGATED HEART: A VIRGINIAN'S STAND IN TIME OF TRANSITION* 175 (4th ed. 1964).

² *Balance*, BLACK'S LAW DICTIONARY 128 (10th ed. 2014).

³ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be the Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) [hereinafter *Roberts Confirmation Hearing*] (statement of John G. Roberts, Jr., Chief Justice of the United States).

brought her “wise Latina” perspective into her judging.⁴ Both examples reflect the common belief that judges are, or should be, “neutral” when they interpret laws.⁵ What this common belief masks is that neutrality is a myth. Judges are human and, as cognitive learning theory demonstrates, humans learn and make decisions based on previously acquired knowledge, learned from their unique life experiences. Empathy will fill many of the gaps between the lived-experiences of the judge and those of the parties before her, but it can only go so far.⁶ In order to empathize with a party’s lived experience, a judge must first recognize that the party’s lived experience differs from her own. Even the most empathetic judge will not be able to identify with an individual if she does not recognize that differences exist.

Since the founding of this great nation, and since the creation of the Supreme Court with Article III of the Constitution, 113 Justices have sat on its bench.⁷ Of those 113 Justices, 107 have been white, ostensibly straight men.⁸ To put that in perspective, if you were to add the time each justice served on the Supreme Court, white, straight men have served for 1763 years. That is one and three-quarters millennia of service crammed into the roughly two and one-third centuries since the Founding. If you add in the time straight men of color have served—a mere 48 years—men have served on the Supreme Court for 1811 years. In that same time, women have served for fifty-eight years—straight white

⁴ *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 7 (2009) [hereinafter *Sotomayor Confirmation Hearing*].

⁵ Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 617-18 & n.287 (2007) (citing Bradley W. Joondeph, *Law, Politics, and the Appointments Process*, 46 SANTA CLARA L. REV. 737, 737 (2006)) (“discussing the notion of justices as ‘neutral arbiters of constitutional disputes, objectively applying the law’”).

⁶ See *infra* Part IV.

⁷ See Susan M. Liss, *Foreword to CIARA TORRES-SPELLISCY ET AL., IMPROVING JUD. DIVERSITY* (Brennan Center for Justice, 2d ed. 2010) (discussing Justice Sotomayor’s confirmation hearing and confirmation in 2009, at which time, “of 111 Supreme Court Justices in the Court’s history since 1789, 106 have been white men”). Since Justice Sotomayor’s confirmation, Justice Kagan and Justice Gorsuch have each joined the Court, bringing the total number of justices to 113. While Justice Kagan’s addition to the court did not affect the total number of straight, white men, Justice Gorsuch’s arrival brought it to 107.

⁸ See *id.* Justice Gorsuch’s addition to the Court brought the total number of straight, white men to 107. See *id.* Some have speculated as to the sexual orientation of certain Justices. See, e.g., JOYCE MURDOCH AND DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT*, 19-20 (2001); Jeffrey Rosen, *The Hopeless Moralist*, N.Y. TIMES, Nov. 2, 1997, § 7, at 12; ANDREW L. KAUFMAN, CARDOZO 68-69 (1998). Still, no justice has ever identified himself or herself in any way other than as heterosexual, and no incontrovertible evidence has been uncovered to the contrary. See, e.g., MURDOCH & PRICE, *supra*, at 19-20; KAUFMAN, *supra*, at 68-69. This Note recognizes the normative pitfalls of assuming an individual is “straight until proven gay,” as well as the possible witch-hunt that follows such an assumption, but rather than engaging in speculation, and for the sake of this argument, this Note takes the justices at their word regarding their sexuality. Additionally, this Note uses the term “straight” to mean heterosexual, and does so not as a pejorative, but rather as a less clinical and less cumbersome term.

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women for fifty-two years, and a straight Latina woman for six years. White justices have spent 1815 years on the Supreme Court, compared to the fifty-eight years for which racial minority justices have served on the bench. Women and men of color have given the Supreme Court 106 total years of service, which is one-seventeenth of the 1763 years that white men have served. Straight justices have served on our Supreme Court for 1869 years, while sexual minority justices have never served.⁹

Now imagine, instead, a Supreme Court consisting entirely of lesbian and bisexual women of color. Putting aside any questions of political feasibility or issues related to their appointment or confirmation, we can assume for these purposes that all of these justices are well qualified, have been vetted, and were appointed and confirmed according to constitutional requirements. Would this compilation of the Court present any problems? For whom? And why? After all, justices are supposed to be neutral arbiters. These nine highly qualified justices would fulfill their duty and oath to uphold the Constitution, and in so doing, would merely apply the facts of the case before them to the law.

The trouble with this system—or perhaps the beauty of it, depending on one’s perspective—is that judges and justices are human. Each justice’s lived experience will color her perspective and the way she views the facts of every case. She cannot divorce her worldview from her judgments. Empathy can help a justice to understand the difference between her own lived experiences and those of the parties before her, but will only bridge certain gaps. Where neither the justice nor the parties before her recognize or see the difference in their respective lived experiences, empathy will not help a justice see the limits of her own worldview. Empathy cannot bridge a gap neither party knows exists.

Because of this limitation on the helpfulness of empathy, the Supreme Court needs justices who are more likely to share or understand the lived experiences of the parties before the Court. To date, the justices serving on the Court have overwhelmingly come from one demographic group. The Court, thus, needs to dramatically increase its diversity to widen its perspective. Adding racial, gender, and sexual minorities to the bench will exponentially increase the likelihood that at least one justice will share or understand the lived experiences of the parties before the Court. Even when a justice, herself, does not share the lived experiences of parties before the Court, increasing the commonalities between the justice and the parties—including race, gender, and sexuality—

⁹ See *supra* note 8, and accompanying text. That so many have speculated as to the sexual orientation of different justices through the years demonstrates the novelty of the concept, even now in a post-Defense of Marriage Act (DOMA) (The Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419, enacted Sept. 21, 1996, 1 U.S.C. § 7 and 28 U.S.C. § 1738C), post-Don’t Ask, Don’t Tell (DADT) (The Don’t Ask, Don’t Tell Act, Pub. L. 103-160, 10 U.S.C. § 654, enacted Nov. 30, 1993), post-*Windsor* (U.S. v. Windsor, 133 S. Ct. 2675 (2013)), post-*Obergefell* (*Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)) society, that an LGBT person would serve on the Highest Court, not to mention an openly-LGBT person. The perceived scandal or intrigue of the very idea of a lesbian, gay, bisexual, or transgender justice better demonstrates the history of entirely ostensibly straight Supreme Court Justices than any scholarly source, or string of scholarly sources, could.

increases the likelihood that the justice will understand the parties' experiences and see how they differ from her own. Once a justice recognizes the gap in lived experiences between herself and the parties before her, empathy can bridge the gap.

Turning back to the imagined Court with nine lesbian and bisexual women justices of color, now imagine a white, straight man whose case is before this Court. Imagine that he has no doubts as to their qualifications, and has great respect for the justices. He knows that each Justice has taken an oath to uphold that Constitution, and he trusts that they will do so in good faith. He has every reason to believe that these Justices are free from outside influences, and that they have no stake in the outcome of the case beyond their sense of duty to get it right. Still, he is uncomfortable. He worries that these Justices—nine lesbian and bisexual women of color, wearing black robes and sitting all in a row—have nothing in common with him. He worries they may not be able to see his perspective or understand his worldview. These Justices, he fears, may not have experienced, or even be able to imagine or empathize with, the circumstances in his case or leading up to it. Compounding this white, straight man's worries is the fact that the opposing party in his case is also a lesbian woman of color. So, he thinks, not only will these Justices struggle to identify with his perspective, not only will they have trouble imagining his experiences leading up to his case, but they also will easily identify with his opponent. They will have no trouble, he fears, understanding the perspective and experiences of his opposing party.

He may be right. Still, the white, straight man can take some amount of comfort in knowing that his perspective is still represented, despite the demography of the current Court. After all, the current Justices still owe deference to precedent—a precedent established by an overwhelmingly white, straight, male judiciary of the past—through *stare decisis*. In addition, the Court is often interpreting statutes created by an overwhelmingly white, straight, male Congress or state legislature.¹⁰ The Court will owe deference to Congress and

¹⁰ Congress is currently the most diverse it has ever been in history, and yet is still eighty-one percent white, which is vastly disproportionate to the sixty-two percent white general population. Kristen Bialik & Jens Manuel Krogstad, *115th Congress Sets New High For Racial, Ethnic Diversity*, PEW RESEARCH CENTER (Jan. 24, 2017), <http://www.pewresearch.org/fact-tank/2017/01/24/115th-congress-sets-new-high-for-racial-ethnic-diversity/>. Women, too, make up a larger share of the Congress now than ever before, but with only 104 members of the House and Senate, women still only comprise nineteen percent of the federal legislative body, compared to fifty-one percent of the general population. Gabrielle Levy, *the 115th Congress by Party, Race, Gender*, U.S. NEWS & WORLD REPORT (Jan. 5, 2017, 2:21 PM), <http://www.usnews.com/news/politics/slideshows/the-115th-congress-by-party-race-gender-and-religion?slide=4>. The current Congress consists of seven openly gay or bisexual legislators, making up approximately 0.13% of the House and Senate. Christina Marcos, *115th Congress Will Be Most Racially Diverse In History*, THE HILL (Nov. 17, 2016, 6:00 AM), <http://thehill.com/homenews/house/306480-115th-congress-will-be-most-racially-diverse-in-history>. Developing an accurate census of the general LGBT population is difficult for a variety of reasons. One survey released by the Centers for Disease Control and Prevention estimates 3.4% of people identify as a sexual minority other than straight. Eugene Volokh, *What percentage of the U.S. Population is Gay, Lesbian or Bisexual?*, WASH. POST: THE VOLOKH CONSPIRACY (July 15, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/15/what-percentage->

state legislatures, though to varying degrees, depending on the issue presented in the case.¹¹ Also, with the exception of the very rare instances in which the Supreme Court has and exercises original jurisdiction, the lower courts—whose judges are also still overwhelmingly white, straight, and male¹²—will already have made factual and legal determinations. Even when the Supreme Court reviews a case *de novo*, it still owes deference to the lower court’s factual determinations.¹³ Accordingly, even if the Justices presently sitting on the Court do not share the white, straight, male perspective, the deference the Court owes to precedent, legislatures, and lower courts serves to ensure the white, straight, male perspective is represented in the Court’s decisions.¹⁴

Given the demography of the Supreme Court throughout its history, straight, white men have decided nearly every case, and answered nearly every constitutional question in our nation’s history. White, straight men, almost

of-the-u-s-population-is-gay-lesbian-or-bisexual/. In state legislatures, women make up twenty-five percent, and racial minorities make up an average of eighteen percent (although the concentration of people of color in Southern State Houses is greater than it is elsewhere). Karl Kurtz, *Who We Elect: The Demographics of State Legislatures*, NAT’L CONF. OF STATE LEGISLATURES (Dec. 1, 2015), <http://www.ncsl.org/research/about-state-legislatures/who-we-elect.aspx>. According to Dr. Gossett at California State University, Sacramento, lesbian, gay, and bisexual representatives made up varied proportions of 2014 state legislatures: 0% in 12 states, 0.1–0.9% in 6 states, 1–1.9% in 20 states, 2–2.9% in 2 states, 3–3.9% in 5 states, 4–4.9% in 2 states, and 5–5.9% in 3 states. Charles W. Gossett, *Lesbian, Gay, and Bisexual State Legislators in the United States: Developing a New Database* (April 17, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2450622.

¹¹ See generally Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921) (discussing the relationship between the legislature and the judiciary in the making and evolving of the law). *But see* Roberts, *supra* note 5, at 583 (quoting *United States v. Lopez*, 514 U.S. 549, 611 (1995) (Souter, J., dissenting)) (exemplifying an instance when the Court did not defer to the legislature, but where, “according to the dissent, . . . the Court should defer to such rationally based legislative judgments in accordance with the ‘paradigm of judicial restraint’”).

¹² See, e.g., Liss, *Foreword to TORRES-SPELLISCY*, *supra* note 7 (referencing the “latest data available from the American Judicature Society, [which found that] 27 State Supreme Courts are all white and two are all male”).

¹³ Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 24 (1995) (citing *Fed. R. Civ. P. 52(a)*, then *Maine v. Taylor*, 477 U.S. 131, 145 (1986)) (“Civil Rule 52(a) requires facts found by the court to be reviewed under a ‘clearly erroneous’ standard. Although the Federal Rules of Criminal Procedure have no provision similar to Rule 52(a), the Supreme Court has said that the considerations underlying that rule apply with full force in a criminal context.”).

¹⁴ Not to mention the fact that the white, straight, male perspective is overwhelmingly represented in every other facet of society. Each of these Justices will likely have attended an undergraduate institution and law school with a majority straight, white student body and faculty. They will likely have practiced as attorneys, judges, or taught as faculty in a legal field that is also overwhelmingly white, straight, and male. The Justices will continue to be exposed to the white, straight, male perspective quite often through television, movies, and media. As such, even when the white, straight, male perspective is not directly represented on the Court through the Justices, themselves, or indirectly through the deference the Court owes to other institutions, past and present, empathy will likely be able to bridge the gaps between the experiences of the Justices and the experiences of the white, straight men who are parties to the case before the Court.

exclusively, have created the precedent to which our current and future justices owe deference. Because of the nature of *stare decisis*, as well as the demography of the legislatures and the lower courts, combined with the importance one's own lived experience plays in her decision-making and ability to empathize, the Court should not aim to ensure neutrality from each individual justice—which is impossibly untenable—but rather to achieve a genuine and enduring balance of perspectives among the collective justices. This Note imagines a fundamental shift in the demography of the Bench from one extreme to the other—a Supreme Court consisting entirely of justices belonging to racial, gender, and sexual minorities. A dramatic, polar shift initially may be the best way to make up for the unimaginably disparate minority representation on the Highest Court. Perhaps once the Court shifts to consist of nine minority Justices, it will eventually achieve a balance such that it adequately represents the varying perspectives of the populace. Once this shift achieves a balance of perspectives, the demography of the Court can then partially shift back, such that the demography of the Supreme Court mirrors that of the populace.

II. Neutrality

The idea that judges are, or should be, neutral is a popular conception. From judges and justices¹⁵ to scholars,¹⁶ and from politicians¹⁷ to pundits,¹⁸ *judicial neutrality* has become a popular notion, and images such as the “Judge as Umpire” have taken hold in our political vernacular.¹⁹ Those neutrality advocates who assert that judges are to remain impartial and that the judiciary is to remain independent are reiterating foundational, constitutionally prescribed tenants of the judicial branch.²⁰ A judge must be impartial, meaning that she must not have a personal stake in the outcome of any case before her. The federal judiciary must also remain independent, meaning judges must not be answerable to the public in the same way as are members of the other two

¹⁵ *Interview: Justices Stephen Breyer & Anthony Kennedy*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html> (last visited May 21, 2016).

¹⁶ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

¹⁷ *Id.*

¹⁸ *Id.* Roberts, *supra* note 5, at 617.

¹⁹ Roberts, *supra* note 5, at 616, n.282 (citing *Sotomayor Confirmation Hearing*, *supra* note 4 (statement of Sen. Sessions) (“What we must have, what our legal system demands, is a fair and unbiased umpire, one who calls the game according to the existing rules and does so competently and honestly every day.”); see also 155 CONG. REC. S8823 (daily ed. Aug. 5, 2009) (statement of Sen. Coburn) (“The American people expect a judge to be a neutral arbiter who treats all litigants equally.”); Alberto R. Gonzales, Fmr. Att’y Gen., Prepared Remarks of Attorney General Alberto R. Gonzales at the American Enterprise Institute (Jan. 17, 2007), http://www.justice.gov/archive/ag/speeches/2007/ag_speech_070117.html, cited in Roberts, *supra* note 5, at 617–18 (exemplifying Chief Justice Roberts’s famous umpire analogy as “terms all Americans could understand” to stress the importance that judges “decide[] cases based on neutral principles”).

²⁰ U.S. CONST. art. III, § 1.

political branches.²¹ Other advocates for judicial neutrality, however, advocate for more than independence and impartiality. *Neutrality* in this sense—that a judge divorce herself from her lived experiences and her personal sense of justice when ruling—is neither possible nor desirable in judging.

A. Independence and Impartiality

An independent judiciary and impartial judges are necessary, and indeed, constitutionally mandated. After all, the Framers designed the federal judiciary to be independent.²² Unlike the other two political branches, the judiciary is isolated by way of lifetime appointment, fixed salary, and impeachment only for cause.²³ Because the Supreme Court is tasked with interpreting the law,²⁴ the justices shape individual rights, particularly those of discrete and insular minorities.²⁵ Because the implications of these decisions and interpretations of the law reach far beyond the parties before the Court, setting precedent for future cases, this independence from politics is imperative in order for justices to remain impartial.²⁶

Professor Caprice Roberts draws from Peter Webster and Erwin Chemerinsky to define judicial independence as both institutional and decisional.²⁷ Institutional independence refers to the Judicial Branch as a whole, as independent and distinct from the other two political branches, and comports with the value of the Separation of Powers.²⁸ Decisional independence refers to the individual judges' and justices' need to decide cases free from external pressures or influences from persons or organizations.²⁹ Impartiality, then, folds

²¹ Note that many state judges are elected, and thus not independent in the same way federal judges are. State judges still must remain impartial in their individual cases, however, as a Due Process requirement of the Fifth and Fourteenth Amendments.

²² U.S. CONST. art. III, § 1.

²³ *Id.*

²⁴ *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).

²⁵ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”); Stephen Shapiro, *The Judiciary in the United States: A Search for Fairness, Independence, and Competence*, 14 GEO. J. LEGAL ETHICS 667, 667 (2001) (“Protecting the constitutional and civil rights of minorities, of criminal defendants, and of other unpopular groups and causes requires . . . the ability to make difficult and unpopular decisions without fear of being removed from office.”).

²⁶ Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 133 (2004) (quoting THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 1990)); see also Shapiro, *supra* note 25, at 669.

²⁷ Roberts, *supra* note 26, at 132–33.

²⁸ *Id.* at 133.

²⁹ *Id.* at 177.

into independence, where it reflects the need for cases to be decided based on their merits rather than outside influences.³⁰

This judicial independence, both institutional and decisional, is not merely a value or an ideal, but a constitutionally prescribed requirement.³¹ Article III of the U.S. Constitution establishes the institutional independence by way of lifetime appointments and salaries.³² The Fifth and Fourteenth Amendments establish the decisional independence and impartiality by way of the Due Process Clauses, providing for the fundamental fairness of the trial, complete with a judge without a stake in the outcome of the case.³³ Judicial independence and impartiality are thus fundamental to our judicial system and our Constitution.

B. The Myth of Neutrality

*“We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.”*³⁴

In addition to judicial independence and impartiality, many scholars, politicians, and even judges themselves, urge the importance of neutrality.³⁵ Although some may be using the term *neutrality* in the way this Note and the above scholars use *impartiality*, often these advocates of *neutrality* call for something that goes beyond independence and impartiality. Where independence or impartiality shield decisions from undue influence relating to the justice’s own personal relationship to the parties or issues in a case, a *neutrality* advocate seeks to shield decisions from the justice’s own personal values or worldview.³⁶

Justice Scalia for example, made clear that he believed that justices do not, or at least should not make value choices, but instead “should discover the answers in external sources.”³⁷ Nevertheless, even Justice Scalia himself was seemingly unable to divorce his own values from his decision-making processes. For example, Erwin Chemerinsky³⁸ contrasts Justice Scalia’s opinions in

³⁰ *Id.* The late Justice Scalia similarly defined judicial impartiality in *Republican Party of Minnesota v. White*, 536 U.S. 765, 775–78 (2002). The “root meaning” of impartiality, he wrote, “is the lack of bias for or against either party to the proceeding.” *Id.* at 775. Impartiality in “the traditional sense,” as Justice Scalia called it, “assures equal application of the law.” *Id.* at 765, 776.

³¹ *Id.*

³² U.S. CONST. art. III, § 1.

³³ U.S. CONST. amend. V.; U.S. CONST. amend. XIV.

³⁴ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 13 (1921).

³⁵ *See, e.g.*, notes 16–19 and accompanying text.

³⁶ CARDOZO, *supra* note 34, at 13.

³⁷ Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 389 (2000); *see also* CSPAN interview with Justice Scalia transcript (June 19, 2009) (explaining that judges “don’t sit here to make the law, to decide who ought to win. We decide who wins under the law that the people have adopted.”).

³⁸ Chemerinsky, *supra* note 37, at 389.

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National Treasury Employees Union v. Von Raab,³⁹ and in *Vernonia School District v. Acton*.⁴⁰ In *Von Raab*, Justice Scalia vehemently dissented to the Court's decision to allow random drug testing for persons applying for a position or promotion within the United States Customs Service.⁴¹ He stressed that the Fourth Amendment required "individualized suspicion" and that a blanket approval of random drug testing runs counter to the purpose of the protection against unreasonable searches and seizures.⁴²

In direct contrast, Justice Scalia wrote the majority opinion in *Acton* in which the Court allowed random drug testing of high school athletes.⁴³ As Chemerinsky points out, the different outcome of these similar cases hinged on the minimal expectation of privacy for high school students and the Court's recognition of the schools' interest in combatting drug abuse.⁴⁴ Chemerinsky contrasts the two opinions noting that although in *Von Raab*, Justice Scalia justified his dissent on his originalist interpretation of the Fourth Amendment, in *Acton*, the Justice "unquestionably [made] a value judgment, not a conclusion based on the original meaning of the Constitution."⁴⁵

Whether or not a justice will ever admit it, value judgments play a role when deciding cases, particularly cases concerning constitutional questions. Legal Realists acknowledged long ago, and now it is "virtually universally accepted," that "Justices deciding constitutional cases inevitably must make value choices."⁴⁶ Constitutional cases must be decided by first answering whether the government's action is justified by a sufficient purpose, and this determination as to whether the state interest is legitimate, important, or compelling "inescapably requires a value choice by the Justice."⁴⁷

Our judicial system evolved from a tradition of belief that judges were handing down the word of a god, to a belief that judges were handing down the word of a king, who himself, handed down the word of a god.⁴⁸ Today, however, in our modern, secular system, "there is no escape from the fact that our judges are human."⁴⁹ Justice Cardozo described the "stream of tendency" within each person as having a current, "which gives coherence and direction to thought and action."⁵⁰ Cardozo candidly noted:

³⁹ Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 680-87 (1989) (Scalia, J., dissenting).

⁴⁰ Veronia Sch. Dist. v. Acton, 515 U.S. 646, 648-66 (1995).

⁴¹ Chemerinsky, *supra* note 37, at 394, n.50 (citing *Von Raab*, 489 U.S. at 680-87 (Scalia, J., dissenting)).

⁴² *See id.* at 394 (citing *Von Raab*, 489 U.S. at 680-81 (Scalia, J., dissenting)).

⁴³ *Id.* (citing *Acton*, 515 U.S. at 648-66).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1905 (1988).

⁴⁹ *Id.*

⁵⁰ CARDOZO, *supra* note 34, at 12.

Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, . . . which, when reasons are nicely balanced, must determine where choice shall fall.⁵¹

Justice Cardozo acknowledged that judges are human, and, as humans, they have unrecognized and unnamed forces that “tug[] at them.”⁵² These forces are the product of each individual’s lived experiences and inherited traits, which inform the choices and decisions the judge makes.⁵³ Judges, just like everyone else, bring their life experiences, their “mental backgrounds,” into every decision and “every problem.”⁵⁴

Supreme Court Justices—although society holds them on high, in their black robes, sitting all in a row, staring down at those before them—are human.⁵⁵ When examining their decisions and the history of the Court, we must not forget their human fallibility, despite society’s entrusting them with the honor and responsibility of answering, with some degree of finality, the most challenging and nuanced legal and Constitutional questions.⁵⁶ All humans make decisions every day in much the same way, though our individual processes may differ. We weigh our options, ultimately choosing one path or the other, perhaps with some degree of compromise. Humans do not make these decisions in a vacuum, but instead take prior knowledge, experiences, and worldviews into account.⁵⁷ We view each new fact or experience through the lens colored by our prior knowledge and experiences, and the subsequent choices and decisions we make are inextricably bound to that framework.⁵⁸

Research in the field of implicit bias shows that “nearly all humans stereotype others unconsciously even when they profess tolerance

⁵¹ *Id.*

⁵² *Id.*

⁵³ *See id.*

⁵⁴ *Id.* at 13.

⁵⁵ ERWIN CHERMERINSKY, *THE CASE AGAINST THE SUPREME COURT* (2014); CARDOZO, *supra* note 34, at 168 (“I do not doubt the grandeur of the conception which lifts [judges] into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. None the less, . . . [t]he great tides and currents which engulf the rest of men do not turn aside in their course, and pass the judges by.”).

⁵⁶ By noting their fallibility, this Note does not mean to suggest that any particular justice or decision of the Court is or has been faulty, but rather that mistakes have been made and some decisions have been demonstrably incorrect, as evidenced by their being subsequently overturned. *See, e.g.*, *Plessy v. Ferguson*, 16 U.S. 537 (1896), *overruled by* *Brown v. Board of Education*, 347 U.S. 483 (1954); *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁵⁷ *See* JEROME FRANK, *LAW AND THE MODERN MIND* 124 (1930) (explaining that a judge’s opinions include “elaborate explorations of the background factors in his personal experience which swayed him in reaching his conclusions. For in the last push, a judge’s decisions are the outcome of his entire life-history.”)

⁵⁸ *See, e.g., id.*; KARL N. LLEWELLYN, *THE BRAMBLE BUSH* (1930).

consciously.”⁵⁹ Humans, including judges and justices, “as perceivers, [] may misperceive, even though [they] honestly believe [they] are fair and just.”⁶⁰ Professor Marybeth Herald explains that as humans, “[o]ur stereotyping mechanism is not easily turned off, even when we want to pull the plug on it.”⁶¹ Because justices are human, they, too, see facts through a lens colored by their own knowledge and life experiences and may be unable to turn off their stereotyping mechanism, and they, too, are inextricably bound to that framework.⁶²

1. Hilary Putnam’s Value Neutrality

Hilary Putnam divides values into two subcategories: ethical values and epistemic values.⁶³ Ethical values are those relating to one’s own morals, while epistemic values are those related to one’s philosophy regarding methodology and process, or when applied to the law, values related to judicial or jurisprudential philosophy.⁶⁴ Putnam discusses value-neutrality within different scientific fields and explains that many scholars and scientists believe that although epistemic value judgments are permissible—and indeed, perhaps, impossible to avoid—ethical value judgments have no place in science.⁶⁵ That is to say, when performing research, one may allow personal methodological judgments and preferences to affect the work, but should remain ethically neutral, and should not allow personal, moral, or substantive preferences or biases to affect the work.⁶⁶ To apply this in the legal context, a judge may allow

⁵⁹ TORRES-SPELLISCY, *supra* note 7, at 11.

⁶⁰ *Id.* (quoting Jerry Kang and Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1090 (2006)).

⁶¹ *Id.* (quoting Marybeth Herald, *Deceptive Appearances: Judges, Cognitive Bias, and Dress Codes*, 41 U.S.F. L. REV. 299, 302 (2007)).

⁶² *Id.*

⁶³ HILARY PUTNAM, *THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS* (2002).

⁶⁴ *Id.* at 31–34.

⁶⁵ *Id.*

⁶⁶ *Id.* Value-neutrality may even be impossible even within the natural sciences, where one’s personal morals, ethics, and worldview inherently affect the initial question that is asked. For example, a researcher’s ethical value judgments will influence whether she seeks to answer the question, “Does carbon have any effect on the atmosphere?” versus the question, “To what extent does carbon affect the atmosphere?” The framing of these two questions, and even the decision to research atmospheric carbon at all, reflects a value judgment on the part of the researcher and may ultimately affect the result. Once the natural scientist frames the question, however, her research process can and should remain value-neutral.

A biologist studying cells, for example, cannot avoid making a judgment as to the morality of using stem cells in her research. If she is morally opposed to the use of human stem cells in research, she may choose to use a different methodology or field of research. A biologist choosing to study human stem cells, however, has made a value judgment that the use of stem cells is morally permissible. The biologist’s methodological choice, whether to use human stem cells, is inextricably linked to her epistemic value judgment, which will ultimately affect her work.

personal jurisprudential preferences to influence the decision or the lens through which the judge views the case, but a judge must not allow personal morals or worldviews to influence the substantive decision.⁶⁷

In the social sciences, unlike in the natural sciences, ethical value judgments affect not only the question asked, but also every step of the research process, and value-neutrality is therefore impossible.⁶⁸ As with natural sciences, the question presented is intrinsically linked to the research, because a researcher's ethical values will affect the question asked, which will, in turn, affect the conclusion reached.⁶⁹ Beyond the question presented, ethical value judgments occur throughout the process in social sciences, affecting the research performed and the conclusion drawn therefrom.⁷⁰ Using the framework of economics as an example: Because a healthy economy is defined as one that promotes the well-being of people, and what constitutes the well-being of people is a matter of ethical debate, any researcher seeking to achieve *economic optimality* is invariably making an ethical value-judgment as to her own definition of the term.⁷¹ Further, "judgments of relevance and judgments of warranted acceptability are not independent. . . . What [researchers] deem relevant [to research, to include as variables, to control for, etc.,] will affect what they will end up determining to be true."⁷² Because the research is riddled with ethical value judgments, value-neutrality is impossible within the framework of social science research.

Applied to the law, this theory works in much the same way: Even if a Justice were able to isolate all ethical or moral preferences from the facts of a case, the way the Justice frames the question presented is inextricably linked to her own ethical and moral value judgments, which inevitably affect the answer to that question.⁷³ The Justice's framing of the question presented is rife not only with *epistemic* value judgments—judicial philosophy—but also with *ethical* value

In contrast, the biologist may not allow value judgments to affect her research beyond the initial question and methodology decisions. She may not fabricate data, for example, based on an ethical value judgment. The biologist who is morally opposed to the use of human stem cells may choose not to use them in her research, but she cannot publish data she collected using hair follicles and formulate a conclusion that the hair follicle data is superior to that of stem cells, having only studied hair follicles. Once the natural scientist frames the question and determines the methodology, value judgments have no place in the research, itself.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 49–56.

⁷² Antoine C. Dussault, Presentation at colloque de la CSHPS, Carleton University: Putnam on Science Value-Neutrality (May 28, 2009).

⁷³ PUTNAM, *supra* note 63, at 69–72. See, e.g., Lawrence v. Texas, 539 U.S. 558 (2003). Justice Scalia's dissent frames the question presented in a fundamentally different way from the majority opinion written by Justice Kennedy. These two different framings yield two opposing results, though each is logically sound and—arguably—value-neutral in their analysis of the facts. *Id.* at 562–79; *id.* at 586–605 (Scalia, J., dissenting).

judgments, making value-neutral judging an impossibility.⁷⁴ Further, what any Justice “deem[s] relevant”—to, for example, grant certiorari, to find actual injury ripe for review for justiciability purposes, or on which to defer to the lower courts, or even sometimes which findings of fact to accept and which to reject—“will affect what [the Justice] will end up determining to be true.”⁷⁵ Because value judgments shape not only the larger question asked, but also each intermediate question asked, including how to view each determination of law and finding of fact, the outcome of any particular case is inextricably linked to each individual Justice’s value judgments.

2. Neutrality Politics

Neutrality, unlike independence or impartiality, is not constitutionally prescribed nor realistically possible.⁷⁶ The idea of neutrality is the idea that a judge can decide a case in a vacuum, divorced from personal experience, opinion, or worldview.⁷⁷ This idea of judicial neutrality is a myth. Judges are human and cannot simply extract their humanity when they put on their black robes.⁷⁸ Judges and justices are not automatons, nor do we want them to be.⁷⁹

In this way, the term “neutrality” is a sound bite, a political talking point. Former Attorney General Alberto Gonzales praised these “terms all Americans

⁷⁴ See *Gonzales v. Carhart*, 550 U.S. 124, 186–87 (2007) (Ginsburg, J., dissenting) (“The Court’s hostility to the right *Roe* and *Casey* secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label ‘abortion doctor.’ A fetus is described as an ‘unborn child,’ and as a ‘baby,’; second-trimester, previability abortions are referred to as ‘late-term,’; and the reasoned medical judgments of highly trained doctors are dismissed as ‘preferences’ motivated by ‘mere convenience.’”). Justice Ginsburg points out explicitly how the language the majority Court uses differs drastically from the language she and dissenters use, and how said difference demonstrates the value-judgments she and other justices made. She aptly demonstrates how these value-judgments can affect the framing of the question, which in turn, can affect the outcome.

⁷⁵ See *DUSSAULT*, *supra* note 72, at 7.

⁷⁶ See *Gonzales*, 550 U.S. at 186–87 (Ginsburg, J., dissenting).

⁷⁷ See *id.*

⁷⁸ *C.f. Roberts Confirmation Hearing*, *supra* note 3, at 205 (statement of Judge Roberts), *cited in* *Roberts*, *supra* note 5, at 619 (testifying that “[T]he ideal in the American justice system is epitomized by the fact that judges, Justices, do wear the black robes, and that is meant to symbolize the fact that they’re not individuals promoting their own particular views, but they are supposed to be doing their best to interpret the law, to interpret the Constitution, according to the rule of law, not their own preferences, not their own personal beliefs. That’s the ideal.”).

⁷⁹ *The Nomination of Solicitor General Elena Kagan to be an Associate Justice of the Supreme Court of the United States, Hearing Before the S. Comm. on the Judiciary*, 111th Cong., 2d Sess. at 103 (2010) [hereinafter *Kagan Confirmation Hearing*] (statement of Ms. Kagan) (“Judging is not a robotic or automatic enterprise, especially on the cases that get to the Supreme Court.”); Hon. Kim McLane Wardlaw, *Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1645 (2010) (“Black robes are not magical garments; they cannot transform the wearer from human to automaton.”).

could understand,” and quoted Chief Justice Roberts’s analogy as in describing the ideal judge.⁸⁰ Its simplicity makes it easily digestible for the public at large, which in turn makes it a term widely used by politicians seeking to please their constituents.⁸¹ Once Chief Justice Roberts made his umpire analogy in his confirmation hearing, Senators clung to it. Professor Caprice Roberts, in her 2007 article, *In Search of Judicial Activism*, equated it to a trial lawyer’s hook or theme: Judges are umpires.⁸² But even Chief Justice Roberts, when pressed in his confirmation hearing, acknowledged that judges, in fact, are “not automatons,” and that he and other judges “all bring [their] life experiences to the bench.”⁸³

III. Empathy

Because judges are human and neutrality is impossible, judges will inevitably bring their own personal experience to the bench. Judges will see the facts of the cases before them through a lens colored by their own lived experience. Recognizing this inevitability, many scholars, politicians, and even judges themselves, have called for the employment of empathy on the bench. A judge who puts herself in the shoes of the parties before her is better able to see past her personal experiences and understand all sides of the facts. This clearer understanding of the facts better enables the judge to justly apply the law and come to the best decision.

When Justice Souter announced his retirement, President Obama announced that he was seeking empathy in a nominee to fill the vacancy.⁸⁴ He had expressed similar views as a Senator during Chief Justice Roberts’s confirmation.⁸⁵ Although President Obama was using the term to mean “a call to stand in somebody else’s shoes and see through their eyes,”⁸⁶ he received political backlash from those claiming his call for “empathy” was “a code word for an activist judge.”⁸⁷

President Obama was not the first President to acknowledge the value of empathy when making Supreme Court appointments. Woodrow Wilson, when he nominated Louis Brandeis to the Bench in 1916, expressed the need for nominees “whose whole comprehension is that law is subservient to life and not life to law.”⁸⁸

⁸⁰ Roberts, *supra* note 5, at 617.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 619; see also *Kagan Confirmation Hearing*, *supra* note 79, at 103 (statement of Ms. Kagan) (“Judging is not a robotic or automatic enterprise, especially on the cases that get to the Supreme Court.”).

⁸⁴ President Barack H. Obama, *Remarks on the Retirement of Supreme Court Justice David Souter* (May 1, 2009), <http://www.gpo.gov/fdsys/pkg/DCPD-200900317/pdf/DCPD-200900317.pdf>.

⁸⁵ 151 Cong. Rec. S10365 (2005) (Floor Statement of Senator Barack Obama on Nomination of John Roberts to be Chief Justice).

⁸⁶ BARACK OBAMA, *THE AUDACITY OF HOPE* 66 (2006).

⁸⁷ Interview with Sen. Orrin Hatch, on ABC’s *This Week* (May 3, 2009).

⁸⁸ Catherine Crowe, *Videri Quam Esse: The Role of Empathy in Judicial Discourse*, 34 *LAW & PSYCHOL. REV.* 121, 122 (2010) (citing Woodrow Wilson, *An After-Dinner*

The notion of empathy in judging has enjoyed bipartisan support, too, as the sentiment has not been exclusive to democratic presidents. When Republican President George H.W. Bush nominated Clarence Thomas to the Supreme Court, he listed empathy as one of the qualities that made him an “able man” who had “earned the right to sit on this nation’s highest court.”⁸⁹ President Bush said of then-Judge Thomas, “He is a delightful and warm, intelligent person who has great empathy,” before also assuring the public that “[h]e will approach the cases that come before the Court with a commitment to deciding them fairly, as the facts and the law require.”⁹⁰ President Bush indicated that empathy was a quality that would help, not hinder, Justice Thomas in “deciding [cases] fairly, as the facts and the law require.”⁹¹

Kim McLane Wardlaw, Circuit Judge for the United States Court of Appeals for the Ninth Circuit, writes of Justice Cardozo’s lectures and writings as “widely—and properly—regarded as authoritative on th[e] subject” of the decision-making process.⁹² She explains, as Justice Cardozo makes clear, neutrality, where “judges abandon the lessons of their life experiences when they take the bench . . . is as impractical as it is imprudent.”⁹³ Because “a judge cannot divorce herself from the experiences that have shaped her,” Judge Wardlaw explains, “in the cases for which precedent fails to command one outcome or another. . . . [.] empathy allows the judge to appreciate more fully the problem before her.”⁹⁴

Additionally, several of the Justices currently sitting on the Supreme Court have said or implied that empathy should be a desirable trait. Justice Alito, in his confirmation hearing before the Senate, said that he employs a degree of empathy when deciding cases.⁹⁵ Justice Alito described how he cannot help but think of his own children when deciding a case before him that involves children.⁹⁶ He further described how he “can’t help but think of [his] own ancestors” when an immigration and naturalization case comes before him.⁹⁷ Justice Alito assured the Judiciary Committee that he does not seek to “change

Talk (Dec. 9, 1916), in 40 THE PAPERS OF WOODROW WILSON 193, 196 (Arthur S. Link ed., 1982); Richard Brust, *No More Kabuki Confirmations: There are Better Ways to Vet a Supreme Court Nominee*, 95 A.B.A. J. 38, 41 (2009).

⁸⁹ *The Supreme Court: Excerpt from News Conference Announcing Court Nominee*, N.Y. TIMES (July 2, 1991), <http://www.nytimes.com/1991/07/02/us/the-supreme-court-excerpts-from-news-conference-announcing-court-nominee.html?pagewanted=all>.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Wardlaw, *supra* note 79, at 1631–32.

⁹³ *Id.* at 1645.

⁹⁴ *Id.* at 1646–47.

⁹⁵ See *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 475 (2006) [hereinafter *Alito Confirmation Hearing*] (statement of Judge Alito), cited in Wardlaw, *supra* note 79, at 1644 n.88.

⁹⁶ *Id.*

⁹⁷ *Id.*

the law or to bend the law to achieve any results.”⁹⁸ Still, when these cases come up, he “say[s] to [him]self, this could be your grandfather.”⁹⁹

Justice Alito’s statements before the Senate Judiciary Committee indicate not only his recognition that he cannot divorce his own personal experience from his view of the facts in the cases before him, but also that the Justice employs some degree of empathy when judging, “think[ing] about [his] children being treated in the way the children may be treated in the case” before the Court.¹⁰⁰ He metaphorically puts himself in the shoes of the parties before him, as if they were his grandfather or his children, and empathizes with that position. Notably, Justice Alito was open, honest, and forthright about his use of empathy in judging. Having discussed it so candidly in his confirmation hearing before the Senate, Justice Alito seems to approve of—even encourage—the use of empathy in judging.

Over a decade before Justice Alito’s confirmation hearing, Justice Ginsburg expressed similar sentiments regarding the use of empathy in judging, and did so quite explicitly.¹⁰¹ During Justice Ginsburg’s confirmation hearing, Senator Metzenbaum questioned her ability to understand the challenges facing America’s workers.¹⁰² Justice Ginsburg replied to the Senator, “I think if you take a full and fair look at the body of decisions I have written . . . you will be well satisfied that I possess the empathy you have just expressed.”¹⁰³ Justice Ginsburg described her empathy and pointed out the ways in which she has used empathy in her decisions, as a way to demonstrate her qualifications to serve on the Supreme Court.¹⁰⁴ Even more explicitly than Justice Alito, Justice Ginsburg used the word “empathy” expressly, and then pointed the Senators on the Senate Judiciary Committee to decisions she had written that demonstrate her empathy in her judging, clearly signaling her approval of empathy in judging.¹⁰⁵

After President Obama’s call for judicial empathy before Justice Sotomayor’s nomination and confirmation, the term became increasingly politically divisive.¹⁰⁶ Still, politicians, judges, and scholars continued to

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Confirmation Hearing on the Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 103d Cong., 1st Sess., at 153 (1993) [hereinafter *Ginsburg Confirmation Hearing*] (statement of Judge Ginsburg).

¹⁰² *Id.* at 152–53 (statement of Senator Metzenbaum).

¹⁰³ *Id.* at 153 (statement of Judge Ginsburg).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (statement of Ruth Bader Ginsburg) (directing the Senators to her decisions in *Fort Bragg* and in *Conair*, both demonstrating Justice Ginsburg’s empathy in her judging).

¹⁰⁶ *See, e.g., Sotomayor Confirmation Hearing, supra* note 4, at 6 (statement of Sen. Sessions, Ranking member, S. Comm. on the Judiciary) (“I fear that this ‘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, Americans are seen as members of separate groups rather than as simply Americans, and where the constitutional limits on Government power are ignored when politicians want to buy out private companies”); *Sotomayor Confirmation Hearing*, at 17–18 (statement of

recognize and appreciate the importance of empathy in judging.¹⁰⁷ In her confirmation hearing, Justice Kagan worked to distance herself from the politics surrounding President Obama's endorsement of empathy, and avoided using the term explicitly.¹⁰⁸ Still, Justice Kagan expressed:

I do think that in approaching any case, the judge is required really, not only permitted, but required to think very hard about what each party is saying, to try to see that case from each party's eyes; in some sense to think about the case in the best light for each party, and then to weigh those against each other. So I think that the judge is required to give consideration to each party, to try to figure out what the case looks like

Sen. Grassley) ("President Obama's empathy standard appears to encourage judges to make use of their personal politics, feelings, and preferences . . . President Obama clearly believes that [Sonia Sotomayor] measure[s] up to his empathy standard. That worries me."); *Sotomayor Confirmation Hearing*, at 22 (statement of Sen. Kyl) ("Unfortunately, a very important person has decided it is time for change, time for a new kind of judge, one who will apply a different standard of judging, including employment of his or her empathy for one of the parties to the dispute. That person is President Obama, and the question before us is whether his first nominee to the Supreme Court follows his new model of judging or the traditional model . . ."); *Sotomayor Confirmation Hearing*, at 38 (statement of Sen. Whitehouse) ("Judge Sotomayor, I believe your broad and balanced background and empathy prepare you well for this constitutional and proper judicial role."); *Sotomayor Confirmation Hearing*, at 39-40 (statement of Sen. Coburn) ("During the campaign, [President Obama] promised to nominate someone who has got the heart and the empathy to recognize what it is like to be a young teenage mom. The implication is that our judges today do not have that. Do you realize how astounding that is? The empathy to understand what it is like to be poor, to be African American or gay or disabled or old. . . . 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."); *Sotomayor Confirmation Hearing*, at 127 (question from Sen. Schumer) ("Now, I believe that empathy is the opposite of indifference, the opposite of, say, having ice water in your veins rather than the opposite of neutrality, and I think that is the mistake, in concept, that some have used."); (155 CONG. REC. S8823 (daily ed. Aug. 5, 2009) (statement of Sen. Coburn) ("The President's 'empathy' standard is antithetical to the proper role of a judge.")).

¹⁰⁷ *Kagan Confirmation Hearing*, *supra* note 79, at 32 (statement of Sen. Durbin) ("America is a better nation because of the tenacity, integrity, and values of Thurgood Marshall. Some may dismiss Justice Marshall's pioneering work on civil rights as an example of empathy; that somehow, as a black man who had been a victim of discrimination, his feelings became part of his passionate life's work; and I say, thank God. The results which Justice Marshall dedicated his life to broke down barriers of racial discrimination that had haunted America for generations."). *But see Kagan Confirmation Hearing*, at 18 (statement of Sen. Kyl) ("Judge Sotomayor explicitly rejected the empathy standard that had been espoused by President Obama Now he says that judges should have a keen understanding of how the law affects the daily lives of the American people and know that in a democracy powerful interests must not be allowed to drown out the voices of ordinary citizens.").

¹⁰⁸ *Kagan Confirmation Hearing*, *supra* note 79, at 103 (answering Senator Kyl's question about under what situations a judge may appropriately invoke empathy by saying, "Senator Kyl, I don't know what was in the—I don't want to speak for the President. I don't know what the President was speaking about specifically.").

from that party's point of view, and that's an important thing for a judge to do.¹⁰⁹

Justice Kagan embraced and spoke out in favor of what could be described as empathy while avoiding the word, itself, which had become politically poisonous.¹¹⁰ Without ever using the term, Justice Kagan said that empathy is not only a desirable quality, but is a necessary one for a judge to have.¹¹¹ She made clear that she recognizes not only that a judge *should* see the facts of the case from the perspective of each of the parties, but rather, a judge *must* see the case from the perspective of all parties before she is able to apply the law fairly and justly.¹¹²

In addition to politicians and judges, legal scholars, including Thomas B. Colby,¹¹³ Rebecca K. Lee,¹¹⁴ and Kenji Yoshino,¹¹⁵ have called for and emphasized the benefits of empathetic judges. They stress that empathy, despite the politics surrounding it, does not “dictate or even imply a propensity to act in a particular way, or to favor any particular group.”¹¹⁶ In fact, it is “first and foremost a capacity. Strictly speaking, it is value-free”¹¹⁷ Empathy is the “capacity to understand the perspective and feel the emotions of others—*all* others.”¹¹⁸

IV. Demography

Though empathy could make a real difference in cases where the judge understands and empathizes with the parties' positions, a judge's empathy will not help a party whose position she does not understand. Where a judge's personal lived experience differs so greatly from those of the parties before her, often the empathy alone will not bridge the gap. A judge may be able to recognize and empathize with a party in a gender discrimination case, where the differing lived experiences are more plain, the parties discuss and explain the experience in depth, and these differences are at issue in the case.¹¹⁹ The differing lived

¹⁰⁹ *Id.*

¹¹⁰ *See id.*

¹¹¹ *See id.*

¹¹² *See id.*

¹¹³ Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944 (2012).

¹¹⁴ Rebecca K. Lee, *Judging Judges: Empathy as the Litmus Test for Impartiality*, 82 U. CIN. L. REV. 145 (2014).

¹¹⁵ Kenji Yoshino, *On Empathy in Judgment (Measure for Measure)*, 57 CLEV. ST. L. REV. 683 (2009).

¹¹⁶ Colby, *supra* note 113, at 1959.

¹¹⁷ *Id.* (quoting Michael Frans Basch, *Empathetic Understanding: A Review of the Concept and Some Theoretical Considerations*, 31 J. AM. PSYCHOANALYTIC ASS'N 101, 119, 123 (1983)).

¹¹⁸ Colby, *supra* note 113, at 1963.

¹¹⁹ *See generally* Glynn and Sen Study Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37 (2015), <http://scholar.harvard.edu/files/msen/files/daughters.pdf>. Where gender discrimination was at issue in the case before the judge, the parties discussed, in depth, the facts and experiences of the parties, allowing the judge to understand the parties' experience. With this understanding, empathy could

experiences may go unnoticed, however, where they are more subtle, or are not at issue in the case and are therefore not discussed in depth by the parties. Because empathy requires an understanding of the different lived experiences, where the differences go unnoticed, empathy cannot bridge the gap.

A. Where Empathy Falls Short

Angela P. Harris argues in favor of “narratives and stories, accounts of the particular, the different and the hitherto silenced” in order to combat essentialism.¹²⁰ Essentialism is the notion of collapsing a class of people into one prototype with a certain set of characteristics to describe all members.¹²¹ The danger of essentialism, she says, speaking specifically in terms of feminist legal theory, is that “in the attempt to extract an essential female self and voice from the diversity of women’s experience, the experiences of women perceived as ‘different’ are ignored or treated as variations on the (white) norm.”¹²² We can apply the same logic in other instances where an individual is a member of multiple minorities¹²³ (i.e., lesbian women¹²⁴ or gay Asian men¹²⁵). In an effort to distill the essential gay experience, the experience of white gay voices will often drown out those of gay racial minorities. The following narratives seek not to essentialize the experience of any group of individuals, but rather demonstrate the ways in which the lived experiences of members of each minority group may differ from those of the majority. Additionally, they seek to demonstrate the ways in which the lived experiences of members of intersectional minority groups (i.e., straight, Black women or lesbian, white women) differ from one another and from the lived experiences of members belonging to only one minority group.

1. Patricia J. Williams’s Personal Narrative¹²⁶

The following is an excerpt from Patricia J. Williams’s 1987 article in which she recounts her experience, as a Black woman, finding an apartment in New York City, and how her experience differed from that of her colleague, a white man, also apartment-hunting at the same time in the same city:

bridge the gap in the lived experiences, and the judge could put herself in the shoes of the party before her.

¹²⁰ Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 615 (1990).

¹²¹ *See id.*

¹²² *Id.*

¹²³ This Note uses “minority” as a catchall term for historically marginalized groups, and those historically underrepresented in positions of power, which includes women.

¹²⁴ *See infra* Part IV.A.2: Author’s Personal Narrative.

¹²⁵ *See* Kenji Yoshino, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006) (drawing deeply on his personal experience as a gay Asian American man, using his own memoir to make his scholarly civil rights argument).

¹²⁶ Excerpt from Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 406-08 (1987).

Some time ago, Peter Gabel and I taught a contracts class together. Both recent transplants from California to New York, each of us hunted for apartments in between preparing for class and ultimately found places within one week of each other. Inevitably, I suppose, we got into a discussion of trust and distrust as factors in bargain relations. It turned out that Peter had handed over a \$900 deposit, in cash, with no lease, no exchange of keys and no receipt, to strangers with whom he had no ties other than a few moments of pleasant conversation. Peter said that he didn't need to sign a lease because it imposed too much formality. The handshake and the good vibes were for him indicators of trust more binding than a distancing form contract.¹²⁷

Patricia Williams admits she told Peter that though "his faith paid off," she "thought he was stark raving mad."¹²⁸ Williams' personal lived experience was so drastically different from that of her white, male colleague that "there was absolutely nothing in [her] experience to prepare [her] for such a happy ending."¹²⁹

She continues, "I, meanwhile, had friends who found me an apartment in a building they owned. In *my* rush to show good faith and trustworthiness, I signed a detailed, lengthily-negotiated, finely-printed lease, firmly establishing me as the ideal arm's length transactor."¹³⁰

Williams describes being "struck by the similarity of what each of [them] was seeking, yet in such different terms, and with such polar approaches."¹³¹ For his part, Peter "appeared to be extremely self-conscious of his power potential (either real or imagistic) as a white or male or lawyer authority figure."¹³² In an effort to "overcome the wall which that image might impose," Peter's approach included an "avoidance of conventional expressions of power and a preference for informal processes generally."¹³³

Williams, alternatively, describes being "acutely conscious of the likelihood that, no matter what degree of professional or professor [she] became, people would greet and dismiss [her] black femaleness as unreliable, untrustworthy, hostile, angry, powerless, irrational and probably destitute."¹³⁴ Therefore, to defend herself against the "[f]utility and despair" she describes as being "very real parts of [her] response," Williams finds it "essential" to establish a clear "boundary; to show that [she] can speak the language of lease [as a] way of enhancing trust" through business transactions.¹³⁵ Williams describes her lived experience "[a]s a black, [as having] been given by this society a strong sense of [herself] as already too familiar, too personal, too subordinate to white

¹²⁷ *Id.* at 406.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 406-07.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

people.”¹³⁶ She describes growing “up in a neighborhood where landlords would not sign leases with their poor, black tenants, and *demand*ed that rent be paid in cash.”¹³⁷

Peter’s approach, to avoid a formal lease and to pay in cash, signaled trust in his experience. To Williams, however, the absence of a lease and payment in cash signaled distrust. These two individuals, with the same goals, wanting to send the same message to those with whom they interact, approached their apartment-hunt in entirely different ways. Having vastly different backgrounds, each viewed the same set of facts from different frames, which brought each to different conclusions. Williams’ lived experience made her view Peter as “stark raving mad,”¹³⁸ and without having discussed their varied approaches, neither would likely have understood the other’s. Even empathizing, putting oneself in the shoes of another, would likely not bridge a delta this wide in their varied perspectives.

2. Author’s Personal Narrative

When I was visiting friends in Los Angeles, we were exploring the city by foot. There were four of us—three men and me, the only woman. We were walking through neighborhoods, noting the differences from one neighborhood to the next. One of my friends commented that he learned his way around the city by walking through alleys. He said that he loved walking down alleys because they can be shortcuts and because you can discover things you have not seen before—you experience a side of the city you have not yet experienced. My other two friends agreed that much of the majesty of a city can be found hidden in the dark coves and the rarely-explored nooks and crannies.

Before he could suggest that we venture down one of the many alleyways, I noted, partially in jest, “That’s your male privilege, that you can explore alleys.” He reacted in a way I had not expected—somewhat taken aback, surprised, and perhaps offended. He has always been open-minded and self-aware of many of the societal advantages his gender had afforded him. He has always been an outspoken advocate for gender equality, so my comment came as a surprise to him, and his reaction, in turn, came as a surprise to me. As a woman, I would never walk down an alley.¹³⁹ Perhaps there are hidden cultural or architectural treasures I am missing. Perhaps there are shortcuts of which I am not taking advantage. Like a tragically large number of other women, I am also a rape survivor. So not only as a woman, but also as a rape survivor, I genuinely fear for my safety. My personal physical safety is constantly at the forefront of my mind. Though these male friends of mine might think about their own physical safety

¹³⁶ *Id.*

¹³⁷ *Id.* at 408.

¹³⁸ *Id.* at 406.

¹³⁹ See Robin West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN’S L.J. 81, 103 (1987) [hereinafter “*Women’s Hedonic Lives*”] (“Almost all women, including those who have never experienced unwanted sex or battery have experienced the fear of rape.”).

occasionally, when they feel it is threatened in an overt way,¹⁴⁰ I have to be constantly aware of my surroundings.¹⁴¹ I must be endlessly on alert, mindful of who is around and where they are. This is not to say that I am paranoid or on the verge of panic at all times, but the reality is that my personal physical safety is a factor in deciding every move I make—what time to leave, where to park, which route to take, what side of the street to walk on, who and what to take with me.¹⁴² The very thought of walking down a dark, enclosed, deserted passageway gives me anxiety.

I knew that these considerations would not necessarily be at the forefront of my friends' minds for themselves, but it surprised me that they did not realize that I would be making these considerations and calculations for myself. He brushed off my comment, I changed the subject, and we continued walking along the busy street. I have often thought about that moment since it happened. It was not a lack of empathy that created the disconnect. These friends are three of the most empathetic men I know. But before my friend could be empathetic to my experience as a woman, he must first have been aware of the experience. Neither of us realized how much of a delta existed between our relative lived experiences. Indeed, neither of us even realized that we did not realize it. Before this moment, he did not know that he needed to ask the question, and I did not know that I needed to explain. Empathy, alone, cannot bridge a gap that neither party knows exists.

In all honesty, because I was in the company of three men, had we decided to walk down one of these majestic alleyways, I would probably not have had the same fear for my physical safety. Their larger physical stature,¹⁴³ combined with our society's general greater respect for the physical autonomy of men,¹⁴⁴ would have served to ease my anxiety on this particular occasion. The trouble is that I am not often walking with three men, or even one man. As a lesbian woman, I am most often walking with my wife, whose presence would not serve to ease my anxiety in the same way.¹⁴⁵ Though her accompaniment provides a bit of strength in numbers, and she is taller than I, she is still smaller in stature than most men, and society does not respect her physical autonomy to the same degree it

¹⁴⁰ *Id.* at 107–08 (discussing how “we all[, both men and women,] live with the threat of criminal violence, pay the state to protect us from the threat, and expend energy legitimating its authoritative right to do so as well”).

¹⁴¹ *Id.* at 108 (clarifying that though men and women may have a fear of violence, “women and only women must somehow ward off the threat of acquisitive and violent male sexuality”).

¹⁴² *C.f.* West, *supra* note 139 (noting that she “pay[s] a high price” for often “refus[ing] to let danger inhibit [her] movement”).

¹⁴³ *Id.* at 107 (describing the difference in lived experience of men and women on the basis of their physicality as “the defining condition of [men’s] childhood—vulnerability because of size and strength disparities—is the defining condition of [women’s] adulthood”).

¹⁴⁴ *See id.*

¹⁴⁵ *Id.* at 104 (“One way that (some) women respond to the pervasive, silent unspoken and invisible fear of rape in their lives is by giving their (sexual) selves to a consensual, protective, and monogamous [heterosexual] relationship”).

respects a man's. As lesbian women, our lived experience differs from that of straight women in that a straight woman may often walk with a boyfriend, or husband, or other man in her life, while my wife and I are often only in the company of another woman, who does not provide the same type of protection, whether that protection is real or merely perceived.

To take it one step further, many of my straight friends, both men and women, feel comfortable or even comforted by holding hands with their significant other while walking in public.¹⁴⁶ Whether during the day in a busy square, or at night on an empty side street, a straight woman holding the hand of her straight significant other feels more comfortable and possibly safer than she would walking with a friend, regardless of gender, whose hand she is not holding. In addition to the inner comfort she may feel, the man holding the hand of a woman sends a signal to others that she is taken. The straight woman holding a man's hand is less likely to be harassed, or worse, assaulted or battered, than if she is alone, with other women, or even with a man who is not making clear signals of romantic involvement with her. Accordingly, she feels physically safer and more comforted when holding the hand of her partner.

My experience as a lesbian woman, however, is markedly different. I will obviously not ever be holding hands with a man when walking down the street. Beyond that, though, holding hands with my significant other makes me more vulnerable. As a woman holding hands with another woman, I draw more attention to myself than a woman by herself or two women who are not touching. I get more looks from passersby. I find we are honked at, whistled at, winked at, and hollered at more often when I hold my wife's hand. In addition to the increased sexual attention, we also receive more looks of disapproval and judgment, more insulting comments, and occasionally slurs. Two women holding hands draw more attention, both sexual and judgmental, than a woman alone or two women who are not touching. Instead of providing safety and comfort, holding my wife's hand in public draws more attention, makes me feel more vulnerable, and puts me more at risk.

To add yet another complicating layer to the varying lived experiences, not only am I a woman, not only am I a lesbian, but I am also a survivor of a rape that, by all appearances, was motivated in part by my sexual orientation. The increased attention and feelings of vulnerability would likely be enough to dissuade me from wanting to hold my wife's hand in public, but because I have experienced very real violence perpetrated as a result of my outward expression of my sexual orientation, I try hard not to put myself in the same dangerous position again. Where expressing my sexual orientation publically to strangers has compromised my own personal physical safety, I will not hold my wife's hand on a public street, much less down a dark alley, while a straight man or

¹⁴⁶ *Id.* (describing the common experience of women seeking monogamous heterosexual relationships to protect themselves from sexual violence from other men). "One woman describes her embrace of this option thusly: 'Being alone I felt, at times, besieged and up for grabs. Being with one man sheltered unwelcome attention from men in the streets, at parties, etc.'" *Id.* (quoting D. Rhodes & S. McNeill eds., *WOMEN AGAINST VIOLENCE AGAINST WOMEN* (1985)).

woman would likely have no problem doing so, and they may even find comfort in such an expression.

3. *Wurie v. United States*

These narratives demonstrate that often, even those wishing to empathize with the lived experiences of other individuals fall short when the differences go unnoticed. Empathy is not enough to bridge the gap between the lived experiences when neither party knows the gap exists. This divide is not unique to personal conversation and relationships. The same way one friend may not be able to empathize with the misunderstood experiences of another, a judge may not be able to empathize with the parties before her when she misunderstands the lived experiences of the parties.

Take, for example, recent Fourth Amendment cases. In *Riley v. California*,¹⁴⁷ Chief Justice Roberts and Justice Scalia revealed how their own lived experiences shape their worldviews in ways that could fundamentally affect the rights of the parties before them. During oral arguments for *United States v. Wurie*,¹⁴⁸ a case “concerning the reasonableness of a warrantless search incident to a lawful arrest,”¹⁴⁹ Chief Justice Roberts asked, “This is somebody selling drugs where the police have told us they typically use cell phones to arrange the deals and the transfers, and this guy is caught with two cell phones. Why would he have two cell phones?”¹⁵⁰ When the attorney, Ms. Judith Mizner, responded, “Many people have multiple cell phones,”¹⁵¹ the Chief Justice was taken aback. “Really?” He responded. “What is – what is your authority for the statement that many people have multiple cell phones on their person?”¹⁵² In his own personal experience, and through no fault of his own, the Chief Justice has no frame of reference for a person having or needing multiple cell phones.¹⁵³ Ms. Mizner responded, “Just observation. But –”¹⁵⁴ Justice Scalia, who also had no frame of reference from his own experience to understand Mr. Wurie’s having two cell phones, responded, “You’ve observed different people from the people

¹⁴⁷ 134 S. Ct. 2473 (2014) (*United States v. Wurie*, an appeal from the 1st Circuit Court of Appeal, and *Riley v. California*, an appeal from the California Court of Appeal).

¹⁴⁸ Transcript of Oral Argument at 49, *United States v. Wurie*, 134 S. Ct. 2473 (2014) (No. 13-212) [hereinafter Oral Argument].

¹⁴⁹ *Riley*, 134 S. Ct. at 2482.

¹⁵⁰ Oral Argument, *supra* note 148, at 49.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Studies have documented many similar incidents, where a judge presumes a cell phone, beeper, etc. is dispositive of nefarious acts, like drug dealing, rather than legitimate business or personal purposes. *See, e.g., STATE OF CONN. JUDICIAL BRANCH TASK FORCE ON MINORITY FAIRNESS, FULL REPORT 62* (1996), *cited in* Myra C. Selby, *Examining Race and Gender Bias in the Courts*, 32 *IND. L. REV.* 1167, 1170 (1999).

¹⁵⁴ Oral Argument, *supra* note 148, at 49.

that I've observed."¹⁵⁵ There was laughter and Ms. Mizner, a Federal Public Defender, responded, "That's probably true."¹⁵⁶

Whether the observers in the courtroom identified with the Justices or with Ms. Mizner and her client, there seemed to be a consensus that each's lived experiences and personal observations that form each of their own frames of reference were fundamentally different. Neither Chief Justice Roberts nor Justice Scalia could fathom why a person might have two cell phones, because in their own lived experiences, a person would only have and need one cell phone. It was up to Ms. Mizner arguing before the Court to clarify that it is actually quite common for an individual to have two cell phones, and that a person's having more than one cell phone in her possession is not indicative, much less dispositive, of her involvement in the sale of illicit drugs. The fundamental rights of the parties before the Court rested on the Justices' perception of reasonableness, which was undeniably and unavoidably clouded by their own lived experiences.¹⁵⁷ The Justices are human and are bound by the constraints of their own understandings and own life experiences.¹⁵⁸ Had these Justices not voiced their misunderstandings or biases during the oral arguments, these misunderstandings would have gone uncorrected and likely would have affected their decision. In fact, because this misunderstanding was preexisting, and because there was very little opportunity to explain or correct it, Ms. Mizner may still not have fully corrected the Justices' misunderstandings.¹⁵⁹

How often must this happen, that a Justice has a bias, or a frame of mind and lived experience so fundamentally different from that of the parties before him or her that the actions or circumstances of the parties are so unfathomable to the Justice as to be "unreasonable," when in fact, they are entirely reasonable? How often must a Justice's experience be so fundamentally different from those of the parties before the Court that the Justice does not even know to ask the question whether an action or circumstance is reasonable because its reasonability is unfathomable?

Had Chief Justice Roberts and Justice Scalia not asked offhand, almost rhetorically, what reason a person may have to be carrying two cell phones other

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *See supra* Part II.B.

¹⁵⁸ *See id.*

¹⁵⁹ *See* Oral Argument, *supra* note 148, at 49–50. The Court ultimately held that, absent exigent circumstances, a warrant is required to search incident to arrest an arrestee's cell phone incident to arrest, and the Court did not find exigent circumstances in Mr. Wurie's case. *Riley*, 134 S. Ct. at 2494–95. Still, Ms. Mizner was very near the end of her time and did not get the opportunity to explain what other legitimate reasons an individual may have multiple cell phones (*i.e.*, a business phone in addition to a personal phone). *See* Oral Argument, *supra* note 148, at 49. *Id.* Because the Justices' misunderstanding was based on their own experiences and observations, one attorney's different observation may not be enough to allow the Justices to expand their understanding or to empathize with the lived experience of other lived individuals whom they had not before observed. The exchange during the oral argument seems to indicate the Justices may find exigency in another case, using the arrestee having more than one cell phone as a factor. *See id.*

than to sell illicit drugs, the Justices' own experiential biases and blindnesses may never have been drawn to their attention nor corrected. Similarly, without their offhand questions, the parties may never have known of the need to address the Justices' experiential biases and blindnesses. The same way a Justice may not even know to ask the question, the parties before the Court may not even know to anticipate and answer the question in their briefs and oral arguments. This experiential and perspective divide exists on both sides of the gavel, and it is impossible to know how often it must go unnoticed, unaddressed, and uncorrected by either.

This effect is then compounded by the fact that the preceding decisions, which set the standard and then molded and shaped the standard, delineating and defining the bounds of reasonableness, were decided and written by other all-white, all-male, all-heterosexual benches of days past. This seems to be a confirmation bias at work.¹⁶⁰ This bias occurs where a Justice has a certain belief, and sees another opinion by another justice who believes the same, confirming as truth or validity of the belief.¹⁶¹ This validation has no regard for the notion that the two Justices share some very real and very important lived experiences. More importantly, it disregards the notion that neither of these Justices shares the lived experiences of a Black single mother, or the bisexual Asian-American student, or the white lesbian widow, or the gay farmhand, or the transgender prisoner.

4. Other Examples Where Empathy May Not Be Enough

One must wonder how often misconceptions like those in *Riley* occur and go unnoticed. Occasionally, the judicial opinion in the case may give a glimpse into a justice's misconception. For example, in *Higgins v. United States*, a Fourth Amendment case from the D.C. Circuit, one judge wrote that "no sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered."¹⁶² The reality is, however, there may be many reasons why an individual may maintain her innocence, yet still stand by while an officer searches her room containing contraband. The judge flippantly dismisses any notion that the individual being searched may have a very real and legitimate fear of the officer, or that the individual may not be fully aware of her rights to deny permission to search. An individual may not protest an officer's search when she does not know or fully understand the permissible extent of the search. Further, she may be a parolee with no choice but to allow the officer to search. Or she may be late for work, fear losing her job, and acquiesce in the hopes of resolving the matter quickly. Though perhaps not for the judge writing the opinion, any of these scenarios present a legitimate reason

¹⁶⁰ In cognitive science and psychology, a confirmation bias, also called a confirmatory bias, is the tendency to see, acknowledge, and emphasize evidence that is consistent with one's own pre-existing beliefs, and to ignore or minimize evidence that is inconsistent with those beliefs. Confirmation, as used in cognitive science and here, is unrelated to the confirmation process of judges and justices.

¹⁶¹ *See id.*

¹⁶² *Higgins v. United States*, 209 F.2d 819, 820 (D.C. Cir. 1954).

why a “sane” woman or man may allow an officer to search her room, but the judge’s easy dismissal of any possibility short of insanity demonstrates that empathy is not bridging the gap between the differing lived experiences.

Alarming, studies indicate that *Higgins* is not outside the norm. Janice Nadler, researching other Fourth Amendment cases, notes, “observers outside the situation systematically overestimate the extent to which citizens in police encounters feel free to refuse [consent].”¹⁶³ Where the justices in *Riley* fortunately demonstrated their misunderstanding during the Oral Argument, allowing Ms. Mizner the opportunity to correct it, or to at least provide an additional perspective on the matter, the judge in *Higgins* maintained his misconception even while writing the decision in the case.¹⁶⁴ Nadler’s work further indicates that these misconceptions go uncorrected quite often—“systematically,” in fact—meaning that even empathy cannot bridge the gap. Where the judges’ and justices’ own lived experiences differ so greatly from those of the parties before the courts, even an empathetic judge may not understand a party’s actions or reasoning behind those actions. As in *Higgins*, a judge may inadvertently make presumptions that, for example, the party must have been guilty or insane to have allowed the police to search, when in reality, an individual may have had a great many reasons for acting in the way that she did.¹⁶⁵

B. Change the Demography of the Court

Because judges cannot be entirely neutral, empathy is required to fill in the gaps, and to fully understand the perspective of the parties before the Court. Because empathy cannot fill in all gaps, however, a change in the perspective of the justices, themselves, is required. The Justices of the Supreme Court overwhelmingly have been from one narrow demographic.¹⁶⁶ A shift in the balance of perspectives on the Court is needed to ensure justice is served even where empathy is not enough to bridge the gap between the Justices and the parties before the Court. In order for the Court to fully represent the varying perspectives and lived experiences of the populace, and in order for these varying perspectives to be balanced, the demography of the Court must shift fundamentally. Given the nature of *stare decisis*, and the deference the Court pays to decisions of the past, the Court must not only balance the perspectives to reflect those of the populace of modern America, it must counterbalance the single perspective, which has been drastically overrepresented on the Court since its founding.

¹⁶³ Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155–56 (2002).

¹⁶⁴ See *supra* Part IV.A.iii; *Higgins*, 209 F.2d at 819.

¹⁶⁵ *Id.*

¹⁶⁶ See *supra* Part I.

1. All-Lesbian Women of Color Supreme Court

Returning to the proposed all-lesbian women of color Supreme Court, we now see the necessity of shifting the demographics to counter the incredible imbalance that has persisted since the Founding of the Court. This all-lesbian, all-women of color Supreme Court would be impartial and independent, as is constitutionally prescribed. The Court would apply the law to the facts of the case before it, as is required of the third branch of government. The Court would be empathetic, and the Justices would put themselves in the shoes of the parties before them, to see the case from all sides before applying the law justly and fairly. Where empathy is not enough, however, and where the differing lived experiences create misunderstandings, the Justices' own personal lived experiences would fill in what gaps have existed and persisted for so long. Because the white perspective has been written into our jurisprudence since the Founding, the Justices' non-white perspective will fill in the gaps. Because the male perspective is ingrained in every legal principle, the Justices' female perspective will begin to correct the imbalance. And because the heterosexual lived experience of every Justice ever to have served on the Supreme Court is enshrined in our law, the Justices' lesbian perspective will provide the Court with another worldview.

Still, however, despite this fundamental shift, this all-lesbian women of color Supreme Court would not represent every perspective. Even setting aside the time needed to counterbalance the 1,763 years of white, straight male perspective, this shift would not fill every representative gap. As demonstrated by the narratives, even if we were to essentialize the lived experiences of minorities, this Court would leave many minority perspectives unrepresented. Just as Patricia Williams' experience as a Black, ostensibly straight woman differs from that of the white, lesbian woman, the experience of the Black, lesbian woman is not the same as the experience of the white, transgender man. The all-lesbian, women of color Supreme Court would leave the men of color still largely unrepresented. This Court would leave LGB men, whose experiences often differ greatly from that of women, without a voice on the bench. The transgender experience would remain entirely unrepresented. Perhaps, instead, an all-varied minority Supreme Court could better represent the perspectives of the populace, and sooner balance the Court's demography.

2. All-Varied Minority Supreme Court

Now imagine that the current Supreme Court is replaced, at once, with nine justices, each representing one or more racial, gender, or sexual minority. Not a single straight, white man would remain on the Court. Imagine this new Court consists of the following justices: (1) Black, straight woman; (2) Black, lesbian woman; (3) Arab, straight woman; (4) Native American, bisexual woman; (5) white, lesbian woman; (6) Asian American, straight woman; (7) Asian American, gay man; (8) Latino, straight man; (9) Black, bisexual man. There is no question that each of these justices possesses the qualifications, experience, and ability to uphold and protect the Constitution. The President has properly

vetted and appointed each justice, and the Senate has confirmed each according to constitutional requirements.

The principle of *stare decisis* will still constrain this newly diversified Court.¹⁶⁷ In deciding cases, these nine justices will still pay deference to Court precedent, just as past Courts have done, but only to the point that the Constitution requires.¹⁶⁸ In this way, the straight, white man of today still has representation on the bench through the “dead hand” of past justices and the deference this Court pays to prior decisions that straight, white men have authored.¹⁶⁹ Additionally, the straight, white man of today who comes before the Court can rest easy knowing that the laws at issue were written and passed by a disproportionately straight, white male Congress, to which the Justices also owe deference, albeit to varying degrees depending on the case.

C. Counterargument

Ruthann Robson, recounting an interview she gave for a magazine’s feature on the Supreme Court in 1992, describes her own proposal that the President appoint a lesbian to the Bench as “glib.”¹⁷⁰ Such a proposal, she says, “implies that lesbianism would be a relevant quality of a United States Supreme Court

¹⁶⁷ Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARVARD L. REV. 113, 114 (1921) (discussing how “through [his] own work in an appellate court,” he had “seen a body of judges applying a system of case law, with powers of innovation cabined and confined. The main lines are fixed by precedents.”).

¹⁶⁸ See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921). From Cardozo’s perspective:

There is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned altogether. I would not go so far myself. I think adherence to precedent should be the rule and not the exception. . . . But I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. We have had to do this sometimes in the field of constitutional law.

Id. at 141–42.

¹⁶⁹ See Cardozo, *supra* note 167, at 115. Cardozo describes the way in which the judicial system establishes precedent and the decisions of past judges live on:

Some judge, a century or more ago, struck out upon a path. The course seemed to be directed by logic and analogy. No milestone of public policy or justice gave warning at the moment that the course was wrong, or that danger lay ahead. Logic and analogy beckoned another judge still farther. Even yet there was no hint of opposing or deflecting forces. Perhaps the forces were not in being. At all events, they were not felt. The path went deeper and deeper into the forest. Gradually there were rumblings and stirrings of hesitation and distrust, anxious glances were directed to the right and to the left, but the starting point was far behind, and there was no other path in sight.

Id.

¹⁷⁰ RUTHANN ROBSON, *SAPPHO GOES TO LAW SCHOOL* 1 (1998).

Justice.”¹⁷¹ Undoubtedly it does. This relevant quality, however, is an input (a perspective stemming from personal lived experience) rather than an output (a presumed outcome of a particular case or class of cases). This relevant quality does not presume that any lesbian Justice embraces a particular ideology or judicial philosophy. Such a presumption would be based on the notion of identity politics—that one’s identity and one’s politics are necessarily related.¹⁷² “The underlying assumption of identity politics is that given a social structure that is cognizant of group identities (such as sexuality, gender, and race), one’s identities will shape one’s experiences, which in turn will influence one’s thinking, including one’s politics.”¹⁷³

It is “hardly arguable” that a person’s identity will shape her experiences, which will shape her thoughts.¹⁷⁴ To this extent, identity politics seems reasonable. What is arguable, however, is that “identities and politics are consistently related in a particular pattern; the conventional configuration [of identity politics] is that one’s experience of oppression produces an emancipatory politic.”¹⁷⁵ Such an “insidious assumption” is unreasonable and demonstrably untenable.¹⁷⁶

Two notable examples of the invalidity, or at least imprecision, of any presumption about one’s identity politics are Anne-Imelda Radice and Justice Clarence Thomas. When the first Black Supreme Court Justice, Justice Thurgood Marshall, retired, Clarence Thomas was nominated to succeed him.¹⁷⁷ Though Justice Thomas had spoken publically about how race had shaped his own experiences, his racial identity served to shield him from much investigation about his racial politics during his confirmation.¹⁷⁸ Because Justice Marshall channeled his personal experience with racism into his effort to eradicate it, many observers may have presumed that Justice Thomas would do the same and that the effects would be the same. In fact, however, during his tenure on the Court, Justice Thomas has demonstrated a commitment to the notion of a colorblind Constitution, rather than a commitment to eradicate racism like his predecessor.¹⁷⁹ Though Justice Thomas and Justice Marshall both share a racial identity and have many similar personal experiences, their politics and the

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 2.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* Although there may be an argument for the normative value of identity politics, which is to say that a person *should* ascribe to a certain political ideology based on her identity, there remains no descriptive value to such identity politics.

¹⁷⁷ *Id.* at 4. Although the Senate did question now-Justice Thomas on his racial politics, he may have avoided some more intense scrutiny by way of the Senators’ presumption that his politics matched those of Justice Marshall.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

outcome of their decisions are very different.¹⁸⁰ Together, they “demonstrate[] that race as identity and race as politic are distinct.”¹⁸¹

Along the same lines, Anne-Imelda Radice demonstrates that one’s sexual identity also does not dictate one’s politics. When controversy embroiled the National Endowment for the Arts (NEA) regarding its funding of provocative art projects, President George H. W. Bush appointed Anne-Imelda Radice to serve as the Acting Director. Under fire from Congress and engulfed by the culture war debate regarding art versus obscenity, the NEA needed to tread carefully for the sake of future of government-funded art grants.¹⁸² Still, those who believed that the NEA should not be in the business of censorship may have hoped that because Radice was a lesbian, she would allow for more freedom of expression within the arts.¹⁸³ In fact, the opposite was true. Radice vowed to “use common sense” to stop providing funds for “sexually explicit material.”¹⁸⁴ During her very short tenure, Radice acted swiftly to veto the recommendations of the NEA expert panels on several occasions, including the recommendations to award grants for three separate gay and lesbian film festivals.¹⁸⁵

The same way Justice Thomas’s racial identity could not predict his politics, Anne-Imelda Radice’s sexual identity could not predict her politics. The purpose of having an all-minority Supreme Court is not to seek to alter the outcome of cases in any particular way. As demonstrated above, a Justice’s status as a racial, gender, and/or sexual minority does not always correlate with her judicial philosophy or her worldview.¹⁸⁶ An all-minority Court, instead, would simply account for the perspectives and lived experiences of non-white, non-male, and non-heterosexual individuals. For so long, the Court has known only the white, male, heterosexual experience, and has answered nearly every constitutional question from that perspective. Even if the outcome of cases remains the same, there remains substantive value to having representation of all perspectives in judicial decision-making.

To this end, the Court has consistently held an impartial jury, as required by the Sixth Amendment, must be comprised of “a fair cross[-]section of the community on venires, panes, or lists from which petit juries are drawn.”¹⁸⁷

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Reagan tried to do away with the NEA altogether. Although this effort was ultimately unsuccessful under his leadership, there remained members of Congress who continued to advocate against the NEA.

¹⁸³ See ROBSON, *supra* note 170, at 4.

¹⁸⁴ *Id.*

¹⁸⁵ See, e.g., *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

¹⁸⁶ *Cf. Easley v. Cromartie*, 532 U.S. 234 (2001) (noting that “in this case . . . the voting population is one in which race and political affiliation are highly correlated” before holding that the use of race in districting decisions is permissible when politically motivated, such as to create a majority Democratic district).

¹⁸⁷ *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); see also *Williams v. Florida*, 399 U.S. 78, 100 (1970) (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)) (suggesting that *Duncan* implied a requirement for a representative cross-section when it held that a criminal defendant’s interest in a trial by jury was “fundamental to the American scheme of justice”).

Even before the Court first articulated the Sixth Amendment's fair cross-section requirement in 1968,¹⁸⁸ the *Smith v. Texas* Court held in 1940 that a state's systematic exclusion of people of color from jury service violated the Fourteenth Amendment's Equal Protection Clause because the resulting jury could never be "a body truly representative of the community."¹⁸⁹ As far back as 1940, the Court recognized the value in a representative body for the purpose of Equal Protection.¹⁹⁰ In so doing, the Court acknowledges a fundamental unfairness in an adjudicative body that is unrepresentative of the community at large, yet the Court itself has never been "a body truly representative of society."¹⁹¹ In 1942, the Court then applied *Smith* to the Sixth Amendment context to hold that a jury must not be "the organ of any special group or class."¹⁹² That is to say, if the members of a jury all come from one group or class, the jury becomes an organ of that group or class.¹⁹³

The Court expanded this concept in *Peters v. Kiff*, and expanded the class of defendants with standing to challenge a jury-selection violation.¹⁹⁴ In *Peters*, the Court held that even when an "arbitrary and discriminatory" jury selection process works solely against the unrelated interests of third parties, a defendant has standing to bring a Fourteenth Amendment challenge for public policy reasons.¹⁹⁵ The Court further reasoned that the right to bring a claim is "supported by, but not contingent upon, the possibility that a systematic exclusion may produce a subtle, undemonstrable prejudice."¹⁹⁶ In so doing, the Court recognized that a jury that does not represent the community is, itself, damaging, and a defendant need not show additional damage to her own interests.

In the context of Supreme Court Justices, the judiciary has arguably been an "organ" of a certain "group or class." The justices have certainly not been "truly representative of the community," as our democracy requires a jury to be.¹⁹⁷ At no point in history have the sitting justices of the Supreme Court been representative of society.¹⁹⁸ Examined in the aggregate, however, approaches what would qualify as an "organ" of straight, white men. Where straight, white

¹⁸⁸ *Taylor*, 419 U.S. at 530.

¹⁸⁹ *Smith v. Texas*, 311 U.S. 128, 130 (1940).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*; see *supra* Part I (discussing the woefully unbalanced demography of the Court in relation to that of society at large).

¹⁹² *Glasser v. United States*, 315 U.S. 60, 85-86 (1942).

¹⁹³ See *id.*

¹⁹⁴ *Peters v. Kiff*, 407 U.S. 493, 498 (1972).

¹⁹⁵ *Id.* at 502.

¹⁹⁶ James H. Druff, *The Cross-Section Requirement and Jury Impartiality*, 73 CALIF. L. REV. 1555, 1557 n.10 (1985) (citing *Peters*, 407 U.S. at 498).

¹⁹⁷ *Glasser*, 315 U.S. at 86.

¹⁹⁸ The current Supreme Court Bench, with five straight, white men, one straight, Black man, two straight, white women, and one straight, Latina woman, comes the closest to representing a cross-section of the community. *Supra* Part I. Still, the LGBT community is entirely unrepresented on the present Court, people of color are woefully underrepresented, and men's representation is double that of women.

men have served 1,763 years of the 1,869 total years served by all justices in the history of our Supreme Court, a single sector of our society has given the unbelievably overwhelming majority of Supreme Court service. Straight, white men have served over ninety-four percent of the total combined time served by all justices, yet straight, white men make up significantly less than half of society at large. Thus, the remaining less than six percent of total time served by Supreme Court Justices was the product of all women, racial minorities, and sexual minorities, yet women, racial minorities, and sexual minorities make up well over half of society.¹⁹⁹ One certainly could argue that our highest Court has been an organ for straight, white men. And in 1942, the *Glasser* Court held that juries cannot be such organs, so surely the bench cannot, either.²⁰⁰

Some may argue that this disparity in the context of judges and justices is not comparable to juries because judges are learned, neutral arbiters of the law who apply the law equally to all parties. Juries, in contrast, must be a fair cross-section of the community because they are not as learned and perhaps less trustworthy. As demonstrated above, however, judges are human and can be no more neutral than any juror can be.²⁰¹ Even empathy, which is a desirable quality in judges, cannot eliminate bias or preconceived notion that judges inherently have, as all humans do.²⁰²

Accordingly, judges and justices are subject to the same human qualities to which jurors are subject. The Supreme Court has long recognized the value and necessity of a jury representative of society, consisting of a fair cross-section of the community. This fair cross-section requirement, itself, is what ensures the impartiality of a jury.²⁰³ Because neutrality is not possible for any one human to achieve individually, the fair cross-section requirement, and that juries must be a truly representative body, serves to *balance* the jury. Impartiality is thus “more an attribute of juries,” as a whole, than of individual jurors.²⁰⁴ This view embraces the notion that where *neutrality* is impossible on the individual level, *balance* in viewpoints and lived experience achieves the requirement of an impartial jury. Because impartiality is a quality of the body rather than of its individual members, it is “*literally unattainable* in an unrepresentative body.”²⁰⁵

The judiciary is no different. Our Supreme Court is made up of human Justices for whom individual neutrality is not possible. The same way jury impartiality is an attribute of the body as a whole, rather than the jurors, individually, impartiality of the judiciary is a quality of the Court, not of

¹⁹⁹ Because women make up 51% of the populace, *supra* note 10, and racial minorities make up 39% of the populace, *id.*, we may presume that women (minority and nonminority) along with men of color make up approximately 71% of the population. As previously discussed, obtaining an accurate census of sexual minorities is incredibly difficult, *id.*, but we can presume that the percentage of the population made up of women, people of color, and LGBT people is greater than 71%.

²⁰⁰ See *Glasser v. United States*, 315 U.S. 60 (1942).

²⁰¹ See *Druff*, *supra* note 196.

²⁰² *Id.*

²⁰³ *Id.* at 1558 n.11 (citing *Taylor*, 419 U.S. 522).

²⁰⁴ *Id.*

²⁰⁵ *Id.* (citing *Taylor*, 419 U.S. 522) (emphasis added).

individual Justices. And the same way an impartial jury is “literally unattainable in an unrepresentative body,” an impartial Court, too, is *literally unattainable* where women and racial minorities are woefully underrepresented, and where sexual minorities are entirely unrepresented.

The doctrine of *stare decisis* adds additional import to the impartial judicial body. Unlike a jury, whose decision affects the interests of parties in one particular case, the decisions of the Supreme Court live on and continue to affect the interests of parties in innumerable cases into the future and in courts at every level across the country. Cases decided by the Supreme Courts of the past are still affecting the rights and interests of countless individuals today. Thus, the unrepresentative judicial body from centuries ago, in which impartiality was *literally unattainable*, decided cases and settled law that continues to affect the rights of individuals today.

For this reason, a present-day Supreme Court adequately reflective of modern society will not remedy the unrepresentative Supreme Courts of the past. For a defendant challenging a jury that is not a truly representative body, an adequate remedy would be a new trial with a jury that reflects the community. But the Supreme Court’s adherence to *stare decisis*, combined with the breathtaking disparity in representation, where straight, white men have made up over ninety-four percent of the judicial body, simply ensuring the representative, and thus impartial, nature of the modern Court will leave unaddressed the continued effect of the decisions of the Supreme Courts of the past. To remedy the unrepresentative nature of the judicial body through the entire history of our Supreme Court, therefore, we must examine the judicial body in the aggregate, collectively. When we do, and we see the 1,763 years of straight, white male Justices’ service and the 106 years of all other Justices’ service, the need for an all-women, all-minority, modern Court becomes clear. Because an impartial judicial body is *literally unattainable* until it is truly representative of society, the need to balance representation on the Court is imperative and urgent.

Even accounting for the unbalanced impact of sitting Justices as compared to Justices of the past, an all-women, all-minority Court is still imperative to reset the balance of the Supreme Court. The fact that only sitting Justices control current cases, and only sitting justices can change or overturn precedent, makes any sitting Court more powerful than Courts of the past. With this understanding, the all-minority Court need not be in place for as long as the all-straight, white, male court had been. The need for such a remedy, however, remains unaltered. Even adjusting for the greater influence of sitting justices than the influence of *stare decisis*, the Court has effectively been the “organ of a[] special group or class,” namely, straight, white men, for so long that the influence of this organ, through the doctrine of *stare decisis*, still would overpower that of sitting justices. Accordingly, an all-women, all-minority Court would best swing the balance of representation on the Court toward that of “a body truly representative of the community.”²⁰⁶ This demography of the Court

²⁰⁶ *Id.* (citing *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

would then remain in place until the precedential influence of women, racial minorities, and sexual minorities is representative of their presence in society, at which point the Court's demography can shift to represent the demography of society. Once the Court achieves an aggregate balance and impartiality, its balance and impartiality can continue through maintaining true representation of society.

In our democracy, we place value on every voice being heard through the act of voting.²⁰⁷ It is a threat to the very fabric of our system if every voice is not heard and if every vote is not counted—even if the outcome of the election is not affected.²⁰⁸ The very foundation of our political system depends on the assurance that the outcome of an election is the culmination of the counting of every vote—that is, that every voice is heard.²⁰⁹ Though the exclusion of an entire segment of society from the process very well may affect the outcome of an election, the real threat to our system has more to do with the normative exclusion of a perspective from consideration, than the way in which that exclusion affects the outcome of any given electoral race. The value our society places on the input—that every person gets a vote—is much greater than the value of the outcome.

The same way our political system depends on the assurance that every voice is heard, regardless of the affect on the outcome of the election, our judiciary depends on the assurance that every perspective is seen and weighed in the decision, regardless of the affect on the rule of law or outcome of the case. This is not to say that the outcome is irrelevant. If the people of the electorate decide they got it wrong in the last election, they elect someone different. And by the same token, if the sitting Justices decide the Courts of the past got a rule of law wrong, or answered a constitutional question the wrong way, they can and should correct it. But precedent need not be overturned to justify the diversification of our Highest Court. We will achieve the goal of diversifying the law once a balance of inputs is reached, without regard to the affect on the output.

V. Conclusion

The demographics of the Supreme Court have for so long been nearly entirely straight, white, and male. The select few women and persons of color to have served the Court have hardly touched the balance of perspectives. Although an empathetic Justice will be able to see the perspectives of many parties before her, without familiarity with the lived experiences of minorities and those at the intersections, empathy, alone, will not bridge the gap between the Justice's own perspective and that of those before her. In order to balance the perspectives on the Court, in order to balance the perspectives in the *law*, the

²⁰⁷ *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”).

²⁰⁸ *Id.* at 559.

²⁰⁹ *Id.*

demography of the Court must dramatically shift to encompass all minorities, until the time when the pendulum may swing back and rest in the center.