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INTERSECTIONALITY, LIFE EXPERIENCE & JUDICIAL DECISION MAKING: A NEW VIEW OF GENDER AT THE SUPREME COURT

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On New Year's Day, acting at the request of an order of Catholic nuns in Colorado, Justice Sotomayor temporarily blocked the Obama administration, acting under the Affordable Care Act, from requiring some religiously affiliated groups to provide health insurance coverage of birth control.¹ In response, commentators attacked the Justice and blamed her decision—one viewed as betraying President Obama and women's rights—on the fact that Sotomayor is Catholic.² Many scholars and judges have said that the presence of women in the judiciary affects overall judicial decision making.³ Scholars proclaim that female judges vote with a “woman's voice.” While some judges would agree, others argue, “[a] wise old man and a wise old woman [will] reach the same conclusion.”⁴ Existing studies finding a gendered correlation focus only on the sex of the decision maker while ignoring the experiences of the individual judge. Because these studies tally-up the number of female votes versus male, if any correlation is found, the conclusion is drawn at the outset—that gender *alone* causes an impact. This Note acknowledges the statistically significant correlation of gender on decision making in certain kinds of cases, but argues the relationship is more nuanced. Instead of focusing on the impact of gender as a biologically immutable factor, the correlation is actually a result of individual experience. Although women may generally share certain kinds of experiences, such as gender discrimination, studies concluding that gender is the determinative factor miss the mark and contribute to a misalignment of scholarly focus. I advocate instead for a more holistic

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1. Steve Kenny & Robert Pear, *Justice Blocks Contraception Mandate on Insurance in Suit by Nuns*, N.Y. TIMES (Dec. 31, 2013), http://www.nytimes.com/2014/01/01/us/politics/justice-sotomayor-blocks-contraception-mandate-in-health-law.html?_r=0.

2. Jamie Stiehm, *The Catholic Supreme Court's War on Women*, U.S. NEWS & WORLD REPORT (Jan. 7, 2014), <http://www.usnews.com/opinion/blogs/jamie-stiehm/2014/01/07/the-catholic-supreme-courts-war-on-women> (“[No] mercy for women on the Supreme Court, not even from a woman”).

3. See *infra*, Part II.A.

4. David Margolick, *Women's Milestone: Majority on Minnesota Court*, N.Y. TIMES, Feb. 22, 1991, at B16 (citing Justice Jeanne Coyne). Although Justice O'Connor is often credited as the mantra's original author, it was actually Justice Jeanne Coyne, formerly of the Minnesota Supreme Court who said, “a wise old man and a wise old woman reach the same conclusion. In the vast majority of cases, [gender] will have no impact whatever.” Former and current Supreme Court justices disagree with this adage. See *infra* note 139 (Justice Sonia Sotomayor); see also *infra* note 180 (Sandra Day O'Connor).

analysis based on *experiential* factors, rather than merely a compartmentalized analysis of gender. This approach highlights broader public policy implications and advances support for judicial diversity.

This Note examines previous research focused on gendered decision making at the federal appellate courts and applies it to the U.S. Supreme Court and particularly, the Roberts Court. Past studies on gender involving a large sample size, although statistically sound, fail to focus on the individual experience that informs judicial decision making. Given the large sample size of past studies, it is impractical to biographically evaluate each judge to determine whether personal experience, not merely gender, impacts decision making. However the impact of *experience* is highlighted by applying statistical studies examining intermediate appellate courts to the individual Justices at the Supreme Court. Moreover, examining the experiences commonly shared by one group, such as women, permits an appreciation of the broader implications of experience on judges generally. Conversely, compartmentalizing women judges as having a “woman’s voice” works against advancing judicial diversity, as women judges are then more likely to be placed on the court as token appointments.⁵ Once a slot is filled, future appointments are less likely. As noted in scholarship on gender in politics, “[d]ifferences *among* men, and differences *among* women, remind us that gender is not an overriding or monolithic force differentiating the attitudes (and behavior) of women and men in public office.”⁶ Even if the members of the U.S. Supreme Court represented the demographic cross-section of society, the Court would still not be reflective of the diverse possible experiences that inform decision making. Therefore, scholarship in the area of gender and judicial decision making should refocus on the experiences of the individual judge, and not *solely* on any one isolated cause and effect.

In support of my argument that each Justice contributes their own unique experiences to the court, I compare the role of experiences, which may be (but not necessarily) shared by women, to the role of Chief Justice. Adding a mutable variable unrelated to gender illustrates how we might better think of the role of women and judging: no two Chief Justices, just as no two women, will fulfill their duties in the same manner. A broader analysis of the role of experience is complicated because experience manifests itself in many ways. Because each judge brings a unique viewpoint to the bench, she may feel a moral or ethical obligation to share her experiences to help inform the decision making of others. By sharing her viewpoint, the individual’s experiences also impact the decision making of her colleagues. This occurs in any scena-

5. One study found that when women comprise less than fifteen percent of an organization, women adhere to organizational norms to avoid stereotypes, resulting in the dominant institutional norm prevailing. In other words, the addition of too few “token” appointments will result in a failure to diversify the overall “voice” of the institution. ELIZABETH A. BENNION, GENDER, PERCEPTION, AND POLICY PRIORITIES IN THREE MIDWESTERN STATE LEGISLATURES (2001) (unpublished Ph.D. thesis, University of Wisconsin-Madison) (on file with author).

6. *Id.* at 11.

rio, regardless of gender, and is a natural tendency in any human interaction.

Although well-intentioned scholarship has pushed for more women in the judiciary on the basis that they have a different voice, focusing on experience more effectively advances arguments for diversity. Achieving a diverse judiciary—one comprised of representative experiences felt by the entire populace—is as a matter of public policy, key to strengthening public support, trust, and legitimacy in the judiciary. Any experience, whether triggered by gender, race, social background, or an intersection of many causes, is combined with other views held by each individual Justice, including political ideology and mode of constitutional interpretation. These variables comprise the individual and at times compete with one another or take precedence. A comprehensive examination of all experiential factors is beyond the scope of this paper. However, as with gender, it is erroneous to focus on a compartmentalized label of “race” or “religion” while dismissing the impact of experience. Instead, these characteristics *collectively* work, along with agents of socialization, education, occupation, etc., to shape one’s life experiences and inform decision making.

Part I explains the allure of judicial decision making. Part II examines existing scholarship demonstrating a correlation between judicial decision making and gender. Part III applies recent scholarship, which focuses on the federal appellate courts to the U.S. Supreme Court. To better understand how experience informs judicial decision making, I address the experiences related to gender felt by women who have served and are now serving on the Supreme Court. Part IV compares the impact of gender, based on experiences commonly felt by women, to the non-gender-specific role of the Chief Justice and how a Chief Justice contributes his own experiences for the benefit of others. Part V briefly draws comparisons to other experiential factors, including race, religion, and socioeconomic status. Part VI ponders the consequence of experience on the broader concerns of morality, ethics, and public policy in judicial diversity.

I. THE MYSTIQUE OF JUDICIAL DECISION MAKING

Insight into judicial decision making, especially that of United States Supreme Court Justices, is in high demand yet difficult to obtain.⁷ The law and those who are involved in it yearn for predictability, which would drive, as well as stabilize, our legal system. With emphasis on precedent and *stare decisis*, legal scholars, litigants, and engaged citizens seek certainty of the future of our legal system based on what has already been decided, coupled with the tendency of any justice to vote in a particular way. Critics argue the Court is too secretive, that “[i]n the third and least covered branch of government,

7. See Matt Negrin, *Roberts’ Switch on Health Care Signals a Leaky Supreme Court*, ABC NEWS (July 2, 2012) <http://abcnews.go.com/Politics/OTUS/chief-justice-john-roberts-switch-obamacare-health-care/story?id=16698557> (“Candor and insight into a Supreme Court justice’s thought process are priceless . . .”).

secrecy is a hallmark.”⁸ This fuels a desire to predict future decision making by compartmentalizing any particular justice as “liberal” or “conservative” and even as “woman.”

In pursuit of certainty, judicial nominees are subjected to rigorous scrutiny throughout the appointment process. Lifetime judicial appointments are among the greatest and longest lasting legacies of any presidency, and every appointment is political. Merit competes with other considerations, like personal and ideological compatibility, interwoven with the support and opposition forces in Congress and the White House.⁹ Appointing a Justice is not a small undertaking.¹⁰ Arguably, this is a lot of (needless) work when predictability may not “carry the day.” Due to the misconception that one can adequately predict future decision making based on compartmentalized labels, many are shocked when a judge labeled as “liberal” or “conservative” votes contrary to expectations.¹¹ Alternatively, if greater emphasis ought to be given to each potential nominee’s individual life experiences, exhaustive professional *and* personal investigations with Senate Judiciary Committee grilling are justified to unearth more information. This is impractical and serves to deter otherwise qualified candidates. Thus, using labels such as “liberal” and “conservative,” or “man” and “woman” are viewed as more convenient—even if having a false sense of certainty may bring reassurance at the cost of accuracy.

II. EXISTING SCHOLARSHIP ON GENDER AND JUDICIAL DECISION MAKING

A. *Gender Discrimination Cases at the U.S. Courts of Appeal*

Research has “shown that female judges tend to be the strongest supporters of women’s rights claims, regardless of their ideology.”¹² Of thirty studies, approximately one-third found a correlation between a judge’s gender and the decisions they reach.¹³ Others find a correlation only in certain types of cases. For instance, even though plaintiffs lost in the vast majority of sexual harassment or gender discrimination

8. *Id.* But see SANDRA DAY O’CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 24 (Craig Joyce ed., 2003) (arguing the federal judiciary is the *least* secretive branch because it is the only one that publishes its opinions for everyone to see).

9. DAVID M. O’BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 34 (8th ed. 2008).

10. *Id.* at 41 (detailing the investigatory process of advisors and the FBI).

11. Like other presidents, President Truman experienced disappointment in his judicial appointments. He once said, “Whenever you put a man on the Supreme Court he ceases to be your friend. I’m sure of that.” He felt he had misjudged his appointee: “He hasn’t made one right decision that I can think of . . .” *Id.* at 87. See also Negrin, *supra* note 7 (discussing Justice Robert’s vote with the “liberal” justices to uphold the Affordable Care Act).

12. Barbara Palmer, “*To Do Justly*”: *The Integration of Women into the American Judiciary*, 34 *POL. SCI. & POL.* 235, 237 (2001) (citations omitted).

13. Deborah Rhode, *In a “Different” Voice: What Does the Research About How Gender Influences Judging Actually Say?*, *SLATE* (June 10, 2009), <http://www.slate.com/id/2220220/> (citing Christina Boyd et al., *Untangling the Causal Effects of Sex on Judging*, paper presented at the 2008 annual meeting of the Midwest Political Science Association).

appeals, they were nearly twice as likely to prevail with a female judge on the appellate panel.¹⁴ Variations among studies are attributable to the low sample size upon which to study.¹⁵ Additionally, each study differs in time period, controlling law, types of cases decided, and jurisdiction. Ideology also poses a challenge because it is hard to control as a variable. For instance, women on the federal bench lean to the political left while men are more evenly distributed.¹⁶ Judges appointed by Democratic presidents found for gender discrimination plaintiffs more than Republican appointees, though Republican-appointed female judges supported plaintiffs at about the same rate as Democratic-appointed males (twenty-nine and thirty percent respectively).¹⁷ Republican-appointed female judges are more likely than Republican-appointed male judges to vote pro-plaintiff in gender discrimination cases.¹⁸ For scholars, this fact is the key in demonstrating that gender—not just party affiliation—plays a part in decision making. As I argue in Part III however, by comparing these studies to the voting behavior of U.S. Supreme Court Justices, it is apparent that while gender and party affiliation affect decision making, it is not gender itself that matters, it is gendered *experience*.

The disclosure of an experience can even influence a colleague's decision making. For instance, male judges' voting behavior changes when a female is added to an appellate panel. The presence of a female judge "more than doubled the probability that a male judge ruled for the plaintiff in sexual harassment cases (increasing the probability from sixteen percent to thirty-five percent) and nearly tripled this probability in sex discrimination cases (increasing [the odds] from eleven percent to thirty percent)."¹⁹ Further, the presence of a female judge affects males regardless of party affiliation.²⁰ More reserved figures still nevertheless report a significant impact. Another study found when a woman is on the appellate panel, the likelihood that a male colleague will rule in favor of the plaintiff increased

14. Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1776 (2005) (demonstrating that pro-plaintiff decisions increased from twenty-two percent to forty-one percent in sex harassment cases and from seventeen percent to twenty-eight percent in gender discrimination cases).

15. See 2013 Representation of United States State Court Women Judges, NAT'L ASS'N OF WOMEN JUDGES, http://www.nawj.org/us_state_court_statistics_2013.asp (women comprise thirty-five percent of state final appellate jurisdiction judges and thirty-three percent of intermediate appellate jurisdiction judges); see also *Women in the Federal Judiciary: Still a Long Way to Go*, NAT'L WOMEN'S L. CENTER (Aug. 2, 2013), <http://www.nwlc.org/resource/women-federal-judiciary-still-long-way-go-1> (thirty-two percent of active judges currently sitting on the thirteen federal courts of appeal are female).

16. Rhode, *supra* note 13.

17. Peresie, *supra* note 14, at 1776–77 (study examined three-judge federal appellate panels deciding cases involving female claimants alleging sexual harassment or gender discrimination in violation of Title VII of the Civil Rights Act of 1964; importantly, the study controlled for possible variables by limiting the time period studied to a timeframe with no significant changes in Supreme Court precedent or federal statutes).

18. *Id.*

19. *Id.* at 1778.

20. See *id.*

between twelve and sixteen percent.²¹ Thus, even statistically conservative studies provide strong evidence that the presence of a female judge affects the decision making of her male colleagues. Section C explores competing explanations for this gendered correlation. However, a woman's influence might be limited. One study found only the presence of the first woman on the appellate panel affected the probability that a male judge ruled for the plaintiff; the addition of a second female did not significantly impact the likelihood of rendering a pro-plaintiff decision.²²

B. *Gender Discrimination is a Unique Experience Shared Among Women Judges*

To demonstrate how *experience*, and not merely gender, affects judicial decision making, particularly with respect to gender discrimination cases, this Section presents a brief history of women (and discrimination *against* women) in the legal profession.

Women entered the legal profession very slowly. In 1868, three women were the first to apply for admission to law school, making Columbia University the first of many to deny women applicants.²³ Esther McQuigg Morris became the first woman judge in the United States when she was appointed as the justice of the peace in South Pass City, Wyoming in 1870.²⁴ Myra Bradwell unsuccessfully argued to the United States Supreme Court in 1873 that the Fourteenth Amendment protected her right to obtain a license to practice law.²⁵ By 1920, only fifteen women had been appointed or elected to even minor judicial roles.²⁶ When practicing female attorney Alta Hulett passed away at the age of twenty-three, newspapers considered this "proof" that women should stay away from the stresses of the legal profession.²⁷ That theory was advanced when Livinia Goodell died at the age of forty-one, just one year after successfully battling the Wisconsin Supreme Court for her law license.²⁸

Women continued to gain access to the legal profession and used their skills to further women's participation as lawyers. Burnita Shelton

21. Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging* (2008) (paper presented at the 2008 annual meeting of the Midwest Political Science Association).

22. Peresie, *supra* note 14, at 1782. *But see* BENNION, *supra* note 5, at 14 (diversity's effect is felt only once women comprise at least fifteen percent of participants).

23. Angela Nicole Johnson, *A Timeline of Women's History in the Legal Profession*, RESEARCHING WOMEN AS LAWYERS, <http://womenaslawyers.files.wordpress.com/2011/03/a-timeline-of-womens-history-in-the-legal-profession-last-updated-6-20-11.pdf> (last visited Apr. 6, 2014) (citing HEDDA GARZA, *BARRED FROM THE BAR: A HISTORY OF WOMEN AND THE LEGAL PROFESSION* (1996)).

24. *Id.* Judge Morris was no doubt, the first to fine her husband for entering her courtroom in a ruckus over her new job; when he refused to pay, she packed him off to jail.

25. *Id.* (citing *Bradwell v. Illinois*, 83 U.S. 130 (1873)).

26. *Id.* (citing GARZA, *supra* note 23).

27. *Id.*

28. *Id.*

Matthews became the first woman to serve on a federal district court in 1950.²⁹ That same year, Harvard Law School opened its doors to women for the first time.³⁰ The *Women's Rights Law Reporter*, a journal of legal scholarship focusing exclusively on women's rights law, was founded by Ruth Bader Ginsburg in 1970.³¹ Title IX of the Higher Education Act, which prohibits discrimination based on sex in the enrollment of students and hiring of faculty, was enacted in 1972.³² In response, law schools began to admit more women to their classes.³³ By 1977, only eight women had served in the federal judiciary.³⁴ Sandra Day O'Connor became the first woman to serve on the United States Supreme Court in 1981.³⁵ Ruth Bader Ginsburg, after promoting women's advancement in the legal profession, became the second female Justice on the U.S. Supreme Court in 1993.³⁶ Three women currently serve on the U.S. Supreme Court—the largest number in history.

Despite some high profile women in top law firms and judicial offices, recent numbers show only nominal improvement. Full-time women lawyers are paid a salary of seventy-seven percent of their male counterparts.³⁷ Women comprise thirty-three percent of all lawyers (a four percent increase over a decade),³⁸ forty-five percent of associates yet only nineteen percent of partners,³⁹ forty-six percent of law students

29. *Id.*

30. *Id.* (citing SUSAN EHRLICH MARTIN & NANCY C. JURIK, *DOING JUSTICE, DOING GENDER* 110 (2007)).

31. *Id.* *Sex-Based Discrimination*, the first law school casebook addressing the topic, was coauthored by Ruth Bader Ginsburg in 1974.

32. *Id.*

33. Two years later, women's representation among American law students increased from nine percent to twenty. See *First Year and Total J.D. Enrollment by Gender 1947-2011*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf (last visited Apr. 6, 2014).

34. Johnson, *supra* note 23 (citing MARTIN & JURIK, *supra* note 30); see also Mary L. Clark, *Carter's Groundbreaking Appointment of Women to the Federal Bench: His Other "Human Rights" Record*, 11 AM. U.J. GENDER SOC. POL'Y & L. 1131 (2003) (describing President Carter's commitment to appointing women to Article III judgeships).

35. Johnson, *supra* note 23.

36. *Id.*

37. See *Median Weekly Earnings of Full-Time Wage and Salary Workers by Detailed Occupation and Sex*, U.S. BUREAU LAB. STATS., www.bls.gov/cps/cpsaat39.pdf (statistics for 2012) (last visited Apr. 6, 2014). Other studies indicate after only two to three years of practice, the average full-time woman earned 5.2% less than her male counterpart; at seven years, the difference increased to approximately 13%. Joyce S. Sterling & Nancy Reichman, *Navigating the Gap: Reflections on 20 Years Researching Gender Disparity*, 8 FIU L. REV. 515, 531 (2013); see also Laurel Bellows, *Gender Inequity in Pay Diminishes Women's Prospects—and the Law Profession*, ABA JOURNAL (June 1, 2013, 4:40 AM), http://www.abajournal.com/magazine/article/gender_inequity_in_pay_diminishes_womens_prospectsand_the_law_profession/ ("Female equity partners in the 200 largest firms, who do comparable work to men, earn 89 percent of the compensation of their male peers.").

38. A.B.A. COMM'N ON WOMEN IN THE PROFESSION, *A CURRENT GLANCE AT WOMEN IN THE LAW* 2 (2013).

39. *Id.* See also Sterling & Reichman, *supra* note 37, at 516 (In 2010, 2011, and 2012, women made up 19.43%, 19.54% and 19.91% of all partners; these figures are not commiserate with the proportion of women who are eligible for such promotion).

(a four percent *decrease* from ten years prior),⁴⁰ thirty-four percent of tenured law faculty,⁴¹ thirty percent of federal district court judges, and thirty-two percent of federal circuit court judges.⁴² There are a dozen district courts where no woman has ever served, and the Eighth and Tenth Circuits each have just one woman serving.⁴³

Women in the legal profession still have a long way to go to achieve equality. Women might first sense an imbalance in law school⁴⁴ and later face discrimination in pay⁴⁵ and advancement to partnership positions.⁴⁶ Because so many women in the legal profession have experienced gender discrimination, for many women judges, the issue is familiar. Even for those not personally affected by discrimination, witnessing the hardships placed upon women in the judiciary has a psychological component—she need only look to her colleagues to see the disparity.⁴⁷ Thus, when a female judge is called on to decide a case involving gender discrimination, she is asked to decide an issue that has affected her personally. She has experienced gender-based discrimination, witnessed such discrimination, or at the very least, is aware of the history of discrimination in the profession. Unsurprisingly, the decision making impact of women judges is clearest in gender discrimination cases.

C. *Competing Explanations for Gendered Correlation*

There are various explanations for why the presence of a woman on a three-judge appellate panel affects her male colleagues' decision making. First, the impact may simply be felt as a gender-neutral consequence of judicial politics within a panel.⁴⁸ As demonstrated in Part IV, this phenomenon exists in many contexts, regardless of the nature of the case or gender of the judge, and occurs particularly when a Chief Justice seeks unanimity or collegiality. Second, male judges may defer

40. *Id.*

41. 2008-2009 AALS *Statistical Report on Law Faculty*, AM. ASS'N L. SCHS., <http://www.aals.org/statistics/2009far/gender.html> (last visited Feb. 27, 2013) (representing a nine percent increase from 2002).

42. NAT'L WOMEN'S L. CENTER, *supra* note 15.

43. *Id.*

44. Although women comprise a near-equal number of law students and law journal members, they represent only 28.6% of editors in chief. *Ms. JD, Women on Law Review: A Gender Diversity Report*, 2012, available at http://ms-jd.org/files/lr2012_final.pdf. Additionally, women law students may perceive a gender bias in comparing the percentage of those employed in more prestigious positions within their law school. For instance, women comprise 66.2% of assistant deans but only 20.6% of deans are women; 53.4% of assistant professors are women while only 29.9% of full professorships are awarded to women; age statistics indicate a gender disparity even when accounting for women's delayed equality in the number of law school graduates. ASS'N AM. L. SCHS., 2008-2009 *Statistical Report on Law School Faculty*, available at <http://www.aals.org/statistics/2009dlt/titles.html>.

45. *See generally supra* note 37.

46. *See generally supra* note 39.

47. *Id.* (only one in three judges are female).

48. FORREST MALTZMAN ET AL., *CRAFTING LAW ON THE SUPREME COURT: THE COLLEAGIAL GAME* (2000) (arguing Supreme Court Justices adopt "tit-for-tat" strategies with one another).

to their female colleagues without deeply considering the information given, thereby voting by proxy. Here, a moderating effect occurs: a male judge silences himself out of respect for his female colleagues or fear of appearing biased—even sexist—if he opposes the female plaintiff's claims.⁴⁹ The surface factor of gender drives decision making. Third, male judges may seek input from a female colleague based on her viewpoint or past experiences but not based on gender. In this instance, the judge internalizes that information with his own understanding. Similar dialogues could occur among judges regardless of gender. The information gained is more likely to have a long-term impact because the judge has gained information from a colleague whose experience he or she has not had. The impact is lasting because it is personal and emotional as opposed to words on the page of a polished brief. And in adverse litigation, the personal experience of a neutral party (as opposed to the plaintiff) is assigned added value. Indeed, one study demonstrated the long-term benefits of having a female judge on an appellate panel in sexual harassment cases: male judges who served on the female-integrated panel were thirty-three percent more likely to render a pro-plaintiff decision in future sexual harassment cases even if no female judge was serving on the panel.⁵⁰

This third explanation is most desirable because the impact continues and might apply in various cases involving other experiential factors. The premise is broad: one colleague expects insight on certain issues based on another's experiences, whether shaped by gender, race, age, social status, etc. Of course, gender discrimination cases are among those affected by the presence of a woman decision maker because it is an experience commonly shared by women that may inform their legal reasoning. Although such shared experiences include a statistically higher risk of experiencing domestic violence and sexual assault, to date no study has explored a correlation of judicial decision making. Nevertheless, the broad applicability and long-term effects serve to emphasize the value of a diverse judiciary.

It is baseless to suggest that women are inherently more pro-plaintiff in gender discrimination cases (or any case) on the basis that they are more empathetic or kind than their male colleagues. Eliminating gender discrimination from the equation and replacing it with gender-

49. For example, one study found that U.S. Supreme Court Justices were more likely to side with female attorneys who presented oral argument in women's rights cases (sex discrimination and harassment, reproductive rights, materiality rights, and issues involving equal employment opportunity), *no matter which ideological position the woman attorney happens to be advocating in the case.*

This is likely a reflection of the influence of a gender stereotype that women lawyers are more capable of addressing these issues. In essence, gender acts as a heuristic for substantive legal expertise in these cases. As such, the Justices attach more credibility to the information presented by woman attorneys in these cases, and are therefore more likely to side with them.

John J. Szmer et al., *Have We Come a Long Way, Baby? The Influence of Attorney Gender on Supreme Court Decision Making*, 6 POL. & GENDER 1, 29 (2010).

50. Peresie, *supra* note 14, at 1784, 1787.

neutral subjects such as criminal sentencing⁵¹ and securities law⁵² further supports this assertion and highlights the importance of experiential factors, rather than gender. Women, as a compartmentalized group, are not affected by securities law or crime in the same way women commonly experience gender discrimination.

Studying gender without examining the individual experiences of each decision maker is inherently problematic because it commands the conclusion that gender alone influences decision making. Once the inquiry's focus is broadened beyond gender, coupled with an understanding of the history of gender discrimination in the legal profession, it is apparent that the correlation between gender and judicial decision making in gender discrimination cases is that women, as part of their varied experiences, are more likely than men to have experienced gender discrimination firsthand.⁵³ Since men are less likely to experience gender discrimination personally, they lack the essential *experiential* factor that could influence their decision making but are nevertheless capable of *understanding* gender discrimination. It is not, as antiquated scholarship suggests, that women are biologically more empathetic or more likely to decide cases more favorably in perceivably traditional women's issues, but rather, it is experience that matters. Instead, learning about gender discrimination from someone who experienced it, assuming the male listens empathetically, may lead him to draw upon that experience to inform his decision making as if he had experienced it himself.⁵⁴ Expansively, any diverse experience can be shared to affect the decision making of others.

51. Contrary to the misconception that women judges are more empathetic or nurturing, they "are somewhat harsher (i.e., more likely to incarcerate and impose longer sentences) . . ." Darrell Steffensmeier & Chris Hebert, *Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?*, 77 J. Soc. Forces 1163, 1163 (1999); but see Jerry Goldman & Kent E. Portney, *The Role of Gender in Determining the Criminal Sanction: Results from Multimedia Experiments in Criminal Sentencing*, Presentation at the Annual Meeting of the American Political Science Association, August 28-31, 1997, Washington, D.C., available at <http://ase.tufts.edu/polsci/faculty/portney/gender.pdf> (finding female judges are more lenient on female armed robbery defendants; however, there were no statistically significant gender effects on other cases studied).

52. See Lyman Johnson et al., *Gender and Securities Law in the Supreme Court*, 33 WOMEN'S RTS. L. REP. 1, 2 (2011) (a study of U.S. Supreme Court cases decided between 1971-2010 involving securities law issues revealed no discernible gender impact though unanimous verdicts were reached more frequently with female-integrated panels, suggesting that female Justices induce collaboration in the deliberation process).

53. Alternatively, this may be attributable to "gender consciousness." Gender consciousness, as a cognitive framework or schema, influences the way that people "see" the world. For instance, those who strongly identify as feminists (or anti-feminists) seem to be thinking in gender-schematic ways. BENNION, *supra* note 5, at 153.

54. Maya Sen, *Courting Deliberation: An essay on Deliberative Democracy in the American Judicial System*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 303, 307 (2013) ("those embarking on a deliberative enterprise must be willing to consider seriously opposing viewpoints and to incorporate those viewpoints into their worldview.").

III. THE IMPACT OF GENDER AND JUDICIAL DECISION MAKING AT THE U.S. SUPREME COURT

A. *Applying Existing Findings to the U.S. Supreme Court*

Although “diversity” should not be constrained to traditional factors like race and gender, it is true that in this sense, the Roberts Court is the most diverse ever, with an African American, two Italian Americans, its first Latina (and first non-native English-speaking Justice), and three women now serving. They each have varied paths to the bench. Following Justice O’Connor’s departure and before Justice Kagan’s appointment, all serving Supreme Court justices had prior federal appellate judicial experience.⁵⁵ The Roberts Court therefore, provides an unprecedented opportunity for examination of the effects of both traditional diversity—based on race, gender, religion—and experiential diversity on judicial decision making.

Any sort of statistical inquiry into the Supreme Court is inherently problematic given its small number of Justices and few opinions rendered. Similarly, studying federal appellate courts skews results pointing to the category of gender without examining experience. Existing studies focusing on the courts of appeals produce statistically significant results; however, an examination of the Supreme Court provides an element lacking in the courts of appeals studies: more is known about each Justice’s individual experiences. With a smaller sample size, it becomes practical to examine individual cases and decision makers. This facilitates pointing more clearly to *experience* and not simply gender.

Experience especially drives decision making when judges are deciding cases without a clear doctrinal background or when political ideology does not provide a default.⁵⁶ Then, Justices’ own experiences, whether informed by race, gender, socioeconomic, or prior judicial experience, play an important and distinct role in decision making. Similarly, a Justice’s own experiences come to bear in applying legal standards involving subjective elements, such as whether a thirteen-year-old girl perceived her strip search by school officials as an invasion of privacy (determined by “both subjective and reasonable societal expectations of personal privacy”).⁵⁷ As demonstrated in prior studies of the federal courts of appeal, decisions dealing with gender discrimination provide another example where, regardless of ideology, personal experiences inform judicial decision making.

Akin to the studies of intermediate appellate panels, female U.S. Supreme Court Justices also share their experiences to inform their male colleagues’ decision making. Justice Rehnquist provided just one

55. Tracey E. George, *From Judge to Justice: Social Background Theory and the Supreme Court*, 86 N.C. L. REV. 1333, 1334–40 (2008).

56. Some have argued that this occurred in the 2013 decision upholding the Affordable Care Act. See Sabrina Siddiqui, *John Roberts’ Switch on Obamacare Sparks Fascination with Supreme Court, Possible Leaks*, HUFFINGTON POST (July 2, 2012), http://www.huffingtonpost.com/2012/07/02/justice-roberts-obamacare-supreme-court-leaks_n_1644864.html.

57. *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 374 (2009).

example of this external impact. He once said “sex discrimination claims carry little weight”⁵⁸ and even mocked then-litigator Ruth Bader Ginsburg at the end of her oral argument before the Court: “You won’t settle for putting Susan B. Anthony on the new dollar, right?”⁵⁹ Yet later as Chief Justice, he wrote the six to three majority opinion in *Nevada Dep’t of Human Resources v. Hibbs*,⁶⁰ holding that the Family Medical Leave Act is a valid abrogation of state sovereign immunity, justified by a history of persistent unconstitutional discrimination of female and male workers. Chief Justice Rehnquist explained, “[W]hen women are stereotyped as responsible for the domestic sphere, and men are not, that makes women seem less valuable as employees.”⁶¹ Justice Ginsburg reflected on whether the presence of female colleagues shaped Rehnquist’s views: “I think I would attribute it to his court experience and his life experience When his daughter Janet was divorced, I think the chief felt some kind of responsibility to be kind of a father figure to those girls. So he became more sensitive to things that he might not have noticed.”⁶² Demonstrably, the ability for gendered enlightenment does not discriminate among sexes. Because these experiential factors are often overlooked, when a Supreme Court decision is surprising, it is attributed to a lack of allegiance to a political party or abandonment of a mode of interpretation.⁶³ Instead, critics should remember that Justices are people with unique experiences that have shaped their worldviews.

Justice O’Connor’s impact on gender discrimination cases became apparent upon her arrival at the Court, beginning with her majority opinion in *Mississippi University for Women v. Hogan*,⁶⁴ finding certain types of single-sex admissions policies violated the Fourteenth Amendment’s Equal Protection Clause. Based on precedent, this is a decision that Justice O’Connor’s predecessor, Potter Stewart, would probably not have cast.⁶⁵ Like the research on federal appellate judges suggests, Justice O’Connor had a compelling impact on her colleagues. After Justice O’Connor joined the Court, Justice Rehnquist increased his support for gender discrimination claimants from twenty-five to fifty percent.⁶⁶ Similarly, Justice Burger increased his support from thirty-two to fifty percent, Justice Stevens from fifty-seven to eighty-three percent,

58. Emily Bazelon, *The Place of Women on the Court*, *Magazine*, N.Y. TIMES (July 11, 2009), <http://www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html>.

59. Justice Rehnquist’s remark was made during oral argument (at 24:58) for *Duren v. Missouri*, where Ruth Bader Ginsburg challenged a law making jury service for women voluntary, arguing it sends a message that women’s service was unnecessary to important government functions. *DUREN V. MISSOURI*, OYEZ, http://www.oyez.org/cases/1970-1979/1978/1978_77_6067 (oral argument recording and transcript) (last visited Apr. 6, 2014).

60. 538 U.S. 721 (2003).

61. Bazelon, *supra* note 58.

62. *Id.*

63. For a recent example, see Stiehm, *supra* note 2.

64. 458 U.S. 718 (1982).

65. Karen O’Connor & Alexandra B. Yanus, *Judging Alone: Reflections on the Importance of Women on the Court*, *POL. & GENDER* 441, 443 (2010).

66. *Id.*

and Justice White from sixty-nine to ninety percent.⁶⁷ Given the statistical effect on Justices of all political leanings, one can infer that a female's presence affects a colleague's decision making even more so than ideology.

In both the Supreme Court and lower courts, the statistical effect of a female's presence only holds true when dealing with gender discrimination cases. For instance, Justices Ginsburg and O'Connor agreed in only fifty-two percent of the Court's decisions during the twelve years they spent together on the bench (1993–2005).⁶⁸ At first glance, this might indicate that ideology weighs more heavily than gender or experience. However, in certain cases, the Justices agreed more frequently; they were united in ninety percent of gender discrimination cases.⁶⁹ This underscores the fact that a woman's impact is not plainly based on her sex or gender, but rather on the type of cases understood based on personal experience. Justice O'Connor's decision to vote with the majority in *United States v. Morrison*⁷⁰ further exhibits this. Despite her "strong track record of ruling in favor of 'women's rights,'"⁷¹ she voted against the civil damages provision of the Violence Against Women Act (VAWA). If gender alone matters then O'Connor should have voted in favor of upholding the Act. However, Justice O'Connor was voting based on personal experience—an experience *unrelated* to gender. As a former assistant attorney general, state senator, and appellate judge for the State of Arizona,⁷² she is a strong advocate for federalism. In her view, informed by her experiences, the prohibition of violence against women remains with the states under their police power.⁷³ Throughout her tenure, Justice O'Connor engaged in robust judicial scrutiny of congressional authority.⁷⁴ Given her experiences in

67. *Id.*

68. *Id.* at 444.

69. *Id.* See also Rosalind Dixon, *Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-Examination*, 21 YALE J.L. & FEMINISM 297, 308 (2010) (O'Connor voted for plaintiffs in Title VII gender discrimination cases eighty-nine percent of the time; Ginsburg voted for plaintiffs ninety-two percent of the time). *But see* Susan W. Johnson & Donald R. Songer, *Judge Gender and the Voting Behavior of Justices on Two North American Supreme Courts*, 30 JUST. SYS. J. 265, 270 (2009) (O'Connor and Ginsburg's agreement in gender discrimination cases did not translate to other areas. In civil liberties, criminal, and torts cases, O'Connor was more conservative than Ginsburg and the average male justice, while she was slightly more liberal than her male colleagues in equality cases. Ginsburg was more liberal than the average male in all four categories).

70. 529 U.S. 598 (2000) (O'Connor joined the majority, thereby departing from Ginsburg, who joined the dissent).

71. Wendy McElroy, *Does Rape Violate the Commerce Clause of the Constitution?*, INDEP. INST. (Oct. 1, 2000), <http://www.independent.org/newsroom/article.asp?id=12>.

72. CQ Supreme Court Collection, *Sandra Day O'Connor*, http://www.cqpress.com/context/SupremeCourt/oconnor_bio.htm (last visited Sept. 29, 2013).

73. Specifically, the majority held violence against women was not an interstate activity nor economic in nature; therefore, it was out of the scope of the congressional power under the Commerce Clause.

74. See *United States v. Lopez*, 514 U.S. 549 (1995) (finding federal law regulating guns near schools was not tied to commerce and interfered with states' traditional police power). See also *Gonzales v. Raich*, 545 U.S. 1 (2005) (O'Connor, J., dissenting) (involving the California Compassionate Use Act which provided for a medicinal exception for the

the Arizona state government, she favored state autonomy and remained remarkably consistent in her jurisprudence, even when it meant voting against VAWA.

“Diversity” therefore, is not constrained to uniqueness in a racial, religious, or gender sense; socioeconomic upbringing and prior work or personal experiences intersect to shape Justice O’Connor’s jurisprudence as a whole. Intersectionality matters. For this reason, it is impossible to claim that any one factor solely determines decision making. As Justice Ginsburg has said,

Yes, women bring a different life experience to the table. All of our differences make the conference better. That I’m a woman, that’s part of it, that I’m Jewish, that’s part of it, that I grew up in Brooklyn, N.Y., and I went to summer camp in the Adirondacks, all these things are part of me.⁷⁵

There is no formula. Varied experiences in the aggregate shape individual decision making. Some factors may be more or less prominent, but which factors take precedence differs among judges and cases. These experiential factors are ever present yet seldom vocalized. Although traditional models of decision making—whether one is an originalist or living constitutionalist—are often used to predict voting behavior, these models sometimes give way to life experiences. Gender is only one factor that shapes a judge’s life experience and worldview.

B. *Gender Discrimination Cases at the U.S. Supreme Court:* *Ledbetter v. Goodyear Tire & Rubber Co.*

The experiences of Justice O’Connor greatly affected the Supreme Court’s jurisprudence on gender discrimination. Following her departure, the liberal/conservative split was unchanged, but Justice Ginsburg became the lone female. The resulting effect was noticeable, particularly in *Ledbetter v. Goodyear Tire & Rubber Co.*,⁷⁶ where the Court found against allegations of workplace discrimination in a five to four decision.⁷⁷ Statistically, there was a ninety percent probability that Justices O’Connor and Ginsburg would have ruled together in favor of the plaintiffs.⁷⁸ Justice Ginsburg’s disappointment in her male colleagues was clear. She has repeatedly commented that Justice O’Connor would

use of marijuana; Justice O’Connor focused on the distinction between commercial activities at the local and national level).

75. Bazelon, *supra* note 58.

76. 550 U.S. 618 (2007). In this time period the Court decided other cases that factually involved gender discrimination. See *Crawford v. Metro. Gov. of Nashville*, 555 U.S. 271 (2009) (holding that an anti-retaliation provision of Title VII protects employees who merely cooperate with internal investigation rather than complain on their own); *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009) (discussing pregnancy discrimination and the calculation of pension benefits).

77. The Justice O’Connor departure effect suggests there is no similar long term socializing effect on male Supreme Court Justices as there had been at the courts of appeal.

78. O’Connor & Yanus, *supra* note 65, at 444.

have sided with her, shifting the Court's ultimate decision to favor the complainant.⁷⁹

The petitioner, Lilly Ledbetter sued her employer, Goodyear Tire under a disparate treatment theory of Title VII alleging it intentionally discriminated against her on the basis of gender by paying her significantly less than her male counterparts. The Supreme Court held that her claim was time-barred because she did not file suit within one hundred eighty days from the first discriminatory paycheck, even though she did not learn of the disparity until decades later, just before her retirement. *Ledbetter* presented a scenario not unfamiliar to Justice Ginsburg. As a law student, she was the subject of ridicule by her male classmates and professors—the environment at Harvard Law School was “extremely hostile.”⁸⁰ The law school's dean asked the women of the class “what it felt like to occupy places that could have gone to deserving men.”⁸¹ Yet, Justice Ginsburg excelled academically and graduated at the top of her class.⁸² Despite a recommendation from the Dean of Harvard Law School, Justice Felix Frankfurter declined to interview her for a clerkship; he “just wasn't ready to hire a woman.”⁸³ Upon graduation, no law firm offered her a job⁸⁴ so Justice Ginsburg worked in legal academia and became involved with the American Civil Liberties Union's Women's Rights Project,⁸⁵ where she argued six landmark cases on gender equality before the Supreme Court.⁸⁶ Of those six cases, Justice Ginsburg won five, paving the way for constitutional protections against gender discrimination.

Justice Ginsburg's background as a feminist legal activist who helped establish women's legal rights gave her a unique understanding of the realities of gender discrimination. *Ledbetter* is an example where the law does not fit those realities. Justice Ginsburg's firsthand experience⁸⁷ not only informed her decision making but also prepared her to enlighten her colleagues. For starters, Justice Ginsburg took the symbolic step of announcing her dissent from the bench.⁸⁸ Second, she

79. 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; Justice Ruth Bader Ginsburg, Address at the National Constitution Center, Phila., Pa. (Sept. 6, 2013) (video available at <https://vimeo.com/74230799>).

80. *Ruth Bader Ginsburg*, OYEZ, http://www.oyez.org/justices/ruth_bader_ginsburg, (last visited Apr. 6, 2014).

81. *Id.*

82. *Id.*

83. Neil A. Lewis, *Rejected as a Clerk, Chosen as a Justice: Ruth Joan Bader Ginsburg*, N.Y. TIMES, June 15, 1993, at A1. Dean Albert Sacks wrote the recommendation, while a prior dean, Erwin Griswold, contributed to the hostility previously referenced. *Ruth Bader Ginsburg*, *supra* note 80.

84. *Times Topics: Ruth Bader Ginsburg*, N.Y. TIMES (June 29, 2012), http://topics.nytimes.com/top/reference/timestopics/people/g/ruth_bader_ginsburg/index.html.

85. *Ruth Bader Ginsburg*, *supra* note 80.

86. *Ruth Bader Ginsburg*, BIOGRAPHY, <http://www.biography.com/people/ruth-bader-ginsburg-9312041> (last visited Apr. 6, 2014).

87. In addition to her firsthand experience, Ginsburg's work as a feminist legal activist provided an in-depth understanding of this case and empathy for the plaintiff.

88. Ironically, the opinion announcement transcript of her dissent identifies her as “Mr. Ginsburg.” *LEDBETTER v. GOODYEAR TIRE AND RUBBER COMPANY*, OYEZ, <http://>

drew upon personal experiences in reflecting, “Title VII was meant to govern *real world* employment practices and that world is what the court ignores today.”⁸⁹ In highlighting those realities, she addressed the fact:

An employee like Ledbetter trying to succeed in a male dominated workplace in a job filled only by men before she was hired, understandably maybe [sic] anxious to avoid making waves. Pay discrimination that recurs and swells an [sic] impact is significantly different from discrete adverse actions promptly communicated and easy to identify as discriminatory.⁹⁰

Instead, the majority’s holding would force plaintiffs, even before the pattern of discrimination fully developed, to sue too soon to prevail, “while cutting them off as time barred once the pay differential is large enough to enable them to mount a winnable case.”⁹¹ “[T]hat situation cannot be what Congress intended when Title VII outlawed discrimination on the basis of race, color, religion, sex, or national origin in our nation’s workplaces.”⁹²

C. *The Role of Experiential Factors in Cases Calling for a Subjective Analysis: Safford Unified School District*

An examination of cases lacking clear doctrinal authority, such as those commanding analysis by applying a subjective standard, even further demonstrates that the totality of an individual’s experiences, and not merely gender, shapes judicial decision making. The ability to draw upon individualized experiences to inform decision-making requires the ability to empathize with those most affected by the court’s decisions. This is especially so when dealing with subjective standards, which necessarily require judges to place themselves in the shoes of the litigant. For example, in the right-to-privacy context, one must determine whether the litigant herself had an actual subjective expectation of privacy.

In *Safford Unified School District #1 v. Redding*, the court decided whether the strip search of a female middle-school student violated the Fourth Amendment. To do so, the Court first had to examine the intrusiveness of the search, weigh the governmental interest, and determine whether the government adopted a reasonable means of addressing its concern. Assessing the intrusiveness of the search required an understanding of the student’s experience and how others in her place would have felt.⁹³ Similarly, to weigh the nature of the governmental interest, the Court needed to put itself in the place of school adminis-

www.oyez.org/cases/2000-2009/2006/2006_05_1074 (follow “Ledbetter v. Goodyear Tire and Rubber Company - Opinion Announcement” hyperlink; then follow “Full Transcript Text” hyperlink) (last visited Apr. 6, 2014).

89. *Id.* (emphasis added).

90. *Id.*

91. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 658 n.9 (2007) (Ginsburg, J., dissenting).

92. LEDBETTER v. GOODYEAR TIRE AND RUBBER COMPANY, *supra* note 88.

93. Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 370 (2009) (“[A] school search ‘will be permissible in its scope when the measures adopted are reasonably related

trators.⁹⁴ During oral argument, the Justices examined the difficult choices facing an administrator who is confronted with a tip that a student is engaging in conduct harmful to herself, others, or the school environment. The transcript reveals many of the Justices engaging in empathetic dialogue to understand what is at stake in their decision making. For instance, Justice Ginsburg put herself in the shoes of administrators and asked: “But an official could follow up to see whether this child—whether there is a basis for what she said. But there were no questions asked at all.”⁹⁵ Similarly, Justice Alito, in suggesting a problem-solving approach of less invasive alternatives, said “the school could keep records on its students”⁹⁶ In disbelief, Justice Scalia scoffed, “[Y]ou reasonably suspect the student has drugs. You’ve searched everywhere else. By God, the drugs must be in her underpants.”⁹⁷ And with backup from Justice Roberts, “You are saying if you have reasonable suspicion that it’s in the underwear, you shouldn’t even bother searching the pack or the pockets. You should go straight to the underwear. That can’t be right.”⁹⁸

Because this case was not met with a strong ideological split among the Justices, an argument can be made that the outcome would have remained the same regardless of the presence of a female on the bench. Nevertheless, the oral argument transcript provides insight into the individual Justices’ contributions to the decision making process as a whole. For instance, Justice Ginsburg was the first to address the subjective experience of Redding as a young girl. Ginsburg empathized by placing herself in the shoes of this student and asking, “What was the reason for . . . putting her in that humiliating situation?”⁹⁹ Justice Ginsburg’s inquiry put her male colleagues on notice, prompting Justice Breyer to add, “[H]ere she is embarrassed . . . [t]here seems no reason for that” because the school could have her instead “[p]ut on [her] gym clothes . . . she does that every day. [There are] just such obvious alternatives to having her be really naked.”¹⁰⁰ Later, Justice Breyer recalled, “[W]hen I was 8 or 10 or 12 years old, you know, we did take our clothes off once a day, we changed for gym” and “in my experience,

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.”) (citation omitted).

94. Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 *CARDOZO L. REV. DE NOVO* 133, 143 (2009).

95. Transcript of Oral Argument of Matthew W. Wright on Behalf of the Petitioners at 6, *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364 at 370 (2009) (No. 08-479) [hereinafter Transcript of Stafford Unified Oral Argument], available at http://www.oyez.org/cases/2000-2009/2008/2008_08_479.

96. *Id.* Previously, Justice Alito stated, “When I have cases involving children, I can’t help but think of my own children. When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender, and I do take that into account.” Bandes, *supra* note 94, at 138 (quoting *Meeting of the Senate Judiciary Subject: The Nomination of Samuel Alito to the Supreme Court*, FED. NEWS SERVICE, Jan. 24, 2006).

97. Transcript of Safford Unified Oral Argument, *supra* note 95, at 11.

98. *Id.* at 12.

99. *Id.* at 8.

100. *Id.* at 9.

too, people did sometimes stick things in [their] underwear.”¹⁰¹ The importance of Ginsburg’s role is further shown when, in response to Justice Breyer’s comment (undoubtedly reflecting upon his own experiences as a young boy), Justice Ginsburg pointed out that the search at issue in this case was no locker room suit-up.¹⁰² Rather, a thirteen-year-old girl was “forced to strip to her underwear and shake out her bra and underpants in front of school officials who suspected her of concealing prescription ibuprofen.”¹⁰³ Justice Ginsburg quickly redirected Justice Breyer’s conception to the “traumatic effect that an adolescent girl would experience when forced to strip down to her underclothes in front of school administrators.”¹⁰⁴

This demonstrates how Justice Ginsburg’s presence as the lone female on the court prompted her male colleagues to think of any differences between a thirteen-year-old girl and a thirteen-year-old boy in terms of how humiliating it is to be seen undressed.¹⁰⁵ While the male Justices “first thought of their own reaction” reflecting on grade school gym class and thinking, “You change your clothes in the gym, what’s the big deal?”¹⁰⁶ Justice Ginsburg was quick to cure any lack of understanding by sharing her own experiences.

The Court’s resulting opinion similarly reflected the use of empathy as a tool in the Justices’ decision making. It reads:

Savana’s subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating. The reasonableness of her expectation (required by the Fourth Amendment standard) is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure.¹⁰⁷

Ultimately, this inquiry prompted the Court to find that “[t]he meaning of such a search [for evidence of wrongdoing], and the degradation its subject may reasonably feel, place a search that intrusive in a category . . . demanding its own specific suspicions.”¹⁰⁸ In contrast, Justice Thomas’s dissent avoids empathetic inquiry of the search subject, which leads to a harsh conclusion, focusing instead on the “deep intrusion into the administration of public schools.”¹⁰⁹ Under this rule, “[b]ecause the school officials searched in a location where the pills could have been hidden, the search was reasonable in scope”¹¹⁰

101. *Id.* at 25.

102. Bandes, *supra* note 94, at 144.

103. *Id.*

104. O’Connor & Yanus, *supra* note 65, at 448.

105. Bazelon, *supra* note 58.

106. *Id.*

107. *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 374–75 (2009) (citation omitted) (although the court found that the defendant’s conduct was unconstitutional, it was entitled to qualified immunity from liability).

108. *Id.* at 377.

109. *Id.* at 382–83 (Thomas, J., dissenting).

110. *Id.* at 387 (Thomas, J., dissenting).

regardless of how violated the subject of the search might have felt.¹¹¹ In light of Justice Thomas's dissent in *Safford Unified*, in which no empathetic inquiry entered into the subjective expectation of privacy analysis, it is interesting to note that as a judicial nominee, Clarence Thomas told the Senate Judiciary Committee that a justice should be able to "walk in the shoes of the people who are affected by what the Court does."¹¹² Today, Thomas is viewed as one of the court's least empathetic Justices.¹¹³ What changed? Perhaps even this provides another example where experience has informed legal reasoning.

IV. THE GENDER NEUTRAL ROLE OF THE CHIEF JUSTICE

Another way to think about the role of women judges is to compare them to the non-gender-related role of the Chief Justice of the United States Supreme Court. It is true that the Chief Justice, serving both as a justice and in an administrative capacity, is motivated by his need to lead the Court. However, in so leading the Court, the Chief Justice uses his discretion, informed by his own experiences. Therefore, although this role is in part based on administrative duties, it nevertheless provides a useful comparison in demonstrating how experiences impact judicial decision making regardless of gender. The Chief Justice, like any other Justice—whether male, female, liberal, conservative—views his or her "voice" as a unique contribution to the panel in the same way each female Justice might similarly share her unique experiences to inform others' decision making.

The role of Chief Justice is untouched by gender variance; no female has ever occupied the position. Arguing that women judges have a "woman's voice" is as strange as saying that a male, desirous of achieving unanimity or collegiality on the Court, speaks with a "man's voice." Instead, as the following demonstrates, each Chief Justice has historically carried out his leadership role based on his own discretion and influenced by his own experiences, much in the same way that a woman judge, or any judge, votes based on experiential factors.

Many Chief Justices, as institutional leaders, have desired to inspire collegiality, homogeneity, and legitimacy. It allows the court to function.¹¹⁴ Chief Justices Taft and Marshall both placed great value on producing unanimous opinions. Marshall, for instance, wrote the opinions of the Court himself, submitted his opinions to the other Justices for consideration, and reconciled any disagreement so that it may be

111. See *id.* at 389 (Thomas, J., dissenting). Nothing in Justice Thomas's dissent indicates a search of a body cavity would be unreasonable, so long as pills could be hidden there.

112. Catherine Crowe, *Videri Quam Esse: The Role of Empathy in Judicial Discourse*, 34 L. & PSYCHOL. REV. 121, 122 (2010) (footnote omitted).

113. See generally Eric L. Muller, *Where, But for the Grace of God, Goes He? The Search for Empathy in the Criminal Jurisprudence of Clarence Thomas*, 15 CONST. COMMENT. 225 (1998).

114. Ginsburg, *supra* note 79 ("One of the hallmarks of the court is collegiality. You could not do the job that the Constitution gives to us if you didn't, to use one of Justice Scalia's favorite expressions, 'Get over it.'").

“delivered as the opinion of all.”¹¹⁵ In the first four years of his tenure, there were no dissents and only one separate concurring opinion.¹¹⁶ However, Thomas Jefferson attributed the Court’s level of agreement, not to Marshall’s willingness to modify opinions to reach consensus, but rather to the Chief’s overwhelming influence on the other Justices.¹¹⁷

While Marshall is credited as developing the grand court we know today, Chief Justice Taft also deserves recognition for uniformity and collegiality. Eighty-four percent of the Taft Court’s opinions were unanimous.¹¹⁸ Taft’s concern for certainty in the law was not only for the need of people to plan their lives and business transactions around it, but also for the legitimacy of the institution itself.¹¹⁹ These goals likely came from his experiences while serving as the United States President and in his subsequent experience as co-chairman of the National War Labor Board. As one of the most prominent conservative lawyers of the day, he was widely expected to be a pro-employer member of the Board.¹²⁰ Yet as Chief Justice, Taft applied his experiences counter to his ideology, most notably in his dissent in *Adkins v. Children’s Hospital*,¹²¹ where—despite a track record of voting with the conservative Justices and developing a reputation as pro-employer—he sided against business owners and argued in favor of minimum wage laws.

The Court under Chief Justice Rehnquist’s leadership, was one of the most fractured and divisive Courts.¹²² When John Roberts took over the reins in September of 2005, he declared that one of his main goals was to bring a more “collegial atmosphere” to the Court.¹²³ Specifically, he sought to add both “‘credibility and stability’ to the law by

115. O’CONNOR, *supra* note 8, at 116 (citing PERCIVAL E. JACKSON, *DISSENT IN THE SUPREME COURT: A CHRONOLOGY* 21-22 (1969)).

116. *Id.*

117. *Id.*

118. *Id.* (citing Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1283 (2001)). There is danger in taking this too far: “When methods of accommodation failed, however, the Justices of the Taft Court were willing to sign on to unanimous opinions that contained statements of the law with which they did not agree. Correspondence between the Justices shows that many of their votes were changed only under protest.” *Id.* at 118–119.

119. *Id.* at 116.

120. BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* 119 (1998).

121. *Id.* (citing VALERIE JEAN CONNER, *THE NATIONAL WAR LABOR BOARD: STABILITY, SOCIAL JUSTICE, AND THE VOLUNTARY STATE IN WORLD WAR I* at ch. 2 (1983); HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT: A BIOGRAPHY* 915 (1939); FOSTER RHEA DULLES, *LABOR IN AMERICA* 226–27 (1949)). See *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923) (Taft, C.J., dissenting).

122. David A. Yalof et al., *Collegiality Among U.S. Supreme Court Justices? An Early Assessment of the Roberts Court*, 95 JUDICATURE, July–Aug. 2011, at 12–13.

123. *Id.* at 13. The Roberts Court is actually slightly less collegial than the Rehnquist Court; twenty-two percent of constitutional-case opinions written during the first four years of the Roberts Court contain non-collegial rhetoric, compared to fourteen percent under the Rehnquist Court’s last four terms. *Id.* at 18. More recently, Justice Samuel Alito is said to have “pursed his lips, rolled his eyes to the ceiling, and shook his head ‘no,’” as Justice Ginsburg read dissents in two cases; Alito’s gestures “brought gasps from more than one person in the audience.” Dana Milbank, *Alito is on a Roll. An Eye Roll*, WASH. POST, June 25, 2013, at A2; see also Garrett Epps, *Justice Alito’s Inexcusable Rudeness*, THE

urging his new colleagues to find agreement in their opinions wherever possible.”¹²⁴ This is because unanimous opinions are more difficult to overturn “while closely divided 5–4 decisions make it harder for the public to respect the court as an impartial institution that transcends partisan politics.”¹²⁵ Chief Justice Roberts has been vocal in the past about his desire to “place the bipartisan legitimacy of the Court above his own ideological agenda.”¹²⁶ By breaking away from the more recent five to four ideologically-divided decisions, Chief Justice Roberts—like the late Chief Justice John Marshall—would rally his associate members into a unified entity thereby strengthening the institutional legitimacy of the Court. Chief Justice Roberts himself seemed to be striving for legitimacy via unanimity by joining the majority ninety-three percent of the time during the October 2011 term.¹²⁷ Yet not all of his colleagues have “signed on:” the Court’s unanimity rate has increased only slightly during Chief Justice Roberts’s tenure.¹²⁸

Following the Affordable Care Act (ACA) decision, Chief Justice Roberts received much criticism as well as admiration for joining the liberal justices. Court observers speculated that the move was an attempt to “shield nine justices from the political fallout sure to result from overturning the [ACA]”¹²⁹ or that it was an attempt to demonstrate the Court’s legitimacy—that they merely apply the law to the facts, sans politics. One reporter declared,

“For bringing the Court back from the partisan abyss, Roberts deserves praise not only from liberals but from all Americans who

ATLANTIC (June 24, 2013), <http://www.theatlantic.com/national/archive/2013/06/justice-alitos-inexcusable-rudeness/277163/> (giving a firsthand account).

124. Yalof, *supra* note 122, at 13.

125. *Id.* Even still, former Justice O’Conner has noted the virtues of dissenting opinions:

There is value to dissent even if it does not eventually carry the day. Dissenting opinions can force the Justices in the majority to respond to criticisms, honing the Court’s opinion . . . Dissents also can serve to limit the holding of the majority opinion . . . and to alert future litigants, and all those who must be governed by the law, of the precise scope of the Court’s opinion.

Perhaps most important, the dissent plays a role in showing those members of the public who disagree with the Court’s opinion that their views, while they did not prevail, were at least understood and taken seriously.

O’CONNOR, *supra* note 8, at 121.

126. Jeffrey Rosen, *Welcome to the Roberts Court: How the Chief Justice Used Obamacare to Reveal His True Identity*, NEW REPUBLIC (June 29, 2012), <http://www.tnr.com/blog/plank/104493/welcome-the-roberts-court-who-the-chief-justice-was-all-along#>.

127. *Frequency in the Majority*, SCOTUSBLOG (June 30, 2012), http://sblog.s3.amazonaws.com/wp-content/uploads/2012/06/SB_frequency_OT11_final.pdf.

128. Yalof, *supra* note 122, at 13.

129. Paul Campos, *Did John Roberts Switch his Vote?*, SALON (June 28, 2012), http://www.salon.com/2012/06/28/did_john_roberts_switch_his_vote/. Some point to “warnings” made by the Obama administration. President Obama stated he was “confident that the Supreme Court [would] not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress.” *Id.*; see also Adam Aigner-Treworgy, *President Obama: Overturning Individual Mandate Would be “Unprecedented, Extraordinary Step,”* CNN.COM (April 2, 2012, 3:55 PM), <http://whitehouse.blogs.cnn.com/2012/04/02/president-obama-overturning-individual-mandate-would-be-unprecedented-extraordinary-step/>.

believe that it's important for the Court to stand for something larger than politics. . . . He placed the bipartisan legitimacy of the Court above his own ideological agenda. Seven years into his Chief Justiceship, the Supreme Court finally became the Roberts Court."¹³⁰

Chief Justice Roberts exercised "political genius" by acting in a perceivably bipartisan manner, upholding the liberal-backed ACA while laying the groundwork for restricting congressional power in the future.¹³¹ Chief Justice Roberts followed Chief Justice Marshall's lead,¹³² acting by not simply acting as a "conservative" appointee. In this light, Chief Justice Roberts's vote was not as surprising as it first appeared. The lesson is that political ideology will not always "carry the day" as the most reliant predictor of decision making. While "[j]urisprudentially, [Justice Roberts] is a constitutional conservative[,] [i]nstitutionally, he is chief justice [sic] and sees himself as uniquely entrusted with the custodianship of the Court's legitimacy, reputation, and stature."¹³³ For this reason, judicial decision making will never be predictable under all circumstances. Speculatively, if Chief Justice Roberts were one of the Associate Justices, appointed by a Republican president and having a history of conservative constitutional construction, he may have voted to join the other conservative Justices. Nevertheless, Chief Justice Roberts's tenure demonstrates the multifaceted role. Just as no two women are alike, neither are two Chief Justices.

V. OTHER EXPERIENTIAL FACTORS

Scholars of social background theory argue "the actions of judges can be best understood as a product of their demographic characteristics and personal and professional experiences such that a shared attribute," including prior work experience, "would affect subsequent behavior in predictable ways."¹³⁴ Under this theory, a Justice who grew up in socioeconomically disadvantaged circumstances might better understand the plight of the poor in the same way a woman would

130. Rosen, *supra* note 126.

131. Relatedly, Chief Justice Roberts's vote on the healthcare ruling was seen as an attempt to "protect the authority of his court against charges of partisanship while accruing a mountain of political capital in the process." Adam Liptak, *Supreme Court Faces Crucial Cases in New Session*, N.Y. TIMES (Sept. 29, 2012), http://www.nytimes.com/2012/09/30/us/supreme-court-faces-crucial-cases-in-new-session.html?pagewanted=2&_r=0&smid=fb-share&pagewanted=all (title subsequently changed to *Supreme Court Faces Weighty Cases and a New Dynamic*).

132. See Rosen, *supra* note 126 (explaining Marshall's similar act of "judicial jujitsu" in *Marbury v. Madison*, where he "refused to confront president Jefferson over a question of executive privilege but laid the groundwork for expanding judicial power in the future").

133. Charles Krauthammer, *Why Roberts Did It*, NAT'L REV. ONLINE (June 28, 2012), <http://www.nationalreview.com/articles/304332/why-roberts-did-it-charles-krauthammer#>.

134. George, *supra* note 55, at 1336.

understand gender discrimination.¹³⁵ Therefore, by extension, many different experiential factors similarly affect judicial decision making.

While it is too early to know the impact Justice Sonia Sotomayor will have on the bench, she has expressed a desire to use her unique experiences to complement her colleagues' world-views.¹³⁶ Aside from "traditional" diversity factors, Justice Sotomayor has had a particularly diverse experience prior to her tenure on the bench. After law school, she worked in the Manhattan District Attorney's Office and later at a top law firm before being appointed to the U.S. District Court for the Southern District of New York and later to the Second Circuit Court of Appeals.¹³⁷ It is likely Justice Sotomayor will take these experiential factors into account in the same way that other women have considered their own experiences of gender discrimination and that past chief justices, as institutional leaders, have drawn upon their own experiences in organizing the goals of the court.

Religion may also inform judicial decision making. Justice Scalia has stated, "The laws I apply have a fair meaning, and that meaning is no different for a Catholic than it is for a Jew, any more than it is different for a woman and a man, or a white man and a black."¹³⁸ Yet he has also stated that while his judicial decisions are not based on religion, he would not work for a judicial system that was counter to the tenets of Catholicism.¹³⁹ Some well known Supreme Court Justices were, and are, deeply religious. Unlike the past, today's Supreme Court Justices have spoken publicly about their religious faith, at times explicitly stating in their opinions that "[c]ourts must recognize that the state is but

135. But at least one judge argued such a judge does not exist. See *United States v. Pineda-Moreno*, 617 F. 3d 1120, 1123 (9th Cir. 2010) (J. Kozinski, dissenting):

[T]here's one kind of diversity that doesn't exist: No truly poor people are appointed as federal judges, or as state judges for that matter. Judges, regardless of race, ethnicity or sex, are selected from the class of people who don't live in trailers or urban ghettos. The everyday problems of people who live in poverty are not close to our hearts and minds because that's not how we and our friends live.

Thus, when impossible to draw upon one's own life experiences, the role of empathy is bolstered. See generally *infra*, Part VI. Judge Kozinski demonstrates this beautifully: "The panel's breezy opinion is troubling on a number of grounds, not least among them its unselfconscious cultural elitism." *Id.*

136. Prior to her nomination, Justice Sotomayor once gave a speech declaring, "Whether born from experience or inherent physiological or cultural differences, . . . for jurists who are women and nonwhite, 'our gender and national origins may and will make a difference in our judging.'" She added, "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life." Charlie Savage, *A Judge's View of Judging Is on the Record*, N.Y. TIMES, May 15, 2009, at A21.

137. Crowe, *supra* note 112, at 121.

138. Kathleen Ganster, *Scalia: Catholicism at Core of My Judicial Ethics*, NEWSMAX (Sept. 25, 2011), <http://www.newsmax.com/InsideCover/scalia-catholicism-justice-court/2011/09/25/id/412199>.

139. *Id.* See also John Garvey & Amy Coney Barrett, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998) (arguing that while mere identification of a judge as Catholic is not sufficient reason for recusal under federal law, the moral impossibility of enforcing capital punishment in such cases as sentencing, enforcing jury recommendations, and affirming are in fact reasons for not participating).

one of several spheres of government, each with its distinct jurisdiction and limited authority granted by God,' and 'that God, not the state or any government established by man, is the source of all our rights.'¹⁴⁰ Although religion is a set of personal principles or beliefs, it too can shape personal experiences.

Others have similarly argued that racial diversity on the bench is important, not only on the basis that minority judges cause the public to become more trustworthy and view the institution as more legitimate but also on the grounds that the "interplay of diverse views and perspectives can enrich judicial decision-making" by bringing important and traditionally excluded perspectives to the bench. Therefore, "minority judges can play a key role in giving legitimacy to the narratives and values of racial minorities."¹⁴¹ Moreover, "racial diversity . . . [may] encourage [] judicial impartiality [] by ensuring that a single set of values or views [does] not dominate judicial decision-making."¹⁴² This highlights the importance of intersectionality—life experiences which are not wholly determined, but are certainly shaped, by individual social identity. For instance in *Virginia v. Black*,¹⁴³ a case involving a First Amendment challenge to a Virginia law prohibiting cross-burning, a usually silent Justice Clarence Thomas—who grew up in the segregated South¹⁴⁴—became frustrated with his colleagues' misunderstanding of the meaning of cross-burning. During an argument in favor of the law, he noted that crosses were a "symbol of [a] reign of terror" during the "100 years of lynching . . . in the South" and interjected: "Aren't you understanding . . . the effects of . . . the burning cross?"¹⁴⁵ The impact of Justice Thomas' remarks is not entirely clear. Although the Court ultimately struck down Virginia's cross-burning ban, the majority acknowledged that a "state, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate," finding a new area of constitutionally unprotected speech for such "true threats" of "intimidation that are most likely to inspire fear of bodily harm."¹⁴⁶

140. Sanja Zgonjanin, Quoting the Bible: The Use of Religious References in Judicial Decision-Making, 9 N.Y. City L. Rev. 31, 32–33 (2005) (citing Ex parte G.C., No. 1040001, 2005 WL 1793345, at *22 (Ala. July 29, 2005) (Parker, J., dissenting)).

141. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 410 (2000).

142. *Id.* at 411.

143. 538 U.S. 343 (2003).

144. Justice Clarence Thomas is the Court's only African American Justice and its only Southerner. In his memoir, he reflected on his experiences growing up in Savannah, GA. See generally CLARENCE THOMAS, *MY GRANDFATHER'S SON: A MEMOIR* (2007).

145. Transcript of Oral Argument of Michael R. Dreeben at 22–23, *Virginia v. Black*, 538 U.S. 343 (2002) (No. 01-1107), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/01-1107.pdf. For a more entertaining account, see Dahlia Lithwick, *Virginia Burning: Are Cross-Burnings Speech or Violence?*, SLATE (Dec. 11, 2002), <http://www.slate.com/id/2075301/>.

146. *Virginia v. Black*, 538 U.S. 343, 347, 363 (2003).

VI. THE BROADER MORAL, ETHICAL, AND PUBLIC POLICY IMPLICATIONS OF A DIVERSE JUDICIARY

President Carter was driven to appoint more women to the federal judiciary by his deep commitment to human and civil rights as well as his view that the judiciary should be representative of the American “population, not of the *lawyer* population”¹⁴⁷ Carter’s commitment to women’s equality was shaped by the women around him, including his wife, mother, and his administration officials who were women.¹⁴⁸ In light of this, “[h]e was committed to women’s equality of opportunity as a substantive matter and believed that women’s presence on the bench would promote greater public trust and confidence in the judiciary as a symbolic matter.”¹⁴⁹

President Obama has similarly declared:

We need somebody who’s got the heart, the empathy, to recognize what it’s like to be a young teenage mom. The empathy to understand what it’s like to be poor, or African-American, or gay, or disabled, or old. And that’s the criteria by which I’ll be selecting my judges.¹⁵⁰

In making his first appointment to the United States Supreme Court, he sought a nominee with “[e]xperience . . . tested by obstacles and barriers, by hardship and misfortune” because “[i]t is experience that can give a person a common touch and a sense of compassion; an understanding of how the world works and how ordinary people live.”¹⁵¹ He found such experience in Sonia Sotomayor who, in response, agreed:

This wealth of experiences, personal and professional, have helped me appreciate the variety of perspectives that present themselves in every case that I hear. It 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. I strive never to forget the real-world consequences of my decisions on individuals, businesses, and government.¹⁵²

Such statements have the potential to instill public confidence in the judiciary, but they must be more than just political rhetoric. As discussed throughout, experiential factors affect decision making. In many instances it even changes the outcomes of cases. This has a profound impact on everyone subjected to the law. Therefore, as a matter of public policy, experience matters.

147. Clark, *supra* note 34, at 1148 (emphasis added).

148. *Id.*

149. *Id.* at 1149.

150. Crowe, *supra* note 112, at 122 (footnote omitted).

151. *Remarks by the President in Nominating Judge Sonia Sotomayor to the United States Supreme Court*, WHITE HOUSE (May 26, 2009, 10:13 AM), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-Nominating-Judge-Sonia-Sotomayor-to-the-United-States-Supreme-Court/.

152. *Id.* (emphasis added).

Some legal commentators view “judicial empathy as necessary to reach moral, reasoned decisions.”¹⁵³ Justice Sotomayor has argued that “by ignoring our differences as women or men of color we do a disservice both to the law and society.”¹⁵⁴ But others contend, “the capacity of judges for empathy is irrelevant to their qualifications as judges and ability to formulate sound legal opinions.”¹⁵⁵ Thus, empathy has no place in sound decision making because it renders the law less predictable.¹⁵⁶ A purported middle approach is that empathy’s place in our legal system should be confined to “legislators, public policy lobbyists, attorneys, and juries.”¹⁵⁷

Why permit juries to exercise empathy when acting as trier-of-fact but disallow judges to do the same when serving the same function? Those who argue empathy has no place in decision making point to the fact judges must disqualify themselves “‘in any proceeding in which their impartiality might reasonably be questioned,’ including ‘where they have a personal bias or prejudice concerning a party.’”¹⁵⁸ But this misconstrues and over-exaggerates the role of empathy. Empathy is distinct from personal bias. Personal bias would indicate favoritism to one position over another. Nor is empathy (a capacity) the same as sympathy or compassion (emotions). “Empathy entails understanding another person’s perspective”; “sympathy is a feeling *for* or *with* the object of the emotion.”¹⁵⁹ Empathy, however, may be effectively used to place oneself in the shoes of *both* sides of an argument. A judge uses empathy as just one of many tools toward understanding conflicting claims. “Empathy assists the judge in understanding the litigants’ perspectives . . . it does not help resolve the legal issue of which litigant ought to prevail.”¹⁶⁰ Prospective jurors are of course questioned about

153. Crowe, *supra* note 112, at 124.

154. Nancy Maveety, *Difference in Judicial Discourse*, 6 POL. & GENDER 452, 454 (2010) (quoting Justice Sonia Sotomayor).

155. Crowe, *supra* note 112, at 122.

156. Judges who admonish empathy as a mode of judicial reasoning often dismiss it on grounds that it disrupts formalistic rules, the separation of powers doctrine, stare decisis, fidelity to law, or mere mechanical application of rules. See Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1587–90 (1987).

157. Crowe, *supra* note 112, at 124.

158. *Id.* at 125 (citing 28 U.S.C. §§ 455(a), (b)(1) (2006)). But the lines of this admonition are uncertain. Most recently, anti-gay activists have called for the recusal of judges deciding cases involving same-sex marriage. See Zack Ford, *Anti-Gay Extremists Call for Illinois Judge to Recuse Herself Because She’s Gay*, THINK PROGRESS (July 24, 2012), <http://thinkprogress.org/lgbt/2012/07/24/573541/anti-gay-extremists-call-for-illinois-judge-to-recuse-herself-because-shes-gay/> (discussing Judge Hall’s involvement in hearing a challenge to Illinois’ ban on same-sex marriage while a member of the Alliance of Illinois Judges, a group committed to “promoting and encourage[ing] respect and unbiased treatment for LGBT individuals as they relate to the judiciary, the legal profession, and the administration of justice”); see also Dan Levine, *Gay Judge Never Thought to Drop Marriage Case*, REUTERS (Apr. 6, 2011), <http://www.reuters.com/article/2011/04/06/us-gaymarriage-judge-idUSTRE7356TA20110406> (discussing U.S. Judge Vaughn Walker’s involvement as a homosexual in the California gay marriage ban commonly known as Proposition 8).

159. Bandes, *supra* note 94, at 136 (footnote omitted).

160. *Id.* at 137.

possible personal bias and ability to return a verdict found “solely upon the evidence and instructions of the court.”¹⁶¹ Yet they are not instructed to remain completely narcissistic, sterile, or cold. If empathy, based on personal experience, is equated with “personal bias or prejudice” then would it follow that Justices O’Connor and Ginsburg, having experienced firsthand discrimination throughout their own legal careers,¹⁶² should have recused themselves? Certainly not.

Those who advocate for total ignorance of one’s life experiences and common sense wisdom in place of strict, machine-like adherence to the rule of law fail to understand that it is not always possible to interpret every issue with complete certainty, even to a cold, sterile result.¹⁶³ In *Safford Unified School District #1 v. Redding*,¹⁶⁴ as previously discussed, the U.S. Supreme Court was asked to determine whether a thirteen-year-old female subject of a strip search subjectively felt that the search was intrusive. The answers to such a legal question will never be plainly given by simply looking to the rule of law. This is precisely why judges often turn to legislative intent to determine the purpose of enacting any given law. In defining the purpose, one must typically ask: what was this law meant to protect? What kinds of situations were contemplated? The search for the purpose of the law can become clearer by empathizing with the exact situation the law was intended to address. It is wrong to assert that upholding the rule of law and empathy are mutually exclusive.

Conversely, if such strict adherence to even the most *unambiguous* laws were always possible, what should we make of the decisions whose dissents later carried the day? Are we to allow *Dred Scott* to live on until the legislature, subject to the whims of the public, garners the courage to rectify immorality? Empathy is “an essential capacity for living in the social world, and a basic component of moral reasoning A total lack of empathy, coupled with an equally total lack of remorse, is the main defect of psychopaths.”¹⁶⁵ The law aims to channel and influence human behavior. Thus, “[t]o apply the law, judges must constantly seek to understand and predict motivations, intentions, perceptions, and other aspects of human conduct”—it is empathy that makes that understanding possible.¹⁶⁶ This is achievable only with empathy, aided by

161. Crowe, *supra* note 112, at 129 (footnote omitted).

162. See *Ruth Bader Ginsburg*, *supra* 80 (noting that Justice Ginsburg was faced with an “extremely hostile” environment at Harvard due to her gender); *Sandra Day O’Connor*, OYEZ, http://www.oyez.org/justices/sandra_day_oconnor (last visited Apr. 6, 2014) (explaining that Justice O’Connor faced a difficult job market after graduating law from Stanford because “[n]o law firm in California wanted to hire her and only one offered her a position as a legal secretary”).

163. Judge Posner argues that “when faced with legal questions lacking determinative answers, judges need to consult good judgment,” defined as “an elusive faculty best understood as a compound of empathy, modesty, maturity, a sense of proportion, balance, a recognition of human limitations, sanity, prudence, a sense of reality and common sense.” Bandes, *supra* note 94, at 137 (footnote omitted).

164. *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364 (2009).

165. Bandes, *supra* note 94, at 139 (footnotes omitted).

166. *Id.*

one's life experiences, and an allowance to put oneself in the position of another. This, rather than innate biological differences, is the primary reason why gender and other social characteristics matter in shaping the decisions of individual judges and those of colleagues with whom they interact.

In addition to the demonstrated effect of the presence of a female judge on an appellate panel, the representation of diverse women judges influences public policy favorably—particularly to women. This is important for socialization and collegiality.¹⁶⁷ Notable exclusion of women judges sends a signal to young women about their career aspirations and may keep many qualified women lawyers from seeking judgeships. But when women are fairly represented on the federal bench, the courts will better reflect the diverse population of this nation and both women and men may have more confidence that the court understands the real-world implications of its rulings.¹⁶⁸ Increased presence of women on the bench improves the quality of justice: women judges can bring an understanding of the impact of the law on the lives of women and girls by enriching courts' understanding of how best to realize the intended purpose and effect of the law. Justice Ginsburg has stated that if there were more women on the bench, some of the discrimination cases might turn out differently "because the women will relate to their own experiences."¹⁶⁹ But even presently serving "token" judges may realize more hostility as minorities; logically, one may be less likely to be vocal in a hostile environment.¹⁷⁰ For example, Justice Ginsburg reported that the quality of her treatment on the Court and her comfort in dealing with colleagues decreased after Justice O'Connor's departure.¹⁷¹ Ginsburg further believes that "the presence of women on the bench made it possible for the courts to appreciate earlier than they might otherwise that sexual harassment belongs under Title VII [as a violation of civil rights law]."¹⁷² Historically it has been women attorneys and judges who have brought sex discrimination onto the legal and political agenda.¹⁷³ But this is just one example of the larger picture: because life experience aids in the ability to achieve sound judicial decision making, greater diversity must be more than just aspirational.

CONCLUSION

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a

167. O'Connor & Yanus, *supra* note 65, at 441.

168. *Women in the Federal Judiciary: Still a Long Way to Go*, *supra* note 15.

169. *See* Bandes, *supra* note 94, at 137.

170. *See generally supra* note 22.

171. O'Connor & Yanus, *supra* note 65, at 448.

172. Bazelon, *supra* note 58.

173. *See generally* Palmer, *supra* note 12.

good deal more to do than the syllogism in determining the rules by which men should be governed.¹⁷⁴

It is important to recognize that no two women will decide a case in precisely the same way.¹⁷⁵ Nor would the same be true for any two men or any two members of any race, religion, or sexual orientation. However, when deciding a case that involves a form of discrimination that only a certain class of discriminatees can experience, those life experiences will impact judicial decision making. The premise is *not* that women or minorities have a different “voice” on the court. Rather, there is a natural tendency to relate to individualized experiences. Although Justice Sandra Day O’Connor has restated the old adage, “a wise old man and wise old woman will reach the same conclusion” in deciding cases, she clarifies it is “helpful to the Court to have nine members of different backgrounds and experiences and, yes, even gender. We bring different life experiences to the task, and that’s a good thing.”¹⁷⁶ Specifically in cases involving gender discrimination, outcomes differ depending on whether there is a female on the court who has experienced, whether directly or indirectly, similar discrimination to that which is involved in the case at hand.

No one is just a woman or just a man. Each person has diverse experiences and each will bring to the bench experiences that affect their own view of the law, life, and decision making. All life experiences affect and influence judicial decision making.¹⁷⁷ It is human nature for “personal experiences [to] affect the facts that judges choose to see.”¹⁷⁸ When we appreciate the experiences that are commonly shared by one particular group, such as women, we are able to see the broader implications of experience on any judge. In the future we should refocus our treatment of gender in the role of decision making. Rather than compartmentalizing the role of women on the bench, we should look broadly to the experiences of each Justice. It is true that gender discrimination is just one experience that is felt, whether firsthand or secondhand, commonly by women. Because gender, and other social characteristics, shape judges’ life experiences, it is important to have diverse experiences on the bench. While both women and men are capable of understanding the issues at stake, the court as a whole is better served when its individual judges bring diverse experiences to the bench.

174. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881), available at http://www.gutenberg.org/catalog/world/readfile?fk_files=3198728&pageno=2.

175. In the same way that “competing ideas about what it means to ‘represent women’ make it difficult to define the substantive political representation of women, especially when such differences are found among political representatives themselves”. BENNION, *supra* note 5, at 10 (emphasis added).

176. Maveety, *supra* note 154, at 455–56 (quoting Sandra Day O’Connor).

177. See Shirley S. Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE U. L. REV. 489, 492–94 (1984).

178. Savage, *supra* note 136 (quoting Justice Sonia Sotomayor).

