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Empathic Dialogue: From Formalism to Value Principles

Mitchell F. Crusto

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EMPATHIC DIALOGUE:
FROM FORMALISM TO VALUE PRINCIPLES

Mitchell F. Crusto*

ABSTRACT

In response to a recent call for heightened attention to judicial ethics and quality judicial decision making, this Article posits the idea that judges should engage in empathic dialogue, a judicial discipline, to achieve empathic constitutionality—a set of value choices that attend to the real world effects of their decisions on people. It seeks a paradigm shift from rights-neutral formalism to rights-focused value principles in federal courts. And it argues that especially during these economically challenging times, judges should assess their biases to minimize “blind injustice,” the unintended negative effects of their decisions and to achieve true justice.

TABLE OF CONTENTS

I. INTRODUCTION: JUDICIAL CHARACTER AND JUSTICE ........................................... 847
   A. FROM FORMALISM TO VALUE PRINCIPLES ........................................... 847
   B. JUDICIAL TEMPERAMENT ........................................... 850
   C. OVERVIEW ........................................... 854

II. THE NEED FOR CHANGE ........................................... 854
   A. BLIND JUSTICE ........................................... 855
      1. Unconscious Judicial Classism ........................................... 857
      2. Judicial Groupthink and Decision Making ........................................... 858
   B. INJUSTICE ........................................... 860
   C. THE EMPATHY STANDARD ........................................... 861

III. EMPATHIC DIALOGUE ................................ 863
   A. JUSTICE ........................................... 864
   B. JUDICIAL DISCIPLINE ........................................... 865
   C. JUDICIAL EXERCISE ........................................... 865

* Professor of Law, Loyola University New Orleans College of Law. J.D., Yale University 1981; M.A., Jurisprudence, Oxford University 1985. Thanks to Judge Guido Calabresi; Professors Charlton Copeland, André Douglas Pond Cummings, Richard Delgado, and Joseph William Singer; Notre Dame law student Michael A. Fragoso; Lisa Crusto; Research Librarian Brian Huddleston; Administrative Assistant Shaneil Streva; and Research Assistants Cassie Jeremie, Hope E. Revelle, Pearl A. Robertson, and Dr. D’Ann R. Penner under the Alfred T. Bonomo, Sr. Family and the Rosario Sarah LaNasa Memorial Fund. Thanks to commentators at the Louisiana Judicial Council/National Bar Association, 2009 Jamaican Sunset CLE, the Southeastern Association of Law Schools 2010 Annual Conference, and the Third National People of Color Legal Scholarship Conference.

845
IV. ARGUMENTS FOR EMPATHIC DIALOGUE............. 866
   A. CONSTITUTIONAL LAW .................................. 866
      1. Trial by Jury ......................................... 867
      2. Other Examples Empathic of Constitutional
          Principles ............................................. 868
   B. JUDICIAL BIAS ......................................... 869
   C. VALUE PRINCIPLES ...................................... 871
V. OBJECTIONS TO EMPATHIC DIALOGUE ............. 872
   A. JUST RESULTS ........................................... 872
   B. INTEREST-CONVERGENCE PRINCIPLE ................ 874
   C. JUDICIAL INTEGRITY .................................... 875
VI. CONCLUSION: A SOLUTION TO BLIND
    INJUSTICE.................................................. 875

I want to tell you a story. I’m going to ask you all to close your eyes
while I tell you the story. . . . This is a story about a little girl walking
home from the grocery store one sunny afternoon. . . . Two men jump
out and grab her. They drag her into a nearby field and they tie her up
and they rip her clothes from her body. Now they climb on. First one,
then the other, raping her, shattering everything innocent and pure
with a vicious thrust in a fog of drunken breath and sweat. And when
they’re done, after they’ve killed her tiny womb, murdered any chance
for her to have children, to have life beyond her own, they decide to
use her for target practice. They start throwing full beer cans at her.
They throw them so hard that it tears the flesh all the way to her bones.
Then they urinate on her. Now they pull the hanging. They have a rope.
They tie a noose. Imagine the noose going right around her neck and
with a sudden blinding jerk she’s pulled into the air and her feet and
legs go kicking. . . . It snaps and she falls back to the earth. So they
pick her up, throw her in the back of the truck and drive out to Foggy
Creek Bridge. Pitch her over the edge. And she drops some thirty feet
down to the creek bottom below. Can you see her? Her raped,
beaten, broken body soaked in their urine, soaked in their semen,
soaked in her blood, left to die. Can you see her? I want you to pic-
ture that little girl. Now imagine she’s white.1

—Character Jake Tyler Brigance in A Time to Kill.

1. A TIME TO KILL (Regency Enterprises 1996); see Memorial Quotes for A Time to
acter Jake Tyler Brigance, played by Matthew McConaughey, talking about Tonya Hailey
in his summation before an all-white, southern jury, in the criminal trial of an African-
American, Vietnam war hero being prosecuted for killing the white drug dealers who raped,
hung, and left his young daughter for dead.). The story raises the question of whether
retribution is a defensive theory of justice examining two competing principles of justice
found in the two maxims: “an eye for an eye,” compared to “two wrongs do not make a
right.” See generally IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 28-41
(John Ladd trans., 2d ed. 1999) (noting that judicial punishment should be in response to
the crime committed ).
rights-based approach to justice must consider the role of judicial character in the federal courts. This Article critically analyzes the nature of a federal judge's judicial character in response to a call for heightened judicial ethics in federal courts and to the judicial decision making debate. The thesis herein is

2. See generally Ronald Dworkin, Taking Rights Seriously (1978) (arguing against the legal positivism and economic utilitarianism theory of Anglo-American law, asserting that individuals have legal rights beyond those explicitly laid down and political and moral rights against the state and prior to the welfare of the majority); Benjamin N. Cardozo, The Nature of Judicial Process (1921) (discrediting legal formalism or law as a closed system of rules, logically applied); Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972).

3. Judicial character is defined, for the purpose of this Article, as the pattern of judicial behavior, judicial personality of a judge's legal constitution composed of her decisions, dicta, out of court pronouncement, judicial training, psyche, personal beliefs, and propensities. See generally Paul Horwitz, Judicial Character (And Does it Matter), 26 Const. Comment. 97 (2009) (analyzing judicial character and what it demands of a judge from the perspective of virtue ethics and virtue jurisprudence and its relationship to constitutional decision making). One notable judicial characteristic is humility—the realization that one's judgment is always subject to criticism and correction. The importance of judicial character in legal decision making reflects the American legal realist school of thought as to the indeterminacy of law, as reflected in Jerome Frank's observation that a judicial decision might reflect mundane influences such as what a judge ate for breakfast. See generally Jerome Frank, Law & the Modern Mind (1930); Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457 (1897) (critiquing popular theories on the legal basis of decision making); Oliver Wendell Holmes, The Common Law 5 (1881) ("The life of the law has not been logic; it has been experience.")


that federal courts should adopt a paradigm shift\textsuperscript{6} from formalism,\textsuperscript{7} a rights-lethal combination of Wechslerian neutralism\textsuperscript{8} and structuralism,\textsuperscript{9} to rights-oriented value principles\textsuperscript{10} or empathic constitutional-the case."); Ilya Somin & Erwin Chemerinsky, Is There a Conflict Between Empathy and Good Judging?, L.A. TIMES, May 28, 2009, http://www.latimes.com/news/opinion/opinionl/la-oeew-chemerinsky-somin28-2009may28-0,4921073.story (Ilya Somin arguing that empathy “is . . . a poor tool for judicial decision making”); Erwin Chemerinsky arguing that in exercising discretion, judges, even conservative ones, “should be mindful of the consequences of their decisions on people’s lives”).

6. See generally THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed. 1962) (on the nature of a “paradigm shift,” noting that during revolutions in science, the discovery of anomalies leads to a new paradigm that changes the rules of the game and the “map” directing new research; asks new questions of old data; and moves beyond the puzzle-solving of normal science).

7. Formalism refers hereinafter to a judicial style of decision making that is preoccupied with rights-neutral results, combining rigid dedication to a dogmatic, super-analytical processing of rules along with a concern for federal-state relationships with a general disregard for precedent when it comes to promoting or enforcing individual and/or minority rights. This definition is exemplified by Chief Justice John Roberts’s “umpire allusion” that, as a Supreme Court Justice, he merely calls balls and strikes. Roberts: “My job is to call balls and strikes and not to pitch or bat.” CNN.com (Sept. 12, 2005, 4:58 PM), http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/index.html (“Judges are like umpires. Umpires don’t make the rules; they apply them . . . . I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability. And I will remember that it’s my job to call balls and strikes and not to pitch or bat.”). See generally Aaron S.J. Zelinsky, Note, The Justice as Commissioner: Benching the Judge-Umpire Analogy, 119 YALE L.J. ONLINE 113 (2010) (for a thorough history of the judge-as-umpire analogy).

8. See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 1 (1959). See also JOHN RAWLS, A THEORY OF JUSTICE 10–11 (1971). In his theory of distributive justice, Rawls stated that to be fair in selecting the principles of justice, the possibility of bias must be removed. Id. Fairness in Rawls’s theory requires the more favored to agree to the type of distributive rule they would prefer if they were not more favored. Id.

9. Structuralism referees hereinafter to a form of judicial philosophy in which the states are provided leeway to decide individual and/or minority rights as long as those rights are restricted or limited, but where states are restrained if and when they seek to broaden individual or minority rights. Its elements include a preoccupation with formality/structure, failure to consider fundamental rights, and ignoring the law’s effects on average citizen’s everyday lives. See Mitchell F. Crusto, The Supreme Court’s “New” Federalism: An Anti-Rights Agenda?, 16 GA. ST. U. L. REV. 517, 519–20 (2000) [hereinafter Crusto, New Federalism] (analyzing the Supreme Court’s new federalism vision as an anti-rights’ agenda relative to individual and civil rights). See generally Noah Feldman, Imagining a Liberal Court, N.Y. TIMES, June 27, 2010, at MM38 [hereinafter Feldman, Imagining] (calling for a “new progressive constitutional vision”); BRUCE ACKERMAN ET AL., THE CONSTITUTION IN 2020 (Jack M. Balkin & Reva B. Siegel eds., 2009) (essays on the future direction of constitutional law); GOODMAN LU ET AL., KEEPING FAITH WITH THE CONSTITUTION (2009) (presenting a compelling and common-sense approach to constitutional interpretation); ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION (2009) (arguing that the Supreme Court has moved dramatically to the right in response to a rigid Republican ideological agenda); and Gunther, supra note 2.

10. Value principles the best civil and human rights’ principles that intersect, or are the confluence or harmony between, liberal and conservative constitutional theories of justice. Some might call this approach Pollyannism, based on the assertion that there is no intersection between conservative and liberal values. This Article hopes to prove those critics wrong. One example of a value principle is fairness: that the law should be fair in both its creation and application. Value principles also recognize the existence of an “American Constitution” as being the confluence of the U.S. Constitution, federal constitutional law, state constitutional law, and other written (and sometimes unwritten) values, “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Michael H.
Concerned with the real world effects of judicial decisions on people,12 this judicial character analysis is timely because federal courts continue to face significant civil and human rights issues including same-sex marriage,13 immigration rights,14 separation of church and state,15 and
dentralizing body of positive principles is embodied in the enduring words of the Founding Fathers from the consent of the governed.1

The Declaration of Independence para. 2 (U.S. 1776). Of course, because some American values are negative, such as racism, sexism, and enslavement there is a critical need for a proven dialectical process or central constitutional theory to promote the best of our civil and human rights principles and to eradicate those negative traditions and practices. This Article seeks an intervention into the subconscious of American constitutional theory to weed out corrupt principles of unfair bias and grow the seeds of inclusion and American harmony. Cf. Dan M. Kahan, The Cognitively Illiberal State, 60 STAN. L. REV. 115, 115 (2007) (suggesting that “rather than attempt to cleanse the law of culturally partisan meanings . . . lawmakers should endeavor to infuse it with a surfeit of meanings capable of simultaneously affirming a wide range of competing worldviews”).

11. Empathic constitutionality refers hereinafter to the state of judicial decision making that harmonizes the current conflict in federal courts, and particularly Supreme Court decision making, so as to minimize persistent political disagreement. See generally Guido Calabresi, An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts, 55 STAN. L. REV. 2113, 2113–27 (explaining the four “schools” or “movements” of law, including the formalist, functionalist, legal process, and law-and-status approaches). This Article follows the Calabresian “Law and Status” school of law described as that in which “legal scholars should examine how laws and the legal system affect specific categories of people. . . . [T]he focus has been on groups that have been viewed as exploited, disadvantaged, or otherwise dominated.” Id. at 2127. Cf. PHILIP B. BOREN, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) (emphasizing the superior role of tradition in the “modalities of constitutional argument;” i.e., structural, textual, ethical, prudential, historical, and doctrinal); NORMAN REDLICH ET AL., UNDERSTANDING CONSTITUTIONAL LAW 3–4 (2d ed. 1999) (describing seven different categories of constitutional arguments, including “textual,” the “intent of the Framers,” “ongoing practice,” “judicial practice or precedent,” “structural arguments (such as federalism),” “consequential arguments,” and “ethical arguments”); Richard H. Fallon, Jr., How to Choose a Constitutional Theory, 87 CALIF. L. REV. 555, 541–45 (1999).


15. See, e.g., Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 114–15 (9th Cir. 2010) (upholding the constitutionality of “under God” in the Pledge of Allegiance); id. at 1114–15 (Reinhardt, J., dissenting) (noting that the “atheist minority [has] . . . to sustain the religious preferences of the God-fearing majority . . . illustrates the inevitable result of

v. Gerald D., 491 U.S. 110, 122 (1989) (Scalia, J., plurality opinion). One such shared, centralizing body of positive principles is embodied in the enduring words of the Founding Fathers in the Declaration of Independence:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .

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the death penalty.16

B. JUDICIAL TEMPERAMENT

To achieve a paradigm shift in judicial decisions, this Article will focus on judicial character, specifically by evaluating judicial temperament,17 including the unconscious biases that a judge brings to the decision making process.18 Reflecting on the excerpt from A Time to Kill, judges who focus on their umpire role may fail to consider how their unconscious biases affect their decisions and the litigants themselves. As a result, they seldom evaluate how their decisions broadly impact people. Such judicial behavior as is referred to hereinafter "blind injustice".19 In particular,


17. Judicial temperament refers hereinafter to the conscious and unconscious, professional and personal bias, or philosophy a judge brings to her job of judging. Cf. H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION (1982) (contending that the Constitution requires judges to decide cases in good faith, using the “constitutional virtues” of candor, intellectual honesty, humility about the limits of constitutional adjudication, and willingness to admit that they do not have all the answers). See also DANIEL A. FABER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW (2008) (suggesting that constitutional adjudication is merely politics in disguise and that judges are legislators in robes who rule according to their political views); RICHARD A. POSNER, HOW JUDGES THINK (2008) (describing nine theories of judicial behavior: the attitudinal, strategic, sociological, psychological, economic, organizational, pragmatic, phenomenological, and legalist theories).

18. See generally John F. Irwin & Daniel L. Real, Unconscious Influences on Judicial Decision Making: The Illusion of Objectivity, 42 McGeorge L. REV. 1 (2010) (exploring unconscious influences on judicial decision making and implicit bias); Diana Kapiszewski, Tactical Balancing: High Court Decision making On Politically Crucial Cases, 45 LAW & SOCY REV. 471 (2011) (analyzing judicial decision making in potentially landmark cases and suggesting that as justices in developed and developing democracies alike contemplate the content of each politically important case and the context in which they are deciding it, they balance six considerations: their own ideology, judicial institutional interests, elected branch preferences, the possible economic or political consequences of their decision, popular opinion regarding the case, and the law and legal considerations); Paul M. Secunda, Cultural Cognition at Work, 38 FLA. ST. U. L. REV. 107 (2010) (analyzing the “cultural cognition theory” in labor and employment law and concluding that a judge’s cultural background shapes the outcome of legal decisions). See also generally Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987); KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 3 (1930) (“[W]hat these officials do about disputes is, to my mind, the law itself.”).

19. “Blind injustice” refers hereinafter to the unattended, unconscious judicial bias by which judges fail to consider the real life effects of their legal decisions on people, often as
when judges fail to address biases of class or the middle class, the impoverished, and the socially-disadvantaged many with unmet legal representation needs.

To address blind injustice, this Article posits that judges, especially federal judges, adopt a traditional, yet often unused disciplining referred to hereinafter as “empathic dialogue.” Using empathic dialogue, a judge inquires beyond her professional and personal experiences before ruling,


21. Middle class refers hereinafter to the class of business people, professionals, highly skilled workers, well-to-do farmers, and other workers whose income is between the wealthy and the impoverished.

22. Impoverished refers hereinafter to the class of people whose income is below that of the middle class or is below the poverty line.

23. Socially disadvantaged refers hereinafter to the class of people who in addition to, or in spite of, their income are subject to societal discriminatory treatment, including women, racial minorities, same-sex couples, children, immigrants, military service people, elderly, students, and others due to religious affiliation.


25. “Empathic dialogue” refers hereinafter to a judicial discipline by which a judge’s obligation to consciously makes inquiry beyond professional, intellectual, or personal worldviews, and unconscious biases (1) to consider the experiences of others and the law’s impact on the lives of everyday people; (2) to protect people from unfair outcomes and injustices; and (3) to redress those injustices especially when they result from unjust bias to achieve value principles of justice. Cf. *Oxford Dictionary*, supra note 20, at 184 (defining “empathy” as “[t]he power of projecting one’s personality into (and so fully comprehending) the object of contemplation”).
takes into account the impact of the law on all people, and decides in a manner that avoids doing harm. This is an especially valuable and essential tool in constitutional cases that often have the same broad impact as legislation. Far from a panacea, empathic dialogue does not dictate who wins in any case. It is a process promoting true justice.

An analysis of judicial temperament raises important questions about justice: Does a judge’s failure to address her subconscious biases affect the quality of justice? Will a conscious intervention into a judge’s subconscious biases result in more just decisions? Finally, will judges voluntarily adopt and utilize certain tools to reach value principles? Answering these questions help us address the neutrality crisis in judicial decision making.

This Article’s analysis of judicial temperament benefits greatly from recent scholarship relating to empathy and judicial decision making. Empathy scholarship includes, but is not limited to, corporate social responsibility, feminist principles of justice, judicial selection, jurors, legal

26. See Erwin Chemerinsky, Progressive and Conservative Constitutionalism as the United States Enters the 21st Century, 67 LAW & CONTEMP. PROBS. 53, 60 (2004) (observing that there is no difference between conservative and liberal constitutionalism, that the divide is over results, not methods, and that “conservatives are much more likely to pose their decisions as the products of a neutral methodology and not as the products of value choices”).

27. See generally Dan M. Kahan, Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law, 125 HARV. L. REV. 1, 1–30 (2011) (examining how the study of motivated reasoning, such as “cultural cognition,” explains the current “neutrality crisis” in the Supreme Court’s decision making).


29. See, e.g., Lynne N. Henderson, Legality and Empathy, 85 MICH. L. REV. 1574, 1575–79, 1628 (1987) (analyzing empathy as imagining and experiencing the situation of another, challenging traditional legal discourse’s equating logic with reason and understanding, and arguing that feeling and imagination also are important aspects of reason and understanding); Cynthia V. Ward, A Kinder, Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature, 61 U. CHI. L. REV. 929, 931 (1994) (analyzing empathic liberalism as confusing and misguided and arguing that “empathy cannot validly be deployed either to attack liberal liberalism or to construct its replacement”).


education social networking, legal history, moral capitalism, philosophical principle, professionalism, psychology of race and justice, scientific principle, storytelling, substantive principles of constitutional law, the criminal justice system, the Sonia Sotomayor Supreme

32. See, e.g., Stephen Ellmann, Empathy and Approval, 43 Hastings L.J. 991, 993-94 (1992) (arguing that lawyers should employ empathy or "approval" to confirm their clients' feelings); Daniel M. Katz & Derek K. Stafford, Hustle and Flow: A Social Network Analysis of the American Federal Judiciary, 71 Ohio St. L.J. 457, 457-506 (2010) (analyzing data collected on law clerks nationwide to argue that social influences, or "peer effects" on judicial decision making are present in addition to political, strategic, and other factors). See generally Peter Margulies, Re-Framing Empathy in Clinical Legal Education, 5 Clinical L. Rev. 605 (1999); Joshua D. Rosenberg, Teaching Empathy in Law School, 36 U.S.F. L. Rev. 621 (2002).

33. See generally Mark Elliott, Color-Blind Justice: Alphonse Toussée and the Quest for Racial Equality from the Civil War to Plessy v. Ferguson (2006); Kim McLane Wardlaw, Umpires, Empathy, and Activism: Lessons from Judge Cardozo, 85 Notre Dame L. Rev. 1629, 1633 (2010) (analyzing Justice Benjamin N. Cardozo's lectures on judicial decision making to argue that the recognition of one's life experiences and sentiments of justice in the act of judging does not render one an "activist" judge).


37. See, e.g., Martin L. Hoffman, Empathy and Moral Development: Implications for Caring and Justice 5-14 (2000) (exploring how, as a result of cognitive processing, people empathize more with similar individuals); Pat K. Chew, Judges' Gender and Employment Discrimination Cases: Emerging Evidence-Based Empirical Conclusions, 14 J. Gender Race & Just. 359, 361-69 (2011) (discussing the influence of a judge's gender in employment discrimination cases).


40. See, e.g., Crusto, Obama's Moral Capitalism, supra note 34, at 1039; Teresa Bruce, The Empathy Principle, 6 Law & Sexuality 109, 109-124 (1996) (identifying the empathy principle in existing legal theory and how it might apply to actual cases).

Court appointment,\textsuperscript{42} and tort liability.\textsuperscript{43} While benefiting from this valuable scholarship, this Article enhances on it by focusing on the role of judicial temperament in achieving value principles in federal courts.

C. OVERVIEW

This Article explores how unconscious judicial bias can negatively impact people's lives and what judges can do to improve their judicial temperament to achieve value principles. Part I introduces the need for a paradigm shift from formalism to value principles of constitutional law, suggests judicial temperament as the analytical lens to assess the shift, and reiterates the Article's thesis. Part II argues that blind justice results in injustice, requiring a change to address unconscious judicial temperament. Part III suggests empathic dialogue as a means to accomplish these objectives. Part IV posits empathic dialogue as a valuable judicial discipline. Part V responds to arguments against empathic dialogue as a judicial tool. Lastly, Part VI concludes that empathic dialogue is a valuable judicial discipline to achieve value principles.

II. THE NEED FOR CHANGE

The answer is that new and pressing constitutional issues and problems loom on the horizon—and they cannot be easily solved or resolved using the now-familiar frameworks of liberty and equality. These problems cluster around the current economic situation, which has revealed the extraordinary power of capital markets and business corporations in shaping the structure and actions of our government. . . . Progressive constitutional thinkers, so skilled in arguing about social and civil rights, are out of practice in addressing such structural economic questions. . . . A truly progressive constitutional project . . . demands that the Supreme Court and other bodies acknowledge the government's responsibility to protect our democracy from the harmful side effects of all-powerful markets.\textsuperscript{44}


We are currently in the midst of a constitutional law crisis caused by the failure of federal judges to recognize the impact that biases have on their decisions. An analysis of recent Supreme Court cases and the recent judicial decision making debate evidences a need for increased attention to value principles. In a “post-supercapitalism” economy, it is unconscionable for federal judges to ignore the law's impact on people's lives.

A. Blind Justice

When applying the law with impartiality, some judges argue that justice is and should be blind. The corollary of this argument is that truly blind justice is justice free from judicial personal bias or worldview. Pushing the envelope, many judges (and legal scholars) maintain that the law should be colorblind even when attempting to remedy racial discrimination.

To the contrary, legal realists believe that a judge's personal biases influence her interpretation of the law. Of course, judges are people and, naturally, can fall victim to their biases and to their unconscious.

45. “Post-supercapitalism” refers hereinafter to the socio-political-economic order in America represented by the current recession following the credit crisis and the government bailout of Wall Street, the auto industry, and AIG. See Crusto, Obama’s Moral Capitalism, supra note 34, at 1011-13 (exploring empathy’s relationship to moral capitalism in the context of predatory lending). See generally Robert B. Reich, Supercapitalism: The Transformation of Business, Democracy, and Everyday Life 3–5 (2007) (arguing that people’s power has shifted from democratic power to consumerism-driven power); Lou Dobbs, War on the Middle Class 2–3 (2006) (arguing that big businesses and big governments are undermining the middle class).


49. See generally Frank, supra note 3.

50. See, e.g., Pat K. Chew & Robert E. Kelley, Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases, 86 WASH. U. L. REV. 1117, 1117 (2009) (“[E]mpirical analysis suggests that African American judges as a group and White judges as a group perceive racial harassment differently. These findings counter the traditional myth that the race of a judge would not make a difference—a myth premised on a presumption of a formalistic and objective decision making process.”).
Therefore, despite the belief that judges blindly rule exclusively based on the law and facts, a judge's should also become self-aware of how their personal biases impact their decisions. For example, in *A Time to Kill*, the judge's racial bias blinded him from seeing a father's anguish over the law's failure to redress his young daughter's brutal rape and near death. Accordingly, judges should realize that blind justice may result in injustice.

Through the lens of critical discourse and recent theories of unconscious adverse behavior, this Article argues that a judge needs to face her inner-self. If sincere in her pursuit of true justice, a judge must actively seek means to identify, understand, and mitigate her own personal biases, including unconscious ones. Judicial history offers many examples of how courageous judges overcame their personal biases by applying value principles. A notable example is Judge John Minor Wisdom, a southern aristocrat, who wrote unpopular desegregation decisions following *Brown v. Board of Education*, putting himself and his family at great personal risk. He and others put status and biases aside and made historic, brave decisions that positively changed the lives of millions of African Americans and others. Such empathic judging requires conscientious self-reflection and courage.

There is a reason why some judges fail to address their biases. Most judges are unaware of a judicial temperament disorder this Article will refer to as "empathy deficient myopia," the result of unconscious judi-

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51. See, e.g., Regina F. Burch, *The Myth of the Unbiased Director*, 41 Akron L. Rev. 509, 512 (2008) (analyzing a Yale empirical study to explain "'white male effect'—a 'well documented pattern' showing that certain white men fear various risks less than women and minorities"); Dan M. Kahan et al., *Culture and Identity-Protective Cognition: Explaining the White Male Effect in Risk Perception*, 4 J. Empirical Legal Stud. 465, 465 (2007); Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489, 1490 (2005) ("Recent social cognition research has provided stunning evidence of implicit bias against various social categories. In particular, it reveals that most of us have implicit biases against racial minorities notwithstanding sincere self-reports to the contrary.").


53. See Bass, supra note 52, at 16–17, 50–51. This Article's Author clerked for Judge John Minor Wisdom.

54. "Empathy deficit myopia" refers hereafter to a judge's conscious or unconscious decision to ignore or discount the law's impact on the lives of everyday people.
cial classism\textsuperscript{55} and judicial groupthink.\textsuperscript{56}

1. Unconscious Judicial Classism

Unconscious judicial classism continues the work of critical race theory\textsuperscript{57} and critical feminist theory\textsuperscript{58} and is consistent with these theories. Essentially, legal discourses on race and gender have not reached their full potential because they have not accounted for the role of class.\textsuperscript{59}

\begin{itemize}
\item \textsuperscript{55} Unconscious judicial classism refers hereinafter to the unconscious judicial temperament towards class bias based on privileged status.
\item \textsuperscript{56} Judicial groupthink refers hereinafter to the conscious or unconscious judicial phenomenon in which a judge promotes and defends the status quo, resulting in part from the reinforcement of her shared worldview in a group dynamic. See generally David Buchanan & Andrzej Huczynski, \textit{Organizational Behaviour: An Introductory Text} 283 (3d ed. 1997) (stating that according to Irving Janis, groupthink is defined as "a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to appraise realistically the alternative courses of action"); Irving L. Janus, \textit{Victims of Groupthink: A Psychological Study of Foreign-Policy Decisions and Fiascoes} 2-5, 8-9 (1972).
which makes it compelling to explore unconscious judicial classism.

Unconscious judicial classism is different from past critical discourse. It posits that judges have an unconscious bias to maintain the status quo, consistent with arguments that racial bias results from subjective decisions.60 Further, it contends that judges unconsciously favor the powerful over the powerless, thereby supporting institutional classism.61 Therefore, unconscious judicial classism is a valuable analytical tool in assessing how classism influences judicial decision making. In addition to overcoming unconscious biases, judges fall victim to groupthink.

2. Judicial Groupthink and Decision Making

Judicial groupthink has observable symptoms;62 essentially, it argues that groups that are alike think alike.63 Groupthink analysis helps to explain Supreme Court decision making. At first glance, the Court's sociological diversity64 suggests styles in diverse decision making. Yet, beyond its apparent diversity, the Court’s membership is very homogeneous. The current Justices share the following background: Ivy-League law school training,65 wealth, privileged upbringing,66 middle-aged or elderly hetero-

60. See, e.g., Hart, supra note 59, at 744–45 (explaining that in some contexts discrimination may be the result of individuals making subjective decisions).
61. See generally IRVING L. JANUS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES 174–75 (2d ed. 1983) (devising symptoms of groupthink: (1) “An illusion of invulnerability . . . which creates excessive optimism” and encourages risk taking; (2) rationalizing warnings that might challenge the group’s assumptions; (3) “unquestioned belief in the group’s inherent morality, . . . [causing] members to ignore the . . . consequences of their actions; (4) stereotyping those who are opposed to the group as weak, evil, biased, spiteful, disfigured, impotent, or stupid; (5) “direct pressure” to conform placed on any member who questions the group, couched in terms of disloyalty; (6) “self-censorship” of ideas that deviate from the “apparent group consensus;” (7) “illusion[s] of unanimity” among group members, where silence is viewed as agreement; and (8) “self-appointed mindguards—members who protect the group from adverse information”).
62. See Cathy Lynn Grossman, Does the U.S. Supreme Court Need Another Protestant?, USA TODAY, Apr. 9, 2010, http://content.usatoday.com/communities/Religion/post/2010/04/supreme-court-justice-stevens-catholic-jewish/1 (noting one African-American man (Thomas), one Hispanic woman (Sotomayer), one Asian American woman (Ginsburg), two Jewish women (Ginsberg and Kagan), one Jewish man (Breyer), and four white men (Alito, Kennedy, Roberts, and Scalia)).
63. See generally Cheryl I. Harris, Whiteness as Property, 106 HARV. L. REV. 1709, 1713–14 (1993) (arguing that society has historically treated “whiteness” as an object of intrinsic value protected by social and legal institutions). Cf. MITCHELL F. CRUSTO, BLACKNESS
sexuality, physical capacity, and Christian or Jewish faith. Moreover, each enjoys the same current socio-economic status: a high paying job, great benefits, guaranteed job security, a sizable pension, and a title of nobility. One wonders whether judges with such shared and limited experiences are equipped to appreciate what it means to be different from others. Predictably, they are emotionally unconnected from many litigants who appear before them, making it hard to appreciate their decisions from the perspectives of diverse litigants.

This issue is most telling when religion plays a role in decision making, as the majority of the Court is Roman Catholic. Should a Justice’s religion disqualify her from hearing upcoming Establishment Clause and Free Exercise Clause cases? Particularly, should a Catholic Justice recuse herself in cases involving issues like abortion? Evidence shows that a judge’s religion is a proven basis for judicial bias in religious cases. Still, courts hold that a judge’s religion does not dis-
qualify her from hearing those cases. Similarly, a judge should not recuse herself merely because it appears that she is an advocate for a group that is appearing before her. But a judge has an ethical and legal obligation to self-recuse when she believes that a bias would influence a decision.

Therefore, judges should become aware of how empathy deficit myopia, a combination of judicial institutional classism and groupthink, affects the quality of their decision making. Currently, judges fail to do so, as evidenced by certain recent Supreme Court decisions. They show the triumph of formalism over value principles and reveal a need for change.

B. INJUSTICE

Recent Supreme Court decisions show how some judges often apply the law while apparently failing to consider the effects on people’s everyday lives, especially of those less fortunate than themselves. These cases illustrate how judges elevate formalism over value principles. In *Citizens United v. Federal Election Commission*, the Court employed neutral First Amendment principles to allow large, powerful institutions, including corporations and unions, to greatly influence national and local elections, suppressing the voice and interests of average citizens. In *Free Enterprise Fund v. Public Co. Accounting Oversight Board* the court

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75. See, e.g., *Salt Lake Tribune Publ’g. Co. v. AT&T Corp.*, 353 F. Supp. 2d 1160, 1182–83 (D. Utah 2005) (“The Tenth Circuit emphatically held that ‘merely because Judge Stewart belongs to and contributes to the Mormon Church would never be enough to disqualify him.’ This is true regardless of which side in the litigation believes that the religious affiliation of the judge makes him partial to one side or the other.”).


78. See Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After Citizens United*, 31 CARDOZO L. REV. 2365, 2390 (2010) (“In contrast to the *Citizens United* majority, the American public supports limitations on free speech in the interest of combating dangers posed by unchecked corporate election spending.”); see also Robert L. Kerr, *Naturalizing the Artificial Citizen: Repealing Lochner’s Error in Citizens United v. Federal Election Commission*, 15 COMM. L. & Pol’y 311, 316 (2010) (“Doing so quite arguably also represents accepting an understanding of democracy and freedom of expression in which huge, powerful corporate institutions dominate the political marketplace of ideas, their interests theoretically arrayed against each other, but with the role of most citizens a diminished, passive one. The advancement of such an understanding . . . trends away from a sovereignty of the many toward a sovereignty of the few.”).

79. 130 S. Ct. 3138, 3150–52, 3162–64 (2010) (holding that the provision of the Securities Exchange Act, allowing aggrieved parties to challenge final order or rule of Securities and Exchange Commission (SEC) in a court of appeals, did not strip the district court of jurisdiction; the Sarbanes-Oxley Act’s dual for-cause limitations on removal of members of the board contravened the Constitution’s separation of powers; such limitations were sev-
Empathic Dialogue 861

again used a formalistic analysis to allow large, sometimes unscrupulous, financial institutions to exploit consumers. Similarly, in McDonald v. City of Chicago, the Court applied a formalistic analytical method to the Second Amendment, which resulted in greater gun availability in urban centers, resulting in more homicides. Finally, in Safford Unified School District No. 1 v. Redding, the Court yet again exercised a formalistic approach to deny constitutional privacy protection to a 13-year-old girl in a public school setting, against one seasoned Justice’s heated objection.

These cases illustrate how a judge’s reliance on formalism adversely impacts justice. They raise the volume in the debate on judicial temperament and evidence the crisis facing today’s constitutional law and the need for change.

C. The Empathy Standard

Concurrent with these Supreme court decisions, the debate on judicial decision making has centered on the role of empathy. Relative to the erable; and appointment of members of the board by the SEC did not violate the Appointments Clause).

80. Minh Van Ngo, A Corporate Practitioner’s Perspective on Recent Supreme Court Cases, 5 CHARLESTON L. REV. 43, 51–54 (2010) (analyzing Free Enterprise Fund v. Public Co. Accounting Oversight Board and concluding, “One common thread in these decisions is the majority’s emphasis of form over substance and principles of interpretation over policy considerations.”).

81. 130 S. Ct. 3020, 3050 (2010) (holding that the Fourteenth Amendment incorporates the Second Amendment right to possess a handgun in the home for the purpose of self-defense and that the protection of this right may be applied to both the federal government as well as the states).

82. See Adam Benforado, Quick on the Draw: Implicit Bias and the Second Amendment, 89 OR. L. REV. 1, 21 (2010) (“With the Supreme Court and states enlarging the scope of Second Amendment rights and an ever-expanding gun culture in the United States, it is quite possible that the use of firearms by private individuals will significantly increase. In fact, the coming decades may demonstrate an ongoing shift of criminal enforcement from police forces to armed citizens. Already, private citizens shoot and kill more than 2.5 times as many criminals as members of the police do.”); Geoffrey Schotter, Diachronic Constitutionalism: A Remedy for the Court’s Originalist Fixation, 60 CASE W. RES. L. REV. 1241, 1347 (2010) (criticizing the Court’s originalist approach in cases like McDonald: “At best, one can say that some judges try harder to obey the Constitution than others, but those judges who interpret the Constitution synchronically by falsely separating ‘the past’ from ‘the present’ are cutting corners.”).

83. 557 U.S. 364, 374–79 (2009) (holding that a principal’s reasonable suspicion that a student was carrying contraband did not justify a strip search, but that law regarding strip searches of students was not clearly established, and therefore the officials were entitled to qualified immunity).

84. See Justin R. Chapa, Stripped of Meaning: The Supreme Court and the Government As Educator, 2011 B.Y.U. EDUC. & L.J. 127, 131 (2011) (“The end result suggests that the school administrators who strip-searched Savana Redding did so less out of a flawed understanding of legal doctrine than a failure to question an institutional culture—fostered in part by the Court’s explication of the Government as Educator—that increasingly promotes the idea that ‘Real Schools’ combat social problems.”).

85. Redding, 557 U.S. at 380 (Stevens, J., dissenting in part) (“[I]t does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude.”).

86. See, e.g., Peter Slevin, Obama Makes Empathy a Requirement for Court, WASH. POST, May 13, 2009, at A3. See also Jim Newton, Earl Warren, a Justice with Empathy,
concept of blind justice, some argue that empathy is essential to achieve real justice,87 is a means to attain it,88 or is contrary to it.89 As empathy in judicial decision making has devolved from President Barack Obama's empathy standard in judicial selection, a brief review of Obama's vision of empathy is appropriate. While first introduced in moral, personal terms,90 Obama used the word "empathy" to critique the judicial style of Supreme Court nominee John Roberts.91 Obama noted that Roberts qualified as a traditional Supreme Court justice92 but further stated that a judge's empathy was critical in deciding the most difficult cases.93 As President, Obama enrolled empathy as a judicial appointment standard when Justice David Souter resigned,94 and then again when he nominated

L.A. TIMES.COM, May 24, 2009, http://articles.latimes.com/2009/may/24/opinion/oe-newton24 ("Jim Newton is the editor of The Times' editorial page and is the author of 'Justice for All: Earl Warren and the Nation He Made.'"), Damon W. Root, Judicial Empathy and Justice Oliver Wendell Holmes, REASON.COM (June 3, 2009), http://reason.com/blog/2009/06/03/judicial-empathy-and-justice-o (last visited July 25, 2012) ("Over at Liberty & Power, historian Paul Moreno, author of the superb Black Americans and Organized Labor, has a long and fascinating post looking at the problems with several previous empathy-driven Supreme Court nominations. As Moreno notes, President 'Theodore Roosevelt told his friend and ally Sen. Henry Cabot Lodge that it was 'eminently desirable that our Supreme Court should show in unmistakable fashion their entire sympathy with all proper effort to secure the most favorable possible consideration for the men who most need that consideration.'"). Cf. Floyd Brown & Mary Beth Brown, Blind Lady Justice?, THE CABIN.NET (May 16, 2009), http://thecabin.net/stories/051609/ opi_0516090018.shtml (citing writer Thomas Sowell contrasting the empathy Obama seeks in his judicial appointees with the "rule of law" which he argues is critical to this country: "[I]f someone was a member of groups of X, Y, or Z and they were to appear before a judge with empathy for groups A, B, and C, that would go against the idea of the 'rule of law.'".

88. Id. at 133–34.
89. Epstein, supra note 5 ("In looking at a dispute between an injurer and an injured party, or between a creditor and debtor, the judge ignores personal features of the litigant that bear no relationship to the merits of the case.").
91. See Senator Barack Obama, Remarks at the Confirmation Hearing of Judge John Roberts (Sept. 22, 2005), available at http://obamaspeeches.com/031-Confirmation-of-Judge-John-Roberts-Obama-Speech.html (last visited Aug. 18, 2010) ("Adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before [the Court], so that both a Scalia and a Ginsburg will arrive at the same place most of the time").
92. Id.
93. Id. ("What matters on the Supreme Court is those 5 percent of cases that are truly difficult . . . [and] can only be determined on the basis of one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy . . . the critical ingredient is supplied by what is in the judge's heart").
94. Remarks by the President on Justice David Souter, WHITE HOUSE (May 1, 2009), http://whitehouse.gov/the_press_office/Remarks-by-the-President-on-Justice-David-Souter ("It is also about how our laws affect the daily realities of people's lives—whether they can
Judge Sonia Sotomayor as Souter’s replacement. Later, upon Justice John Paul Stevens’s retirement and following in his nomination of Solicitor General Elena Kagan as Stevens’s replacement, Obama elaborated that under the empathy standard a judge’s personal experiences should show a commitment to justice, an appreciation of the law’s impact on people's lives, and protection of the powerless against the interests of the powerful. President Obama’s empathy standard has ignited a broader debate on judicial temperament and its impact on the quality of justice.

Clearly, a change in constitutional direction is needed and requires an examination of judicial temperament. Consequently, judges should seek tools to explore their biases, including a decision making tool illustrated in biblical history. As judges may not voluntarily address their inner demons, the judicial selection process and rules of civil procedure should be reviewed and modified as needed to effect a change in judicial decision making.

III. EMPATHIC DIALOGUE

So the LORD said: the outcry against Sodom and Gomorrah is so great, and their sin so grave, that I must go down and see whether or not their actions are as bad as the cry against them that comes to me. I mean to find out.

As the men turned and walked on toward Sodom, Abraham remained standing before the LORD. Then Abraham drew near and said: “Will you really sweep away the righteous with the wicked? Suppose there were fifty righteous people in the city; would you really sweep away and not spare the place for the sake of the fifty righteous people within it? Far be it from you to do such a thing, to kill the righteous with the wicked, so that the righteous and the wicked are treated alike! Far be it from you! Should not the judge of all the world do what is just?” The LORD replied: If I find fifty righteous people in the city of Sodom, I will spare the whole place for their sake.

make a living and care for their families; whether they feel safe in their homes and welcome in their own nation.”).


96. Remarks by the President on the Retirement of Justice Stevens and on the West Virginia Mining Tragedy, WHITE HOUSE (Apr. 9, 2010), http://www.whitehouse.gov/the-press-office/remarks-president-retirement-justice-stevens-and-west-virginia-mining-tragedy (remarking that a Justice should have “a keen understanding of how the law affects the daily lives of the American people”).


In seeking a solution to biased, insensitivity and blind injustice, I posit that the judiciary employ empathic dialogue facilitates a judge's moral, legal, and ethical duty to seek just results in the application of the law.

A. Justice

In the biblical passage above, Abraham’s dialogue with God shows the goal of empathic dialogue to achieve just results in judicial decision making. There, God plans to destroy all the city’s inhabitants, including the good, in order to punish sin. In a classic empathic dialogue with God, Abraham inquires whether it would be just to treat the innocent and guilty alike. God decides that for fifty innocent people he would not destroy the cities.

This biblical example of empathic dialogue teaches three lessons relative to judicial decision making: First, a judge has a moral obligation to inquire into the nature of justice by challenging status-quo authoritarianism, as Abraham challenged God’s absolute authority and blind sense of justice. Second, a judge needs to reach beyond her own perspectives and experiences in order to see rulings from the eyes of others, as Abraham asked God to see justice from the eyes of the city’s innocents. Third, a judge should aspire to identify and apply value principles of justice, as God agreed that it would be unjust to kill innocent people for the sake of punishing the guilty. These valuable lessons highlight a judge’s moral duty to seek just results in her application of the law.

Applied to contemporary constitutional law, a judge should employ empathic dialogue to assess difficult issues such as the constitutionality of the death penalty. For example, a judge has a moral obligation to hold the death penalty unconstitutional because there are many innocent people on death row. Utilizing empathic dialogue to assess this controversial issue would result in identifying and applying a value principle: it is

law philosophy in which morality is the source of law's binding power; H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593 (1958) (promoting a positivist approach to law as separate from ethics or morals). See generally Joseph William Singer, Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation, 1 Stan. J. C.R. & C.L. 1 (2005); Joseph William Singer, The Edges of the Field (2000) (noting the true sins of Sodom and Gomorrah were “a failure of hospitality to strangers and a lack of concern for the poor”). The author kindly acknowledges Professor Joseph William Singer for planting the seed of this analysis during the Inaugural Symposium for Stanford’s Journal of Civil Rights and Civil Liberties.

100. Id.
101. See id.
102. See id.
103. See id.
104. See id.
105. See, e.g., David C. Baldus et al., Equal Justice and the Death Penalty: A Legal and Empirical Analysis 154 (1990) (showing that defendants were 4.3 times as likely to receive the death penalty when the victim was white rather than black). See generally Stephen King, The Green Mile (1996) (showing the injustice of corporal punishment of an innocent, African-American man with supernatural abilities); Stevens, supra note 16.
unjust for the state to wrongly execute innocent persons in an attempt to rightly execute guilty persons. In this situation, empathic dialogue serves a moral purpose: to apply the law in a way that protects the innocent from overreaching formalism.

### B. Judicial Discipline

As reflected in the biblical story of Sodom and Gomorrah, empathic dialogue guides a judge's decision making to achieve just results. Simply stated, empathic dialogue provides judges with an established discipline to explore unconscious biases to achieve value principles. Using empathic dialogue, a judge (1) consciously makes inquiry beyond her professional, intellectual, and personal worldviews; (2) confronts her unconscious biases; (3) assesses the law's impact on the lives of everyday people; (4) protects people from unfair outcomes and injustices; and (5) redresses injustices that result from majoritarian abuses. Broadly applied, empathic dialogue differs from Obama's empathy standard in that it is not limited to judicial appointments or to difficult cases, but is a judicial decision making tool to achieve true justice.

### C. Judicial Exercise

How would a judge who is seeking to achieve value principles use empathic dialogue? Empathic dialogue is founded on the principles and practice of Socratic dialogue, a well-established, legal approach to discovering the truth. In consulting empathic dialogue a judge can use external dialogue with her judicial clerks, encourage oral argument with litigants' legal counsel, or both. Alternatively, a judge could use internal dialogue, that is, personal reflections of her biases to reach just results. Furthermore, a judge could compare her rulings against already established value principles to achieve just results. For example, how do the judge's rulings compare to the value principle that innocent people should not suffer in order to punish the guilty?

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106. See Barbara J. Hayler, *Moratorium and Reform: Illinois's Efforts to Make the Death Penalty Process "Fair, Just, and Accurate"*, 29 JUST. SYS. J. 423, 424 (2008) (citing People v. Bull, 705 N.E.2d 824, 847–48 (Ill. 1998) (Harrison, J., dissenting) (“Despite the courts' efforts to fashion a death penalty scheme that is just, fair, and reliable, the system is not working. . . . The result, inevitably, will be that innocent persons are going to be sentenced to death and be executed in Illinois. A sentencing scheme which permits such horrific and irrevocable results cannot meet the requirements of . . . the United States Constitution . . . or . . . the Illinois Constitution . . .”).

107. Socratic dialogue modified into the Socratic method, has been traditionally used in law school classroom case analysis, although it is seldom used in its purest form today. See generally Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 113 (1999) (“The Socratic method has long been considered a defining element of American legal education. Among both lawyers and laypersons, Socratic questioning is perceived as a rite of passage that all law students endure in their first year of law school.”). *Cf. Webster's Third International Dictionary* 2163 (2002) (defining “Socratic method” as “the method of inquiry and instruction employed by Socrates esp. as represented in the dialogues of Plato and consisting of a series of questionings the object of which is to elicit a clear and consistent expression of something supposed to be implicitly known by all rational beings”).
Empathic dialogue encourages a judge to apply the rule of law with minimal negative impacts on innocent people. It does not require a judge to actively ignore the law and legislate from the bench. A literary example shows that just results can follow while still applying the exact language of a contract:108 When the claimant Shylock demanded the contractually guaranteed “pound of flesh” in Shakespeare’s The Merchant of Venice, the judge used the contract’s specific words to produce a just result.109 Hence, the court concluded that justice be served but only to the extent that Shylock not spill a drop of Antonio’s blood. This analytical process does not mean that a judge should decide cases strictly to favor the powerless, minorities, or individuals. In fact, it may result in harsh enforcement of the law; in the biblical story, the guilty sinners were severely punished.110

The following arguments show the efficacy of empathic dialogue as a judicial decision making means to achieve value principles. Also, considering the seriousness with which federal judges take their judicial obligations, empathic dialogue should be a voluntary tool which renders mandatory requirements unnecessary. Yet there may be progressive ideas, as that the Supreme Court’s deliberations must be televised,111 that might promote the institutionalization of empathic dialogue principles.

IV. ARGUMENTS FOR EMPATHIC DIALOGUE

Public policy supports empathic dialogue as a valuable judicial decision making discipline, as it reflects existing fundamental constitutional law principles, addresses unconscious judicial bias, and leads to value principles.

A. CONSTITUTIONAL LAW

Empathy is a fundamental constitutional principle, and empathic dialogue is an established discipline in constitutional judicial review.112 Emp-

108. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1 (Portia, impersonating an eminent judge, states that: “The quality of mercy is not strain’d, It droppeth as the gentle rain from heaven Upon the place beneath. It is twice blest: It blesseth him that gives and him that takes.”).

109. Id. act 4, sc. 1 (“Tarry a little, there is something else. This bond doth give thee here no jot of blood; The words expressly are ‘a pound of flesh.’”).


111. See Brandon Smith, The Least Televised Branch: A Separation of Powers Analysis of Legislation to Televise the Supreme Court, 97 GEO. L.J. 1409, 1428 (2009) (“Both history and the Justices themselves make clear that oral argument can and does affect judicial decisionmaking.”).

112. See, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 24 (1962) (analyzing the Court’s ability to articulate “certain enduring values”); CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 52 (1960) (analyzing the Court’s role in legitimating governmental conduct); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (analyzing the Court’s role in reinforcing fair democratic representation); CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 3 (2001) (analyzing the Court’s role as a “representative institution well-shaped to speak on behalf of the people about questions of moral and political principle”); RICHARD H. FALLON, JR.,
Empathy, like federalism, is not expressly stated in the Constitution. Yet, like federalism, its significance is grounded in the Constitution. Though what follows is not an exhaustive analysis, it demonstrates that empathy is a part of the foundation of constitutional law.

1. Trial by Jury

Perhaps the best illustration of the Founding Fathers’ commitment to empathy as a constitutional principle is the right to a jury trial,113 found in Article III, Section 2.114 Specifically, a criminal defendant’s right to trial by a jury in the place where the alleged crime was perpetrated proves the Founders’ commitment to empathy, as evidenced by its prominent placement in the third article of the Constitution. This fundamental right ensures that fellow citizens from the same locality judge both accused persons and the victims of crimes, rather than a superior, such as an appointed judge from another locality. The right to a jury of persons most empathetic towards the accused and the victims proves a constitutional commitment to empathy.

The Founders repeated their commitment to empathy in the Sixth Amendment to the Constitution, which guarantees the right to a speedy and public trial by an impartial jury.115 Here again, this right is a prominent requirement because it appears in the Bill of Rights. As an empathic principle, the Bill of Rights ensures certain protections of individual rights including a speedy trial, a public trial, a trial by an impartial jury, a trial in the locality where the alleged crime occurred, the right of the accused to confront one’s accuser and witnesses, the right to present witnesses in the accused person’s favor, and most importantly, the right to have the assistance of legal counsel.116 These personal protections reflect the value principle that an accused is presumed innocent until proven guilty, ensuring empathic treatment for the accused and recognizing her rights to liberty.

While the Sixth Amendment guarantees a citizen’s right to a trial by jury in criminal matters, it is the Seventh Amendment that ensures the
right to a trial by jury in civil matters, yet again reinforcing the empathy principle. Furthermore, the Fourteenth Amendment ensures and expressly extends the protections of a speedy and public trial and of an impartial trial against the states, demonstrating that its drafters re-adopted the Founders' commitment to empathy.

2. Other Examples of Empathic Constitutional Principles

In addition to rights guaranteed in a trial, the Constitution has several other provisions that exemplify the empathy principle in certain criminal matters. Showing empathy for American revolutionaries falsely accused by the British as traitors, the Founders protected the rights of alleged traitors from wrongful prosecution. The Founders also showed empathy for the accused by guaranteeing citizens the protections afforded by a grand jury indictment and by establishing Fifth Amendment protections against double jeopardy; self-incrimination; deprivation of life, liberty, and property without due process of law; and the right to "just compensation" for governmental takings. Furthermore, the Founders expressly granted the President the authority "to grant Reprieves and Pardons" to forgive criminal acts. Beyond the drafting of the Constitution, empathy continued to be a guiding constitutional principle in establishing exceptions to the stark enforcement of the criminal law, such as the "self-defense" plea, the "insanity defense," the "innocent

117. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."); see also Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 504 (1959). Cf. Batson v. Kentucky, 476 U.S. 79, 79 (1986) (upholding the principle announced in Strauder v. West Virginia, 100 U.S. 303, 305 (1879) ("[A] State denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded . . . . ") (Nevertheless, a defendant may not challenge the jury selection if the jury includes representatives of her race.").

118. See U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); see also Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968).

119. U.S. CONST. art. III, § 3 ("No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.").

120. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . . ").

121. U.S. CONST. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law").

122. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation")

123. U.S. CONST. art. II, § 2 ("The President . . . shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").


125. See Durham v. United States, 214 F.2d 862, 874–75 (D.C. Cir. 1954) (stating that under the Durham rule a defendant is excused "if his unlawful act was the product of mental disease or mental defect"); Mark Kelman, Interpretive Construction in the Substan-
spouse" defense, the "mentally retarded" defense rules, as well as the mitigating factors in federal sentencing guidelines. These examples prove both that the Founders laid empathy as a constitutional cornerstone and that subsequent federal judges continued to build on it. In addition to being a constitutional cornerstone, empathy can help address new anti-bias constitutional standards.

B. JUDICIAL BIAS

The second argument for empathic dialogue is that federal judges can adopt it to address bias. In Caperton v. A.T. Massey Coal Co., the Supreme Court reassessed the self-recusal standards, wherein a judge's campaign contributor was a party to a case before him. The Court recognized that a judge's inquiry into actual bias is "often a private one," which "underscores the need for objective rules." The Court concluded that the Fourteenth Amendment's Due Process Clause provides objective standards for self-recusal that do not require proof of actual bias.

126. *See, e.g.*, Reser v. Comm'r, 112 F.3d 1258, 1262 (5th Cir. 1997) (applying the innocent spouse defense, and explaining: "Congress . . . has statutorily mitigated the harshness of [the Tax Code] by enacting the innocent spouse defense. Accordingly, a taxpayer who qualifies as an innocent spouse is relieved of liability for the tax, including interest, penalties, and other amounts, attributable to a deficiency on the joint return."); United States v. Lee, 232 F.3d 556, 562 (7th Cir. 2000) (holding that the government could not execute a forfeiture judgment against the home owned by a convicted criminal husband and his innocent wife, when owned as tenants by the entirety).


129. 556 U.S. 868 (2009); *see also* MODEL CODE OF JUDICIAL CONDUCT Canon 2, R. 2.11 (2007) ("A judge shall perform the duties of judicial office impartially, competently, and diligently."); LA. CODE OF JUDICIAL CONDUCT Canon 2 (2012) ("As used in this Code, 'impartiality' or 'impartial' denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.").

130. Caperton, 556 U.S. at 877 ("As new problems have emerged that were not discussed at common law, however, the Court has identified additional instances which, as an objective matter, require recusal.").

131. *Id.* at 884 ("We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.").

132. *Id.* at 883–84 ("In defining these standards the Court has asked whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'").

133. *Id.* at 889.

134. *Id.* at 881 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)) ("The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his
The Caperton self-recusal, due-process standard may have broader application following the Supreme Court’s decision in *Citizens United.*135 There, the Court held that the First Amendment protects large institutions’ political speech, invalidating a federal statute barring corporate expenditures for electioneering communications.136 This decision increases the types of judicial campaign contributions addressed directly by the Court in the Caperton case.137 Combining Caperton’s heightened bias standard with *Citizens United’s* First Amendment protections, the ABA Model Code of Judicial Conduct needs revision, as it currently allows a judge’s campaign committee to solicit campaign contributions that are “reasonable” in amount.138

Some judicial ethicists criticize the U.S. Supreme Court for not adopting the judicial code of conduct that other federal judges must follow, some proposing legislation requiring the Court to do so.139 They are motivated by (1) the fact that the Court lacks a judicial code; (2) the media reports of judicial misbehavior; and (3) the Court’s ruling in the Caperton case.140 With the public’s trust in the impartiality of judges at an all-time

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137. *Caperton*, 556 U.S. at 883–85. In a case before the West Virginia Supreme Court, the defendant’s CEO, Don Blankenship, had donated $2.5 million to a political organization that supported then Justice Brent Benjamin’s election to the bench in addition to another $500,000 in indirect expenditures for his campaign. *Id.* The Court stated that a judge should recuse herself when:

*there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.*

138. MODEL CODE OF JUDICIAL CONDUCT Canon 4, R. 4.4(B)(1). See generally Lisa G. Lerman & Philip G. Schrag, *Ethical Problems in the Practice of Law* 585 (2d ed. 2008) (noting that there are thirty-eight states where judges are elected and where the ABA Model Code of Judicial Conduct is followed).
139. See Mauro, supra note 4.
140. See generally *Caperton*, 556 U.S. at 872–90.
Several groups have proposed model reforms and a few states have begun reexamining their recusal rules.

These cases and scholarly criticisms of a judge’s duty to address bias show the importance of adopting empathic dialogue to improve judicial temperament. As a point of comparison, the use of empathy in legislation has arguably produced just results, as discussed below.

C. VALUE PRINCIPLES

Lastly, empathic dialogue leads to just results, as seen in the legislative response to the Supreme Court case of Ledbetter v. Goodyear Tire & Rubber Co. In Ledbetter, the Supreme Court denied a woman’s equal pay claim for pay discrimination, due to the majority’s interpretation of the 180-day limit for filing a claim, placing a formalist, technical statute of limitations over justice. In response to this controversial decision, Congress enacted the Lilly Ledbetter Fair Pay Act of 2009. In a ceremonial signing, President Obama noted that empathy played a role in the development of this legislation, making each unfair paycheck an act of

\[\text{\textsuperscript{141}}\text{See Brandenburg, supra note 137 at 213–14 (“[A] 2009 Justice at Stake poll showed that more than 80% of all voters support the idea of an impartial judge deciding recusal requests and agree that judges should not hear cases involving their own major campaign backers. Several groups have proposed model reforms. . . . The American Bar Association is exploring new model recusal rules, and a few states have been reexamining their recusal rules.”}).\]

\[\text{\textsuperscript{144}}\text{In Ledbetter, the Supreme Court denied a woman’s equal pay claim for pay discrimination, due to the majority’s interpretation of the 180-day limit for filing a claim, placing a formalist, technical statute of limitations over justice. In response to this controversial decision, Congress enacted the Lilly Ledbetter Fair Pay Act of 2009. In a ceremonial signing, President Obama noted that empathy played a role in the development of this legislation, making each unfair paycheck an act of}\]

\[\text{\textsuperscript{147}}\text{Macon Phillips, A Wonderful Day, WHITE HOUSE BLOG (Jan. 29, 2009, 12:00 PM), http://www.whitehouse.gov/blog_post/AWonderfulDay (“[J]ustice isn’t about some abstract legal theory, or footnote in a casebook. It’s about how our laws affect the daily lives and the daily realities of people: their ability to make a living and care for their families and achieve their goals.”).}\]
discrimination and thus reopening the 180-day window for filing a claim and extending the statute of limitations.\textsuperscript{148} Though controversial, Obama's overall motivation for his first term's legislative agenda is his sense of empathy.\textsuperscript{149}

In summary, empathic dialogue supports good public policy. It reflects fundamental constitutional principles, addresses new Due Process standards for bias in judicial decision making, and seeks just results similar to the goal of recent federal legislation.

\section{V. OBJECTIONS TO EMPATHIC DIALOGUE}

In response to arguments against it as a valuable judicial tool, empathic dialogue constitutes valuable public policy.

\subsection{A. Just Results}

Some critics argue that empathic dialogue dictates that the poor and the powerless must always win over the wealthy and the powerful, leading to socialism.\textsuperscript{150} To the contrary, empathic dialogue seeks just results in decisions, regardless of class or other distinctions. For example, a comparison of two cases involving the right to intrastate travel shows the universal benefits of empathic dialogue. In the first case, a federal judge held that Hurricane Katrina evacuees lacked a right to travel from New Orleans to an adjacent city because the Supreme Court has not expressly held that there is a constitutional right to intrastate travel.\textsuperscript{151} In contrast, the Third Circuit, in \textit{Lutz v. City of York},\textsuperscript{152} applied the substantive due

\begin{thebibliography}{100}
\bibitem{148} Id.
\bibitem{151} Dickerson v. City of Gretna, No. 05-6667, 2007 WL 1098787, at *3 (E.D. La. Mar. 30, 2007) (“While there is no doubt that a fundamental right of interstate travel exists, the Supreme Court has not ruled on whether a right of intrastate travel exists. This Court declines to find that there is a fundamental right to intrastate travel.”) (emphasis added); see also Mitchell F. Crusto, \textit{Enslaved Constitution: Obstructing Freedom to Travel}, 70 U. PITTS. L. REV. 233, 233–34 (2008) [hereinafter Crusto, \textit{Enslaved Constitution}] (arguing the inherent constitutional right to intrastate travel as an expression of our Nation’s liberty paradigm over its enslavement paradigm, and analyzing the decision’s enslavement foundation).
\bibitem{152} 899 F.2d 255 (3d Cir. 1990).
\end{thebibliography}
process test\textsuperscript{153} to hold that the right to move freely is "implicit in the concept of ordered liberty" and "deeply rooted in the Nation's history."\textsuperscript{154} While the \textit{Dickerson} court employed a formalistic approach to reach an unjust result, the \textit{Lutz} court reached a just decision through empathic dialogue. This comparison proves that empathic dialogue seeks universally beneficial decisions, such as ensuring the right to intrastate travel, and does not seek wealth redistribution. Additionally, the \textit{Lutz} court's empathic approach to this question is consistent with a moral reading of the Constitution.\textsuperscript{155}

Empathic dialogue also encourages a judge to increase the number of winners and decrease the losers in their rulings. For example, the Supreme Court, in implementing its \textit{Brown v. Board of Education}\textsuperscript{156} decision, showed empathy to segregationists when it ordered the desegregation of public schools "with all deliberate speed."\textsuperscript{157} Similarly, in \textit{Johnson v. M'Intosh},\textsuperscript{158} while the Court recognized the U.S. Government's title to all land within its boundaries, it also empathized with the Native Americans by awarding them the right to occupy the land, rather than holding them to be criminal trespassers.\textsuperscript{159}

Furthermore, empathic dialogue protects the wealthy from misconduct, just as it applies to protect the poor. For example, a judge using empathic dialogue should exact a severe penalty against investment advisor Bernie Madoff for exploiting his wealthy investment clients in a weak federal financial oversight environment.\textsuperscript{160} Empathic dialogue, therefore, is not class legislation, but promotes utilization of shared values in order to level the playing field in a majoritarian democracy.

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\textsuperscript{153.} \textit{Id.} at 267–68 (quoting \textit{Michael H. v. Gerald D.}, 491 U.S. 110, 122 (1989) (plurality opinion) ("[T]he Due Process Clause substantively protects unenumerated rights 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' . . . [T]he relevant traditions must be identified and evaluated at the most specific level of generality possible.")).

\textsuperscript{154.} \textit{Id.}

\textsuperscript{155.} \textsc{Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution} 2 (1996) (noting that we interpret constitutional "clauses on the understanding that they invoke moral principles about political decency and justice").

\textsuperscript{156.} (\textit{Brown I}), 347 U.S. 483 (1954).

\textsuperscript{157.} \textit{Brown v. Board of Education} (\textit{Brown II}), 349 U.S. 294, 301 (1955) (providing the enforcement follow-up to \textit{Brown I}).

\textsuperscript{158.} 21 U.S. (8 Wheat.) 543 (1823).

\textsuperscript{159.} \textit{Id.} at 562; see also \textsc{John Marshall & John E. Oster, The Political and Economic Doctrines of John Marshall}, 124–25 (1914) (recounting that in a letter to Justice Joseph Story, Justice Marshall went on to state his view that "every oppression now exercised on a helpless people depending on our magnanimity and justice for the preservation of their existence impresses a deep stain on the American character").

\textsuperscript{160.} See generally Robert Lenzner, \textit{Bernie Madoff's $50 Billion Ponzi Scheme}, \textsc{Forbes.com} (Dec. 12, 2008, 6:45 pm), http://www.forbes.com/2008/12/12/madoff-ponzi-hedge-pf-ii-in_rl_1212croesus_inl.html. Bernie Madoff was a financial advisor who allegedly used an elaborate scheme to defraud his investors. \textit{Id.}
B. INTEREST-CONVERGENCE PRINCIPLE

Some critics argue that federal judges will not place just results over protection of the powerful, and therefore, that empathic dialogue is contrary to Derrick Bell’s interest-convergence principle.161 To the contrary, history shows that, through empathic dialogue, many judges have reached beyond their personal biases to achieve just results.162 Consequently, a judge should embrace empathic dialogue for the sake of her ensuring and preserving a positive reputation in history.163 The following cases illustrate how history applauds judges who have embraced empathic dialogue to achieve just results. For example, in the landmark case of Loving v. Virginia,164 the Supreme Court struck down Virginia’s anti-miscegenation law, protecting a mixed race couple’s right to marry over states’ interest in maintaining racial segregation.165 Similarly, in Clay v. United States,166 the Supreme Court decided that the appellant Ali had rightfully claimed conscientious objector status against military service in the Vietnam War,167 protecting the right to religious freedom over the Government’s interest in conducting war. Finally, in Meredith v. Fair,168 the U.S. Fifth Circuit ordered the University of Mississippi to admit its first African-American undergraduate, despite physical threats against the judges and their families from radical segregationists.169 In summary, through em-

161. Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518, 523 (1980) (“Translated from judicial activity in racial cases both before and after Brown, this principle of ‘interest convergence’ provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”).
162. See generally BASS, supra note 52 (describing how four Fifth Circuit, Republican judges integrated the South and the resulting exposure to challenges to their personal safety); Paul Butler, Will Judges Lie (and When They Should), 91 MINN. L. REV. 1785 (2007) (identifying cases in which judges intentionally framed the law to achieve a just outcome); Robert M. Cover, Book Review, 68 COLUM. L. REV. 1003 (1968) (reviewing Richard Hildreth, Atrocious Judges: Lives of Judges, in Famous As Tools of Tyrants and Instruments of Oppression (1856) and describing formalism that judges have used when applying fundamentally unjust laws).
163. The author is thankful to Professor Richard Delgado for highlighting a judge’s place in history as a motivator to change how the judge views cases, seeking to avoid being labeled in history as moral monsters. See generally Richard Delgado & Jean Stefancic, Norms and Narratives: Can Judges Avoid Serious Moral Error?, 69 TEX. L. REV. 1929, 1934 (1991) (presenting numerous examples of “notorious” cases and lessons on how to avoid “serious moral error”).
164. 388 U.S. 1 (1967).
165. Id. at 12. Chief Justice Earl Warren, for a unanimous court, stated “Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.” Id.
166. 403 U.S. 698, 699–701 (1971) (Ali had filed an application with the United States Selective Service System following a denial by the Louisville Local Board to recognize him as a conscientious objector.).
167. Id. at 704–05.
169. See BASS, supra note 52.
pathic dialogue, judges can reach just results, thereby preserving their place in history, consistent with the interest-convergence principle.

C. Judicial Integrity

Some critics argue that empathic dialogue fails because judges will not voluntarily adopt empathy for those who are different or less fortunate than the judges themselves. Assuming the current composition of the Supreme Court, how does empathic dialogue compare to reform judicial recusal rules? For example, it has been suggested that the federal judiciary add more sociological diversity, but this alone does not ensure just decisions since judges who are alike sociologically do not necessarily think the same. Compared to current proposals, empathic dialogue works best because it promotes the integrity of the federal judiciary. Relative to mandatory recusal proposals, empathic dialogue does not enforce morality, but rather encourages judges to become self-aware of how their biases impact their decisions.

In summary, empathic dialogue is the best solution to the needed change in judicial temperament. It promotes judicial self-inspection and is more likely to promote value principles than sociological diversity. Overall, empathic dialogue promotes federal judicial integrity and succeeds because it is voluntary.

VI. CONCLUSION: A SOLUTION TO BLIND INJUSTICE

You see in all this legal maneuvering, something’s gotten lost. That something is the truth. It is incumbent on us as lawyers not to just talk about the truth, but to live it. My teacher taught me that. What is it in us that seeks the truth? Is it our minds or is it our heart? I set out to prove a black man can receive a fair trial in the South. That we are all equal in the eyes of the law. That is not the truth. Cause the eyes of the law are human eyes . . . yours and mine. And until we can see each other as equals, justice is never going to be evenhanded. It will remain nothing more than a reflection of our own prejudices. So until that day, we have a duty under God to seek the truth. Not with our eyes, not with our minds.

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170. See generally Ciara Torres-Spelliscy et al., Improving Judicial Diversity, BRENNAN CENTER FOR JUSTICE (2008), http://brennan.3cdn.net/96d1666f331bb13ac_kfm6bplue.pdf (evaluating the impact of a lack of diversity on judicial decision making).


172. See Mauro, supra note 4.
with fear and hate, with community of prejudice, but with our hearts.\textsuperscript{173}

This Article concludes that empathic dialogue is a valuable judicial dialectic towards value principles of constitutional law. As judges have moral, legal, and ethical duties to find justice, they may find empathic dialogue a valuable tool to explore their judicial subconscious, weed out bias, and produce just results, especially relative to class. As illustrated in the \textit{A Time to Kill} excerpt, the quest for justice does not end with the application of formalistic rules of law, but must grapple with a judge's prejudices in order to achieve truth and justice.

\textsuperscript{173} \textit{A Time to Kill}, \textit{supra} note 1 (Jake Tyler Brigance's closing argument).