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## NOTES

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# SOTOMAYOR'S EMPATHY MOVES THE COURT A STEP CLOSER TO EQUITABLE ADJUDICATION

*Veronica Couzo\**

### INTRODUCTION

On August 6, 2009, then-Judge, now-Justice, Sonia Sotomayor was confirmed as the nation's first Latina Supreme Court Justice.<sup>1</sup> While many Latinos embraced the idea of having "Sonia from the Bronx"<sup>2</sup> on the bench, others were fearful that her jurisprudence, combined with her background, would result in "reverse racism."<sup>3</sup> These fears, while arguably unfounded at the time, have been completely dispelled. Just as Justice Thurgood Marshall transformed the adjudications of the Supreme Court through experiential discourse, so too, to a lesser extent, has Justice Sotomayor. In both oral arguments and written opinions, Justice Sonia Sotomayor has demonstrated educative leadership—enlightening her colleagues to other perspectives—while utilizing empathy shaped by her experiences to facilitate her decisionmaking. This empathy has allowed her to give a voice to the habitually unheard, which inevitably generates fairer decisions.

Part I discusses two competing theories of judicial adjudication: the traditional model and the empathic model. This Part will call attention to the pitfalls of the formalist mode of decisionmaking, while contending that

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1 Charlie Savage, *Senate Confirms Sotomayor for the Supreme Court*, N.Y. TIMES, Aug. 7, 2009, at A1.

2 *Justice Sotomayor Prefers "Sonia from the Bronx,"* CBS NEWS (Jan. 13, 2013, 8:07 PM), [http://www.cbsnews.com/8301-18560\\_162-57563700/justice-sotomayor-prefers-sonia-from-the-bronx/](http://www.cbsnews.com/8301-18560_162-57563700/justice-sotomayor-prefers-sonia-from-the-bronx/).

3 Newt Gingrich, Anne Coulter, and Rush Limbaugh each accused Sotomayor of being racist. See Huma Khan & Jake Tapper, *Newt Gingrich on Twitter: Sonia Sotomayor 'Racist,' Should Withdraw*, ABC NEWS (May 27, 2009), <http://abcnews.go.com/Politics/SoniaSotomayor/story?id=7685284#.UXQcpbVQHXM>.

the use of empathy is the more realistic and humane paradigm of adjudication. This Part will also address and dispel some of the criticisms leveled at empathic decisionmaking. Part II maintains that in spite of the attacks directed toward empathy, it has played a vital role in significant Supreme Court decisions. Both *Brown v. Board of Education*<sup>4</sup> and *Safford Unified School District No. 1 v. Redding*<sup>5</sup> demonstrate how the use of empathy has allowed the Court to reach more just and equitable decisions. Part III examines Justice Sotomayor's empathic decision making. This Part first provides a brief history of her life, highlighting the challenges she has overcome. This Part then discusses how Sotomayor believes empathy participates in the decisionmaking process. Finally, in examining oral arguments and her separate opinion in *Calhoun v. United States*,<sup>6</sup> this Part reveals that, while Sotomayor's empathy gives a voice to those who are typically less heard, it does not amount to bias. In fact, her majority opinion in *J.D.B. v. North Carolina*<sup>7</sup> refutes accusations of unfair bias by demonstrating how the use of empathy facilitated Sotomayor's ability to be influenced by other perspectives. By taking into account the real-world consequences of her decisions, and acknowledging the litigants' differing perspectives, Sotomayor assists the Court in reaching more even-handed decisions.

## I. FORMALISM V. EMPATHY IN ADJUDICATION

### A. *The Traditional View: Formalism*

In the nineteenth century, the central legal theory was formalism. Under this paradigm, it was understood that "judges decided cases in mechanical, 'scientific' fashion."<sup>8</sup> Judges were likened to pharmacists, prescribing the appropriate rule to correct the legal issue presented.<sup>9</sup> The human element of judicial decisionmaking was altogether rejected; judges were merely the instrument through which relevant legal rules were applied to the particulars of a controversy.

Today, this view, which demands that judges abandon the lessons learned from life experiences, has softened slightly. Judge Cardozo was instrumental in the transformation of the prevailing legal theory by calling attention to the impracticability of such a model: "We may try to see things as objectively as we please. None the less, we can never see them with any eyes

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4 347 U.S. 483 (1954).

5 557 U.S. 364 (2009).

6 133 S. Ct. 1136 (2013).

7 131 S. Ct. 2394, 2399 (2011).

8 William J. Brennan, Jr., *Reason, Passion, and "The Progress of Law,"* 42 REC. ASS'N B. CITY N.Y. 948, 952 (1987); see also Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 315–17 (2012); Robert N. Wilentz, *Judicial Legitimacy—Finding the Law*, 8 SETON HALL LEGIS. J. 221, 228 (1985).

9 Brennan, *supra* note 8, at 951–52.

except our own.”<sup>10</sup> To put it simply, a judge cannot separate herself from the experiences that have shaped her,<sup>11</sup> nor should she have to.

Judge Cardozo's insights have become established in legal jurisprudence and have triggered various gradations of formalism. While there are those who still believe in “the myth of judge-as-oracle,”<sup>12</sup> there are others who propose a quasi-formalist approach. In this method of adjudication, a judge is not a robot, but must “exercise good judgment in reaching decisions.”<sup>13</sup> Judges are required to implement discretion when settling factual disputes and ambiguities in the law,<sup>14</sup> but “[e]mpathy has no place” in this process.<sup>15</sup> Therefore, a judge is expected to bear in mind her life experiences, but is prohibited from utilizing empathy.<sup>16</sup>

A rejection of empathy, however, can lead to devastating outcomes for the litigants involved in a case. The decision reached in *Plessy v. Ferguson*<sup>17</sup> serves as one example.<sup>18</sup> The Court in *Plessy*—which upheld institutional-

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

11 See *id.* at 168 (“[Judges] 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.”).

12 Brennan, *supra* note 8, at 953. For instance, Justice Roberts championed this view in his confirmation hearing. “Judges are like umpires,” Roberts pronounced, stating “Umpires don’t make the rules. They apply them.” Jeffrey Toobin, *No More Mr. Nice Guy*, *NEW YORKER* (May 25, 2009), [http://www.newyorker.com/reporting/2009/05/25/090525fa\\_fact\\_toobin?currentPage=all](http://www.newyorker.com/reporting/2009/05/25/090525fa_fact_toobin?currentPage=all). Interestingly, however, Chief Justice Roberts has proved to be much more than just an umpire, exhibiting a one-sided view in decisionmaking. “In every major case since he became the nation’s seventeenth Chief Justice, Roberts has sided with the prosecution over the defendant, the state over the condemned, the executive branch over the legislative, and the corporate defendant over the individual plaintiff.” *Id.*

13 J. Harvie Wilkinson III, *Subjective Art; Objective Law*, 85 *NOTRE DAME L. REV.* 1663, 1679 (2010).

14 *Id.* (“Judges are expected, for example, to exercise discretion in resolving factual disputes and ambiguities in the law itself.” (footnote omitted)). For more about the law’s ambiguities, see H.L.A. HART, *THE CONCEPT OF LAW* 124–54 (2d ed. 1994). Specifically, Hart contended that in the legal system a great deal “is left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in developing and qualifying rules only broadly communicated by authoritative precedents.” *Id.* at 136.

15 Wilkinson, *supra* note 13, at 1679 (“[T]he fact that some discretion lies at the heart of the judicial function does not justify utilizing personal, subjective criteria either to create ambiguity or to resolve it. Empathy has no place in the typical factual determination.”).

16 Empathy takes place when a judge views legal problems from the perspectives of the parties before her. See *infra* notes 22–25 and accompanying text.

17 163 U.S. 537 (1896).

18 Justice Brennan considers *Lochner v. New York*, 198 U.S. 45 (1905), in which the Court struck down a statute that limited the number of hours per week that bakery employees could work, to provide another example of what can happen when the Supreme Court reaches a decision absent empathy. See Brennan, *supra* note 8, at 959–61. He argued that while the decision “made logical sense,” the Court, in desiring to stick to pure reason, had a flawed and one-sided conception of liberty. *Id.* at 960. In overlooking “the plight of an employee whose only ‘choice’ is between working the hours the employer demands or not

ized segregation—failed to take into account segregation’s adverse effects on black Americans. By opining that racial segregation did not “destroy the legal equality of the two races, or reestablish a state of involuntary servitude[.]”<sup>19</sup> the Court did not appreciate the drastic consequences of segregation. The question of whether a law upholds human dignity can only be answered in the details of everyday life. In *Plessy*, the Court evidently chose to ignore experience, demonstrating a complete unwillingness to empathize with those subjected to discrimination. Indeed, the Court maintained that segregation made blacks feel inferior “solely because the colored race [chooses] to put that construction upon it.”<sup>20</sup> This “ivory-towered analysis of the real world”<sup>21</sup> neglected the experience of a whole race, and consequently endorsed the subordination of many citizens.

### B. Empathy

An empathic response is one that involves the “psychological processes that make a person have feelings that are more congruent with another’s situation than with his own situation.”<sup>22</sup> According to Justice Brennan, empathy is attentiveness to the range of human experience as well as a “[s]ensitivity to one’s intuitive and passionate responses.”<sup>23</sup> It is a corollary of “the heart rather than the head”<sup>24</sup> that “puts [judges] in touch with the dreams and disappointments of those with whom they deal.”<sup>25</sup> Thus, judicial empathy takes place when a judge enters the “skin” of another, making a litigant’s experience part of the judge’s experience.<sup>26</sup> This can occur either when a judge has personal understanding of the situation at hand, or when a judge, through a concerted effort, envisions the circumstances of another.<sup>27</sup> Consequently, empathy empowers the decisionmaker to give voice to the too

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working at all[.]” the Court did not succeed in fulfilling its constitutional duty to protect liberty. *Id.* at 960–61.

19 *Plessy*, 163 U.S. at 543.

20 *Id.* at 551.

21 *California v. Hodari*, 499 U.S. 621, 630 n.4 (1991) (Stevens, J., dissenting) (using this phrase to describe the majority opinion, which failed to take into account the experiences of minorities).

22 MARTIN L. HOFFMAN, *EMPATHY AND MORAL DEVELOPMENT* 30 (2000); see THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 428 (8th ed. 1971) (defining empathy as “[u]nderstanding so intimate that the feelings, thoughts, and motives of one are readily comprehended by another”). Although there are differing conceptions of empathy, this is the definition that will apply to empathy discussed in this Note.

23 Brennan, *supra* note 8, at 959.

24 *Id.* at 958.

25 *Id.* at 970.

26 See Bertha Wilson, *Will Women Judges Really Make a Difference?*, 28 OSGOODE HALL L.J. 507, 521 (1990).

27 See Catherine Gage O’Grady, *Empathy and Perspective in Judging*, 33 ARIZ. ST. L.J. 4, 9 (2001) (“In judicial decisionmaking, empathy is the attempt actively to imagine the situations of others as an integral part of deciding a case on the law.” (footnote omitted)).

often unheard by urging judges to imagine and attempt to understand the “outsider” perspective.<sup>28</sup>

Critics of empathy believe that such an approach defies the traditional creed that judges should be purely objective. They insist that an empathic connection prevents judges from adjudicating solely on the mandates of law.<sup>29</sup> In their view, if a judge identifies with a particular community of people, that judge’s impartiality is undermined because she may feel accountable to that community. In reality, however, all “judges have had life experiences that could be said to affect [their] perception of the cases” before them.<sup>30</sup> For instance, Justice Alito admitted that his upbringing shapes his perspective of cases involving immigrants.<sup>31</sup> Nevertheless, these life experiences do not prohibit judges from impartially ruling on cases in which the issues or the facts are in some way indirectly related to their personal experiences.<sup>32</sup> Since empathic judges envision, comprehend, and contemplate each party’s viewpoint, such a judge is more likely to reach a just decision by simply acknowledging the natural inclination to empathize with those who are most similar to oneself.<sup>33</sup> By identifying her affinities, a judge will be prompted to uncover other perspectives that were not immediately perceptible to her. Additionally, a sense of connection with a particular community should be encouraged because it motivates judges to accept responsibility for the consequences their decisions have on individuals.

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28 See *id.* at 13 n.50 (“The outsider perspective is commonly misunderstood or ignored for a number of reasons including (1) it is a different life story told by someone outside the mainstream; thus, it does not resonate easily with those in the mainstream; (2) there is often no one in the system who assumes the responsibility, as a part of their job, for attempting to understand this perspective; and (3) the actual process of obtaining an empathic perspective is just plain difficult—it takes time and it is hard work.”).

29 See *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 69 (2009) (statement of Sen. Jeff Sessions, Ranking Member, Comm. on the Judiciary) (“[Sotomayor has] evidenced, I think it is 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 are to put aside their personal biases and prejudices.”).

30 *Miles v. Ryan*, 697 F.3d 1090, 1091 (9th Cir. 2012).

31 See *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 475 (2006) (statement of Judge Samuel Alito) (“[I]n my opening statement, I tried to provide a little picture of who I am as a human being and how my background and my experiences have shaped me and brought me to this point. . . . [W]hen a case comes before me involving, let’s say, someone who is an immigrant, . . . 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. . . . [B]ut 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.”).

32 See *Miles*, 697 F.3d at 1091.

33 See O’Grady, *supra* note 27, at 13.

While opponents of the empathic theory contend that employing empathy amounts to bias, the reality is that those who fail to view cases from each litigant's perspective are the least apt to adjudicate equitably. Indeed, "[i]t 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>34</sup> Empathy is a necessary component of good decisionmaking. In the words of Justice Brennan, a colloquy between head and heart is "not only an inevitable but a desirable part of the judicial process, an aspect more to be nurtured than feared."<sup>35</sup> It is desirable because it calls attention to the tangible human realities hanging in the balance.

The use of empathy should not be equated with judicial activism or with a view of the judge as an aimless "knight-errant."<sup>36</sup> It is not to be assumed that judges should disregard the law and decide cases based solely on a personal sense of justice. It is foolish, however, to imagine that one's conceptions of justice—formed by one's experiences—play no role in a judge's decisionmaking. It forms one of the many points of reference employed by judges. Each and every judge has experiences that influence the way she perceives the world. And a judge's view of the world will inevitably play a role in the choices she makes in those instances when she must decide how the facts of a case fit together, or how an existing rule applies in a new context.<sup>37</sup>

Empathy does not dictate an outcome or solve issues; it merely permits a judge to better understand the problems before her. Empathic adjudication provides a judge with the capacity to realize that, when balancing interests, justice cannot simply be the application of an abstract legal theory. Justice

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34 Kim McLane Wardlaw, *Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1649 (2010); see 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, 18 (2009) ("[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.").

35 Brennan, *supra* note 8, at 959.

36 CARDOZO, *supra* note 10, at 141 ("[The judge] is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence.").

37 For instance, in the context of employment civil rights cases, determining whether discrimination is present depends chiefly on the judge's opinion of an employer's actions against a plaintiff. However, "[b]ecause illegal discrimination can operate through implicit bias rather than overt harassment, the facts and evidence in these cases often are . . . open to interpretation." Weinberg & Nielsen, *supra* note 8, at 323 (footnote omitted). Similarly, according to Justice Brennan, interpreting the Due Process Clause requires a judge to think with both heart and head. See Brennan, *supra* note 8, at 966–67 ("[T]he Due Process Clause demands of judges more than proficiency in logical analysis. It requires that we be sensitive to the balance of reason and passion that mark a given age, and the ways in which that balance leaves its mark on the everyday exchanges between government and citizen. In order to do so, we must draw on our own experience as inhabitants of that age, and our own sense of the uneven fabric of social life.").

involves bearing in mind the social consequences of decisions. Such a view will help the United States judiciary avoid *Plessy v. Ferguson*-like outcomes.

## II. THE SUPREME COURT'S MANIFESTATIONS OF EMPATHY<sup>38</sup>

Notwithstanding the opinion of those who oppose the use of empathy in judicial adjudication, empathy does not undermine judicial fairness or observance of the rule of law. Indeed, the use of empathy in decisionmaking helps achieve fairness by ensuring that others' perspectives are considered.<sup>39</sup> Justice Thurgood Marshall implicitly emphasized this fact in his dissent in *United States v. Kras*.<sup>40</sup> In *Kras*, the majority held that a poor person had to pay the weekly filing fees required for bankruptcy court, reasoning that the fee was an inconsequential burden "less than the price of a movie and little more than the cost of a pack or two of cigarettes."<sup>41</sup> Justice Marshall responded indignantly: "It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised on unfounded assumptions about how people live."<sup>42</sup> Justice Marshall, undeniably inspired by his personal experiences with the poor, sought to remind the Court of the divide between the Court's decision and the realities of those much less fortunate.<sup>43</sup> His quote conveys his acknowledgment that in order to achieve fairness, legal decisionmaking must take into account human experiences.

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38 The role of empathy is not limited to United States courts. Madame Justice Wilson, the first female justice of the Canadian Supreme Court, contended that the addition of female judges to the court would have a substantial impact on tort, criminal, and family law because "women judges[,] through their differing perspectives on life[,] can bring a new humanity to bear on the decision-making process." Wilson, *supra* note 26, at 522; see Anita F. Hill, *The Embodiment of Equal Justice Under the Law*, 31 NOVA L. REV. 237, 243-44 (2007). Indeed, an empirical analysis of Canadian courts found that the presence of women judges influenced decisions in civil liberties cases. See DONALD R. SONGER, *THE TRANSFORMATION OF THE SUPREME COURT OF CANADA: AN EMPIRICAL EXAMINATION* 204-05 (2008).

39 Chris Edelson, *Judging in a Vacuum, or, Once More, Without Feeling: How Justice Scalia's Jurisprudential Approach Repeats Errors Made in Plessy v. Ferguson*, 45 AKRON L. REV. 513, 521 (2012) ("Supreme Court decisions do not suffer from acknowledging context and applying empathy. To the contrary, these are tools that, when used skillfully, help the Court reach decisions that correspond to the real world litigants and the general population inhabit.").

40 409 U.S. 434 (1973).

41 *Id.* at 449.

42 *Id.* at 460 (Marshall, J., dissenting). Justice Marshall was outraged by the complete ignorance the majority displayed concerning how the other half lived. *Id.* ("It may be easy for some people to think that weekly savings of less than \$2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are. . . . A pack or two of cigarettes may be, for them, not a routine purchase but a luxury . . . . The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have . . . .").

43 See Davis, *supra* note 34, at 18-19; Weinberg & Nielsen, *supra* note 8, at 345 (using empirical data to establish that empathic adjudication plays a role in employment civil rights cases).

Regardless of whether or not opponents believe empathy should factor into decisionmaking, the fact is that empathy *does* influence judicial adjudication. Specifically, the Supreme Court's decision in *Brown v. Board of Education (I)*<sup>44</sup> illustrates the presence of empathic understanding in the United States' highest court.<sup>45</sup> *Brown (I)* is a noteworthy case because nine white Justices were able to place themselves in the shoes of black school children. They imagined what it would feel like to be isolated because of the color of one's skin:<sup>46</sup> "To separate [school children] from others of similar age and qualifications solely because of their race generates a *feeling* of inferiority as to their status in the community that may *affect their hearts and minds* in a way unlikely ever to be undone."<sup>47</sup> In this excerpt, the Court acknowledged the sentiments of others, recognizing and reflecting upon the anguish of individuals very different from the Justices themselves. In doing so, the Court was able to reach a laudable decision.

Similarly, *Safford Unified School District No. 1 v. Redding*<sup>48</sup> provides another example of the Supreme Court's use of empathy in its adjudication. The importance of empathy is particularly clear when a court must evaluate whether conduct is "reasonable." In *Safford*, the Supreme Court had to determine whether a thirteen-year-old student's Fourth Amendment right against "unreasonable searches"<sup>49</sup> was infringed when she was strip-searched by school officials who believed she possessed prescription-strength ibuprofen.<sup>50</sup> Under the Fourth Amendment, deciding the constitutionality of searches by school administrators requires "a careful balancing of governmental and private interests."<sup>51</sup> In order to be deemed constitutional, the search must be "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

44 347 U.S. 483 (1954).

45 See Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1593 (1987) (characterizing the ruling as an example of successful judicial empathy); Sonia Sotomayor, *A Latina Judge's Voice*, 13 LA RAZA L.J. 87, 92 (2002) ("[W]e should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. Many are so capable. . . . [N]ine white men on the Supreme Court in the past have done so on many occasions and on many issues including *Brown*.").

46 See Henderson, *supra* note 45, at 1608 (noting that the Justices were able to understand racism from the perspective of the black school children, enabling them "to see the world in a new way and to understand the pain created by law in that world; and to respond to that pain"); see also Edelson, *supra* note 39, at 540 (classifying *Brown* as a triumph of empathy).

47 *Brown (I)*, 347 U.S. at 483, 494 (emphasis added).

48 557 U.S. 364 (2009).

49 U.S. CONST. amend. IV; Wardlaw, *supra* note 34, at 1649. If judges failed to understand the perspective of others in such circumstances, "the Fourth Amendment would preserve not society's reasonable expectations of privacy, but rather the federal judiciary's." *The Supreme Court, 2008 Term: Leading Cases—Fourth Amendment—Search by School Officials*, 123 HARV. L. REV. 153, 172 (2009).

50 *Safford*, 557 U.S. at 368.

51 *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

of the infraction.”<sup>52</sup> Thus, resolving the constitutional issue in *Safford* required the Justices to determine how intrusive the search was to the student.<sup>53</sup> This determination called for more than law; it demanded empathy for both Miss Redding’s situation and that of the school officials.<sup>54</sup>

Throughout oral arguments, some Justices seemed to minimize the thirteen-year-old girl’s plight. Justice Breyer, for instance, equated the strip-search in *Safford* to changing for gym class: “In my experience when I was 8 or 10 or 12 years old, . . . we did take our clothes off once a day, we changed for gym, okay?”<sup>55</sup> His failure to imagine Miss Redding’s humiliation was apparent: “I’m trying to work out why is this a major thing to say strip down to your underclothes, which children do when they change for gym, they do fairly frequently . . . .”<sup>56</sup> Statements like these seemingly prompted Justice Ginsburg to assist her fellow Justices in comprehending the impact a strip search might have on a teenage girl.<sup>57</sup> She explained to the media, “[The male Justices] 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>58</sup>

In the end, and most likely with the help of Justice Ginsburg,<sup>59</sup> the Supreme Court concluded that the search was unconstitutional.<sup>60</sup> Both Jus-

52 *Id.* at 342.

53 Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944, 1966 (2012).

54 *See id.* (“[T]o ascertain the extent to which the search was ‘intrusive’ to [Miss Redding] . . . [The Justices] needed to be able to empathize with her—to understand how the search would have felt to her and the impact that it would have had upon her.”); Wardlaw, *supra* note 34, at 1649–50 (“The judges who heard *Safford* could not appropriately discharge their duties under [the Fourth Amendment’s] legal test without the capacity to understand the problems confronting the school and the gravity of the ordeal to Miss Redding.”); *see also The Supreme Court, 2008 Term: Leading Cases—Fourth Amendment—Search by School Officials*, *supra* note 49, at 169 (“*Safford* was challenging on another, more subtle level: law alone could not answer the question whether the search was reasonable.”).

55 Transcript of Oral Argument at 58, *Safford*, 557 U.S. 364 (No. 08-479), *available at* [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-479.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-479.pdf).

56 *Id.* at 45. Justice Breyer’s questions are significant and reveal a great deal about his mode of thinking. Indeed, he has acknowledged that he attempts to communicate his own arguments to the other Justices through his questions during oral arguments. *See* Joan Biskupic, ‘Dynamic’ duo of Kagan, Sotomayor Add Vigor to Court, USA TODAY (Mar. 1, 2011), [http://usatoday30.usatoday.com/news/washington/judicial/2011-03-01-courtarguments\\_N.htm](http://usatoday30.usatoday.com/news/washington/judicial/2011-03-01-courtarguments_N.htm).

57 *See* Wardlaw, *supra* note 34, at 1651.

58 Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY (Oct. 5, 2009), [http://usatoday30.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg\\_N.htm](http://usatoday30.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg_N.htm) (internal quotation marks omitted).

59 *See* Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES, July 7, 2009, at MM22 (“I think [having a woman as part of the conversation in the *Safford* case] 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?” (second alteration in original)).

60 *Safford*, 557 U.S. 364, 376–77 (2009).

tice Breyer, by joining the majority, and Justice Souter, by writing the opinion, exhibited a more profound understanding of Miss Redding's perspective. Justice Souter proved that he could fully comprehend the sense of embarrassment felt by one in Miss Redding's position by holding that the reasonableness of a teenage girl'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>61</sup>

The decision reached in *Safford* exemplifies the vital role that comprehending the views of another plays in adjudication. The male Justices had to use empathy in order to properly resolve the dispute. The Court would not have reached a truly just decision had it only considered the interests of the school district.

### III. JUSTICE SOTOMAYOR'S EMPATHY

#### A. *Sotomayor's Personal History*

According to Justice Ginsburg, "[a] system of justice is the richer for the diversity of background and experience of its participants."<sup>62</sup> Justice Sotomayor's background, robust and colorful, undeniably enhances the richness of the Supreme Court. Judge Guido Calabresi of the Second Circuit advances this belief: "Her whole experience as part of three discriminated-against groups . . . I'm talking about ethnicity, gender, and disability—plus her legal experience, in really being a district judge, really being a Court of Appeals judge, makes her different from really any Justice that I can think of . . ." <sup>63</sup> Indeed, as a Latina woman raised in a Bronx housing project and suffering from Type 1 diabetes,<sup>64</sup> Sotomayor has endured experiences that none of the other Justices can claim to match.

Sotomayor was born and raised in the South Bronx area of New York City by Puerto Rican parents.<sup>65</sup> She grew up in "very modest and challenging circumstances"<sup>66</sup>—living in a public housing project with her alcoholic father<sup>67</sup>—a factory worker with a sixth-grade education<sup>68</sup>—her mother, and her younger brother. Throughout her childhood, Sotomayor's family tradi-

61 *Id.* at 375.

62 Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, 32 SW. U. L. REV. 189, 190 (2003).

63 Lauren Collins, *Number Nine: Sonia Sotomayor's High Profile Debut*, NEW YORKER (Jan. 11, 2010), [http://www.newyorker.com/reporting/2010/01/11/100111fa\\_fact\\_collins?currentPage=all](http://www.newyorker.com/reporting/2010/01/11/100111fa_fact_collins?currentPage=all) (internal quotation marks omitted).

64 SONIA SOTOMAYOR, *MY BELOVED WORLD* 273 (2013) ("I've lived most of my life inescapably aware that it is precious and finite. The reality of diabetes always lurked in the back of my mind, and early on I accepted the probability that I would die young.").

65 *Id.* at 12.

66 *Sonia Sotomayor Biography*, BIOGRAPHY.COM, <http://www.biography.com/people/sonia-sotomayor-453906?page=1#early-life> (last visited Sept 5, 2013) (quoting Sonia Sotomayor) (internal quotation marks omitted).

67 SOTOMAYOR, *supra* note 64, at 12.

68 *Id.* at 61.

tions cultivated and solidified her Latina identity.<sup>69</sup> To Sotomayor, being Latina is an “ember that blazes forever.”<sup>70</sup>

While being a Latina gave her the benefit of affirmative action, which encouraged Princeton University to reach out to her because of her heritage and academic excellence,<sup>71</sup> it also came with a considerable disadvantage—discrimination. As an undergraduate at Princeton, it was common for her to feel like an outsider. These sentiments were exacerbated by letters she read in the student-run newspaper that bemoaned the affirmative action students on campus, “each one of whom had presumably displaced a far more deserving affluent white male and could rightly be expected to crash into the gutter built of her own unrealistic aspirations.”<sup>72</sup> To Sotomayor, this conduct amounted to discrimination. She wrote, “to doubt the worth of minority students’ achievement when they succeed is really only to present another face of the prejudice that would deny them a chance even to try.”<sup>73</sup> In order to ground herself in this new world, Sotomayor avidly participated in the Puerto Rican groups on campus. Despite the criticisms leveled at affirmative action students, Sotomayor did not crash, but ascended to the pinnacle founded upon her hard-work and dedication. At graduation she was awarded the university’s highest undergraduate award, presented for a combination of academic success and extracurricular work.<sup>74</sup>

After graduating from Princeton, Sotomayor attended Yale Law School, where she was an editor for the Yale Law Journal.<sup>75</sup> Immediately upon passing the bar, she worked as an assistant district attorney in Manhattan.<sup>76</sup> There, she prosecuted assaults, robberies, murders, police brutality, and child pornography cases.<sup>77</sup> After five years, she left to work for a commercial litigation firm, specializing in intellectual property litigation.<sup>78</sup> While at the firm, Sotomayor served on the board of the Puerto Rican Legal Defense and Education Fund (“PRLDEF”).<sup>79</sup> It was her pro-bono work with PRLDEF and other agencies that eventually led to her appointment as a U.S. District Court Judge for the Southern District of New York.<sup>80</sup> In 1998, Judge Sotomayor became the first Latina to serve on the U.S. Court of Appeals for the Second

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69 *Id.* at 17. “Part of my Latina identity is the sound of *merengue* at all our family parties and the heart wrenching Spanish love songs that we enjoy.” Sotomayor, *supra* note 45, at 88.

70 Collins, *supra* note 63.

71 SOTOMAYOR, *supra* note 64, at 119.

72 *Id.* at 145.

73 Bill Mears, *New Sotomayor Memoir Reveals Pain, Joys of an ‘Extraordinary Journey,’* CNN (Jan. 14, 2013), <http://www.cnn.com/2013/01/14/living/sotomayor-memoir>.

74 SOTOMAYOR, *supra* note 64, at 162; Adam Liptak, *Washington is Home (for Now at Least), but Sotomayor Stays True to New York*, N.Y. TIMES, Jan. 14, 2013, at A13.

75 SOTOMAYOR, *supra* note 64, at 178.

76 *Sonia Sotomayor Biography*, *supra* note 66.

77 *Id.*

78 SOTOMAYOR, *supra* note 64, at 260–61.

79 *Sonia Sotomayor Biography*, *supra* note 66.

80 *See id.*

Circuit, where she adjudicated a wide array of complicated issues ranging from constitutional law to complex procedural questions.<sup>81</sup>

Undeniably, Justice Sotomayor's experiences, when taken as a whole, distinguish her from every other Justice on the bench. Combined with her background, identity, and disability, her vast work experience contributes to her inimitability. Justice Sotomayor, with a seventeen-year career as a district and circuit court judge, brings more federal judicial experience to the Supreme Court than any other Justice in a century.<sup>82</sup> Her personal history and training undoubtedly enhance the bench with a different perspective that has the potential to positively influence the outcomes of cases.

### B. *Sotomayor's Notion of Empathy*

[T]o understand [others' points of view] takes time and effort, something that not all people are willing to give. For others, their experiences limit their ability to understand the experiences of others. Other[s] simply do not care. Hence, one must accept the proposition that a difference there will be by the presence of women and people of color on the bench. Personal experiences affect the facts that judges choose to see. . . . I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.<sup>83</sup>

For Justice Sotomayor, empathy is a necessary decisionmaking tool because it serves as a constant reminder of the human existences at stake in the case.<sup>84</sup> Rulings have real-world consequences that materially impact the lives of the litigants. Sotomayor concedes that the empathic model of adjudication can be challenging, especially in the context of empathizing with those whose experiences are utterly foreign from our own.<sup>85</sup> This should come as no surprise, since utilizing empathy can be so arduous that, on occasion, even Supreme Court Justices are not up to the task.<sup>86</sup> Justice Sotomayor candidly acknowledges that her experiences as a woman of color have the potential to influence her decisions by determining the lens through which she perceives the facts of a case.<sup>87</sup> This should not be misconstrued as bias. Rather, it simply represents her distinct point of view. Such an attitude, although criticized, is hardly revolutionary. Justice Ginsburg insists that "women, like persons of different racial groups and ethnic origins, contribute to the United States judiciary . . . a distinctive medley of views influenced by differences in biology, cultural impact and life experience."<sup>88</sup> A "medley" of interpretations and viewpoints is to be embraced in judicial

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81 *Sonia Sotomayor: 10 Things You Should Know*, HUFFINGTON POST (June 26, 2009), [http://www.huffingtonpost.com/2009/05/26/sonia-sotomayor-10-things\\_n\\_207724.html](http://www.huffingtonpost.com/2009/05/26/sonia-sotomayor-10-things_n_207724.html).

82 *Id.*

83 Sotomayor, *supra* note 45, at 92.

84 *See id.* at 92–93.

85 *See id.* at 92.

86 *See supra* notes 16–20 and 39–42 and accompanying text.

87 *See* Sotomayor, *supra* note 45, at 91.

88 Ginsburg, *supra* note 62, at 189 (internal quotation marks omitted).

decisionmaking, for it advances neutrality by safeguarding against the domination of a particular opinion.

Judges are but mortals and, as such, are not free from individual predispositions. While Justice Sotomayor accepts the existence of these limitations on judges, she is not fettered by them.<sup>89</sup> She instead vigilantly examines her “assumptions, presumptions and perspectives” in order to make certain that she “reevaluate[s] them and change[s] [them] as [the] circumstances and cases before [her] require[.]”<sup>90</sup> Thus, Sotomayor avoids the pitfall of the truly dangerous judge—the belief that her outlook, formed by her own individual experience, is the objective view. By acknowledging her affinities, Sotomayor recognizes that her stance is not the only one, and pursues viewpoints beyond her own in order to take them into consideration. Her wealth of experience, both professional and personal, has facilitated her awareness of and appreciation for the various points of view latent in each case. By empathizing with numerous perspectives, she is better able to respond to the concerns of not only the parties to a case, but also her colleagues on the bench.<sup>91</sup>

### C. *Sotomayor's Empathy in Practice*

To take the words of Supreme Court Justice Oliver Wendell Holmes, “The life of the law has not been logic: it has been experience.”<sup>92</sup> Justice Sotomayor’s experience facilitates her ability to play a leadership role among the Court’s liberals for her candor during oral argument and in her written opinions.<sup>93</sup> In her brief time on the bench, she has managed to become the voice of the liberal Justices and has demonstrated her awareness of the humanity of the parties whose cases reach the Supreme Court.<sup>94</sup>

#### 1. Oral Arguments

The perspectives presented through questioning at oral arguments can have a significant impact on fellow Justices, especially in light of the fact that oral arguments are the first chance the Justices have to see their colleagues’ attitude toward a case.<sup>95</sup> Supreme Court Justices can, and do, utilize oral

<sup>89</sup> See Sotomayor, *supra* note 45, at 93.

<sup>90</sup> *Id.*

<sup>91</sup> *Remarks by the President Nominating Judge Sonia Sotomayor to the United States Supreme Court*, WHITEHOUSE.GOV (May 26, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-in-Nominating-Judge-Sonia-Sotomayor-to-the-United-States-Supreme-Court/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-Nominating-Judge-Sonia-Sotomayor-to-the-United-States-Supreme-Court/) (“[My experience] has helped me to understand, respect, and respond to the concerns and arguments of all litigants who appear before me, as well as to the views of my colleagues on the bench.”).

<sup>92</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

<sup>93</sup> Madhavi M. McCall et al., *Criminal Justice and the 2010-2011 U.S. Supreme Court Term*, 53 S. TEX. L. REV. 307, 314–15 (2011).

<sup>94</sup> Liptak, *supra* note 74.

<sup>95</sup> See Biskupic, *supra* note 56 (noting that Justice Kagan regards oral arguments as a medium for “justice-to-justice persuasion”).

arguments to convey both their legal insights and their life experiences.<sup>96</sup> Justice Sotomayor is no exception. Indeed, she has already solidified herself as one of the Court's most outspoken and assertive questioners in oral argument.<sup>97</sup> For instance, in the 2011–2012 Term, Sotomayor posed more questions during oral arguments than any other Justice outside of Justice Scalia.<sup>98</sup> Her thorough inquiries provide a glimpse of her empathic outlook.

In a case concerning the rights of prisoners, Justice Sotomayor posed questions that demonstrated her compassion and her ability to empathize with others. *Brown v. Plata*<sup>99</sup> concerned California prisons' violation of the Eighth Amendment's prohibition of cruel and unusual punishment.<sup>100</sup> In particular, the severely overcrowded prisons jeopardized the safety of the inmates.<sup>101</sup> The conditions were appalling. In one prison, up to fifty sick inmates were contained in a two-hundred-and-forty-square-foot cage for up to five hours awaiting treatment.<sup>102</sup> In another, a prisoner suffering from severe abdominal pain died after five weeks lapsed before being referred to a specialist.<sup>103</sup>

In oral argument, while other Justices were less concerned about the prisoners' predicament,<sup>104</sup> Justice Sotomayor unmistakably communicated her position. When the attorney for the State of California contended that the time-table for reducing the number of inmates in a prison depended on the state's interests, Sotomayor countered, "[I]sn't [the best interest of the State of California] to deliver adequate constitutional care to the people that it incarcerates?"<sup>105</sup> When the attorney answered in the affirmative, she continued "When are you going to avoid the needless deaths . . . ? When are you going to avoid or get around people sitting around in their feces for days in a dazed state?"<sup>106</sup> These questions reveal her empathy for the inmates. Growing up in poverty enhanced Sotomayor's ability to identify with the inmates' situation. She is no stranger to conditions that are less than ideal, even dangerous—having resided in a building where the stairs were littered with drug addicts and needles.<sup>107</sup> Because Justice Sotomayor faced such circumstances

96 See Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992) ("At oral arguments . . . Justice Marshall imparted not only his legal acumen but also his life experiences. . .").

97 A.E. Dick Howard, *Out of Infancy: The Roberts Court at Seven*, 98 VA. L. REV. IN BRIEF 76, 102–03 (2012).

98 *Id.* at 103.

99 131 S. Ct. 1910 (2011).

100 *Id.* at 1922.

101 *Id.* at 1924.

102 *Id.* at 1925.

103 *Id.*

104 For instance, Justice Alito seemed more concerned about the consequences of releasing the prisoners. See Transcript of Oral Argument at 44, *Plata*, 131 S. Ct. 1910 (No. 09-1233).

105 *Id.* at 15.

106 *Id.* at 14.

107 SOTOMAYOR, *supra* note 64, at 19.

in her childhood, it is arguably easier for her to imagine herself in a hazardous environment that gives rise to severe health risks.

Moreover, Sotomayor's understanding of the harsh reality accompanying "needless deaths" most likely stems from her time working as an assistant district attorney. As a prosecutor, she combated evil-doers in a city inundated with drugs, street crimes, and murder.<sup>108</sup> Through her work, she became conscious of the pain and suffering borne by families torn apart by the loss of a loved one. Indeed, Sotomayor admitted that while supervising a highly publicized murder case, she learned "the tragic consequences of needless deaths."<sup>109</sup> This language, echoed in her inquiries, conveys her empathy not only towards the prisoners, but also for the inmates' families destroyed by the loss of their loved ones.

In a controversial 5–4 decision written by Justice Kennedy,<sup>110</sup> the Supreme Court affirmed a three-judge district court's order that California decrease its prison population, and held that a population limit is necessary to remedy the violation of prisoners' constitutional rights.<sup>111</sup> Perhaps influenced by Justice Sotomayor's passionate inquiries detailing the inhumane treatment of prisoners, Justice Kennedy wrote: "Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment."<sup>112</sup>

Most recently, Sotomayor's experiences as a Latina woman have likely informed her assessment of the difficulties confronting lesbians and gays.<sup>113</sup> During oral arguments concerning cases dealing with the Defense of Marriage Act ("DOMA"), her commitment to equality, regardless of sexual orientation, was evident when she asked questions implying a belief in the existence of illicit discrimination:

Outside of the marriage context, can you think of any other rational basis . . . for a state using sexual orientation as a factor in denying homosexuals benefits? Or imposing burdens on them? Is there any other decision-

108 Ann O'Neill, *Sotomayor Learned the Ropes on 'Tarzan Case'*, CNN.COM (Jul. 28, 2009, 9:38 PM) (internal quotation marks omitted), <http://www.cnn.com/2009/US/07/16/sotomayor.district.attorney/>.

109 *Id.*

110 *Brown v. Plata*, 131 S. Ct. 1910 (2011). Justices Sotomayor, Ginsburg, Kagan, and Breyer joined in the majority decision.

111 *Id.* at 1922. For an article discussing the controversy surrounding the decision, see Ben Kerschberg, *Supreme Court Addresses Inhumane Conditions in California Prisons, Orders Release of 46,000 Inmates*, FORBES (May 23, 2011, 4:01 PM), <http://www.forbes.com/sites/benkerschberg/2011/05/23/supreme-court-addresses-inhumane-conditions-in-california-prisons-orders-release-of-46000-inmates/>.

112 *Plata*, 131 S. Ct. at 1928.

113 See Sandra Lilley, *Analysis: Justice Sonia Sotomayor's Increasingly Visible Supreme Court Role*, NBC LATINO (Mar. 28, 2013, 4:51 PM), <http://nbclatino.com/2013/03/28/analysis-justice-sonia-sotomayors-increasingly-visible-supreme-court-role/> ("Attorney John Treviño believes Justice Sotomayor's experiences as a woman and as a minority inform her perspectives on the challenges facing lesbian, gay, bisexual and transgender Americans.").

making that the government could make—denying them a job, not granting them benefits of some sort[?]<sup>114</sup>

As a minority, it is expected that Justice Sotomayor would be more apt to identify with other minorities, such as sexual minorities. “The reality of empathy is that we *are* more likely to empathize with people similar to ourselves . . . .”<sup>115</sup> Lesbians and gays, classified as sexual minorities,<sup>116</sup> share similar experiences with members of racial and ethnic communities. For instance, both racial/ethnic and sexual minorities fall victim to prejudice and are subjected to disparate treatment by the majority.<sup>117</sup> Thus, it is likely that Justice Sotomayor’s encounters with discrimination—both against Latinos<sup>118</sup> and women<sup>119</sup>—facilitate her ability to relate to the prejudices facing lesbians and gays. Sotomayor revealed such an empathic attitude toward classes of minorities when she asked, “If they’re a class that makes any other discrimination improper, irrational, then why aren’t we treating them as a class for [marriage]?”<sup>120</sup> Her comments at oral argument imply that she is cognizant of discrimination and its real-world consequences.

In another controversial 5–4 decision written by Justice Kennedy,<sup>121</sup> the Supreme Court ruled that DOMA was unconstitutional.<sup>122</sup> The opinion echoes the concerns expressed by Sotomayor in her questions during oral arguments. Using the same word choice as Sotomayor, the Court held that DOMA “burden[s]” same-sex couples.<sup>123</sup> The majority explicitly recognized

114 Transcript of Oral Argument at 14, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144). Although it is possible that Sotomayor is using her inquiries to play devil’s advocate, the fact that she is even able to recognize this argument is illustrative of her ability to see different perspectives in a case.

115 Henderson, *supra* note 45, at 1584 (“[E]lites will empathize with the experience of elites, men empathize with men, women with women, whites with whites.”).

116 Kenneth H. Mayer et al., *Sexual and Gender Minority Health: What We Know and What Needs to Be Done*, 98 AM. J. PUB. HEALTH 989, 989 (2008).

117 Gregory M. Herek, *Race and Sexual Orientation: Commonalities, Comparisons, and Contrasts Relevant to Military Policy*, UCDAVIS PSYCHOLOGY, [http://psychology.ucdavis.edu/rainbow/html/military\\_race\\_comparison.html](http://psychology.ucdavis.edu/rainbow/html/military_race_comparison.html) (last visited Oct. 22, 2013).

118 Sotomayor, while a sophomore at Princeton, was subjected to enough class-based discrimination that she felt compelled to write a piece in Princeton’s student newspaper titled “Anti-Latino Discrimination at Princeton.” In the article she expressed her outrage at the lack of Latino faculty. In fact, she contended there was not one Puerto Rican or Chicano faculty member, which she believed reflected a “total absence of regard, concern and respect” for Latinos and their culture. See Sonia Sotomayor, *Anti-Latino Discrimination at Princeton*, DAILY PRINCETONIAN, May 10, 1974 (Republished May 27, 2009), <http://www.dailyprincetonian.com/2009/05/27/23731/>.

119 See Oprah Winfrey Network, *Exclusive Webisode: Justice Sonia Sotomayor’s Experience with Casual Sexism*, AOL NEWS (Mar. 26, 2013), <http://on.aol.com/video/exclusive-webisode—justice-sonia-sotomayors-experience-with-casual-sexism-517724892> (describing Justice Sotomayor’s encounters with sexism in the work place).

120 Transcript of Oral Argument, *supra* note 114, at 14.

121 Justices Sotomayor, Ginsburg, Kagan, and Breyer joined in the majority decision. Justices Roberts, Thomas, Alito, and Scalia dissented.

122 *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

123 *Id.* at 2694.

the Act's blatant discrimination—a fact emphasized by Sotomayor in her questioning—when it ruled that DOMA's “principal purpose is to impose inequality.”<sup>124</sup> The Court found that DOMA “imposes a disability on the class [of same-sex couples],” and “instructs all federal officials, and indeed all persons with whom same-sex couples interact . . . that their marriage is less worthy than the marriages of others.”<sup>125</sup>

As the above examples illustrate, Justice Sotomayor's views—shaped by both her work as a prosecutor and her experiences with poverty, discrimination, and living with a disability—are crucial to encouraging healthy debate on the Court.<sup>126</sup> Additionally, her ability to empathize with litigants as a result of those experiences empowers her to identify and combat inequality.

## 2. Written Opinions

While some people originally expressed fears that Justice Sotomayor's use of empathy would result in an unfair bias,<sup>127</sup> the Latina Justice has proven that empathy and impartiality can go hand in hand. For instance, when the Supreme Court denied the petition for a writ of certiorari in *Calhoun v. United States*,<sup>128</sup> Justice Sotomayor expressed her identification with the defendant but did not allow it to cloud her decision making.

In *Calhoun*, the petitioner was on trial for his alleged participation in a drug conspiracy.<sup>129</sup> The primary issue presented was whether Calhoun was aware that the friends he joined on a road trip were about to participate in a drug transaction.<sup>130</sup> The issue of Calhoun's intent reached its apex during the prosecutor's cross-examination of Calhoun when he testified that he separated himself from the group after his friend came to the hotel room with a bag of money.<sup>131</sup> At this, the prosecutor pushed Calhoun to clarify why he

124 *Id.*

125 *Id.* at 2695–96. The Court's majority opinion demonstrates empathy for same-sex couples as well as their families. The Court noted that DOMA not only “demeans the couple, whose moral and sexual choices the Constitution protects” but also “humiliates tens of thousands of children now being raised by same-sex couples.” *Id.* at 2694.

126 See Davis, *supra* note 34, at 19.

127 See *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor*, *supra* note 29, at 6–7 (2009) (statement of Sen. Jeff Sessions, Ranking Member, S. Comm. on the Judiciary) (“I will not vote for . . . an individual . . . who is not fully committed to fairness and impartiality toward every person who appears before them. . . . I will not vote for . . . an individual . . . who believes it is acceptable for a judge to allow their personal background, gender, prejudices, or sympathies to sway their decision in favor of, or against, parties before the court. . . . Such an approach to judging means that the umpire calling the game is not neutral, but instead feels empowered to favor one team over the other. Call it empathy, call it prejudice, or call it sympathy, but whatever it is, it is not law.”).

128 133 S. Ct. 1136 (2013).

129 *United States v. Calhoun*, 478 F. App'x 193, 194 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 1136 (2013).

130 *Calhoun*, 133 S. Ct. at 1136.

131 *Id.*

did not want to be in the hotel room.<sup>132</sup> When the district judge instructed the prosecutor to move on, the prosecutor asked “You’ve got African-Americans, you’ve got Hispanics, you’ve got a bag full of money. Does that tell you—a light bulb doesn’t go off in your head and say, [t]his is a drug deal?”<sup>133</sup>

Imagine the isolation and humiliation felt by Calhoun, an African-American, in that instance. Envision the feeling of hopelessness incited by such a racially prejudiced comment—uttered during a proceeding meant to embody justice and equality. Justice Sotomayor, joined by Justice Breyer, did. She asserted “By suggesting that race should play a role in establishing a defendant’s criminal intent, the prosecutor here tapped a deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation.”<sup>134</sup>

The influence of her experience living as a minority allowed her to easily assume the viewpoint of those in Calhoun’s situation. Undeniably, Justice Sotomayor’s background enabled her to recognize the social consequences of such conduct on minorities’ faith in the justice system, stating it “diminishes the dignity of our criminal justice system and undermines respect for the rule of law.”<sup>135</sup> One can sense her empathy for Calhoun and her indignity at the thought of being considered anything less than equal when she maintains, “We expect the Government to seek justice, not to fan the flames of fear and prejudice.”<sup>136</sup>

Despite the objectionable actions of the prosecution and of the government,<sup>137</sup> Justice Sotomayor did not opine that the Supreme Court should take this case to correct a clear injustice. Instead, she acknowledged that Calhoun’s counsel neglected to object to the question at trial and, as a result, the lower court’s decision was subject to the stringent “plain-error review” standard.<sup>138</sup> Since Calhoun did not attempt to make that showing and offered new arguments in its place, Justice Sotomayor determined that these contentions were waived because he failed to make them on appeal to the Fifth Circuit.<sup>139</sup> Even when confronted with blatant prejudice, Sotomayor looked to the law and agreed that the case should not be granted certiorari. Thus, *Calhoun* serves as an exemplification of the reality that Justice Sotomayor firmly grounds her decisions in law.

Sotomayor has also demonstrated her ability to listen and be influenced by others’ perspectives—further disproving the accusation that empathy gives

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132 *Id.*

133 *Id.*

134 *Id.* at 1137.

135 *Id.* at 1138.

136 *Id.*

137 Justice Sotomayor also lamented the government’s response to the prosecutor’s actions. Particularly, she accused the government of failing to recognize the injustice of the prosecutor’s question. *Id.*

138 *See id.* at 1136–37.

139 *See id.*

rise to unfair bias. While an appellate judge on the Second Circuit, Sotomayor seemed to empathize more with the government, a characteristic most likely attributable to her tenure as a prosecutor.<sup>140</sup> Sotomayor's empathy for the government manifested itself most in cases concerning police searches and the use of evidence.<sup>141</sup> For instance, in *United States v. Falso*,<sup>142</sup> then-Judge Sotomayor upheld the defendant's child pornography conviction even though the FBI agent searched his home pursuant to a search warrant that was wrongfully issued due to the lack of probable cause.<sup>143</sup> Sotomayor maintained that the evidence could still be used against the defendant because the agent's conduct fell under the good faith exception.<sup>144</sup> Similarly, in *United States v. Santa*,<sup>145</sup> the police discovered crack after arresting and searching the defendant based on a mistaken belief that the defendant was wanted on an outstanding warrant.<sup>146</sup> Then-Judge Sotomayor affirmed the district court's denial of the defendant's motion to suppress because "[t]here is no indication [in the record] that the arresting officer[s] w[ere] not acting objectively reasonably when [they] relied upon the police computer record."<sup>147</sup>

However, in *J.D.B. v. North Carolina*,<sup>148</sup> Justice Sotomayor made a conscious attempt to understand the defendant's perspective and, in doing so, ruled against the government. *J.D.B.* involved a thirteen-year-old seventh grader who was removed from his classroom by a police officer, escorted to a conference room, and questioned by two cops and school administrators for thirty to forty-five minutes.<sup>149</sup> His legal custodian was never notified, nor was he informed of his *Miranda* rights, or his right to leave the room.<sup>150</sup> After being threatened with juvenile detention, J.D.B. confessed to committing break-ins.<sup>151</sup> At that point, the officer informed J.D.B. that he could decline to answer questions and was free to leave.<sup>152</sup> The police searched his home, located the stolen goods, and charged the youth with breaking and entering

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140 See James Oliphant, *Sotomayor is Remembered as a Zealous Prosecutor*, L.A. TIMES (Jun. 9, 2009), <http://www.latimes.com/la-na-sotomayor-prosecutor9-2009jun09,0,1224643.story?page=1> (reporting that a defense lawyer, who appeared before her while she was federal district judge, noticed that she leaned toward the government). But see Linda Greenhouse, *The Roberts Court, Version 4.0*, N.Y. TIMES (Oct. 3, 2010), <http://query.nytimes.com/gst/fullpage.html?res=9801EFDA123BF930A35753C1A9669D8B63> ("[During her initial Term] Justice Sotomayor voted for the rights of criminal defendants more often than any other justice except Justice Stevens.").

141 See Oliphant, *supra* note 140.

142 544 F.3d 110 (2d Cir. 2008).

143 *Id.* at 120.

144 *Id.* at 125–29.

145 180 F.3d 20 (2d Cir. 1999).

146 *Id.* at 22.

147 *Id.* at 30 (alterations in original) (internal quotation marks omitted).

148 131 S. Ct. 2394 (2011).

149 *Id.* at 2399.

150 *Id.*

151 *Id.* at 2400.

152 *Id.*

along with larceny.<sup>153</sup> J.D.B's attorney moved to suppress the statements made by J.D.B and any evidence derived from them, alleging that J.D.B. was interrogated while in custody without being afforded *Miranda* warnings.<sup>154</sup>

Writing for the majority, Justice Sotomayor held that a child's age must factor into the *Miranda* custody analysis if the interrogating officer knew the child's age at the time of questioning, or if the age "would have been objectively apparent to a reasonable officer."<sup>155</sup> Although Justice Sotomayor demonstrated her empathy towards the government by recognizing that an objective custody inquiry "avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect,"<sup>156</sup> she maintained that incorporating age in the analysis would not be overly burdensome on law enforcement or courts.<sup>157</sup>

Justice Sotomayor revealed her willingness to actively take into account the positions of others by drawing on the argument advanced in an *amicus curiae* brief for the petitioner. One of her main rationales for including age in the analysis rested on the belief that children are particularly vulnerable to the pressures of police interrogations, and are therefore more likely to give a false confession.<sup>158</sup> This contention was advanced in an *amicus curiae* brief, which outlined a series of cases illustrating that children have confessed falsely to offenses as significant as murder.<sup>159</sup> It insisted that a decision that failed to consider a child's age would contribute to wrongful convictions of innocent children.<sup>160</sup>

Sotomayor, always concerned about the real-life consequences of judicial decisions on individuals, was likely prompted by these empirical findings to place herself in the child's position. She made the effort to imagine what it would feel like to be a thirteen-year-old interrogated by police officers. In so doing, she determined that it should be obvious to "anyone who was a child once himself, including any police officer or judge" that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go."<sup>161</sup> This case exemplifies Sotomayor's ability to recognize and assess the differing perspectives of the many parties involved in litigation, as well as her endeavor never to forget the concrete human realities at stake in a case.

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153 *Id.*

154 *Id.*

155 *Id.* at 2406.

156 *Id.* at 2402.

157 *Id.* at 2407.

158 *Id.* at 2401.

159 See Brief for Center on Wrongful Convictions of Youth, et al. as Amici Curiae Supporting Petitioner, *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (No. 09–11121).

160 *Id.* at 29.

161 *J.D.B.*, 131 S. Ct. at 2403.

## CONCLUSION

The ideal judge is one who makes decisions firmly grounded in the law, while concomitantly taking into account the humanity latent in the controversy and the societal impact of the decision. A judge can only truly grasp the human consequences of a decision through empathy. Empathic decision-making encourages a judge to perceive and consider the various stances of the litigants before her. Only by recognizing the differing viewpoints can a judge adequately weigh the interests at stake in the case. In this way, empathy produces more equitable results than a formalist or quasi-formalist approach to adjudication. Refuting those who criticize empathic decision-making, the Supreme Court has demonstrated that empathy can, and should, play an integral role in the judicial process to reach more just decisions.

Supreme Court Justice Sonia Sotomayor understands that empathy is a necessary decisionmaking tool. She brings with her a distinctive background and heritage, as well as an unparalleled level of experience as a judge in the lower courts. Consequently, she is able to give a voice to those who are typically less heard by recognizing and comprehending the perspectives of others. As a woman who has suffered poverty, discrimination, and a disability, she can view the world through many lenses. Her inherent lenses, however, cannot address every vantage point, thus she urges herself to identify and evaluate those viewpoints with which she is less familiar. Indeed, she has demonstrated that she is willing to adopt other viewpoints. Justice Sotomayor's training and history enriches the bench with a novel outlook and encourages robust debates that serve to positively influence decisions. Her desire to comprehend perspectives beyond her immediate experience empowers her to curb her presumptions, combat inequality, and bear in mind the human lives hanging in the balance.

