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Empathy and Experience in the Sotomayor Hearings

KATHRYN ABRAMS*

I. INTRODUCTION

For four days last summer, I felt I had taken a dizzying plunge down a rabbit hole and landed in a very strange place. The visual markers identified it as the U.S. Senate, exercising its “advise and consent” powers on the nomination of a new justice of the Supreme Court. But much of what I heard there seemed utterly baffling. A federal judge, who had served with distinction and minimal controversy for seventeen years, who had been confirmed in two previous Senate processes, and who had received the highest rating from the American Bar Association, was being lectured, patronized, and treated as a potential dissident, likely to break free of the tethers of stare decisis and fair play as soon as she was handed her Supreme Court robes. There were two primary sources of this controlled mayhem. The first was a statement by President Barack Obama that among Judge Sonia Sotomayor’s virtues was a set of life experiences that would permit her to empathize with parties who had experienced disadvantage.¹ The second was a series of speeches by Judge Sotomayor herself, musing about the effects of her life experience on her performance as a judge and, most notably, expressing her hope that “a wise Latina with the richness of her experiences would more often than not reach a better conclusion than a white male judge who hasn’t lived that life.”²

Although I was baffled by these proceedings, I also have to admit that I was fascinated. I have spent many years writing about feminist theory and the role of experience, on the one hand, and the relation between law and emotions, on the other. I realized that the Senate Judiciary Committee had stumbled onto the place where I lived (or perhaps I should say, worked), and a view of the judge’s role that I find quite congenial. Many of these senators, however, really did not like what they saw.

With the President and the nominee on one side, and a number of prominent Republican senators arrayed on the other, many people looked forward to a probing discussion of the role of empathy and experience in adjudication.³ This, I think, was unrealistic. In this polarized setting, the goal of the administration, and of the Judge herself, was to win confirmation, not to have a national teach-in on emotion and identity in the work of a judge. Opponents, similarly, were not

* Herma Hill Kay Distinguished Professor of Law, UC-Berkeley School of Law. I would like to thank participants in two very lively gatherings for comments that helped me to develop these ideas. The first was the Dean’s Lecture at Ohio Northern University, Pettit College of Law, the occasion for which I wrote this article. The second was a symposium sponsored by the Berkeley La Raza Law Journal to commemorate Judge Sotomayor’s “wise Latina” speech, which was originally given at a symposium sponsored by that Journal, and to celebrate Justice Sotomayor’s appointment to the Supreme Court.

¹ President Barack Obama, Remarks by the President in Nominating Judge Sonia Sotomayor to the United States Supreme Court (May 26, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-Nominating-Judge-Sonia-Sotomayor-to-the-United-States-Supreme-Court/.

² Sonia Sotomayor, *A Latina Judge’s Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002) (the most famous occasion of this statement was during this speech given by then-Judge Sotomayor at the Judge Mario G. Olmos Memorial Lecture at UC-Berkeley School of Law.).

³ See Neil A. Lewis, Senators Settling Into New Roles to Weigh Sotomayor Nomination, N.Y. TIMES, July 8, 2009 (discussing Republican senator concern regarding “Judge Sotomayor’s willingness to bring a personal agenda to the court, especially when it comes to issues of race.”).

inspired by a pure interest in jurisprudence. They were formulating positions that emphasized Judge Sotomayor's distance from the mainstream, so they could make a public case for a "no" vote.⁴ Nuanced discussion of empathy and the rule of law was, regrettably but quite clearly, not going to be the order of the day. But now that the fireworks are over and Sotomayor is safely ensconced on the Court, we can take a step back and begin to think through the positions that animated the participants – we can have, in effect, at least a part of the discussion that did not take place in July.

In facilitating this discussion, my goal is first to unpack the views that animated many of Sotomayor's critics. How did they understand adjudication, and what exactly about Sotomayor was making them so exercised? I then want to lay out some less familiar understandings of the role of experience and emotion in judging that might have been propounded in response – the kinds of arguments that Judge Sotomayor might have made if she had been in a position to defend her speeches and articles at full theoretical length. I will acknowledge at the outset that I am not completely neutral between these positions: I think that there is important value in empathy and experience in adjudication that I hope to make clear. My goal in playing out this conversation is to highlight that value, to see the transformation in conventional understandings that it requires, and ultimately to encourage a shift in both legal and lay understandings of the process of judging, so that views like President Obama's or Justice Sotomayor's will not seem quite so surprising in the future.

In setting out this position, I will draw on a number of resources. One resource is a body of scholarship from two decades ago in which no less an authority than Justice William Brennan, seconded by an innovative group of feminist legal scholars, argued that we should recognize the role of emotion, experience, and situatedness in adjudication.⁵ Another resource is a series of very interesting arguments and lines of questioning introduced by Democratic members of the Judiciary Committee during the Hearings.⁶ Many commentators had expected to see the primary exploration of these issues in the exchanges between Judge Sotomayor and her Republican opponents. But while listeners were focusing on these tense exchanges, there was a very interesting secondary drama going on. If you look carefully at the Hearings (or as I did, the transcript), you find that there is some fascinating commentary on the role of experience and emotion in adjudication being offered by Democratic members of the Committee and, in some cases, witnesses for Sotomayor. These members understood that they were going to have to support some of the positions Sotomayor had taken in her lectures and that, if they were going to neutralize Republican worries, they would have to rearticulate these positions in terms that made them comprehensible and not scary. Some of these efforts represent very valuable ways of talking about experience and empathy in adjudication. A third resource is a body of work from psychology and neuroscience that analyzes the process of normative decisionmaking in judges as well as laypersons.⁷ This body of work suggests that this process may operate somewhat differently from the ways it has been described in the classical legal accounts. This new vision of decisionmaking may leave more room for the kinds of influences Justice Sotomayor and President Obama identify, yet without undercutting the possibility of judicial fairness or

⁴ See Peter Baker & Neil A. Lewis, *Republicans Press Judge About Bias*, N.Y. TIMES, July 14, 2009, at A1 (discussing Republican senators questioning then-Judge Sotomayor regarding racial bias, judicial activism, and temperament).

⁵ See *infra* section IV.

⁶ See *infra* section V.

⁷ See discussion *infra* Irrationality.

adherence to the rule of law. My analysis of these resources points to some ways that the ongoing dispute about the role of empathy and emotion in adjudication might be rendered less polar. It also suggests some questions about the ways that judges deliberate that might set an agenda for future research.

II. EMPATHY, EXPERIENCE, AND ADJUDICATION

While Judge Sotomayor's selection was, on the one hand, a sensible pragmatic nomination of a largely centrist, highly experienced federal judge, it was also marked by an element of controversy. President Obama, as a Senator and on the campaign trail, had been unusually outspoken about the value he placed on empathy as an attribute of a federal judge or Supreme Court justice. At their most expansive, these statements included a taxonomy of the kinds of positions with which a judge should be able to empathize: "We need somebody who's got the heart to recognize – the empathy to recognize what it's like to be a young teenaged mom . . . [and] to understand what it's like to be poor or African American or gay or disabled or old."⁸ This view of judicial empathy is linked to a larger understanding of the role of the Court, I might add, that President Obama shares with a number of progressive legal scholars:

[P]art of the role of the Court is . . . to protect people who may be vulnerable in the political process, the outsider, the minority, those who are vulnerable, those who don't have a lot of clout. . . . If we can find people who have life experience and they understand what it means to be on the outside, what it means to have the system not work for them, that's the kind of person I want on the Supreme Court.⁹

At other times, however, Obama's ideal of judicial empathy seems more comprehensive in its reach and less specific in its targets. He seems to be referring to a quality of extending oneself, imaginatively and emotionally, toward a range of others – what he calls a "quality of empathy, of understanding and identifying with people's hopes and struggles[.]"¹⁰

The discussion became more complicated when it became clear that Judge Sotomayor also valued empathy, a kind of understanding she saw as arising from concrete experience of a certain type or as a member of a certain group. She had given a number of lectures – published as law review articles – in which she explained that recourse to such experience might be a predictable attribute of her judging, and that it could be a good thing. Sotomayor explained:

[W]e should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. Many are so capable. . . . [N]ine white men on the Supreme Court in the past have done so on many occasions and on many issues including Brown.

⁸ William Safire, *Zombie Banks*, N.Y. TIMES, May 17, 2009, at MM26, available at <http://www.nytimes.com/2009/05/17/magazine/17wwln-safire-t.html> (quoting Sen. Barack Obama).

⁹ *Transcript: The Democratic Debate*, N.Y. TIMES, Nov. 15, 2007, available at <http://www.nytimes.com/2007/11/15/us/politics/15debate-transcript.html>.

¹⁰ President Barack Obama, Press Briefing by Press Secretary Robert Gibbs (May 1, 2009), available at http://www.whitehouse.gov/the_press_office/Press-Briefing-By-Press-Secretary-Robert-Gibbs-5-1-09.

However, to understand takes time and effort, something that not all people are willing to give. For others, their experiences limit their ability to understand the experiences of others. Other[s] simply do not care. Hence, one must accept the proposition that a difference there will be by the presence of women and people of color on the bench. Personal experiences affect the facts that judges choose to see. . . . I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.¹¹

These views, as I noted at the outset, produced strong – and strongly expressed – concern in many Republican senators. Consider this quote from the opening remarks of Senator Jeff Sessions, the ranking Republican member of the Judiciary Committee:

I will not vote for, and no senator should vote for, an individual nominated by any president who is not fully committed to fairness and impartiality toward every person who appears before them.

And I will not vote for, and no senator should vote for, an individual nominated by any President who believes it is acceptable for a judge to allow their personal background, gender, prejudices, or sympathies to sway their decision in favor of or against parties before the court.

In my view, such a philosophy is disqualified. Such an approach to judging means that the umpire calling the game is not neutral, but instead feels empowered to favor one team over the other. Call it empathy, call it prejudice, or call it sympathy, but whatever it is, it's not law. In truth it's more akin to politics, and politics has no place in the courtroom.

Some will respond Judge Sotomayor would never say it's acceptable for a judge to display prejudice in that case, but I regret to say, Judge, that some of your statements that I'll outline seem to say that clearly.¹²

One factor that has complicated the discussion is that the definition is “empathy” is somewhat murky. As law and emotions scholar Susan Bandes has pointed out, there are several clarifying questions one might ask about “empathy” that were never fully answered either in the run-up to the Sotomayor Hearings or in the course of the Hearings themselves.¹³ One might ask first whether empathy is a powerful emotion or simply a capacity for putting oneself in another's shoes.¹⁴ One might also query the source(s) of empathy, whether it arises exclusively or primarily from a similarity in personal experience or whether it might also arise from learning about the experience of another or from an act of imagination.¹⁵ Finally, it is not clear whether

¹¹ Sotomayor, *supra* note 2, at 92.

¹² *Hearing on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court*, 111th Cong. (July 13, 2009) [hereinafter “July 13, 2009 Judiciary Committee”] (statement of Senator Jeff Sessions), available at LEXIS, CQ Transcriptions database (before the Senate Committee on the Judiciary) (official transcript not yet available).

¹³ Susan Bandes, *Empathic Judging and the Rule of Law*, 2009 CARDOZO L. REV. DE NOVO 133, 134-36 (2009). In the discussion that follows, I do not answer all of these questions in precisely the same ways that Professor Bandes does, but my understanding was informed and illuminated by her thoughtful discussion.

¹⁴ Susan Bandes, *Empathic Judging and the Rule of Law*, 2009 CARDOZO L. REV. DE NOVO 133, 137.

¹⁵ *Id.* at 134-36.

empathy simply involves a kind of understanding, or whether it is likely to be connected with an impetus to act.¹⁶ The answers to these questions sometimes vary among the statements of President Obama or Judge Sotomayor. But let us, for the purposes of this discussion, adopt an understanding of empathy that is neither overly technical nor politically contentious and that encompasses a core element of connecting over a shared sense of affective experience. In my own work, I tend to define empathy as a feeling of affinity, whether based on experience or imagination, that permits one a full, sometimes visceral understanding of what another is going through. This definition actually corresponds roughly to the definition one finds in a prominent dictionary, which describes empathy as an “[u]nderstanding so intimate that the feelings, thoughts, and motives of one are readily comprehended by another.”¹⁷ That sense of strong, affective identification with the experience of another will be our starting point for this examination.

Given this understanding, Obama’s and Sotomayor’s positions valuing empathy as a judicial attribute implicate at least three interrelated norms central to a mainstream understanding of adjudication – an understanding articulated by a number of Republican senators. The first two norms concern the perspective or stance of the decisionmaker; the last implicates the cognitive processes through which decisions are made.

1. The notion that experience gives judges a familiarity with, and therefore an empathic connection to, certain groups of people challenges the notion that judges should be *objective* – that is, that they should have *no perspective, no view of their own* that could shape their decisions, and should come at disputes from a *detached, God’s eye view*, formed only by the mandates of the law.
2. The notion that judges would consider themselves to be situated within a particular community also threatens the idea that they should be *impartial* – that is, that they should have *no connection with and show no favoritism toward any of the parties* before them.
3. The notion that empathy – considered here as an emotional response – can be a beneficial attribute of judicial decisionmaking militates against the assumption of *rationality*: that *reaching decisions in the adjudicative process is a function of logic or reason*, which is capable of being disrupted or corrupted by surges of emotion.

We have a tendency in legal discourse to treat these three terms – objectivity, impartiality, rationality – roughly as synonyms describing the primary attributes of judicial decisionmaking; but I think there is value in separating out the different strands of their meaning and treating them separately. I will start by examining the challenge Judge Sotomayor’s view posed to objectivity and impartiality, and then I will turn to the concern about rationality.

III. OBJECTIVITY

When Judge Sotomayor, in her writings, lectures, or public statements, acknowledges the effect of her experience or group affinities on her adjudication, she is identifying judges as socially-situated beings. They are situated in a community or communities, and they are shaped by the perspectives and norms that structure life and relations in those communities. This

¹⁶ *Id.* at 136 (stating that empathy “does not necessarily lead to action on behalf of its object, or the desire to take action on his behalf.”).

¹⁷ AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 428 (8th ed. 1971).

situatedness militates against the notion that judges should be objective – that is, they should take a God’s eye view of any given controversy by holding themselves at a distance not only from the case before them, but from any kind of affiliation that might prevent them from seeing all aspects of the dispute. If a judge is situated, this argument suggests, she may view a case through a particular kind of lens, thus limiting her ability to approach it in other ways or to grasp all dimensions of the controversy.¹⁸ Situatedness also threatens the kind of detachment, or even insularity, which is often valued in American adjudication. This detachment frees the judge from a sense of accountability to the public, to the officials who appointed her, and to other branches of government.¹⁹ This freedom from accountability to any human constituency permits the judge to remain accountable to the abstract mandates of the law.²⁰ This expectation that a judge will be detached, and therefore unaccountable to particular groups, was invoked by Senator Charles Grassley. Grassley said that it is understandable and appropriate for him to pay attention to his experience when he acts as a legislator because his role is constructed to make him accountable to others; however, the role of the judge is defined specifically so as not to be accountable in this way.²¹

Judge Sotomayor’s answer – which she offers not in her testimony but in her writings – is interesting. She quotes Martha Minow, now the Dean of Harvard Law School and hardly a fringe player, as saying ““there is no objective stance but only a series of perspectives – no neutrality, no escape from choice in judging[.]””²² This position was subject to many misunderstandings in the Hearings. One senator accused her of saying that there is no objectivity in the law; rather, the rules are whatever you like.²³ But that is not what Judge Sotomayor is saying. She is saying first that there is no such thing as a person who is not situated. All of us have experiences, affiliations that shape the way we look at the world. It would seem bizarre to deny this fact for the average person; Judge Sotomayor believes it is also true when that person goes on the bench.²⁴ But there is another part to her argument: this situatedness plays an inevitable role – and can play a valuable role – in some contexts of judging. There are moments in judging – in deciding how the facts of a case fit together or deciding what effect an existing rule should have in a new context – when a judge has to make a choice.²⁵ In most cases that reach the highest levels of our judicial system, there is no single way of understanding a case that is neutral and appears to be uncontroversially the way to go. This statement is what Minow and

¹⁸ See Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1894 (1988) (discussing that despite the fact that judges are situated and their judgments questioned as biased and self-serving, they acknowledge this fact and continue to “give themselves permission to judge.”). Having a particular perspective equips you to view multiple dimensions of a controversy (double vision); and thinking that you have no perspective can hide from you and others the fact that you are coming from a perspective.

¹⁹ See *id.* at 1882-84.

²⁰ Administering justice “without respect to persons” is often described as one of the critical elements of the rule of law. Steven Calabresi, *Obama’s ‘Redistribution’ Constitution*, WALL ST. J., Oct. 28, 2008, at A17. Susan Bandes provides a view that acknowledges the tension between empathy and a conventional view of the rule of law, but seeks to but seeks to broaden the latter. See Bandes, *supra* note 11, at 134-36.

²¹ *All Things Considered: Sen. Grassley Pledges Open Mind on Sotomayor* (NPR radio broadcast May 26, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=104562343&ps=rs>.

²² Sotomayor, *supra* note 2, at 91.

²³ July 13, 2009 Judiciary Committee, *supra* note 12 (statement of Sen. Cornyn).

²⁴ Sotomayor, *supra* note 2, at 91.

²⁵ *Hearing on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court*, 111th Cong. (July 14, 2009) [hereinafter July 14, 2009 Judiciary Committee] (statement of Judge Sonia Sotomayor), available at LEXIS, CQ Transcriptions database (Before the Senate Committee on the Judiciary) (official transcript not yet available) (discussing judicial discretion and choice).

Sotomayor mean when they say “no escape from choice in judging”: a judge cannot predictably “find” an answer in the law.²⁶ The way a judge looks at the world, as informed by her experiences and affinities, can and will be a part of the choices she makes in these moments, along with her knowledge of doctrine and the support it lends to one choice or another, her “situation sense” about the case, and a number of other factors.

The judge who is truly dangerous, according to this view, is not the judge who recognizes her situatedness and its contribution to the inevitable choices she faces in judging. It is the judge who does not understand that she is situated at all, who believes that her own view, shaped by her own particularized experience, is some kind of God’s eye view. A person who understands her individual perspective in this way has no incentive to look for anything beyond it as she considers a case. Although Judge Sotomayor does not make this argument herself, it was advanced by several Democratic senators during the Hearings. Senators Whitehouse and Kaufman make this point, for example, with respect to the Roberts Court.²⁷ Justice Roberts (then Judge Roberts) was not challenged during his Confirmation Hearings as having a situated, problematically-particularized perspective; he was simply understood as a smart judge who implemented the law.²⁸ Part of this difference in treatment had to do with the fact that Justice Roberts did not write or speak about the particularity of his perspective, and President Bush certainly did not make it a desideratum in appointing him. But, part of this difference in treatment also had to do with who Justice Roberts was, who Justice Sotomayor was, and what their particularized perspectives represented to the predominantly middle aged, middle class, white, male senators on the Judiciary Committee. As legal scholars in the feminist and critical race literature have frequently pointed out, when a perspective is farther from the mainstream and when the perspective of a nominee is different from the perspective of those assessing her, it is more likely to be understood *as a perspective*.²⁹ Whereas when the perspective is closer to the mainstream, when it’s more like the senators’ own, it is more likely to be viewed simply as *the right way to look at things*, or *the way things are*, or *a reasonable judge following the law*. So Justice Roberts, for the Senate, did not create a problem of a prospective justice with an identifiable perspective. They accepted it when he described himself as an “umpire” simply calling the balls and strikes.³⁰ But, as Senator Whitehouse observed, since he has been on the bench, he has not simply acted as an umpire: you can see an identifiable perspective in his judicial work.³¹ Quoting Jeffrey Toobin of the *New Yorker*, Senator Whitehouse noted that “[i]n every major case since he became the nation’s seventeenth [C]hief [J]ustice, Roberts has sided with the prosecution over the defendant, the state over the condemned, the executive branch over the legislative, and the corporate defendant over the individual plaintiff.”³² The problem is not that Justice Roberts is situated, though some might disagree with his particular affinities. The problem is that he, the Senators, and many members of the American public see

²⁶ Sotomayor, *supra* note 2, at 91.

²⁷ See generally July 13, 2009 Judiciary Committee, *supra* note 12 (statements of Senators Sheldon Whitehouse and Ted Kaufman).

²⁸ See Jeffrey Toobin, *No More Mr. Nice Guy; The Supreme Court’s Stealth Hard-Liner*, *NEW YORKER*, May 25, 2009, at 42.

²⁹ See CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 32-45 (1987).

³⁰ See Toobin, *supra* note 27.

³¹ July 13, 2009 Judiciary Committee, *supra* note 12 (statement of Senator Sheldon Whitehouse) (stating that “[t]he umpire analogy is belied by Chief Justice Roberts though he cast himself as an umpire during his confirmation hearings[.]”).

³² See *id.* (statement of Senator Sheldon Whitehouse) (quoting Toobin, *supra* note 27).

him as unsituated, as embodying “the view from nowhere”³³ or the vessel through which the objectivity of the law passes.

The point Minow and Sotomayor make is that this sense of one’s self can be threatening in adjudication.³⁴ When you do not see yourself as situated, you do not press yourself to look beyond your immediate experience and see other parts of the picture. Sotomayor’s awareness of her situatedness causes her to behave differently. As she explains in the Mario Olmos Lecture, in which she made the “wise Latina” remark: “I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions and perspectives and ensuring that to the extent that my limited abilities and capabilities permit me, that I reevaluate them and change as circumstances and cases before me require[.]”³⁵ If that kind of care and exacting examination of one’s assumptions is the product of recognizing the situatedness of one’s perspective, then a stance like Judge Sotomayor’s can only be good for the law.

IV. IMPARTIALITY

Beyond these questions relating to objectivity, some senators also took Judge Sotomayor’s comments to raise questions about impartiality.³⁶ The argument here is that the same empathic connection President Obama values raises the risk that a judge might actually decide in favor of those parties with whom she has some kind of experientially-generated, affectively-experienced affinity.³⁷ This argument is why Senator Sessions was concerned that Judge Sotomayor was likely to favor those whose life experiences were closer to hers and why others, such as Newt Gingrich, saw the “wise Latina” comment as an indication that Sotomayor would find it difficult to be fair to white males.³⁸ I see these concerns as being animated by two basic assumptions. First, empathy as an affective phenomenon arises irresistibly and exclusively from experience and is limited in its reach to those whose experiences have been similar to one’s own. Second, a judge who feels empathic identification with a group or particular individuals is

³³ This expression was originally coined in the philosophical domain by Thomas Nagel. *See generally* THOMAS NAGEL, *THE VIEW FROM NOWHERE* (1986).

³⁴ *See* Sotomayor, *supra* note 2, at 91.

³⁵ *Id.* at 92. Some critical race theorists go farther and argue that those who are members of communities that have been subordinated or marginalized may in fact experience double or multiple perspectives: they can intuit the perspective of their own community, but also the perspective of the dominant group, a familiarity with which subordinated groups require in order to navigate life in a hierarchized society. *See generally* Margaret E. Montoya, *Máscaras, Trenzas, Y Greñas: Un/masking the Self While Un/braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN’S L.J. 185 (1994) (for awareness of dominant perspective and pluralism of perspectives), Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN’S RTS. L. REP. 297 (1992) (for “double” vision). It is not clear whether Judge Sotomayor espouses either view or whether it was part of the thinking of then-Senator Obama when he said that he wanted appointees who identified with the perspectives of marginalized groups. It is an argument that might be raised against the claim that a nominee of Judge Sotomayor’s background is likely to neglect the perspectives of those who are not like her.

³⁶ *See, e.g.*, July 13, 2009 Judiciary Committee, *supra* note 12 (statements of Sen. Grassley).

³⁷ *See id.* (statements of Sen. Hatch).

³⁸ Posting of Newt Gingrich to Twitter, <https://twitter.com/newtingrich/status/1937323138> (May 27, 2009, 09:34EST) (“White man racist nominee would be forced to withdraw, Latina woman racist should also withdraw.”); *see also* Newt Gingrich, *Supreme Court Nominee Sotomayor: You Read, You Decide*, Newt.org, <http://newt.org/tab/id/102/articleType/ArticleView/articleId/4266/Default.aspx>.

likely to decide cases in favor of that group. I think both of these assumptions require closer consideration.

It is possible that the Senators' fears about Judge Sotomayor's partiality arise less from a view that associates partiality with shared, group-based experience than from a view that associates partiality with the *specific group-based experience* claimed by Judge Sotomayor. A Latina woman who grew up in a housing project has forms of affinity which are unfamiliar to most senators and mediated by potent group-based stereotypes.³⁹ Her gender makes her more likely to be seen as subject to excesses of emotion or as experiencing difficulty regulating her emotions and resorting to analysis or reason.⁴⁰ Her race may activate the majority group's fears that, as a member of a racial minority group, she will behave in ways that are clannish or will use governmental power to implement group-based payback against whites who might historically have disadvantaged her. (We can think of the number of white voters and talk show hosts who expressed this fear when Obama first began to emerge as a serious candidate.)⁴¹ A judge alert to and animated by these particular affiliations is a daunting spectacle to mainstream senators. She elicits a very different response from, for example, then-Judge Alito, who held forth at length about the role that his experience and affinities played in his judging to humanize himself for the Senate.⁴² With his position within the dominant race and sex, he was not assumed to be in thrall to strong, potentially hostile emotions. On the contrary, he had to make clear that he engaged affectively with the lives of litigants and had some feelings for those who were underdogs.⁴³

But even if suspicions of Judge Sotomayor stem less from her identity than from her frank identification with her group-based experience, I would argue that several assumptions underlying those suspicions demand closer scrutiny. Let us begin with the view of empathy as an emotion that arises from experience and extends toward those who share that experience. This assumption reflects a view of the relation between experience and empathy that may be both too exclusive and too powerful. Empathy is not a phenomenon that arises simply, or even primarily, from group-based experience. It can also be generated by a process of informing yourself about lives that are different from yours. This argument is made both by Mari Matsuda,⁴⁴ one of the early legal scholars to look at the effect of perspective on legal thought, and by Judge Sotomayor herself. Sotomayor acknowledges that some people may not be motivated or energetic enough to undertake this process of self-education, which makes it important to have a diversity of experiences reflected on the courts.⁴⁵ Even so, she definitely sees the possibility of knowledge-based, rather than experience-based, empathic connection.⁴⁶

³⁹ Sotomayor, *supra* note 2, at 87 n.a.1.

⁴⁰ See, e.g., *id.* at 90.

⁴¹ See, e.g., Ronald Kessler, *Barack Obama's Racist Church*, NEWSMAX, Jan. 7, 2008, <http://newsmax.com/RonaldKessler/Obama-Church-Racism/2008/01/07/id/322582> (discussing the racist views of Obama's church). If one wants a less inflammatory – but perhaps more disturbing – example of this assumption, we can consider Justice O'Connor's suggestion in *City of Richmond v. Croson* that the minority contractor set-aside enacted by a majority-black city council was appropriately subjected to strict scrutiny because it might have been an example of minority cronyism or racial payback. 488 U.S. 469, 493 (1989).

⁴² See Bades, *supra* note 13, at 138.

⁴³ See *id.* (citing *The Nomination of Samuel Alito to the Supreme Court: Meeting of the S. Judiciary Comm. Subject*, 110th Cong. (Jan. 24, 2006) (statement of Rep. DeWine)).

⁴⁴ See Matsuda, *supra* note 35, at 299.

⁴⁵ See generally Sotomayor, *supra* note 2.

⁴⁶ July 13, 2009 Judiciary Committee, *supra* note 12 (statements of Sen. Sessions).

Empathy may also arise from sources beyond purposive self-education. Martha Minow describes empathy as capable of being generated by an act of the imagination, such as imaginatively placing yourself in someone's shoes.⁴⁷ Former Justice William Brennan argues, in a controversial and path-breaking article, that the experiential narratives of another – such as he read in the briefs in *Goldberg v. Kelly*⁴⁸ – can create a moment of passionate connection with a life very different from one's own.⁴⁹ These insights may make empathy seem less threatening because it becomes a more common feeling that a range of people can access; Judge (now Justice) Sotomayor's experientially-based empathy would not necessarily put her in a different posture, in relation to litigants, than judges who came by their empathy in some other way.

More importantly, empathy – however generated – is not always limited to those who have shared one's specific group-based experience. Judge Sotomayor talks about extending the kind of empathy she has gained through her experience toward others who have had different experiences.⁵⁰ It could be that you begin to understand the consequences of judicial decision-making for other groups which are not identical to your group, but have something loosely in common. There are, as Eve Sedgwick has argued, both "minoritizing" and "universalizing" dimensions of identity: the former defines it in limited group-specific terms and the latter sees its connection with a range of others.⁵¹ This point was vividly illustrated by Senator Jose Serrano, who spoke as a witness on Judge Sotomayor's behalf, with respect to the phenomenon of being part of an immigrant family.⁵² Senator Serrano's family was Puerto Rican, which created for him an immediate connection with Judge Sotomayor's history.⁵³ He understood that experience, not in a minoritizing but in a universalizing way, as connecting him with a wide segment of his listeners who had families who had immigrated generations back or who had been new to their communities in various ways.⁵⁴ "Her story is my story," he said, "but [it is also] your story or the story of your parents or grandparents."⁵⁵ It is also possible to empathize with people far distant from your experiential base because you see similar dynamics (e.g., a person who is a member of an outgroup in one setting or situation might identify with someone who is a member of an outgroup in another),⁵⁶ or to empathize or envision consequences for both sides, as

⁴⁷ See generally Martha Minow, *The Supreme Court, 1986 Term: Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37 (1988).

⁴⁸ 397 U.S. 254 (1970).

⁴⁹ See William J. Brennan Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3, 21 (1988).

⁵⁰ July 13, 2009 Judiciary Committee, *supra* note 12 (statements of Sen. Sessions).

⁵¹ EVE KOSOFSKY SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET I* (1990).

⁵² *Hearing on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court*, 111th Cong. (July 16, 2009) [hereinafter July 16, 2009 Judiciary Committee] (statements of Sen. Serrano), available at LEXIS, CQ Transcriptions database (Before the Senate Committee on the Judiciary) (official transcript not yet available).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ July 16, 2009 Judiciary Committee, *supra* note 52 (statement of Sen. Serrano).

⁵⁶ Patricia Williams, *Legal Storytelling: The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2144-47 (1989) (discussing two narratives on relation for Williams between racism and anti-Semitism).

Sotomayor describes herself as having done in the controversial *Ricci* case.⁵⁷ Finally, empathy is not always directed toward particular targets: it can be a receptive, engaged stance that one takes toward all people. President Obama’s discussions of empathy, in fact, fluctuated between those that highlighted understanding of particular groups and those that highlighted a posture that sought to understand the concrete life circumstances of the many kinds of litigants who come before the Supreme Court.⁵⁸ He stated, immediately before nominating Judge Sotomayor to the Supreme Court:

I will seek somebody who understands that justice isn’t about some abstract legal theory or footnote in a case book; it is about how our laws affect the daily realities of people’s lives – whether they can make a living and care for their families; whether they feel safe in their homes and welcome in their own nation. I view that quality of empathy, of understanding and identifying with people’s hopes and struggles, as an essential ingredient for arriving at just decisions and outcomes.⁵⁹

This sort of receptive interest does not seem likely to lead a judge to favor one group over another.

But to take the argument one step farther, let us assume that in some cases, shared experience may lead a judge to feel an empathic connection with certain categories of claimants. To see this kind of connection as leading predictably to decisions in their favor (or unfairness toward those who are different) represents the most reductive notion of what empathy might mean in the context of adjudication. Judge Sotomayor, her supporters, and earlier theorists raise a number of other subtler and more reassuring possibilities. According to these accounts, the effects of empathy and experience are far more plural than critics have tended to recognize and pose far less of a threat to impartiality.

Having an empathic connection with a particular set of experiences might mean, for example, that you apprehend or conceptualize the facts in certain cases before you differently from those who have not had that experience.⁶⁰ This understanding can be found in the literature of law and the emotions, which describes emotion as a mode of apprehension that serves to tell us which elements of a complex situation are important.⁶¹ Judge Sotomayor makes a slightly different version of this point in her writings – something I touched on earlier when I was talking about objectivity.⁶² She says that before a judge can apply the law in any case, she has to

⁵⁷ See *Hearing on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court [Before the Senate Committee on the Judiciary]*, 111th Cong. (July 14, 2009) [hereinafter July 14, 2009 Judiciary Committee] (statement of Hon. Sonia Sotomayor, Judge, United States Court of Appeals for the 2d Circuit). After questioning by Senator Sessions, Judge Sotomayor noted that she empathized with Ricci, as a person who had risen above the challenge presented by a learning disability to secure promotion via the examination, as well as with the people of color on the police force who had been disadvantaged by the examination. See *id.*

⁵⁸ President Barack Obama, Press Briefing by Press Secretary Robert Gibbs, *supra* note 8.

⁵⁹ *Id.*

⁶⁰ This idea sometimes emerges in the literature of critical race theory – in the suggestion that distinctive racialized experiences of people of color sometimes lead them to see different dimensions of complex fact situations as salient when, for example, they encounter cases in law school. See Montoya, *supra* note 23, at 201-09; Matsuda, *supra* note 35, at 297-99.

⁶¹ See, e.g., Angela Harris and Marjorie Shultz, “Another Critique of Pure Reason”: Toward Civic Virtue in Legal Education, 45 STAN. L. REV. 1773, 1774 (1993).

⁶² See *infra* Objectivity.

apprehend the facts – that is, figure out how they come together and get a sense of what “really happened” in a case.⁶³ This process of apprehending the facts of a case often involves interpretation or, as she puts it, choice; the sense of affiliation that her experience creates is one of the resources that helps judges with that kind of choice.⁶⁴

This point was made in a fascinating way by two of the Democratic senators on the Judiciary Committee. Given Judge Sotomayor’s writings, demonstrating that life experience should be regarded as a resource, rather than a source of bias or prejudice, was an important challenge that Judge Sotomayor’s supporters faced during the Hearings. One of ways they did so was by foregrounding her experience not as a Latina growing up in poverty, but as a prosecutor and corporate lawyer.⁶⁵ This move was, I thought, a wonderful strategic move. Emphasizing this form of experience not only placed Sotomayor closer to the mainstream of senatorial experience (and was therefore less likely to be viewed as ‘other,’ irresistible, or distorting); but it was experience whose relation to the act of judging was less controversial and more broadly accepted as germane. The argument was that this experience had shaped what Sotomayor brought to her career as a judge, and would also shape her approach to being a Justice, but would do so in a nuanced and subtle way: it would affect the kinds of facts or fact patterns that stand out for her in the cases that come before her.

There is a particularly interesting line of questioning by Amy Klobuchar, the senior senator from Minnesota (who is, in my opinion, the jurisprudential star of the Hearings), about how Sotomayor’s experience as a prosecutor shaped her decision-making on cases involving search warrants and the exclusionary rule.⁶⁶ What emerges from Klobuchar’s questioning is that, while Judge Sotomayor had served as a prosecutor, she did not always decide in favor of law enforcement.⁶⁷ It is interesting to note, in relation to my earlier point about some forms of experience being more threatening to the senatorial mainstream than others, that while a number of Senators were worried that, as a Latina, Judge Sotomayor would decide in favor of racial minority groups, almost none voiced concern that, as a former prosecutor, she would decide in favor of law enforcement.⁶⁸ Instead, having experienced the concrete challenges facing the prosecutor, she was able to make distinctions between different fact patterns that might have escaped other judges and, therefore, was able to apply legal rules in a more nuanced fashion.⁶⁹ Sotomayor distinguished, for example, between cases where the failure to get a warrant, and the consequent acquisition of illegal evidence, was the result of a failure by law enforcement officials and when it was the result of a failure by the district court judge.⁷⁰ A less experienced judge, Klobuchar’s questioning suggests, might simply have focused on the fact that the evidence was obtained without a warrant. This distinct, experientially-informed conceptualization of the facts of a case is not, of course, isolated from the resolution of the legal

⁶³ See Sotomayor, *supra* note 2, at 92.

⁶⁴ Hearing on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court, 111th Cong. (July 28, 2009) [hereinafter July 28, 2009 Judiciary Committee] (statements of Sen. Leahy), available at LEXIS, CQ Transcriptions database (before the Senate Committee on the Judiciary) (official transcript not yet available).

⁶⁵ July 13, 2009 Judiciary Committee, *supra* note 12 (statements of Sen. Klobuchar).

⁶⁶ See July 16, 2009 Judiciary Committee, *supra* note 52, (statements of Chuck Canterbury, National President of the Fraternal Order of Police).

⁶⁷ See *id.*

⁶⁸ *Id.* (statements of Sen. Klobuchar).

⁶⁹ See Sotomayor, *supra* note 2, at 91.

⁷⁰ July 16, 2009 Judiciary Committee, *supra* note 52, (statements of Chuck Canterbury, National President of the Fraternal Order of Police).

issue. It can, as in the case of the warrants, point to one legal answer rather than another. But, the point is that empathy need not determine outcomes by producing a crude kind of partiality toward one party or another: it may have a range of other subtler and more salutary adjudicative effects.

It is interesting to envision – as I suspect Justice Sotomayor does – that group-based experience might be viewed as the same sort of resource: it is a source of knowledge about interior workings of the factual world to which law is to be applied, and that therefore brings expertise. Several members of the Supreme Court have treated personal experience as precisely such a resource in recent cases.

Ruth Bader Ginsburg did so in her dissent in *Ledbetter v. Goodyear Tire & Rubber Company*,⁷¹ noting that women who have been in the workforce understand that it can often take a period of years before one recognizes that one is being underpaid in relation to one's colleagues.⁷² There are still other cases in which Justices do not explicitly invoke their own experience, but pursue a line of analysis that is strongly suggestive of its influence. Justice Marshall's poignant discussion of political change in the formerly-segregated City of Richmond, Virginia⁷³ reflects his long years of struggle in precisely those kinds of environments. Justice O'Connor's view, via the three-judge opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁷⁴ that reproductive rights are linked to women's autonomy and participation in public life (“[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society”⁷⁵), an emphasis different from that of Justice Blackmun in *Roe v. Wade*,⁷⁶ could be understood as a perspective shaped by gendered experience. When such experience is shared with others on the bench, it can increase the collective base of knowledge about circumstances and life paths that may not be available to many of the judges from their own experience. Justice O'Connor made this point about Justice Marshall's experiential storytelling.⁷⁷ Even if she did not always agree, she learned; maybe over time that helped to form and differentiate her experience. Judge Sotomayor makes this point as well, when she responds to Judge Cedarbaum's argument that an all-white Supreme Court rendered the decision in *Brown v. Board of Education of Topeka*.⁷⁸ Judge Sotomayor responded that this case was litigated, and its arguments framed, by many lawyers of color: their involvement must be understood as a key influence which made it possible.⁷⁹

There is a final way in which empathy might impact decision-making, without producing favoritism toward its ostensible objects. Empathy might simply mean that you begin to understand that your decisions have concrete consequences for the lives of people before you. This meaning is true of the broadest kind of empathy. But, it can also emerge from an

⁷¹ See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (Ginsburg, J., dissenting). Congress responded to this decision with the Lilly Ledbetter Fair Pay Act of 2009, which amended Title VII to provide that 180-day statute of limitations for filing claims based on pay discrimination resets with each new discriminatory paycheck. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scatter sections of Titles 29 and 42 of the United States Code).

⁷² *Id.* at 645.

⁷³ *Croson*, 488 U.S. 469, 561 (Marshall, J., dissenting).

⁷⁴ 505 U.S. 833, 852 (1992).

⁷⁵ *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 852 (1992).

⁷⁶ 410 U.S. 113 (1973).

⁷⁷ Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1218-19 (1991).

⁷⁸ 347 U.S. 483 (1954), Sotomayor, *supra* note 2, at 91-92.

⁷⁹ *Id.*

experientially-driven kind of empathy. When you have an experiential connection to the lives of a particular group, you may be able to imagine, with a kind of immediacy or specificity, the effects of a judicial decision on members of that group. But frequently, that apprehension of immediate effects does not end with the group in question. After apprehending the effects of adjudication on the life of a particular group, you may come to view the role of the judge a little differently. You see its concrete implications for the lives of a range of litigants. This judicial posture may make some observers or commentators nervous because of its distance from the conventional expectation that a judge will be detached from the litigation before her. But, as theorists such as Martha Minow have pointed out, detachment often means that judges fail to take responsibility for the effects of their decisions.⁸⁰

In his book *Justice Accused*, Robert Cover explains that judges, who as private citizens abhorred slavery, were willing to enforce the Fugitive Slave Acts because their stance of detachment created a separation between their judicial role and their personal moral intuitions.⁸¹ Experiencing a sense of connection with any particular group of human beings may help a judge take, rather than evade, responsibility for the human consequences of her decisions.⁸² As Judge Sotomayor says, “I am reminded each day that I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions and perspectives[.]”⁸³ This question of engagement versus detachment leads us to the final argument against Sotomayor, which views empathy not so much as a byproduct of experience but as an emotion.

V. IRRATIONALITY

Empathy understood as an emotion, or an affective response to another, may also be understood as problematic, because it is viewed as a threat to the primacy of logic or reason in legal decision-making.⁸⁴ Empathy as an emotion is thought to be a potent force, dwarfing the influence of deduction or other forms of logic and rendering the decision-making fundamentally irrational. You can see this effect in the resistant Senators’ repeated grouping of “emotion, prejudice, and bias.”⁸⁵ They are not focusing simply on Judge Sotomayor’s supposed tendency to bend over backward for people of color; they are claiming that there will be forces loose in her decision-making that have no part in a process defined by the logical application of rules.⁸⁶

⁸⁰ Minow & Spelman, *supra* note 47, at 48.

⁸¹ ROBERT COVER, *JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS* 119-123 (1975).

⁸² See Richard Posner, *Emotion and Emotionalism in Law*, in *THE PASSIONS OF LAW* 309, 323-24 (Susan Bandes ed., 1999).

⁸³ Sotomayor, *supra* note 2, at 93.

⁸⁴ See July 14, 2009 Judiciary Committee, *supra* note 57 (statement of Senator Jeff Sessions, Ranking Member, S. Comm. on the Judiciary), available at LEXIS, CQ Transcriptions database (official transcript not yet available).

⁸⁵ The linking of these three characteristics itself bears consideration: why emotion should automatically be connected to prejudice and bias is not immediately clear. Not all emotions make us more susceptible to some groups than others: one might think here about indignation or regret. This rhetorical strategy could be a conscious, or less than conscious, effort to connect a variety of stances that are viewed as unsavory in judging – a kind of guilt by association. But it could be a product of the view that emotion draws us toward particulars, *see* Owen Fiss, *Reason in All Its Splendor*, 56 *BROOK. L. REV.* 789, 801-02 (1990), while a fair or impartial judicial stance demands generality or abstraction. This latter view could be heightened by the fact that the emotion in question is, in fact, empathy, which may be associated with partiality for the reasons discussed in the preceding section.

⁸⁶ See July 14, 2009 Judiciary Committee, *supra* note 57.

Sotomayor did offer an answer to this implication – it was one of the few ways in which she directly engaged the opposing senators.⁸⁷ She argued, not surprisingly, that her ideal mode of adjudication is about applying the law to the facts.⁸⁸ In some ways, this answer seems to be beside the point, but it actually reflects the most detailed description she offered regarding the way she sees emotion and reason or logic coming together in her decision-making.⁸⁹ Her claim is that empathy, along with other emotions and the kinds of insights born of experience that were considered earlier, comes into play as she is trying to make sense of the case and put the facts into some intelligible constellation.⁹⁰ Judge Sotomayor argues that emotion helps her to grasp what is important about the facts, what stands out, and what the narrative that connects the facts should be.⁹¹ Then when she has fully apprehended the facts, she applies the law to them.⁹² She claims that emotions help her to learn about the case, but they do not control the way she decides it.⁹³ It is similar to the way she treats another contentious issue: the use of foreign legal practices or rules.⁹⁴ Her argument is that they are incitements to thought – they provoke ideas – at an early stage of the process.⁹⁵ But, they do not control the actual decision, for the plaintiff or the defendant, which comes later.

Now you might think, as I did during the Hearings, that she is putting a lot of stock in this distinction between apprehending the facts and applying the law. In a way, it permits her to cabin all the influences which she sees as potentially beneficial (but her opponents see as potentially threatening) in one phase of judicial decision-making, and then acknowledge a second phase in which she is able mainly to apply the law in the way that more conventional legal thinkers, such as senators, expect her to do.⁹⁶ In some ways, this formulation is too dichotomous: most lawyers (or law students) understand that the way you conceptualize the facts can make a decisive difference in the legal outcome, and recognizing that the separation is not quite so neat requires us to acknowledge some influence for empathy and experience throughout the adjudicative process. But Sotomayor's characterization of a two-phase decision-making process – an affective or intuitive stage followed by a more deliberate, logical, or rule-bound stage – has a thought-provoking correspondence to the way that mind scientists are increasingly describing moral or normative decision-making.

Let's start with a commonsense account of this view presented in an editorial on Sotomayor by New York Times columnist David Brooks.⁹⁷ He points out that a view of normative decision-making that assumes an exclusive influence for the purposive application of logic belies what we have learned about garden-variety human decision-making in fields like

⁸⁷ See *id.* (statement of Hon. Sonia Sotomayor, Judge, United States Court of Appeals for the 2nd Circuit).

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See July 13, 2009 Judiciary Committee, *supra* note 12 (statement of Hon. Sonia Sotomayor, Judge).

⁹¹ See July 14, 2009 Judiciary Committee, *supra* note 57 (statement of Hon. Sonia Sotomayor, Judge).

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See *Hearing on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court [Before the Senate Committee on the Judiciary]*, 111th Cong. (July 15, 2009) [hereinafter July 15, 2009 Judiciary Committee] (statement of Hon. Sonia Sotomayor, Judge, United States Court of Appeals for the 2nd Circuit), available at LEXIS, CQ Transcriptions database (official transcript not yet available).

⁹⁵ See *id.*

⁹⁶ See Chris Guthrie, Jeffrey Rachlinski and Andrew Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 5-8 (2007).

⁹⁷ See generally David Brooks, *The Empathy Issue*, N. Y. TIMES, May 28, 2009, available at: <http://www.nytimes.com/2009/05/29/opinion/29brooks.html>.

psychology and neuroscience.⁹⁸ He argues that the initial stage of reaching a decision is subconscious and intuitive rather than purposive or purely rational.⁹⁹ He explains:

When noodling over some issue – whether it’s a legal case, an essay, a math problem or a marketing strategy – people go foraging about for a unifying solution. This is not a hyper-rational, orderly process of the sort a computer might undertake. It’s a meandering, largely unconscious process of trial and error.

The mind tries on different solutions to see if they fit. Ideas and insights bubble up from some hidden layer of intuitions and heuristics. Sometimes you feel yourself getting closer to a conclusion, and sometimes you feel yourself getting farther away. The emotions serve as guidance signals, like from a GPS, as you feel your way toward a solution.

Then – often while you’re in the shower or after a night’s sleep – the answer comes to you. You experience a fantastic rush of pleasure that feels like a million tiny magnets suddenly clicking into alignment.

Now your conclusion is articulate in your consciousness. You can edit it or reject it. You can go out and find precedents and principles to buttress it. But the way you get there was not a cool, rational process. It was complex, unconscious and emotional.¹⁰⁰

Emotional reactions, like the information provided by experience, play a very useful role in the first part of the process. They help to highlight things that are important.¹⁰¹ They may help to form a heuristic or cognitive shortcut that subconsciously shapes a view of the decision.¹⁰² But, there is also a second stage of the process where a degree of rational second-guessing or reconstruction takes place.¹⁰³ This may emerge immediately after an intuition about a decision reaches consciousness, or it may emerge in the process of discussing it with or justifying it to others. Brooks makes the interesting suggestion that, for judges, some of these norms that structure the second phase of the process are, and should be, specific to the judicial role.¹⁰⁴ Can she empathize with both sides, or with all kinds of people? Does she love and respect the distinctive institutions of the law? Does she account for the murky, intuitive nature of her own decision-making by moving slowly and incrementally – rather than broadly and in a

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Angela P. Harris & Marjorie M. Schultz, *Another Critique of Pure Reason*, 45 STAN. L. REV. 1773, 1786 (1993).

¹⁰² Chris Guthrie, Jeffery J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 780 (2001).

¹⁰³ See Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV., 1449, 1451-52 (2003).

¹⁰⁴ See David Brooks, *The Empathy Issue*, N. Y. TIMES, May 28, 2009, available at: <http://www.nytimes.com/2009/05/29/opinion/29brooks.html>.

sweeping fashion – in rendering her decisions? Brooks ultimately concluded that these were the questions on which Sotomayor’s nomination would rise or fall.¹⁰⁵

The latter part of his argument became more controversial. George Lakoff, for example, criticized Brooks’s list of second-stage desiderata as importing into an otherwise new and illuminating account a conservative view of adjudication.¹⁰⁶ I see Lakoff’s point, but we do not need to subscribe to Brooks’s specific second-stage norms to accept his model of the process. The more deliberative phase could be structured by a range of decisional norms, including something like self-consciously envisioning the effects of a decision on the party whose well-being was not the subject of your intuition. This move, incidentally, is recommended by legal commentators from Dean Minow to Judge Richard Posner.¹⁰⁷ The key is that there is a stage in which intuitive, emotionally-inflected decision-making comes into play and a stage in which decision-makers supplement or correct it by recourse to a process that is more conscious and deliberative. This process could be the process of consulting and arguing back and forth with other judges, or it could be the process of setting forth one’s view in a reasoned opinion. But, it is a different kind of route to the final decision.

This commonsense account reflects a body of work that describes normative decision-making as consisting of two processes: one faster, intuitive, and sometimes operating below the level of conscious or purposive thought; and one slower, more intentional, logical, deductive, or rule-bound.¹⁰⁸ The theorization of this two-stage process (sometimes called “System 1/System 2” or “S1/S2” decision-making) has been associated with an increased emphasis on, and appreciation of, the role of more intuitive judgments in decision-making, as we can see in Malcolm Gladwell’s best-selling book *Blink*¹⁰⁹ or the work of social scientists like Daniel Kahnemann¹¹⁰ and Jonathan Haidt.¹¹¹ Perhaps more importantly, for our purposes, work by Cornell Law professor Jeffrey Rachlinski and others demonstrates that this process is as true for judges as it is for college students, laypeople, and other decision-makers.¹¹² Judges engage in S1 intuitive judgments when they take an experimentally administered Cognitive Reflection Test, which distinguishes intuitive from deliberative judgments, and when they respond to scenarios reflecting adjudicative contexts where particular kinds of cues produce heuristically-guided judgments.¹¹³

¹⁰⁵ See *id.*

¹⁰⁶ George Lakoff, *Empathy, Sotomayor, and Democracy: The Conservative Stealth Strategy*, HUFFINGTON POST, May 30, 2009, available at http://www.huffingtonpost.com/george-lakoff/empathy-sotomayor-and-dem_b_209406.html.

¹⁰⁷ See RICHARD POSNER, *Emotion and Emotionalism in Law*, in *THE PASSIONS OF LAW* 309, 321-25 (Susan Bandes ed., 1999); Minow & Spelman, *supra* note 47, at 51-53.

¹⁰⁸ See Chris Guthrie, Jeffrey Rachlinski and Andrew Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 3 (2007).

¹⁰⁹ MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* 13-14 (2005).

¹¹⁰ See e.g., Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1450-51 (2003); see generally HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002).

¹¹¹ Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 830 (2001).

¹¹² See Chris Guthrie, Jeffrey Rachlinski and Andrew Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 3 (2007); Guthrie, Rachlinski & Wistrich, *supra* note 102, at 821; see also Jeffrey Rachlinski, Sheri Lynn Johnson, Andrew Wistrich & Chris Guthrie, *Does Unconscious Bias Affect Trial Court Judges*, 84 NOTRE DAME L. REV. 1195, 1197 (2009); see generally, Jeffrey Rachlinski, *Bottom-Up Versus Top Down Lawmaking*, 73 U. CHI. L. REV. 933 (2006).

¹¹³ Guthrie, Rachlinski & Wistrich, *supra* note 112, at 14-18.

Rachlinski's work, perhaps not surprisingly for a legal scholar, has a slightly more normative or prescriptive dimension.¹¹⁴ While he acknowledges both the inevitability and the potential advantage of judicial engagement in intuitive judgment, he also sees downsides.¹¹⁵ Intuitive, heuristically-guided thinking is associated with group-based stereotypes: it may be too quick and it may not apprehend all facets of a situation.¹¹⁶ The more deliberative, rule-based thinking characteristic of S2 decision-making may produce better decisions in many legal contexts, or it may produce better decisions by supplementing S1 thinking.¹¹⁷ So, Rachlinski argues that legal scholars and legal actors should be involved in structuring the processes or contexts of adjudication in a way that encourages judges to resort to S2 processes, by focusing on overcrowded dockets and permitting longer time-periods for decision-making, for example.¹¹⁸ He agrees with Brooks that the key area for debate should NOT be whether adjudication should be quick, intuitive decision-making that has recourse to emotions and experience – adjudication inevitably will involve this kind of thinking.¹¹⁹ The key area for debate should be the second phase of decision-making, essentially how to ensure that it happens and how to make it optimally beneficial for legal decision-makers.¹²⁰

This account of bifurcation in judicial decision-making, which has been well-received and not (at least by this point) extraordinarily controversial, sheds a very interesting light on Sotomayor's understanding of the judicial role. First, it suggests that it is descriptively accurate in some very important ways. The distinction may not be strictly between apprehending the facts and applying the law, although cognitive research suggests that heuristics (mental shortcuts) seem to be generated where there is factual complexity to be apprehended, and the presence of systems of rules (such as legal doctrine) tend to generate a more deliberative response.¹²¹ But, the identification of two phases of decision-making, and the highlighting of a role for emotion and experience and the intuitions they frame, seems right on point. When she says that empathy and experience play a role in adjudicating by influencing “the facts you choose to see,” – a phrase which created a world of trouble for her with the Republicans on the Judiciary Committee – she appears to be onto something important.¹²² The word ‘choose’ may be misleading because this first stage of the process often operates quickly and automatically, below the level of conscious choice. But, the notion that these processes are not exclusively the object of rule-bound, deductive reasoning which can be objectively identified, and are the same for everyone, seems important and correct.

Justice Sotomayor's view of judging, however, also seems to be important in a normative way. There are many things that we still have to learn about this way of conceptualizing judicial decision-making, and the Sotomayor Hearings point to some of the most interesting questions. For example, when are intuitive or heuristic ways of thinking likely to be helpful and when are they likely to be problematic? Rachlinski says that one problem with intuitive or heuristic

¹¹⁴ See generally *id.*; Jeffrey Rachlinski, *Bottom-Up Versus Top Down Lawmaking*, 73 U. CHI. L. REV. 933 (2006).

¹¹⁵ See generally Guthrie, Rachlinski & Wistrich, *supra* note 112.

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ *Id.*

¹¹⁹ See Chris Guthrie, Jeffrey Rachlinski and Andrew Wistrich, *supra* note 112; Brooks, *supra* note 97.

¹²⁰ See Guthrie, Rachlinski & Wistrich, *supra* note 112.

¹²¹ See generally Guthrie, Rachlinski & Wistrich, *supra* note 113.

¹²² July 16, 2009 Judiciary Committee, *supra* note 53 (statement of Dr. Charmaine Yoest, President and CEO, Americans United for Life).

thinking is that some of the shortcuts may involve stereotypes.¹²³ Sotomayor suggests that experientially-based thinking about groups is different and may be a source of strength.¹²⁴ Sorting out helpful from flawed heuristic thinking seems important in deciding in what settings it needs to be supplemental. To take another example, Rachlinski observes that there are sometimes interesting feedback effects between S2 and S1 thinking: chess masters develop good intuitive thinking by applying in a blink whole sets of rules or moves that beginners only process deliberately.¹²⁵ Senator Klobuchar's questioning suggested that training as a prosecutor might have had the same effect for Judge Sotomayor: it conditioned her intuitions in a more fully developed and sophisticated way.¹²⁶ Might some kinds of personal life experience – as a member of a racial or ethnic group – condition particular kinds of intuitions, which are relevant to particular kinds of cases, in a similar way? Finally, when we as policymakers want to structure an S2 process, so that judges are able to reflect carefully on their intuitions, what should that process look like? Is it more importantly about slowing down the decision-making process and bringing in as many judicial heads as possible, as Rachlinski suggests?¹²⁷ Or are there, as Brooks and Lakoff suggest, procedural or substantive norms that should be built into it, such as a self-conscious effort to view a case from multiple vantage points or to keep decisions as incremental as possible?¹²⁸

VI. CONCLUSION

These questions should provide us with important research agendas for years to come. But, it is important to note that Justice Sotomayor's view of judging sets us on the right track toward discovering answers. If Rachlinski is correct that S1 decision-making may not be sufficient in all contexts, and we as the architects of a court system need think about how to encourage more deliberative decision-making, we need first to recognize the role that intuition – based on factors such as experience and emotion – plays. The conventional views of legal decision-making propounded by critics of Sotomayor, and indeed the more fully-elaborated views of legal formalists, tend to thwart this goal by denying that cognitive modes such as emotion and intuition have any role in adjudication. When we as legal scholars and legal actors become aware of both the values and the dangers of S1 decision-making, we can structure decision-making processes so as to give it rein, but also enable the sober second look that balanced decision-making requires.

¹²³ Jeffrey Rachlinski, Sheri Lynn Johnson, Andrew Wistrich & Chris Guthrie, *Does Unconscious Bias Affect Trial Court Judges*, 84 NOTRE DAME L. REV. 1195, 1204 (2009).

¹²⁴ July 14, 2009 Judiciary Committee, *supra* note 26, (statement of Hon. Sonia Sotomayor, Judge).

¹²⁵ See Guthrie, Rachlinski & Wistrich, *supra* note 112.

¹²⁶ July 15, 2009 Judiciary Committee, *supra* note 95, (statement of Sen. Amy Klobuchar, Member, Sen. Comm. on the Judiciary), available at LEXIS, CQ Transcriptions database (official transcript not yet available).

¹²⁷ See Guthrie, Rachlinski & Wistrich, *supra* note 112.

¹²⁸ David Brooks, *The Empathy Issue*, N.Y. TIMES, May 28, 2009, available at <http://www.nytimes.com/2009/05/29/opinion/29brooks.html>; George Lakoff, *Empathy, Sotomayor, and Democracy: The Conservative Stealth Strategy*, HUFFINGTON POST, May 30, 2009, available at http://www.huffingtonpost.com/george-lakoff/empathy-sotomayor-and-dem_b_209406.html.