

## ESSAYS

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### UMPIRES, EMPATHY, AND ACTIVISM: LESSONS FROM JUDGE CARDOZO

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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.<sup>1</sup>

#### INTRODUCTION

Our national dialogue about the role of federal judges in our democratic society has devolved into a political game in which points are awarded to whomever can reduce the complexities of judging into the most oft-repeated sound bites.<sup>2</sup> Lawmakers on both sides of the

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\* Circuit Judge, United States Court of Appeals for the Ninth Circuit. This Essay is an extension of remarks made at a colloquium held by the *Notre Dame Law Review* on March 20, 2009, examining Judge Cardozo's *The Nature of the Judicial Process*. The views expressed in this Essay are my own and do not necessarily reflect the views of my colleagues or the United States Court of Appeals for the Ninth Circuit. I acknowledge, with gratitude, the assistance of my law clerks, Joshua Riley, J.D., 2007, Harvard Law School, and Kendall Hannon, J.D., 2009, Notre Dame Law School, in preparing this Essay.

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

2 See Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1078 (2006) (describing the judicial confirmation process as "a useless charade"); Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709, 1716 (2007) ("[T]he increasingly polarized climate surrounding the courts makes it extremely difficult for us judges to admit either publicly or privately that we are the product of our experiences, and burdened by human frailties like all other mortals."); see also Jay Reeves, *Roberts: State of Union Scene 'Troubling'*, WASH. TIMES, Mar. 9, 2010, available at <http://www.washingtontimes.com/news/2010/mar/11/roberts-state-union-troubling> ("I think the [confirmation] process is broke down." (quoting Chief Justice Roberts)).

aisle deride the opposing party's judicial nominees as activists and extremists whose personal prejudices override their allegiances to the rule of law.<sup>3</sup> Though much of the rhetoric about judges and judging has proven politically expedient for the politicians and interest groups engaged in judicial confirmation fights, it has been a disservice to the American public and the federal judiciary. Oversimplified talking points and buzzwords hardly explain what judges actually do, or, more importantly, what we should expect of them.<sup>4</sup>

Two talking points have gained special traction. One is that judges should be nothing more than neutral umpires. For example, during Chief Justice John Roberts's confirmation hearings, he promised to "remember that it's my job to call balls and strikes."<sup>5</sup> From Capitol Hill to cable news, the analogy took hold as shorthand for the idea that administering justice is a purely objective task, one in which life experiences and personal conceptions of justice play no role.

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3 See, e.g., 155 CONG. REC. S11469 (daily ed. Nov. 18, 2009) (statement of Sen. Coburn) ("I believe [Judge David Hamilton] is an activist jurist. He has shown that he will allow his personal biases and prejudices to affect the outcome of cases before him."); 151 CONG. REC. S6203-04 (daily ed. June 8, 2005) (statement of Sen. Corzine) ("[Judge Janice Rogers Brown is an] individual who would, in my view, insert her extremist legal philosophy into the courts . . ."). See generally CHARLES PICKERING, A PRICE TOO HIGH 233 (2007) ("My personal odyssey through confirmation chaos did not reveal a reasoned and rational debate on the qualifications, integrity, or judicial temperament of nominees.").

4 See Chemerinsky, *supra* note 2, at 1069 ("Increasingly, the rhetoric about judicial review is at complete odds with reality."); Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor*, 40 U. BALT. L.F. 1, 7 (2009) ("Certainly, the picture of how a judge approaches his or her role is more complicated than either the questions or the responses articulated at Judge Sotomayor's confirmation hearings represent."); McKee, *supra* note 2, at 1716 ("The phrase 'judicial activism' is itself as unfortunate as it is meaningless because it offers little more than reflexive criticism and convenient sound bites.").

5 See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of Judge John G. Roberts, Jr.); see also *id.* at 55 ("Judges are like umpires. Umpires don't make the rules, they apply them."). Although the Chief Justice did not originate the judge-as-umpire analogy, his confirmation hearings enhanced its popularity. For a thorough discussion of the history of the judge-as-umpire analogy, see Aaron S.J. Zelinsky, Note, *The Justice as Commissioner: Benching the Judge-Umpire Analogy*, 119 YALE L.J. ONLINE 113, 114-17 (2010). Chief Justice Roberts was not the first nominee to the Supreme Court to invoke a sports analogy during confirmation hearings. During his confirmation hearing, Justice Clarence Thomas testified, "[Y]ou want to be stripped down like a runner" and "shed the baggage of ideology." *Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 102d Cong. 177 (1991) [hereinafter *Thomas Confirmation Hearing*] (statement of Judge Clarence Thomas).

Despite, or perhaps because of, its simplicity, the judge-as-umpire construct gained political popularity and became an indispensable page in the confirmation playbook.<sup>6</sup>

A second, oft-repeated talking point is that empathetic judges are dangerous, activist judges. No sooner had President Barack Obama uttered the word “empathy” in connection with judicial appointments than the word took on a life of its own.<sup>7</sup> It became a code word for judicial overreaching, and it served as the blank slate onto which politicians painted doomsday scenarios of a judiciary run amok. That one word became so politically charged that Supreme Court nominee Sonia Sotomayor went on record as distancing herself from the approach to judging espoused by the President.<sup>8</sup>

I would like to step back from today’s political rhetoric about the role of judges and the nature of judging. Far back. Back to 1921, when then-Judge, and eventual Supreme Court Justice, Benjamin Cardozo delivered a series of influential lectures on judges’ decisionmak-

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6 See, e.g., 151 CONG. REC. S1458 (daily ed. Feb. 16, 2005) (statement of Sen. Cornyn) (“So it is important that the process I have described produces a truly independent judiciary because we want judges who are going to be umpires, who are going to call balls and strikes regardless of who is up at bat.”); 148 CONG. REC. 15,886 (Sept. 3, 2002) (statement of Sen. Hatch) (“[Judge Priscilla Owens] is an umpire who calls the balls and the strikes as they are. It is silly to suggest that she is pro-bat or pro-ball, pro-batter or pro-pitcher.”); see also Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 702 (2007) (“Politically, Roberts’ use of the umpire analogy was an instant success . . .”).

7 Press Release, The White House, Remarks by the President on Justice David Souter (May 1, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-By-The-President-On-Justice-David-Souter](http://www.whitehouse.gov/the_press_office/Remarks-By-The-President-On-Justice-David-Souter) (“I will seek somebody with a sharp and independent mind and a record of excellence and integrity. I will seek someone who understands that justice isn’t about some abstract legal theory or footnote in a case book. It is also about how our laws affect the daily realities of people’s lives—whether they can make a living and care for their families; whether they feel safe in their homes and welcome in their own nation. I view that quality of empathy, of understanding and identifying with people’s hopes and struggles as an essential ingredient for arriving as [sic] just decisions and outcomes. I will seek somebody who is dedicated to the rule of law, who honors our constitutional traditions, who respects the integrity of the judicial process and the appropriate limits of the judicial role.”).

8 When asked by Senator Jon Kyl, “Do you agree with [the President] that the law only takes you the first 25 miles of the marathon and that the last mile has to be decided by what’s in the judge’s heart?,” then-Judge Sonia Sotomayor replied, “No Sir . . . [I] wouldn’t approach the issue of judging in the way the [P]resident does.” See *Transcript: Sotomayor Confirmation Hearings, Day 2*, N.Y. TIMES, July 14, 2009, [http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2009/07/14/us/politics/14confirm-text.html?_r=1&pagewanted=all) [hereinafter *Sotomayor Transcript*].

ing processes.<sup>9</sup> Judge Cardozo's writings are widely—and properly—regarded as authoritative on this subject.<sup>10</sup> He effectively discredited the legal formalists' view of the law as a closed system of preordained rules that were logically to be discovered and mechanically to be applied.<sup>11</sup> Notre Dame Law School is to be commended for hosting a colloquium to remind us of Judge Cardozo's rightful place at the fore of our modern discussions about the judicial function and for encouraging us to reflect meaningfully on the role of judges in our democratic system.

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9 ANDREW L. KAUFMAN, *CARDOZO* 203–17 (1998). These lectures were subsequently published. See *CARDOZO*, *supra* note 1. I refer to Benjamin Cardozo as “Judge Cardozo” throughout this Essay because he sat as a judge on the New York State Court of Appeals at the time of his lectures.

10 See RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 32 (1990); Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 *HARV. L. REV.* 16, 23 n.18 (2002) (stating that Judge Cardozo's examination on the role of the judge has been a “great success” and “the first systematic effort by a judge to explain how judges reason and to articulate a judicial philosophy”); William Wayne Justice, *Putting the Judge Back in Judging*, 63 *U. COLO. L. REV.* 441, 445–46 (1992) (describing Judge Cardozo's work as “seminal” and stating that it had “discredited—most had thought permanently—the Legal Formalist notion of law as a set of clear abstract principles that a judge merely had to discern and mechanically apply”); Harlan F. Stone, *Book Review*, 22 *COLUM. L. REV.* 382, 385 (1922) (reviewing *CARDOZO*, *supra* note 1) (“To those who have not passed beyond the Blackstonian concept of a law which has always existed and which needs only to be discovered by the diligent judge, this book may seem to exhibit radical tendencies. To others it will seem no more radical than science itself which seeks always by the gathering of data and their accurate interpretation to penetrate a little nearer to the ultimate truth. In this sense, the book is truly scientific in spirit and method, presenting its subject with the balance, restraint and clarity which have marked the author's distinguished service as a judge.”). During her confirmation hearings, Justice Sotomayor expressed her admiration for Judge Cardozo's approach to judicial decisionmaking. See *Sotomayor Transcript*, *supra* note 8 (“I'm a judge who believes that the facts drive the law and the conclusion that the law will apply to that case. . . . If you would ask me . . . to tell you a justice from the past that I admire for applying that approach to the law, it would be Judge Cardozo.”). A simple Westlaw search demonstrates the influence this work has had in both the academic and judicial fields: over 1000 judicial opinions—including almost 50 from the U.S. Supreme Court—and 2000 law review articles have cited the work.

11 See Justice, *supra* note 10, at 445–46 (“Judge Cardozo's efforts discredited—most had thought permanently—the Legal Formalist notion of law as a set of clear abstract principles that a judge merely had to discern and mechanically apply. Cardozo saw judgment not as a science, but as an art, and a quintessentially human one at that. Formal reason and abstract logic play their part, but judging is inevitably a creative, active, and personal enterprise.” (citing *CARDOZO*, *supra* 1, at 166–68) (footnotes omitted)).

Judge Cardozo recognized that the law is not always a strike zone; that the facts of life are not always pitches; and that judges are not always umpires making objective calls between balls and strikes. He acknowledged that there are some areas in which the law is unclear or undeveloped and others in which reasonable jurists will disagree about its proper application to the facts.<sup>12</sup> In these areas of the law, where much appellate litigation and most Supreme Court litigation takes place, judges must exercise judgment and discretion. Yet the judge-as-umpire construct, as recently deployed in political debate, fails to recognize the existence of either judgment or discretion.

Only after we acknowledge that complications do exist within the law—that the act of judging defies simple metaphors and labels—may we engage in a serious discussion about what should be expected of our judges. Time and again, Judge Cardozo acknowledged that judges should be true to their sense of justice, shaped as it is by their own life experiences. It is as unrealistic as it is unwise to expect our judges to shed their humanity when they don their robes. Life experiences facilitate judges' ability to appreciate the problems of the people on whose behalf they administer justice. The questions before our courts are too important and too complex to be addressed from a singular vantage point, and it is incumbent upon the judge to understand the views of others.

Judge Cardozo's recognition that one's life experiences and sentiments of justice come to bear on the act of judging did not, by any means, render him an "activist." To the contrary, he emphasized that our judges should be modest, ever vigilant of their role as public servants operating within the confines of the constitutional structure of which they share stewardship. He was as honest and candid in discussing his approach to judging as he was restrained in his view of the judge's role in our democracy. His example undermines the politically popular assertion that empathy and activism are one and the same.

"There has been a certain lack of candor," Judge Cardozo wrote, "in much of the discussion of the theme [of judges' humanity], or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations."<sup>13</sup> That a judge is a fellow citizen, whose sense of justice is informed by his life experiences, should be embraced, not

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12 See, e.g., CARDOZO, *supra* note 1, at 165 ("[There are cases that] might be decided either way. By that I mean that reasons plausible and fairly persuasive might be found for one conclusion or for another.").

13 *Id.* at 167–68.

ignored—or, worse, chastised—especially when those life experiences facilitate one’s ability to understand the circumstances of others.

### I. UMPIRES

In some cases, the judge-as-umpire construct works. If the factual circumstances of the case are undisputed and clearly addressed by an applicable rule, the disposition of the case requires little more than application of the law to the facts. A swing and a miss is a strike, and the umpire lacks discretion to call it otherwise.<sup>14</sup> “[T]he controversy relates most often not to the law, but to the facts,” Judge Cardozo wrote, “In countless litigations, the law is so clear that judges have no discretion.”<sup>15</sup> Both the plaintiff and the defendant are residents of California; diversity jurisdiction does not lie if the plaintiff and defendant come from the same state; therefore, there is no diversity jurisdiction.<sup>16</sup> My daughter is a teenager; the Constitution requires that the President be at least thirty-five years old;<sup>17</sup> therefore, my daughter cannot now be President. Where “the rule of constitution or of statute is clear, . . . the difficulties vanish.”<sup>18</sup>

Nor is there much difficulty in the vast majority of cases that are controlled by precedent. Judge Cardozo observed that most of these cases “could not, with semblance of reason, be decided in any way but one [because] [t]he law and its application alike are plain.”<sup>19</sup> Granted, the judge’s function can be more difficult in these cases than in those governed by clear commands from legal texts. The judge must reason by analogy, comparing the facts and legal claims in the case before him to the facts and legal claims of previously decided

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14 Then again, whether a batter really swung is itself often subject to dispute and may require the home plate umpire to defer to other umpires with the better vantage points. See Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 138–39 (“You can’t take the judgment out of judging.”).

15 CARDOZO, *supra* note 1, at 129.

16 See 28 U.S.C. § 1332 (2006); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267–68 (1806).

17 U.S. CONST. art. II, § 1.

18 CARDOZO, *supra* note 1, at 18.

19 *Id.* at 160. For example, in the twelve-month period ending on September 30, 2008, the Ninth Circuit resolved about 5800 cases on the merits. Of these, nearly eighty-seven percent were decided in unpublished memorandum dispositions because they were governed by clear statutory language or by precedent from the Ninth Circuit or the Supreme Court. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 44 tbl.S-3 (2009), available at <http://www.uscourts.gov/judbus2008/JudicialBusinesspdfversion.pdf>. Adherence to precedent is thus “the everyday working rule of our law.” CARDOZO, *supra* note 1, at 20. Without it, “the labor of judges would be increased almost to the breaking point.” *Id.* at 149.

cases. Only if the former are sufficiently close in kind to the latter will the precedent govern. As Judge Cardozo put it: “It is a process of search, comparison, and little more. Some judges seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk.”<sup>20</sup> Thus, reasoning by analogy to precedent requires some discretion, but not much.

If all cases fit this mold—if the act of judging were always a non-discretionary task—one would not expect to find much disagreement among judges. If the dispensation of justice were truly robotic, judges tasked with reviewing their colleagues’ work would perform quality control—checking for the defective product that somehow made its way down the assembly line—and little more.<sup>21</sup> Genuine, substantive disputes about the law would be the utmost rarity. But, in the Supreme Court, dissenting opinions are the norm, not the exception, and cases are almost as likely to be decided by the narrowest of 5–4 or 6–3 margins as they are to be decided unanimously.<sup>22</sup> Splits in authority often emerge among the Circuit Courts of Appeals, which reach conflicting conclusions on nearly identical legal questions.<sup>23</sup> On the Ninth Circuit Court of Appeals, good faith disagreements among my colleagues result in a robust en banc workload.<sup>24</sup> Mean-

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20 CARDOZO, *supra* note 1, at 20.

21 See Lauren Collins, *Number Nine: Sonia Sotomayor’s High-Profile Début*, NEW YORKER, Jan. 11, 2010, at 42, 53 (“The robotic dispensation of justice is a fiction . . .”); see also Davis, *supra* note 4, at 14 (“The argument that ‘discretion-free’ judging, devoid of the influence of one’s identity or experiences, is implausible in a profession populated by human beings, and not machines, is compelling . . .”).

22 See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 231 tbl.3-2 (4th ed. 2007) (reporting that 58.5% of cases argued before the Supreme Court between 2000 and 2004 had at least one dissenting opinion); *id.* at 241 tbl.3-4 (reporting that 24.1% of cases argued before the Supreme Court between 2000 and 2004 were decided by a one-vote margin); see also Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts’ of Appeals Image*, 58 DUKE L.J. 1439, 1463 tbl.1 (2009) (reporting that, of all cases argued before the Supreme Court between 1953 and 2006, more than 30% were decided 5-4 or 6-3).

23 See, e.g., *MetroPCS, Inc. v. City & County of S.F.*, 400 F.3d 715, 721 (9th Cir. 2005) (recognizing the circuit split over the Telecommunications Act’s “in writing” requirement); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 666 & n.3 (9th Cir. 2004) (recognizing a circuit split over whether “reliance is the *only way* plaintiffs can establish causation in a civil RICO claim predicated on mail fraud”); *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004) (recognizing a circuit split over whether “an arresting officer’s lack of authority under state or federal law to conduct an otherwise constitutionally valid arrest constitutes an unreasonable seizure under the Fourth Amendment”).

24 For example, in 2009, there were forty-three calls for en banc rehearing in the Ninth Circuit, with eighteen succeeding. Beneath the surface, many cases that are

while, the reasoned decisions of district court judges are reversed thousands of times every year.<sup>25</sup> “It happens again and again,” Judge Cardozo observed, “where the question is a close one, that a case which one week is decided one way might be decided another way the next if it were then heard for the first time [by a different panel of judges].”<sup>26</sup> It is not “a new, a partisan, or a particularly radical idea that different judges judge differently.”<sup>27</sup> It is, instead, an idea that is borne out by experience.

“It is when the colors do not match,” Judge Cardozo wrote, “when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins.”<sup>28</sup> As Judge Cardozo recognized, questions arise for which the legal authority carries the judge to a point just short of his final destination. What then? It is here that the judge-as-umpire construct is not only useless but is counterproductive for judges and damaging to the process by which they are selected.<sup>29</sup> The judge-as-umpire construct establishes a false choice between the judge who calls balls and strikes, and nothing more, and the activist judge who behaves extrajudicially. The choice is false because the law often explicitly assigns the judge a role more sophisticated than that of umpire: It empowers the judge to “say what the law is,”<sup>30</sup> and it entrusts the judge to exercise his discretion in

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not called en banc are nonetheless the subject of impassioned debates amongst my colleagues. See Carol J. Williams, *A Liberal Bastion's Right Turn*, L.A. TIMES, Apr. 19, 2009, at A1 (discussing the growing use of dissents from a denial of rehearing en banc).

25 During the twelve-month period ending September 30, 2008, the U.S. Courts of Appeals reversed district courts 2522 times. See ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 19, at 111 tbl.B-5.

26 CARDOZO, *supra* note 1, at 150.

27 Collins, *supra* note 21, at 53; see also McKee, *supra* note 2, at 1718 (“It just may be that the rulings of even the most respected jurists differ on such issues because they have different experiences, and different frames of reference, and therefore view the relevant legal authority through different lenses.”).

28 CARDOZO, *supra* note 1, at 21.

29 See Chemerinsky, *supra* note 2, at 1077 (“So what is wrong with the myth of discretion-free judging? One harm is that the myth greatly distorts the judicial selection process.”); *id.* at 1069 (“Although both [judges and umpires] make decisions, it is hard to think of a less apt analogy.”); McKee, *supra* note 2, at 1710 (“[T]he metaphor has become accepted as a kind of shorthand for judicial ‘best practices,’ that obscures a complex dynamic that is far more amorphous, elusive and troublesome than its simplistic appeal suggests.”); Siegel, *supra* note 6, at 701–02 (“I argue that those cases [involving integration] vividly illustrate how inapt the umpire analogy is if one takes its appeal to formalism seriously as a statement about how judges can or should execute their responsibilities in constitutional cases.”).

30 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).



doing so. In these circumstances, the act of judging involves the exercise of judgment, and the judge behaves extrajudiciously when he plays (or pretends to play) umpire in the face of a law requiring him to do something more.<sup>31</sup>

Insist as one might, “[y]ou can’t take the judgment out of judging.”<sup>32</sup> In his lectures, Judge Cardozo recognized at least three judicial functions that require the judge to exercise his discretion: (1) interpreting the law; (2) applying the law; and (3) selecting among competing laws. The pages that follow offer a brief discussion of each function, occasionally with reference to Ninth Circuit decisions as illustrations.

### A. Interpretation

Judge Cardozo described judges’ interpretive function as one of filling the “‘gaps in the law.’”<sup>33</sup> He cited to the works of Géza Kiss, who wrote: “[T]he general framework furnished by the statute is to be filled in, for each case, by means of interpretation, that is, by following out the principles of the statute . . . . In every case, without exception, it is the business of the court to supply what the statute omits.”<sup>34</sup> The judge’s interpretive function remains important today. As one of my

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31 McKee, *supra* note 2, at 1719 (“Rather than indulging the pretense that judges are merely umpires and that umpires merely ‘call ‘um as they see ‘um’ we should accept the fact that the law is flexible enough and strong enough to accommodate a far more honest approach to adjudication.”); *see also* THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[The judiciary] may truly be said to have neither force nor will, but merely judgment . . . .” (emphasis omitted)); *cf.* Diarmuid F. O’Scannlain, *Must a Faithful Judge Be a Faithless Judge?*, 4 U. ST. THOMAS L.J. 157, 164 (2006) (“[W]hile there is allowance in our system for the exercise of discretion, it does not fall to the judge to second guess the lawgiver in order to bring about the judge’s vision of justice or to exercise the judge’s understanding of compassion, except where such discretion has been expressly delegated.”).

32 Karst, *supra* note 14, at 138–39.

33 CARDOZO, *supra* note 1, at 69.

34 *Id.* at 70 (quoting Géza Kiss, *Equity and Law: Judicial Freedom of Decision*, 9 MODERN LEGAL PHILOSOPHY SERIES 146, 161 (Ernest Bruncken & Layton B. Register trans., Comm. Ass’n Am. Law Schs. ed., 1917)); *see also* INS v. Chadha, 462 U.S. 919, 978 (1983) (White, J., dissenting) (“[T]he wisdom of the Framers was to anticipate that the Nation would grow and new problems of governance would require different solutions. Accordingly, our Federal Government was intentionally chartered with the flexibility to respond to contemporary needs without losing sight of fundamental democratic principles.”); CARDOZO, *supra* note 1, at 14–15 (“Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had none the less a real and ascertainable pre-existence in the legislator’s mind. The process is, indeed, that at times, but it is often something more.”).

renowned colleagues has written: “Frequently, in my line of work, disputes cannot be resolved by ‘mere application’ of the law. The literal texts are unclear. Either they are open to several possible interpretations or they are not sufficiently specific to be of much help.”<sup>35</sup> The judge-as-umpire construct fails to account for the interpretive function of judging. It assumes that the law is like an exhaustively detailed rulebook, specifying with precision the parameters of the strike zone.<sup>36</sup> Though it is that at times, often it is not.

For example, our Constitution provides that “[no state shall] deprive any person of life, liberty, or property, without due process of law.”<sup>37</sup> “Here is a concept of greatest generality,” Judge Cardozo wrote, “Yet it is put before the courts *en bloc*. Liberty is not defined. Its limits are not mapped and chartered. How shall they be known?”<sup>38</sup> Facially nebulous concepts, such as “due process” and “liberty,” take shape over the years as doctrine is developed by the courts. Today, when procedural fairness is at issue, we know that the amount and type of process “due” is a function of the private interest at stake, the risk of an erroneous deprivation of that interest, the probable value of any additional procedural safeguards, and the government’s interest.<sup>39</sup> The concept of liberty, too, needs judicial interpretation. An early definition referred to “those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men,”<sup>40</sup> and, of course, in our own time, the courts have recognized many constitutional liberties beyond the foresight of the Justices who wrote those words.<sup>41</sup> We understand the meaning of “liberty” and “due process,” not because the Constitution explicitly provides it, but because years of judicial interpretation have given meaning to what the Constitution does say.

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35 Stephen Reinhardt, *The Role of Social Justice in Judging Cases*, 1 U. ST. THOMAS L.J. 18, 23 (2003).

36 See Chemerinsky, *supra* note 2, at 1069 (“Interpretation of an ambiguous statute or a constitutional provision’s broad, open-textured language is also the judge’s legal product.”); Siegel, *supra* note 6, at 708 (“[M]y primary concern is that Supreme Court Justices cannot even agree on the basic contours of the ‘strike zone’ when it comes to such fundamental matters as whether the equal protection clause presumptively prohibits racial classifications or instead targets practices of racial subordination. That is because the constitutional text itself is indeterminate . . .”).

37 U.S. CONST. amend. XIV.

38 CARDOZO, *supra* note 1, at 76.

39 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

40 *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

41 See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

### B. Application

In many cases, the law has been, at least partially, interpreted; precedent provides the analytical framework within which a given problem is resolved, or it provides the legal test against which a particular set of circumstances is measured. But even where the contours of the law have become relatively settled—where the boundaries of the strike zone are more or less defined—new factual problems and unforeseen circumstances require judges to exercise discretion and judgment. The application of the law to the facts is easier said than done when the facts are kaleidoscopic.

That the courts have not covered all the factual bases is, in many respects, the result of institutional design. Courts do not set about looking for problems to solve; they address only the questions properly presented to them, and, even then, they do so on the narrowest grounds possible.<sup>42</sup> In a world of evolving technologies,<sup>43</sup> shifting relations between governments,<sup>44</sup> and often unpredictable foreign and domestic challenges,<sup>45</sup> it is hardly surprising that the rate at which new questions emerge far exceeds the rate at which courts can provide answers. The application of established law to rapidly changing circumstances generates some of our most lively and impassioned legal debates.

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42 See *Christopher v. Harbury*, 536 U.S. 403, 417 (2002) (recognizing the “obligation of the Judicial Branch to avoid deciding constitutional issues needlessly”); *Burke v. Barnes*, 479 U.S. 361, 363 (1987) (“Article III of the Constitution requires that there be a live case or controversy at the time a federal court decides the case . . .”). But see *Citizens United v. F.E.C.*, 130 S. Ct. 876 (2010); *Bush v. Gore*, 531 U.S. 98 (2000). As Justice Stevens recently stated in an interview, referring to *Citizens United*, “If it is not necessary to decide a case on a very broad constitutional ground, when others are available, then doesn’t that create the likelihood that people will think you’re not following the rules?” Jeffrey Toobin, *After Stevens: What Will the Supreme Court Be Like Without Its Liberal Leader?*, *NEW YORKER*, Mar. 22, 2010.

43 See, e.g., *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that police use of a thermal imaging scanner on an individual’s home constituted a search under the Fourth Amendment).

44 See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–47, 557 (1985) (overruling *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976), and holding that state immunity from federal regulation did not depend on whether the governmental function was “integral” or “traditional”).

45 *Boumediene v. Bush*, 128 S. Ct. 2229, 2262–75 (2008) (finding that Congress’s attempt to strip federal courts of habeas corpus jurisdiction over claims from Guantanamo Bay detainees effected an unconstitutional suspension of the writ of habeas corpus).

In *Redding v. Safford Unified School District No. 1*,<sup>46</sup> an en banc panel of the Ninth Circuit Court of Appeals was called upon to decide whether a public school administrator violated Savana Redding's rights under the Fourth Amendment when he ordered her strip-searched on a suspicion that she was concealing prescription strength ibuprofen pills.<sup>47</sup> If judging required nothing more than application of law to facts, *Redding* would have been an easy case. There was no dispute that the governing legal test of the search's constitutionality was whether it was "'reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.'"<sup>48</sup> Nor was there much disagreement as to the facts. The school had stepped up enforcement of its drug policies in the aftermath of a dance at which school officials detected alcohol use by unidentified students.<sup>49</sup> About a month and a half later, a student named Marissa was found with prescription-strength ibuprofen at school. Caught red-handed, Marissa said that she received the pills from Miss Redding, an honors student with no disciplinary record.<sup>50</sup> School officials summoned Miss Redding to the principal's office where she was questioned.<sup>51</sup> Miss Redding denied any involvement with the pills. School officials then searched Miss Redding's belongings. No pills were found.<sup>52</sup> Nonetheless, the school officials required Miss Redding to remove her clothes, article by article, and reveal her naked body in the presence of two adults.<sup>53</sup> Still, no pills were found.<sup>54</sup>

Though the law was clear and the facts were not in dispute, there was intense debate as to the application of the former to the latter. Was the search of Miss Redding "reasonable"? Was it "intrusive"? "Excessively" so? The Fourth Amendment does not provide a checklist of facts, the existence or absence of which would compel one answer or another. At the end of the day, deciding whether the school administrator's search of Miss Redding was unconstitutional

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46 531 F.3d 1071 (9th Cir. 2008) (en banc), *aff'd in part, rev'd in part*, 128 S. Ct. 2633 (2009).

47 *Id.* at 1076–77.

48 *Id.* at 1079 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)).

49 *Id.* at 1075–76.

50 *Id.* at 1076–77.

51 *Id.* at 1074–75.

52 *Id.* at 1075.

53 *Id.*

54 *Id.*

would require more than calling a ball or a strike; it would require an exercise of judgment.<sup>55</sup>

Similarly, in *Jones v. City of Los Angeles*,<sup>56</sup> a three-judge panel of the Ninth Circuit Court of Appeals was asked to decide whether the City of Los Angeles violated the Eighth Amendment when it arrested homeless individuals on Skid Row under an ordinance making it unlawful to “sit, lie or sleep in or upon any street, sidewalk or other public way.”<sup>57</sup> The judges on the panel agreed that certain legal principles governed the question. The Eighth Amendment prohibits “cruel and unusual punishment,”<sup>58</sup> and the Supreme Court’s decisions in *Robinson v. California*<sup>59</sup> and *Powell v. Texas*<sup>60</sup> read together explain that it is “cruel and unusual” to criminalize an individual’s status, as opposed to his conduct.<sup>61</sup> The majority opinion described the legal principle: “[T]he state may not criminalize ‘being’; that is, the state may not punish a person for who he is, independent of anything he has done.”<sup>62</sup> Relying on the very same legal precedent, the dissent echoed this assessment of the law, stating that the Eighth Amendment protects people from “being punished for crimes that do not involve *conduct* that society has an interest in preventing.”<sup>63</sup> None of this, however, compelled a particular answer to the ultimate question of whether the city’s ordinance criminalized status or conduct. Confronted with that issue, it would be futile simply to admonish the judge to apply the law to the facts, to call a ball a ball and a strike a strike. Instead, the judges considering *Jones* would have to exercise their judgment.

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55 See *The Supreme Court 2008 Term—Leading Cases*, 123 HARV. L. REV. 163, 169 (2009) [hereinafter *Leading Cases*] (“[*Redding*] was challenging on another, more subtle level: law alone could not answer the question whether the search was reasonable.”).

56 444 F.3d 1118 (9th Cir. 2006).

57 *Id.* at 1123 (quoting L.A., CAL., MUN. CODE § 41.18(d) (2005)). This opinion was subsequently vacated following the parties’ settlement of the action. See *Jones v. City of L.A.*, 505 F.3d 1006 (9th Cir. 2007).

58 U.S. CONST. amend. VIII.

59 370 U.S. 660 (1962).

60 392 U.S. 514 (1968).

61 See *id.* at 550 n.2 (White, J., concurring); *id.* at 567 (Fortas, J., dissenting); *Robinson*, 370 U.S. at 667.

62 *Jones*, 444 F.3d at 1133.

63 *Id.* at 1139 (Rymer, J., dissenting).

### C. Selection

Precedent may be a “beaten path,”<sup>64</sup> but it sometimes leads to a fork in the road. Judge Cardozo explained that “[t]he directive force of logic does not always exert itself . . . along a single and unobstructed path.”<sup>65</sup> Instead, “[o]ne principle or precedent, pushed to the limit of its logic, may point to one conclusion; another principle or precedent, followed with like logic, may point with equal certainty to another.”<sup>66</sup> When faced with conflicting lines of authority, judges “must choose between the two paths.”<sup>67</sup> Making that choice requires judgment and discretion.<sup>68</sup>

A panel of the Ninth Circuit, sitting en banc, came upon a fork in the road in deciding *Hulteen v. AT&T Corp.*<sup>69</sup> AT&T employees’ pension payments were based on the number of “service credits” they accumulated during their tenure. Until 1978, an employee’s leave from work because of a temporary disability was counted toward the employee’s service credits, but leave for pregnancy was not.<sup>70</sup> The Supreme Court recently had held that policies of this sort were not unlawful under Title VII of the Civil Rights Act, which prohibited gender-based discrimination but did not specify that disparate treatment on the basis of pregnancy qualified as such.<sup>71</sup> In 1978, Congress adopted the Pregnancy Discrimination Act<sup>72</sup> (PDA), which amended Title VII explicitly to prohibit disparate treatment “because of or on the basis of pregnancy, child-birth, or related medical conditions.”<sup>73</sup> AT&T then changed its pension plan to provide that employees taking pregnancy leave from that point forward would receive service credits just as if they were taking leave for any other temporary disability.<sup>74</sup>

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64 See ROBERT H. JACKSON, THE NÜRNBERG CASE, at xv (1971) (“The power of the precedent . . . is the power of the beaten path.” (quoting Judge Cardozo)).

65 CARDOZO, *supra* note 1, at 40.

66 *Id.*

67 *Id.*; see also *Citizens United v. F.E.C.*, 130 S. Ct. 876, 903 (2010) (“The Court is thus confronted with conflicting lines of precedent . . .”).

68 See Siegel, *supra* note 6, at 702 (“The umpire analogy would have judges ‘just’ decide constitutional cases according to ‘the rules.’ Judges, however, cannot ‘just’ decide constitutional cases according to ‘the rules’ because they cannot agree on what the rules are in the vast majority of the most important cases.”).

69 498 F.3d 1001 (9th Cir. 2007) (en banc), *rev’d*, 129 S. Ct. 1962 (2009).

70 See *id.* at 1002–05. A pregnant woman could take personal leave, but the allowance for such was thirty days, whereas temporary disability leave was unlimited.

71 *Id.* at 1003.

72 Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2006)).

73 42 U.S.C. § 2000e(k).

74 *Hulteen*, 498 F.3d at 1004.

Ms. Hulteen, an AT&T employee, took pregnancy leave under the pre-1978 version of AT&T's pension plan. Her employment was terminated involuntarily in 1994 as part of a reduction in AT&T's workforce.<sup>75</sup> In calculating Ms. Hulteen's pension, AT&T did not provide her with service credits for 210 days of pregnancy leave that she took before 1978. As a result, her pension payments were less than they would have been if she had taken leave for any other temporary disability.<sup>76</sup> Ms. Hulteen, and a group of similarly situated employees, sued AT&T under the Civil Rights Act, arguing that AT&T discriminated against them on the basis of gender when it calculated their pension payments, post-enactment of the PDA, so as to exclude pregnancy leave from their service credits.<sup>77</sup> AT&T countered that its pension policy was at all times in compliance with federal law and that Ms. Hulteen was not entitled to the disputed service credits because she took pregnancy leave during a period in which AT&T had no legal obligation to treat pregnancy like other disabilities.<sup>78</sup>

Two different lines of precedent bore on the issue of whether AT&T was required to provide Ms. Hulteen with service credits for pregnancy leave taken before enactment of the PDA. One line extended from the Supreme Court's decision in *Bazemore v. Friday*<sup>79</sup> through the Ninth Circuit's decision in *Pallas v. Pacific Bell*<sup>80</sup> and provided that liability may be imposed for a pre-Title VII discriminatory policy to the extent that it is perpetuated in post-Title VII employment actions.<sup>81</sup> Another line of precedent extended from the Supreme Court's decision in *Landgraf v. USI Film Products*,<sup>82</sup> which provided that, in the absence of an express retroactivity provision, a statute may not impair a party's pre-existing rights, increase a party's liability for past conduct, or impose new duties as to already completed transactions.<sup>83</sup> Thus, if the court viewed the 1994 calculation of Ms. Hulteen's pension payments as the operative discriminatory act, it would follow *Bazemore* and find AT&T in violation of Title VII. If, however, it viewed the pre-1978 allocation of service credits as the operative discriminatory act, it would follow *Landgraf* and find no vio-

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75 *Id.*

76 *Id.*

77 *Id.* at 1004-05.

78 *Id.* at 1005.

79 478 U.S. 385 (1986).

80 *Pallas v. Pac. Bell*, 940 F.2d 1324 (9th Cir. 1991), *abrogated by* AT&T Corp. v. Hulteen, 129 S. Ct. 1962 (2009).

81 *Id.* at 1327.

82 511 U.S. 244 (1994).

83 *Id.* at 265-74.

lation. The amount of Ms. Hulteen's pension payments depended on which path the court chose to follow. In this circumstance, adopting the judge-as-umpire construct by simply telling the judge to apply the law to the facts begs the dispositive question: Which law?

## II. EMPATHY

"We like to figure to ourselves the processes of justice as coldly objective and impersonal," Judge Cardozo wrote, "It has a lofty sound; it is well and finely said; but it can never be more than partly true."<sup>84</sup> So long as we cling to half-truths about the judicial function, we render irrelevant otherwise important questions about judges and judging, and we forgo pursuit of "the needed corrective of an ideal of impossible objectivity."<sup>85</sup> Why scrutinize, or even discuss, the exercise of judicial discretion when we pretend that there is no judicial discretion to be exercised? By demonstrating that judges must exercise judgment, Judge Cardozo's work brings to the fore the tough questions about judicial decisionmaking that the judge-as-umpire construct ignores. Judge Cardozo not only encouraged us to think about those questions—a notable contribution in its own right—but he went further still in offering answers. As he suggested, "[S]ome principles of selection there must be to guide [the judge] among all the potential judgments that compete for recognition."<sup>86</sup> Judge Cardozo explained that one's "individual sentiment of justice" is "one of the tests and touchstones in construing or extending law."<sup>87</sup>

Life experiences provide each of us with sentiments of right and wrong, fair and unfair, rational and irrational, just and unjust. And that is as true for judges as it is for anyone else.<sup>88</sup> One need not have

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84 CARDOZO, *supra* note 1, at 168–69; *see also* Reinhardt, *supra* note 35, at 19 ("The model judge is increasingly thought to be a technocratic proceduralist . . .").

85 CARDOZO, *supra* note 1, at 168–69; *see also* David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1879 (2008) (book review) ("Just as a good manager must understand the job description before hiring an employee, Americans 'must have a clear understanding of what Supreme Court justices do'—specifically, how they decide politically controversial cases—to know what kind of individuals should be nominated and confirmed." (quoting CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE* 6 (2007))).

86 CARDOZO, *supra* note 1, at 21.

87 *Id.* at 140.

88 *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 475 (2006) [hereinafter *Alito Confirmation Hearing*] ("When I have cases involving children, I can't help but think of my own children and think about my children being treated in the way the children may be treated in the case that's before me. And that goes down the line." (statement of Judge Samuel A. Alito, Jr.)).



a black robe, or a law degree for that matter, to have conceptions of justice. “[E]very one of us has in truth an underlying philosophy of life,” Judge Cardozo wrote, “even those of us to whom the names and the notions of philosophy are unknown or anathema.”<sup>89</sup> Some insist that judges abandon the lessons of their life experiences when they take the bench.<sup>90</sup> Judge Cardozo’s lectures explain why this insistence is as impractical as it is imprudent.

It is impractical because it is impossible. “We may try to see things as objectively as we please,” Judge Cardozo wrote, “None the less, we can never see them with any eyes except our own.”<sup>91</sup> There are times when the judge’s sense of justice necessarily comes to bear on his consideration of the legal problems with which he is presented. Black robes are not magical garments; they cannot transform the wearer from human to automaton. Time and again in his lectures, Judge Cardozo recognized that a judge cannot divorce herself from the experiences that have shaped her. “There is in each of us,” he wrote, “a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals.”<sup>92</sup> He added:

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89 CARDOZO, *supra* note 1, at 12.

90 *Sotomayor Transcript*, *supra* note 8 (“SEN. JEFF SESSIONS: . . . [Y]ou have evidenced, I think it’s quite clear, a philosophy of the law that suggests that a judge’s background and experiences can and should—even should, and naturally will—impact their decision, which I think goes against the American ideal and oath that a judge takes to be fair to every party, and every day when they put on that robe, that is a symbol that they’re to put aside their personal biases and prejudices.”); *id.* (“SEN. SESSIONS: . . . I believe every judge is committed—must be—to put aside their personal experiences and biases and make sure that that person before them gets a fair day in court.”); *id.* (“SEN. KYL: . . . And it strikes me that you could’ve easily said here, now, of course, blind Lady Justice doesn’t permit us to base decisions in cases on our ethnicity or gender. We should strive very hard to set those aside when we can. I found only one rather oblique reference in your speech that could be read to say that you warned against that. All of the other statements seem to embrace it or certainly to recognize it and almost seem as if you’re powerless to do anything about it. I accept that this will happen, you said.”); *see also Thomas Confirmation Hearing*, *supra* note 5, at 177 (statement of Judge Clarence Thomas) (testifying judges need to “be stripped down like a runner” and “shed the baggage of ideology”). Martha Minow aptly explained that “[t]he confusion is particularly pronounced because the ultimate goal of fairness in our society includes notions of representation as well as ideas of neutrality.” Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1202 (1992).

91 CARDOZO, *supra* note 1, at 13; *see also Davis*, *supra* note 4, at 18 (“That we all perceive through the prism of our own experiences is beyond cavil.”).

92 CARDOZO, *supra* note 1, at 12 (footnote omitted).

[E]very day there is borne in on me a new conviction of the inescapable relation between the truth without us and the truth within. The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties.<sup>93</sup>

Simply put, a judge is no more capable of renouncing entirely his prior existence than is anyone else, which is to say not at all.

Insisting that judges abandon their identity is also imprudent. Some of history's greatest jurists have acknowledged that one's personal experiences, and one's resultant sense of justice, are useful guides when the law does not command an answer to a particular question. Judge Cardozo identified one's "compelling sentiment of justice" as one of the guideposts that might "come to the rescue of the anxious judge, and tell him where to go" when the law fails fully to do so.<sup>94</sup> He explained that one's ability to make the close calls—"to know when one interest outweighs another"—comes "from experience and study and reflection; in brief, from life itself."<sup>95</sup> Justice Holmes agreed, famously stating that "[t]he life of the law has not been logic: it has been experience."<sup>96</sup> For Justice Thurgood Marshall, a "personal history of exposure to the indignities and dangers of racism" resulted in his "vision of justice."<sup>97</sup>

Nobody would suggest that judges throw the law to the wind and decide cases based exclusively on individual sentiments of justice. But it is irresponsible to pretend that one's notions of justice do not play, or may not play, a role in the cases for which precedent fails to command one outcome or another. They constitute one—and only one—of the judge's points of reference.<sup>98</sup> Empathy allows the judge

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93 *Id.* at 174–75; *see also id.* at 12 ("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 . . .").

94 *Id.* at 43.

95 *Id.* at 113.

96 OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (Am. Bar Ass'n 2009) (1881).

97 *Remembering Justice Thurgood Marshall: Thoughts from His Clerks*, 1 *GEO. J. ON FIGHTING POVERTY* 8, 11 (1993) (remarks of Vicki C. Jackson); *see also* Reinhardt, *supra* note 35, at 28–29 ("Every day, we must struggle to apply our concepts of justice in cases ranging from the most mundane individual disputes to great social and political controversies. This is the part of the job that we should embrace and take the greatest pleasure in performing. Above all, it makes being a judge a worthwhile and noble endeavor.").

98 *See, e.g., Alito Confirmation Hearing, supra* note 88, at 475 (statement of Judge Samuel Alito) ("[I]n my opening statement, I tried to provide a little picture of who I

to appreciate more fully the problem before her; it does not solve it for her; it does not dictate a result. The operative question should not be whether the judicial nominee will or will not ignore the lessons of her life experiences when she takes the bench; it should be whether her life experiences provide her the capacity to understand the views and problems of the parties who appear before her. Do we have confidence in the judge's sense of justice in the close cases?

Whereas Chief Justice Roberts's judge-as-umpire analogy received much approving fanfare, President Obama's statement that judges should have "empathy" was met with strong criticism from his opponents and uncomfortable silence from his supporters. The President's critics railed against the notion of empathy; then-nominee, now-Justice Sonia Sotomayor distanced herself from it; and the President, perhaps believing that discretion is the better part of valor, never repeated it. "Empathy," we were warned, is "antithetical to the proper role of the judge."<sup>99</sup> We were told that placing empathetic judges on the bench would result in nothing short of lawlessness.<sup>100</sup> Feelings and emotions would displace the rule of law as the basis for judicial decisions.<sup>101</sup> The hysteria over that one word may be best captured by statements of one United States Senator in an interview with the *National Journal*:

I don't know what [President Obama] means. And it's dangerous, because I don't know what empathy means. So I'm one judge and I have empathy for you and not this party, and so I'm going to rule for the one I have empathy with? So what if the guy doesn't like your haircut, or for some reason doesn't like you, is he now free to

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am as a human being and how my background and my experiences have shaped me and brought me to this point. . . . [W]hen a case comes before me involving, let's say, someone who is an immigrant, and we get an awful lot of immigration cases and naturalization cases, I can't help but think of my own ancestors because it wasn't that long ago when they were in that position. And so it's my job to apply the law. It's not my job to change the law or to bend the law to achieve any results, but I have to, when I look at those cases, I have to say to myself, and I do say to myself, this could be your grandfather.").

99 155 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. The American people expect a judge to be a neutral arbiter who treats all litigants equally.").

100 155 CONG. REC. S8780 (daily ed. Aug. 4, 2009) (statement of Sen. Grassley) ("A mandate of judicial empathy turns that traditional legal concept on its head in favor of a lawless standard.").

101 155 CONG. REC. S7602 (daily ed. July 16, 2009) (statement of Sen. Bunning) ("Empathy in and of itself is not a bad thing. However, in this context it means that the law would lose out to a justice who feels an emotional pull to rule one way or the other.").

rule one way or the other based on likes, predilections, politics, personal values?<sup>102</sup>

That statement bears repeating: “[I]t’s dangerous, because I don’t know what empathy means.” Apparently, in the heat of a judicial confirmation battle, there are two ways to find meaning in an unfamiliar word. The politically expedient method is to define it oneself. Under that approach, “empathy” quickly became a three-syllable call to arms, inciting opposition to the President’s judicial nominees. The more absurdly it was defined, the more valuable its place in the partisan wrangling. It soon became synonymous with emotionally-driven capriciousness, and who would ever want that in a judge?

The other way to find meaning in an unfamiliar word is to consult a dictionary. The *Oxford English Dictionary* defines empathy as the “power of projecting one’s personality into (and so fully comprehending) the object of contemplation.”<sup>103</sup> *Webster’s International Dictionary* defines it as the “capacity for participating in or a vicarious experiencing of another’s feelings, volitions, or ideas.”<sup>104</sup> Thus, when President Obama announced that he would nominate judges with empathy, the ordinary interpretation of this statement was that he planned to nominate judges who possess the capacity to understand the views and problems of others. In his words: “[W]hat empathy does—it calls us all to task, the conservative and the liberal, the powerful and the powerless, the oppressed and the oppressor. We are all shaken out of our complacency. We are all forced beyond our limited vision.”<sup>105</sup> A judge’s work requires a capacity to understand the challenges faced by a wide range of potential litigants from across the spectrum of our society. Judge Cardozo must have had this notion in

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102 *Sessions Says He’s Looking for Judicial Restraint*, NAT’L J. ONLINE, May 7, 2009, [http://www.nationaljournal.com/njonline/no\\_20090507\\_5499.php](http://www.nationaljournal.com/njonline/no_20090507_5499.php) (quoting Sen. Jeff Sessions).

103 OXFORD ENGLISH DICTIONARY (2d ed. 1989).

104 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1981).

105 BARACK OBAMA, *THE AUDACITY OF HOPE* 68 (2006); see also PRESS RELEASE, *supra* note 7. (“I will seek somebody with a sharp and independent mind and a record of excellence and integrity. I will seek someone who understands that justice isn’t about some abstract legal theory or footnote in a case book. It is also about how our laws affect the daily realities of people’s lives—whether they can make a living and care for their families; whether they feel safe in their homes and welcome in their own nation. I view that quality of empathy, of understanding and identifying with people’s hopes and struggles as an essential ingredient for arriving as [sic] just decisions and outcomes. I will seek somebody who is dedicated to the rule of law, who honors our constitutional traditions, who respects the integrity of the judicial process and the appropriate limits of the judicial role.”).

mind when he wrote that “[i]t will help to broaden the group to which [the judge’s] subconscious loyalties are due.”<sup>106</sup>

It is those judges who are unable to understand the views and problems of others—who are unable to assess problems from any vantage point other than their own—who may not be up to the task of administering justice equally and impartially.<sup>107</sup> The legal questions before the courts are far too important, and often far too complex, to be resolved with the narrow perception of persons incapable of viewing legal problems from the perspectives of the parties before him. Therein lies the irony in the political squabbling over the role of “empathy” in judging: The principle that we should avoid appointing judges who impose upon others their own narrow, personal views argues for, not against, empathetic judges.<sup>108</sup> One’s sense of justice and capacity to understand the views and problems of others are products of life experiences. Instead of denying this truth, we should make it a topic of honest dialogue in our national conversation about judging and judicial appointments.

#### A. Redding *Revisited*

Perhaps nowhere is the importance of empathy more apparent than in the context of laws establishing standards of “reasonableness” to govern conduct, such as the Fourth Amendment’s protection against “unreasonable searches.” If judges lacked the capacity to understand the views and positions of others, “the Fourth Amendment would preserve not society’s reasonable expectations of privacy, but rather the federal judiciary’s.”<sup>109</sup> *Redding* is illustrative. Recall that the legal issue in that case was whether the strip-search of Miss Redding was “reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”<sup>110</sup> The judges who heard *Redding* could

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106 CARDOZO, *supra* note 1, at 176.

107 See Minow, *supra* note 90, at 1203 (“We also want [judges] to have the ability to empathize with others, to evaluate credibility, to know what is fair in this world, not in a laboratory. And we want jurors and judges to have, and to remember, experiences that enable their empathy and evaluative judgments.” (emphasis omitted)).

108 Davis, *supra* note 4, at 18 (“[T]he inability of judges to empathize with individuals subject to their judgment, may, in some instances, result in decisions that reflect only the cloistered perspective of a jurist, disconnected from the everyday experiences of the less fortunate.”).

109 *Leading Cases*, *supra* note 55, at 172.

110 *Redding v. Safford Unified Sch. Dist. No. 1*, 531 F.3d 1071 (9th Cir. 2008) (en banc), *aff’d in part, rev’d in part*, 128 S. Ct. 2633 (2009) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)).

not appropriately discharge their duties under that legal test without the capacity to understand the problems confronting the school and the gravity of the ordeal to Miss Redding.

Each of the eleven members of the en banc panel, which consisted of ten male colleagues and me, brought some life experiences to the oral argument, subsequent conference, and communications about the circulated draft opinions. Some had teenage daughters; some did not. Some were married to public school teachers. Some had been members of middle school boards; others had served on police commissions. Instead of setting aside our life experiences, the panel drew upon them to understand the parties' competing interests.

The majority of the en banc panel concluded that the search of Miss Redding was unconstitutional, not because of a knee-jerk emotional reaction to the facts of the case, but because we exercised our collective judgment as to the reasonableness of the school's actions under the circumstances. We decided that the school went far beyond the bounds of the Fourth Amendment when it strip-searched a thirteen-year-old girl despite minimal justification for doing so. The ability to understand the intrusiveness of the search from a young lady's perspective and the school administration's interests in the search resulted, not in lawlessness, but rather in an outcome reflecting "the Supreme Court's stated goal of developing a standard that 'ensure[s] that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.'"<sup>111</sup>

The majority opinion stated that "[t]he overzealousness of school administrators in efforts to protect students ha[d] the tragic impact of traumatizing those they claim to serve."<sup>112</sup> The majority concluded:

Here, the public school authorities adopted a disproportionately extreme measure to search a thirteen-year old girl for violating a school rule prohibiting possession of prescription and over-the-counter drugs. We conclude the strip search was not reasonably related to the search for ibuprofen, as the most logical places where the pills might have been found had already been searched to no avail, and no information pointed to the conclusion that the pills were hidden under her panties or bra (or that Savana's classmates would be willing to ingest pills previously stored in her underwear). Common sense informs us that directing a thirteen-year-old girl to remove her clothes, partially revealing her breasts and pelvic area, for allegedly possessing ibuprofen, an infraction that poses an imminent danger to no one, and which could be handled by keeping her

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111 *Redding*, 531 F.3d at 1087 (quoting *T.L.O.*, 469 U.S. at 343).

112 *Id.* at 1086.

in the principal's office until a parent arrived or simply sending her home, was excessively intrusive.<sup>113</sup>

During oral argument in the ensuing appeal to the Supreme Court, Justice Breyer stated, "In my experience when I was 8 or 10 or 12 years old . . . we did take off our clothes once a day, we changed for gym."<sup>114</sup> Justice Breyer's experience as a teenage boy changing for gym was certainly different from Miss Redding's experience as a teenage girl instructed to expose her body to school officials. Justice Breyer's vote would ultimately depend on his capacity to understand the depth of Miss Redding's humiliation. Similarly, Justice Souter remarked, "I would rather have the kid embarrassed by a strip search . . . than to have some other kids dead . . . ."<sup>115</sup> Justice Souter demonstrated empathy for the school administrators' interest in eliminating dangerous drugs in school. His vote, too, would ultimately depend on his ability to gain as full an appreciation of Miss Redding's position.

After argument, Justice Ginsburg apparently saw the need to facilitate her fellow Justices' understanding of what a strip-search might mean to a teenage girl.<sup>116</sup> In a series of rare media interviews, she said of her colleagues, "'They have never been a 13-year old girl . . . . It's a very sensitive age for a girl. I didn't think that my colleagues, some of them, quite understood.'<sup>117</sup> She also noted:

"I think it makes people stop and think, Maybe a 13-year-old girl is different from a 13-year-old boy in terms of how humiliating it is to be seen undressed. I think many of [the male Justices] first thought of their own reaction. It came out in various questions. You change your clothes in the gym, what's the big deal?"<sup>118</sup>

In the majority opinion affirming our en banc determination that the search was unconstitutional, Justices Souter and Breyer demon-

113 *Id.* at 1085 (footnote omitted).

114 Transcript of Oral Argument at 58, *Redding*, 129 S. Ct. 2633, available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/08-479.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-479.pdf).

115 *Id.*

116 See Marsha S. Berzon, *Memorial Dedication to Justice William J. Brennan, Jr.*, 31 LOY. L.A. L. REV. 739, 741 (1998) (recognizing that female advocates "help[ed] the justices hearing the case see beyond the assumptions of the world in which they had grown up to the actual financial and childcare arrangements of many families in recent years").

117 Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY, May 6, 2009, available at [http://www.usatoday.com/news/washington/judicial/2009-05-05-ruth-ginsburg\\_N.htm](http://www.usatoday.com/news/washington/judicial/2009-05-05-ruth-ginsburg_N.htm) (quoting Justice Ruth Bader Ginsburg).

118 Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES, July 7, 2009, at MM22 (quoting Justice Ginsburg).

strated a deeper understanding of Miss Redding's situation than their questioning during oral argument suggested.<sup>119</sup> Justice Souter, who authored the opinion, demonstrated his capacity to understand the school's interests: "[T]he record raises no doubt that [the assistant principal's] motive throughout was to eliminate drugs from his school and protect students . . . ."<sup>120</sup> He also demonstrated his capacity to understand the humiliation that one in Miss Redding's position would feel: "The reasonableness of [Miss Redding's expectation of privacy] is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure."<sup>121</sup> Perhaps addressing Justice Breyer's comments during oral argument, he added that exposing one's body during a search has a different effect on an adolescent than does exposing one's body for other purposes: "Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as . . . degrading . . . ."<sup>122</sup> In the end, the *Redding* decision fairly illustrates that the capacity to understand the views of others is an essential component of judging.<sup>123</sup>

### B. Jones Revisited

*Jones* shows that judges need not have walked in a litigant's shoes to have the capacity to understand the circumstances faced by the parties. However, the majority could not have reached a reasoned decision in *Jones* without understanding the challenges of homelessness from the perspective of those who faced them every day on Skid Row. No place in America had a higher concentration of homeless individuals than did Los Angeles's Skid Row, which was known for its desper-

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119 *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2642–43 (2009).

120 *Id.* at 2643.

121 *Id.* at 2641.

122 *Id.* at 2642.

123 See *Leading Cases*, *supra* note 55, at 163 ("Conflicting empathetic impulses may have played a significant role in the Court's deliberations [in *Redding*] and, because the Fourth Amendment's reasonableness standard demands reference to external factors, this kind of debate is jurisprudentially sound."); see also Berzon, *supra* note 116, at 741 ("[U]nderstanding and applying established legal principles often requires a conscious attempt at understanding the points of view of individuals in different situations."); Davis, *supra* note 4, at 18 ("The proper exercise of empathy . . . in no sense diminishes [judges'] ability to make provident, even harsh, decisions. On the other hand, the inability of judges to empathize with individuals subject to their judgment, may, in some instances, result in decisions that reflect only the cloistered perspective of a jurist, disconnected from the everyday experiences of the less fortunate.").



ate poverty, drug use, and crime.<sup>124</sup> And no place in America had a more draconian policy against sitting, lying, or sleeping in public ways.<sup>125</sup> Conditions were so abhorrent and unruly on Skid Row that the *Los Angeles Times* reported that local jails and hospitals abandoned individuals there upon their release.<sup>126</sup> It was, literally, a dumping ground for the less fortunate. The National Coalition for the Homeless named Los Angeles one of the twenty “meanest” cities in the nation in its treatment of the homeless.<sup>127</sup>

So why did so many people sit, lie, and sleep on the streets of Skid Row? Was that phenomenon the product of status or conduct? As an initial matter, the homeless population on Skid Row outnumbered the inventory of shelter beds by up to 3000 on any given night, and the market rate for low-income motel rooms in the area was \$379 per month, more than \$150 above and beyond a single adult’s monthly welfare stipend.<sup>128</sup> Complicating matters, between one-third and one-half of the homeless population in Los Angeles suffered from mental illness, and many others were the victims of domestic violence.<sup>129</sup> For many Skid Row residents, working their way out of poverty had proven futile; more than three-quarters had held employment within the two years before becoming homeless.<sup>130</sup> Homelessness on Skid Row is not just about statistics; it is about real people. Robert Purrie, one of the plaintiffs in *Jones*, slept on Skid Row for more than forty years because, he said, he “‘had nowhere else to sleep.’”<sup>131</sup> Thomas Cash, another plaintiff, ended up on Skid Row after breaking his foot and losing his job.<sup>132</sup> Patricia and George Vinson were arrested for sleeping on Skid Row when they missed a bus that would have taken them to a shelter after a day searching for work.<sup>133</sup>

From the late 1980s until the early 2000s, the city’s lead prosecutor refused to enforce the ordinance against homeless individuals who

124 *Jones v. City of L.A.*, 444 F.3d 1118, 1122 (9th Cir. 2006).

125 *Id.* at 1120.

126 *Id.* at 1121 (citing Cara Mia DiMassa & Richard Winton, *Dumping of Homeless Suspected Downtown*, L.A. TIMES, Sept. 23, 2005, at A1).

127 *Jones*, 444 F.3d at 1126 n.3 (citing NAT’L COAL. FOR THE HOMELESS & NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, A DREAM DENIED: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 10, 40–41 (2006)).

128 *Id.* at 1122. In Los Angeles County as a whole, the differential between homeless individuals and beds was about 50,000. *Id.*

129 *Id.* at 1123.

130 *Id.*

131 *Id.* at 1124 (quoting Purrie).

132 *Id.*

133 *Id.* at 1125.

had no alternative to sitting, lying, or sleeping in the public way.<sup>134</sup> When enforcement was revived, homeless individuals sought an injunction preventing the city from arresting them between 9 p.m. and 6:30 a.m. All they wanted was a safe haven from the ordinance during the night when shelter was unavailable. The judges on the *Jones* panel studied the factual record and read and reread applicable law. We examined the problem from the viewpoints of the city and the homeless. Ultimately, the majority concluded that the arrested individuals were “not on the streets of Skid Row by informed choice”<sup>135</sup> and that they had “nowhere else to sit, lie, or sleep, other than on public streets and sidewalks.”<sup>136</sup> Because the “criminal activity” prohibited by the ordinance was “involuntary and inseparable from status,” it followed from *Robinson* and *Powell* that the ordinance was unconstitutional. It “criminaliz[ed] the unavoidable act of sitting, lying, or sleeping at night while being involuntarily homeless.”<sup>137</sup> That is, it criminalized status instead of conduct.<sup>138</sup>

In deciding *Jones*, it would not do simply to measure the text of the ordinance against the text of *Robinson*, *Powell*, and the Eighth Amendment. Determining whether the ordinance was “cruel and unusual” required an understanding of the “practical realities of homelessness,” which, in turn, required empathy in the true meaning of the word.<sup>139</sup>

### C. *Hulteen Revisited*

In *Hulteen*, reasonable jurists could, and did, disagree on whether the *Bazemore* or *Landgraf* lines of authority controlled the question of whether AT&T’s pension payment to Ms. Hulteen was lawful under Title VII. The judges examined the PDA and other applicable statutes. We analyzed the case law. We scrutinized the parties’ briefs and

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134 *Id.* at 1122.

135 *Id.* at 1123.

136 *Id.* at 1125.

137 *Id.* at 1132.

138 Dean Erwin Chemerinsky commented at the time that Anatole France famously had observed “the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.” ANATOLE FRANCE, *THE RED LILY* 95 (Winifred Stephens trans., John Lane Co., 1910) (1894); see also Henry Weinstein & Cara Mia DiMassa, *Justices Hand L.A.’s Homeless a Victory*, L.A. TIMES, April 15, 2006, at A1 (“In our society, you can’t make it a crime to be poor and homeless.” (quoting Dean Chemerinsky)).

139 *Id.* at 1131. Reasonable jurists could, and did, disagree. The dissenting opinion relied on the same legal authority and facts as the majority but concluded that the ordinance constitutionally prohibited conduct. See *id.* at 1139–40 (Rymer, J., dissenting).

arguments. We studied the facts in the record. We discussed the case with our law clerks and with each other. I also recalled my experience of taking pregnancy leave as a litigation partner of the law firm O'Melveny and Myers and how fairly I was treated upon my return. Was it fair to provide a working mother with fewer benefits than her identically situated coworkers when the record demonstrated that the benefits were calculated after the PDA's enactment?

The injustice of dissimilar treatment based on pregnancy was the impetus behind the PDA. Confronted with two lines of authority, one of which comported with the purposes underlying the PDA and one of which did not, the majority concluded that "AT&T applied its discriminatory seniority system to Hulteen in 1994, causing her to be deprived of early retirement benefits and thus injuring her."<sup>140</sup> The record showed that AT&T had a practice of recalculating and adding to retirees' service credits in certain circumstances but that it had simply chosen, in 1994, not to follow it in Ms. Hulteen's and the other mothers' cases. These facts supported a finding that the operative discriminatory act took place in 1994 and belied "[a]ny assertion that the violations here are continuing effects of pre-PDA discrimination and thus 'unfortunate event[s] in history which [have] no present legal consequences.'"<sup>141</sup> Viewing the facts in that light, the issues in Ms. Hulteen's case were "virtually identical" to those resolved in *Pallas* and *Bazemore*.<sup>142</sup> The law took the panel to the point of asking the right questions and considering the right factors, but it did not answer the questions for us. The majority's "sentiment of justice" and the purpose behind the PDA itself led it to answer the dispositive questions in favor of Ms. Hulteen.

The Supreme Court reversed in a 7-2 decision, which reflected the *Hulteen* Court's sense that it would be unfair to upset AT&T's "reliance interests" on a pension system that allowed "for predictable financial consequences, both for the employer who pays the bill and for the employee who gets the benefit."<sup>143</sup> In dissent, Justice Ginsburg, the only working woman on the Court at the time, forcefully expressed her sense of fairness, shaped as it must have been by her

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140 *Hulteen v. AT&T Corp.*, 498 F.3d 1001, 1011 (9th Cir. 2007) (en banc), *rev'd*, 129 S. Ct. 1962 (2009).

141 *Id.* at 1012 (quoting *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 625-26 (2007)) (alterations in original).

142 *Id.* at 1002.

143 *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962, 1973 (2009).

personal background, including her scholarship on and advocacy for gender equality<sup>144</sup>:

The plaintiffs (now respondents) in this action will receive, for the rest of their lives, lower pension benefits than colleagues who worked for AT&T no longer than they did. They will experience this discrimination not simply because of the adverse action to which they were subjected pre-PDA. Rather, they are harmed today because AT&T has refused to fully heed the PDA's core command: Hereafter, for "all employment-related purposes," disadvantageous treatment "on the basis of pregnancy, childbirth, or related medical conditions" must cease.<sup>145</sup>

Justice Ginsburg's opinion recognized that the legal problems with which judges are confronted arise in an historical and social context. And statutes, like the PDA, do not materialize from the ether. They are products of conditions as they were, as they are, and as we have hoped them to be. She supported her conclusion by prefacing it with background on the struggle for women's rights in the labor force and the often-detrimental societal attitudes about pregnancy and motherhood.<sup>146</sup>

Justice Ginsburg observed that the path chosen by the majority was not the only way to resolve the case. There was "another way to read the PDA," one better attuned to the perniciousness of gender discrimination that prompted passage of the statute.<sup>147</sup> This analysis certainly did not substitute a personal sense of justice for the rule of law.<sup>148</sup> Instead, it proved useful to refer to "individual sentiment[s] of

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144 See Jack B. Weinstein, *Limits on Judges Learning, Speaking and Acting—Part I—Tentative First Thoughts: How May Judges Learn?*, 36 ARIZ. L. REV. 539, 541–42 (1994) ("No one would expect that Ruth Bader Ginsberg would ignore what she has learned about discrimination against women—both in her personal experience and as an advocate for other women . . . . [F]or the most part, our knowledge is considered folded in and subsumed in what we bring to a judgeship at the time of appointment." (footnotes omitted)).

145 *Hulteen*, 129 S. Ct. at 1975 (Ginsburg, J., dissenting) (quoting 42 U.S.C. § 2000e(k) (2006)).

146 See *id.* at 1978–80; see also CARDOZO, *supra* note 1, at 81 ("Courts know today that statutes are to be viewed, not in isolation or *in vacuo*, as pronouncements of abstract principles for the guidance of an ideal community, but in the setting and the framework of present-day conditions, as revealed by the labors of economists and students of the social sciences . . . .").

147 *Hulteen*, 129 S. Ct. at 1976 (Ginsburg, J., dissenting).

148 See CARDOZO, *supra* note 1, at 140 ("There is a wide gap between the use of the individual sentiment of justice as a substitute for law, and its use as one of the tests and touchstones in construing or extending law.").

justice” as “one of the tests and touchstones in construing or extending the law.”<sup>149</sup>

### III. ACTIVISM

Judicial “activism” has been variously defined.<sup>150</sup> Some define it as a propensity to overturn enactments of the elected branches.<sup>151</sup> Others define it as a disregard for judicial precedent.<sup>152</sup> Still others have defined it as a willingness to identify individual rights not explicitly listed in the Constitution.<sup>153</sup> As another of my well-respected colleagues has written, “judicial restraint,” which is the opposite of judicial activism, “reserves for judges only those responsibilities inherent in the judicial branch of a tripartite system of separated powers.”<sup>154</sup> Both political parties have employed the “activist” label to describe the others’ judicial nominees.<sup>155</sup> Some politicians assert that

149 *Id.*

150 See generally Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195 (2009) (discussing the development of the “judicial activism” label).

151 See, e.g., Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1535 (1989) (book review) (characterizing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), *Brown v. Board of Education*, 347 U.S. 483 (1954), and *INS v. Chadha*, 462 U.S. 919 (1983), as “activist” decisions—though rooted in the Constitution—“in the sense of striking down actions of the political branches”).

152 See, e.g., Daniel J. Foley, *Tennessee Supreme Court: A Statistical Analysis of an Ideological Shift After the 1990 Election*, 64 TENN. L. REV. 155, 156 n.8 (1996) (“As used here, the term ‘activist’ describes judges who are willing to write court-made law and to overturn precedent.”); William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1, 2 (1992) (recognizing that the “judicial activist” label is often applied to “decisions whereby judicial precedents or statutory schemes are overturned based upon the constitutional values determined by the judges”).

153 See, e.g., Michelle R. Slack, *Avoiding Avoidance: Why Use of the Constitutional Avoidance Canon Undermines Judicial Independence*, 56 CASE W. RES. L. REV. 1057, 1058 (2006) (“Judicial activism has largely been used as a synonym for judges whose decisions favor liberal views, protect civil liberties, and expand the protections of the Bill of Rights.” (emphasis omitted)).

154 Diarmuid F. O’Scannlain, *Lawmaking and Interpretation: The Role of a Federal Judge in Our Constitutional Framework*, 91 MARQ. L. REV. 895, 896–97 (2008).

155 See, e.g., 155 CONG. REC. S8829 (daily ed. Aug. 5, 2009) (statement of Sen. Brownback) (“This leads me to ask which Sotomayor are we voting to confirm—the liberal activist or the modest judge who believes in strictly apply the law as written?”); 152 CONG. REC. S347 (daily ed. Jan. 31, 2006) (statement of Sen. Reid) (“I fear that Alito would join Justices Scalia and Thomas in their activist campaign to narrow congressional power under the Commerce Clause, a movement that threatens important public health and welfare laws in the name of ‘federalism.’”); see also O’Scannlain, *supra* note 154, at 896 (“All of us who have observed the increasingly combative judicial confirmation hearings in the U.S. Senate in recent years are quite aware that it

judges who possess empathy—who admit to being the products of their life experiences—are necessarily “activist” judges.<sup>156</sup>

Judge Cardozo’s example demonstrates that a judge’s acknowledgement of his humanity ought not be equated with “activism,” and it cautions against the reckless hyperbole to which we have grown accustomed. Judge Cardozo refused to abandon his own sentiments of justice. He knew that it was not possible to do so, but even if it were, he would forego a valuable guide if he did. But Judge Cardozo was not, by any stretch, an “activist” judge.<sup>157</sup>

A refreshing sense of modesty pervades Judge Cardozo’s work. He viewed his own lectures as inadequate, thorough and thoughtful as they were, particularly when contrasted with the shallow rhetoric that passes as discussion on the topic today.<sup>158</sup> And he rejected the notion that answers to legal questions were objective truths, ascertainable to

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has become popular for Americans of all political persuasions to applaud the values of ‘judicial restraint’ while criticizing so-called ‘activist judges.’”).

156 See, e.g., *Fox News Sunday: Interview with Senators Arlen Specter and Lindsey Graham* (Fox News television broadcast May 31, 2009), transcript available at <http://www.foxnews.com/story/0,2933,523697,00.html>; *ABC This Week: Interview with Senator Orrin Hatch and Senator Patrick Leahy* (ABC television broadcast May 3, 2009), transcript available at <http://abcnews.go.com/ThisWeek/story?id=7491153&page=1>.

157 Perhaps no era is more decried for “activist” judging than the *Lochner* era. See Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1159 (2002) (“It was precisely this superlegislative quality of the *Lochner* regime—in which the Court expressly arrogated to itself the power to review legislators’ judgment of how needful a particular law was—to which most objections to *Lochner* were directed.”); James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 B.Y.U. L. REV. 1037, 1119–20 (“In the 1880s, members of the formalistic Supreme Court isolated themselves from public opinion . . . . They praised English judges for their capacity to transcend their fellow citizens. Such judicial arrogance helped set the stage for the *Lochner* era, in which the Court ignored, at great cost to the country, radical changes in the economy, technology, and public opinion.” (footnotes omitted)). Judge Cardozo was a member of the majority in *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 406–12 (1937), which effectively overruled *Lochner*. Modern courts have been criticized for “activism” as well. See, e.g., Lori A. Ringhand, *The Rehnquist Court: A “By the Numbers” Retrospective*, 9 U. PA. J. CONST. L. 1033, 1034 (2007) (“The [Rehnquist] Court plainly was more ‘activist’ than its predecessor courts in its willingness to invalidate federal statutes, and to do so in a surprising range of issue areas. It also, however, invalidated notably fewer state statutes than did those earlier courts . . . .”); Adam Cohen, Editorial, *Last Term’s Winner at the Supreme Court: Judicial Activism*, N.Y. TIMES, July 9, 2007, at A16 (“Largely because of Chief Justice Roberts and Justice Alito, the court has just completed one of its most activist terms in years.”).

158 CARDOZO, *supra* note 1, at 13 (“A richer scholarship than mine is requisite to do the work aright. But until that scholarship is found and enlists itself in the task, there may be a passing interest in an attempt to uncover the nature of the process by one who is himself an active agent, day by day, in keeping the process alive. That must be my apology for these introspective searchings of the spirit.”)

the enlightened few, if not to others.<sup>159</sup> He did not pretend that judging came to him easily, instead admitting that he “was much troubled in spirit, in [his] first years upon the bench, to find how trackless was the ocean on which [he] embarked.”<sup>160</sup>

This sense of modesty extends to Judge Cardozo’s reminder that judges are public servants who have been entrusted by their fellow citizens to hold and to exercise the judicial power. That power belongs at all times to the public; the judge is merely its steward, and he must refrain from doing with it as he pleases: “[Judges] have the power, though not the right, to travel beyond . . . the bounds set to judicial innovation . . . .”<sup>161</sup> The judge should not be so arrogant as to believe that his black robe and seat on the bench entitle him to dictate the public’s conduct. “My duty as judge,” Judge Cardozo wrote, “may be to objectify in law, not my own aspirations and convictions and philosophies, but the aspirations and convictions and philosophies of the men and women of my time.”<sup>162</sup> Reading his lectures as a whole, it is apparent that Judge Cardozo did not mean by these words that the judge’s own aspirations and convictions must be—or even can be—divorced from the judge’s decisionmaking process. As discussed above, he took a view quite to the contrary. Instead, his point was that “[t]he final cause of law is the welfare of society,” not the advancement of the judge’s agenda.<sup>163</sup> The judge’s views are a means toward an end; they cannot, in and of themselves, define the end.

Today, some fairly might describe the modesty undergirding Judge Cardozo’s work as supporting a theory of judicial restraint.<sup>164</sup> Judge Cardozo recognized that the judicial function often requires demarcation of the limits of governmental and individual conduct, but that it rarely, if ever, requires the selection of conduct within the

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159 See Chemerinsky, *supra* note 2, at 1077 (“Far from modest, [the judge-as-umpire construct is] tremendously arrogant. They speak and write as if there is only a single true answer to every constitutional question and one simply needs to be bright enough to discover it. They are not to be held accountable for their decisions; they are just following the law. But they know, as does every law student and the vast majority of the public, that most constitutional issues before the Supreme Court provide the Justices great discretion.”).

160 CARDOZO, *supra* note 1, at 166.

161 *Id.* at 129.

162 *Id.* at 173.

163 *Id.* at 66; *see also id.* at 108 (stating that the judge would err “if he were to impose upon the community as a rule of life his own idiosyncrasies of conduct or belief”).

164 See RICHARD A. POSNER, *THE FEDERAL COURTS* 304–34 (1996) (expressing a theory of judicial restraint defined as a court showing greater deference to the democratic institutions).

bounds of permissibility. In other words, judges must, consistent with their constitutional powers, declare as impermissible an act falling outside the bounds of the law. But they may not pass upon the wisdom of those permissible acts that do fall within the bounds of the law. As Judge Cardozo explained, “One department of the government may not force upon another its own standards of propriety.”<sup>165</sup> Judges may—indeed, must—decide whether an action falls outside the bounds of the law; they act immodestly, however, when they decide whether the action is wise or unwise, whether it is superior or inferior to other permissible options, whether it is good policy or bad.<sup>166</sup> To this end, even Judge Cardozo was susceptible to a sports analogy: “[The judicial power] tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith.”<sup>167</sup> Judges keep the runners on the course; they set the path; but they do not themselves “run in the race.”<sup>168</sup>

That the judicial power must be exercised within its constitutional bounds does not mean “that a judge is powerless to raise the level of prevailing conduct.”<sup>169</sup> Throughout history, judges have played a central role in our collective progression toward a more perfect union.<sup>170</sup> As Judge Cardozo wrote, “Our jurisprudence has held

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165 CARDOZO, *supra* note 1, at 90; *see also id.* at 88–89 (“[Judges] are free in marking the limits of the individual’s immunities to shape their judgments in accordance with reason and justice[, but] [t]hat does not mean that in judging the validity of statutes they are free to substitute their own ideas of reason and justice for those of the men and women whom they serve.”).

166 *See Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 866 (1824) (“Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to . . . the will of the law.”). Without denying that judges must exercise discretion, Judge Cardozo likely would have rejected Justice Sotomayor’s statement that the courts of appeals are “‘where policy is made.’” *See* Peter Baker & Jeff Zeleny, *Start of a Battle*, N.Y. TIMES, May 27, 2009, at A1 (quoting Judge Sonia Sotomayor). In his view, the courts are where the legality of policy is determined, not where policy is made in the first instance.

167 CARDOZO, *supra* note 1, at 93.

168 *See, e.g., Jones v. City of L.A.*, 444 F.3d 1118, 1138 (9th Cir. 2006) (“We do not suggest that Los Angeles adopt any particular social policy, plan, or law to care for the homeless. We do not desire to encroach on the legislative and executive functions . . . . [T]he City is free to address [the issue] in any way that it sees fit, consistent with the constitutional principles we have articulated.” (citations omitted)).

169 CARDOZO, *supra* note 1, at 108; *see also* Reinhardt, *supra* note 35, at 22 (“The Warren-Brennan Court understood that our legal system does not force judges to wait on the sidelines while other public and private institutions perpetuate injustice.”).

170 *See* U.S. CONST. pmbl. (“We the People of the United States, in Order to form a more perfect Union . . . do ordain and establish this Constitution of the United States of America.”); *see also* Siegel, *supra* note 6, at 712 (“[T]he Court legitimates itself in



fast to Kant's categorical imperative, 'Act on a maxim which thou canst will to be law universal.' It has refused to sacrifice the larger and more inclusive good to the narrower and smaller."<sup>171</sup> Broadly speaking, Judge Cardozo suggested two ways in which judges may facilitate progress. First, judges may condemn destructive attitudes and behaviors that lack support in law and impede our pursuit of democratic objectives: "In one field or another of activity, practices in opposition to the sentiments and standards of the age may grow up and threaten to intrench [sic] themselves if not dislodged."<sup>172</sup> Second, judges may amplify the expression of democratic values: "[W]e find [the courts'] chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and directing choice within the limits where choice ranges."<sup>173</sup> As my esteemed colleague has recognized, in translating "the events of real life into terms the legal system can understand[,]

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history in significant part by functioning as an engaged participant in the constitutional culture of the nation, a culture in which competing visions of social order compete for popular allegiance.").

171 CARDOZO, *supra* note 1, at 139.

172 *Id.* at 108–09. Compare *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) ("Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of [African American] children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.") (first and third alterations in original) (quoting the court below), with *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.").

173 CARDOZO, *supra* note 1, at 94; see also, e.g., *Miranda v. Arizona*, 384 U.S. 436, 457–58 (1966) ("The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."); *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961) ("Today we once again examine *Wolf's* constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct."); *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) ("We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment.").

. . . . one must not lose sight of the world one is translating from, so that the law continues, as it has in the past, to reflect the real needs of real people.”<sup>174</sup> Fluent in the language of the law, judges serve the public when they give voice to democratic principles.

#### CONCLUSION

In a 1908 State of the Union address, President Theodore Roosevelt remarked:

“The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions.”<sup>175</sup>

Judge Cardozo recalled the critics’ response to the President’s message:

It betrayed ignorance, they said, of the nature of the judicial process. The business of the judge, they told us, was to discover objective truth. His own little individuality, his tiny stock of scattered and uncoordinated philosophies, these, with all his weaknesses and unconscious prejudices, were to be laid aside and forgotten.<sup>176</sup>

Judge Cardozo described the detractors’ response to the President’s remarks as nothing short of “a storm of criticism.”<sup>177</sup>

Today, just over one hundred years later, the storm rages on. So long as our national debate is besieged with misconceptions of the judicial function, poured on as they are by oversimplified talking points and other rhetorical devices, we drown out meaningful dialogue about what it is that we should expect of our judges. Judge Cardozo’s lectures provide a beacon to those who seek less tempestuous ground. He reminds us that judges are people, engaged in a public service and shaped by their life experiences:

[T]hey do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by.<sup>178</sup>

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174 Berzon, *supra* note 116, at 744.

175 CARDOZO, *supra* note 1, at 171 (quoting President Theodore Roosevelt).

176 *Id.* at 172.

177 *Id.*

178 *Id.* at 168.