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Empathic Dialogue: From Formalism to Value Principles

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EMPATHIC DIALOGUE: FROM FORMALISM TO VALUE PRINCIPLES

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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.

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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 comes the hanging. They have a rope. They tie a noose. Imagine the noose going tight 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 picture 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 Kill*, IMDB, http://www.imdb.com/title/tt0117913/quotes (last visited July 25, 2012) (Character 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 druggies 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).

I. INTRODUCTION: JUDICIAL CHARACTER AND JUSTICE

A. FROM FORMALISM TO VALUE PRINCIPLES

A rights-based approach to justice[2] must consider the role of judicial character[3] 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[4] and to the judicial decision making debate.[5] 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 or 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 suspect 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.").

4. *See, e.g.*, Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 883–85 (2009) (Justice Kennedy, writing for the 5–4 majority, analyzed the nature of judicial bias, and established a Fourteenth Amendment Due Process test for it.); Bob Edgar, *"Impartial" Supreme Court Justices Raise Money for Opponents of Health Care Law*, HUFFINGTONPOST (Nov. 14, 2011, 5:22 PM), http://huffingtonpost.com/rev-bob-edgar/impartial-supreme-court-j_b_1093468.html; Adam Cohen, *Judges Are for Sale—and Special Interests Are Buying*, TIME (Oct. 31, 2011), http://ideas.time.com/2011/10/81/judges-are-for-sale-and-special-interests-are-buying; Tony Mauro, *Law Profs Urge Ethics Rules for Supreme Court Justices*, BLT: THE BLOG OF LEGAL TIMES (Feb. 24, 2011, 1:31 PM), http://legaltimes.typepad.com/blt/2011/02/law-profs-urge-ethics-rules-for-supreme-court-justices.html (reporting that over 100 law professors proposed congressional hearings and legislation for "mandatory and enforceable" ethics rules for Supreme Court justices for the first time, as currently required for lower federal court judges).

5. *See, e.g.*, RICHARD A. POSNER, OVERCOMING LAW 381 (1995) ("The internal perspective—putting oneself in the other person's shoes—that is achieved by the exercise of empathetic[sic] imagination lacks normative significance."); Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 21 (2008) (asserting that the "three elements of a just decision" are "facts, law, and empathy"); Geoffrey R. Stone, Op-Ed., *Our Fill-in-the-Blank Constitution*, N.Y. TIMES, Apr. 14, 2010, at A27 ("[I]t should be apparent that conservative judges do not disinterestedly call balls and strikes . . . they make value judgments, often in an aggressively activist manner that goes well beyond anything the framers themselves envisioned."); Richard A. Epstein, *Beware of Empathy*, LIBERTARIAN, May 5, 2009, http://forbes.com/2009/05/04/supreme-court-justice-opinions-columnists-epstein.html ("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

that federal courts should adopt a paradigm shift[6] from formalism,[7] a rights-lethal combination of Wechslerian neutralism[8] and structuralism,[9] to rights-oriented value principles[10] or empathic constitutional-

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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/opinionla/la-oew-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); GOODWIN LIU 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 Pollyannaism, 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.

ity.[11] 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

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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 . . . .

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 BOBBITT, 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. 535, 541–45 (1999).

12. *See, e.g.*, Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 515–22 (2004) (explaining that equality analysis often results in the loss or reduction of rights generally). Using the term "people" is not meant to preclude the importance of the environment or other concerns.

13. *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 995–1003 (N.D. Cal. 2010) (holding a state constitutional ban on same-sex marriage unconstitutional under the U.S. Constitution's Due Process and the Equal Protection Clauses); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 387–97 (D. Mass. 2010) (ensuring federal benefits for same-sex couples and holding that Section 3 of the federal Defense of Marriage Act violated the Equal Protection Clause).

14. *See, e.g.*, United States v. Arizona, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010) (invalidating sections of SB1070, wherein Arizona sought to identify and deport illegal immigrants), *aff'd* 641 F.3d 339 (9th Cir. 2011), *aff'd in part, rev'd in part, & remanded* 132 S. Ct. 2492 (2012).

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

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,

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defining injury in the absence of empathy"); *id.* at 1115 n.109 ("[Empathy] is a quality that is most desirable in, even if frequently absent from, today's federal judges at all levels of the judicial system").

16. *See generally* John Paul Stevens, *On the Death Sentence*, THE N.Y. REVIEW OF BOOKS (Dec. 23, 2010), http://www.nybooks.com/articles/archives/2010/dec/23/death-sentence/?pagination=false (criticizing capital punishment as "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes"); Adam Liptak, *Ex-Justice Criticizes Death Penalty*, N.Y. TIMES, Nov. 28, 2010, at A1 (Stevens "now believed the death penalty to be unconstitutional . . . a system . . . shot through with racism, skewed toward conviction, infested with politics and tinged with hysteria."); DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION (2010); Richard C. Dieter, *Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent*, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/node/523 (last visited July 25, 2012) (describing the rights of death penalty innocents).

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. FARBER & SUZANA 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 & SOC'Y 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[20] the middle class,[21] the impoverished,[22] and the socially-disadvantaged,[23] many with unmet legal representation needs.[24]

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."[25] Using empathic dialogue, a judge inquires beyond her professional and personal experiences before ruling,

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a result of formalism; holding the interests of institutions over the interests of people; or allowing the rule of law to prevail over fairness, morality, or justice.

20. Classism refers hereafter to the conscious or unconscious discrimination against a person or a group of persons due to their socio-economic class, including the middle class, the impoverished, and the socially disadvantaged. *See* Mitchell F. Crusto, *Unconscious Classism: Entity Equality for Sole Proprietors*, 11 U. PA. J. CONST. L. 215, 222–24 (2009) [hereinafter Crusto, *Unconscious Classism*] (defining "unconscious classism," as a combination of Critical Class Theory with recent theories of unconscious adverse behavior); *see also* EMMA COLEMAN JORDAN & ANGELA P. HARRIS, ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS (2005) (questioning why no legal language addresses class in the United States and suggesting what such a language might look like, and using race and gender injustice to interrogate both critical theory and economic theory); Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109, 109–12, 126–29 (2009) (exploring the equal-protection analysis for constitutional protection of socioeconomic rights); Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1317–44 (1964) (discussing the constitutional basis of President Johnson's war on poverty); Clark Freshman, *Foreword: Revisioning the Constellations of Critical Race Theory, Law and Economics, and Empirical Scholarship*, 55 STAN. L. REV. 2267, 2267–68 (2003) (suggesting an overlap between Critical Race Theory and empirical studies of inequality); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9, 40–45 (1969) (providing an early articulation of the moral and political imperative for the recognition of constitutional welfare rights); Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 739–46 (1964); Weinstein, *supra* note 5, at 25–26 (noting that with "sharp and growing socioeconomic differences," some litigants living "lives of silent desperation" have a rightful claim to judges' attention, many of whom are often "out of touch emotionally" with the litigants before them). *Cf.* OXFORD ENGLISH DICTIONARY 283 (3d ed. 2010) [hereinafter OXFORD DICTIONARY] (defining "classism" generally as "[t]he belief that people can be distinguished or characterized . . . on the basis of their social class").

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.

24. *See generally* Lawrence M. Friedman, *Access to Justice: Some Comments*, 73 FORDHAM L. REV. 927 (2004); Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance* Noblesse Oblige *to Stated Expectations*, 77 TUL. L. REV. 91 (2002).

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.[26] 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.[27]

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,[28] feminist principles of justice,[29] judicial selection,[30] jurors,[31] 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).

28. *See, e.g.*, Cheryl L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TUL. L. REV. 1461, 1461–80 (2002) (exploring empathy's role in corporate governance, especially relative to workplace discrimination).

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 legalism or to construct its replacement").

30. *See, e.g.*, STEPHEN L. CARTER, THE CONFIRMATION MESS 1193 (1988); Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 HARV. J.L. & PUB. POL'Y 1035, 1038–44 (2009) (noting the separation of powers in judicial selection, judicial restraint as a judicial qualification, and Senatorial deference to a President's qualified nominees); Linda C. McClain, *Supreme Court Justices, Empathy, and Social Change: A Comment on Lani Guinier's Demosprudence Through Dissent*, 89 B.U. L. REV. 589, 601–02 (2009) (noting the inspiring role that both dissenting judges and the President play in spurring ordinary people to engage in social and constitutional change).

31. *See, e.g.*, Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887, 887–910 (1996) (exploring the role that race-related empathy plays in criminal justice).

education social networking,[32] legal history,[33] moral capitalism,[34] philosophical principle,[35] professionalism,[36] psychology of race and justice,[37] scientific principle,[38] storytelling,[39] substantive principles of constitutional law,[40] the criminal justice system,[41] 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: ALBION TOURGÉE 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).

34. *See, e.g.*, Mitchell F. Crusto, *Obama's Moral Capitalism: Resuscitating the American Dream*, 63 U. MIAMI L. REV. 1011, 1019 (2009) [hereinafter Crusto, *Obama's Moral Capitalism*] (exploring empathy's relationship to moral capitalism in the context of predatory lending). *Cf.* ADAM MACLEOD, EMPATHY'S WHITE ELEPHANT: RESPONDING TO THE SUBPRIME MORTGAGE CRISIS WITHOUT DENIGRATING THE POOR 7–11 (2011) (arguing that the law should provide a dignified means for the poor to address foreclosures due to subprime lending).

35. *See generally Empathy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/empathy/ (last visited July 25, 2012).

36. *See, e.g.*, Note, *Being Atticus Finch: The Professional Role of Empathy in* To Kill a Mockingbird, 117 HARV. L. REV. 1682, 1682–1702 (2004) (exploring empathy's role in professionalism).

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).

38. *See, e.g.*, Natalie Angier, *The Biology Behind the Milk of Human Kindness*, N.Y. TIMES, Nov. 24, 2009, at A1 (reporting that "a raft of new research in humans suggests that oxytocin underlies the twin emotional pillars of civilized life, our capacity to feel empathy and trust," citing a recent finding in *The Proceedings of the National Academy of Sciences*).

39. *See, e.g.*, Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CALIF. L. REV. 61, 68 n.25 (1996) (on the essential role of emotions in the law); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2099–2102 (1989) (critically assessing the polemical invocation of a vague concept of empathy, and exploring its role in the deep dissatisfaction with the abstract and collective focus of law and legal discourse).

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).

41. *See generally* MARKUS DIRK DUBBER, THE SENSE OF JUSTICE: EMPATHY IN LAW AND PUNISHMENT (2006) (developing a concept of empathy with enough content to do real analytical and normative work in the criminal justice arena).

Court appointment,[42] and tort liability.[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.[44]

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42. *See, e.g.*, Kathryn Abrams, *Empathy and Experience in the Sotomayor Hearings*, 36 OHIO N.U. L. REV. 263, 264–70 (2010) (exploring the role of experience and the relationship between law and emotions); Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor*, 40 U. BALT. L.F. 1, 16–18 (2009) (drawing on his own life experiences as well as those of notable Supreme Court Justices and the Maryland appellate judges to propose that a judge's life experience and the possession of empathy can actually make him or her a more well-rounded jurist); Lauren Gilbert, *The 26th Mile: Empathy and the Immigration Decisions of Justice Sotomayor*, 13 HARV. LATINO L. REV. 1, 1–11, 38–45 (2010) (analyzing Justice Sotomayor's "wise Latina" comments against her judicial philosophy during her seventeen years on the bench and exploring empathy as a judicial virtue).

43. *See, e.g.*, Cheryl L. Wade, *When Judges Are Gatekeepers: Democracy, Morality, Status, and Empathy in Duty Decisions (Help from Ordinary Citizens)*, 80 MARQ. L. REV. 1, 29–40 (1996) (exploring the dimensions of race and empathy in malpractice cases).

44. Feldman, *Imagining*, *supra* note 9. *See generally* NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR's GREAT SUPREME COURT JUSTICES, at xi, xiii (1st ed. 2010) (chronicling the development of judicial liberalism).

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"[45] economy,[46] 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.[47] 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.[48]

To the contrary, legal realists believe that a judge's personal biases influence her interpretation of the law.[49] Of course, judges are people and, naturally, can fall victim to their biases[50] 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).

46. *See* JACOB S. HACKER ET AL., ROCKEFELLER FOUNDATION, ECONOMIC SECURITY AT RISK: FINDINGS FROM THE ECONOMIC SECURITY INDEX, at ii, 8 (2010), *available at* http://www.economicsecurityindex.org/upload/media/Economic_Security_Index_Full_Report.pdf (reporting that one in five Americans has experienced a decline of 25 percent or more in available household income, a plunge that will require six to eight years just to climb back to previous levels of income). *See generally* JACOB S. HACKER, THE GREAT RISK SHIFT: THE ASSAULT ON AMERICAN JOBS, FAMILIES, HEALTH CARE, AND RETIREMENT (2006).

47. *See, e.g.*, Molly Townes O'Brien, Essay, *Justice John Marshall Harlan as Prophet: The* Plessy *Disaster's Color-Blind Constitution*, 6 WM. & MARY BILL RTS. J. 753, 753 (1998).

48. *See id.* (addressing the limitations of constitutional color-blindness in judicial decisions by analyzing the relationship that federalism has with color-blind racial justice; Grutter v. Bollinger, 539 U.S. 306, 306–07 (2003) (upholding a public law school's use of race in admissions decisions to maintain a diverse student body by using "diversity" as a non-race-based judicial criterion). *See generally* Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 985–92 (2007) (discussing the history of color-blindness in the context of anti-discrimination law).

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.").

minds.[51] Therefore, despite the belief that judges blindly rule exclusively based on the law and facts, 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.[52] 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.[53] He and others put status and biases aside and made historic, brave decisions that positively changed the lives of millions of Afircn 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,"[54] the result of unconscious judi-

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.").

52. *See, e.g.*, JACK BASS, UNLIKELY HEROES 13–14 (1981), FRANK T. READ & LUCY S. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH, at xi–xii (1978) (describing how four Fifth Circuit, Republican judges integrated the South). *Cf.* MICHAEL J. KLARMAN, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY, at xvi, 7, 8 (2007) (concluding, inter alia, that the Supreme Court has been a foe to African Americans and other racial minorities); Michael Hiltzik, *"Empathy" on 1927 Supreme Court Might Have Saved Thousands from the Knife*, L.A. TIMES, June 4, 2009, http://articles.latimes.com/2009/jun/04/business/fi-hiltzik4 (arguing that Oliver Wendell Holmes and the Court were wrong in their *Buck v. Bell* decision, upholding the forced sterilization of "mental defectives," stating that "its consequence was tens of thousands of ruined lives over the next half-century"); Dahlia Lithwick, *Stevens's Real Legacy: Why the E Word Matters*, NEWSWEEK, Apr. 9, 2010, http://www.newsweek.com/2010/04/08/stevens-s-real-legacy.html (citing *Illinois v. Wardlow*, 528 U.S. 119, 132 (2000) (Stevens, J., concurring in part and dissenting in part) ("Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent.")).

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 hereinafter to a judge's conscious or unconscious decision to ignore or discount the law's impact on the lives of everyday people.

cial classism[55] and judicial groupthink.[56]

1. Unconscious Judicial Classism

Unconscious judicial classism continues the work of critical race theory[57] and critical feminist theory[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,[59]

55. Unconscious judicial classism refers hereinafter to the unconscious judicial temperament towards class bias based on privileged status.

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, 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 ingroup, when the members' strivings for unanimity override their motivation to appraise realistically the alternative courses of action"); IRVING L. JANUS, VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES 2–5, 8–9 (1972).

57. *See generally* CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., Temple Univ. Press 1995); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., New Press 1995); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 5–9 (1999) (arguing that anti-racist scholars generally misunderstand the relationship between racial and other forms of oppression, and thus help perpetuate heterosexism); Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455, 1469 (2002) (criticizing the "progressive race blindness" theory for failing to embrace race as an important dimension of identity); Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 330–33 (2006) (suggesting that the critical race theory should more adequately account for issues of class); Bailey Figler, Note, *A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement*, 61 N.Y.U. ANN. SURV. AM. L. 723, 724–27 (2006) (discussing the problem of unconscious racism in felon disenfranchisement).

58. *See, e.g.*, Keith Aoki, *Does Nothing Ever Change; Is Everything New?: Comments on the "To Do Feminist Legal Theory" Symposium*, 9 CARDOZO WOMEN'S L.J. 415, 415–16 (2003) (summarizing various works of critical feminist theory scholarship); Don S. Browning, *Linda McClain's* The Place of Families *and Contemporary Family Law: A Critique from Critical Familism*, 56 EMORY L.J. 1383, 1403–04 (2007) (proposing a theory of "critical familism" to challenge trends in family law theory); Verna L. Williams, *Private Choices, Public Consequences: Public Education Reform and Feminist Legal Theory*, 12 WM. & MARY J. WOMEN & L. 563, 563–68 (2006) (discussing public education from a critical feminist theory perspective).

59. *See, e.g.*, JORDAN & HARRIS, *supra* note 20, at 420–600; MARTHA R. MAHONEY ET AL., SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES, AND LAW 1–6 (2003); Clark Freshman, *Foreword: Revisioning the Constellations of Critical Race Theory, Law and Economics, and Empirical Scholarship*, 55 STAN. L. REV. 2267, 2269–71 (2003) (suggesting an overlap between critical race theory and empirical studies of inequality); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 741–45 (2005) (discussing discrimination in employment decisions); Kristin Brandser Kalsem, *Bankruptcy Reform and the Financial Well-Being of Women: How Intersectionality Matters in Money Matters*, 71 BROOK. L. REV. 1181, 1181–90 (2006) (arguing that feminist legal theory requires broader thinking about matters relating to women's financial well-being); Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479, 1480–85 (1996) (discussing disparate impact and class theory in the employment context); Rachel Bloomekatz, Comment, *Rethinking Immigration Status Discrimination and Exploitation in the Low-Wage Workplace*, 54 UCLA L. REV. 1963, 1964–68 (2007) (analyzing the statutory reme-

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 diversity[64] 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-

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dies available for U.S. workers to challenge employment discrimination in favor of immigrants).

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. Institutional classism refers hereinafter to the study of institutional classism, the phenomenon by which financial institutions, such as banks, mortgage lenders, credit-card companies, payday loan companies, student-loan lenders, car-loan companies, and the like, consciously or unconsciously, take advantage of prey." *See* Crusto, *Obama's Moral Capitalism, supra* note 34, at 1019. *See generally* JAMES K. GILBRAITH, THE PREDATOR STATE: HOW CONSERVATIVES ABANDONED THE FREE MARKET AND WHY LIBERALS SHOULD TOO (2008) (attempting to purge the liberal mind of the false economic idols of monetary control, balanced budgets, and decreased governmental regulations).

62. 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").

63. *See, e.g.*, Katz & Stafford, *supra* note 32, at 457–64; Secunda, *supra* note 18, at 107–08.

64. *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), two Jewish women (Ginsberg and Kagan), one Jewish man (Breyer), and four white men (Alito, Kennedy, Roberts, and Scalia)).

65. *See* Tim Padgett, *Is the Supreme Court Too Packed With Ivy Leaguers?*, TIME, May 12, 2010, http://www.time.com/time/nation/article/0,8599,1988877,00.html.

66. *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.[67] 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.[68] 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.[69]

This issue is most telling when religion plays a role in decision making, as the majority of the Court is Roman Catholic.[70] Should a Justice's religion disqualify her from hearing upcoming Establishment Clause and Free Exercise Clause cases?[71] Particularly, should a Catholic Justice recuse herself in cases involving issues like abortion?[72] Would the pressures of excommunication from the Catholic Faith influence her decision?[73] Evidence shows that a judge's religion *is* a proven basis for judicial bias in religious cases.[74] Still, courts hold that a judge's religion does not dis-

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as Property: Sex, Race, Status, and Wealth, 1 STAN. J. C.R. & C.L. 51, 168–69 (2005) (arguing that the history of society's treatment of "blackness" as private and state property provides a case for reparations and affirmative action).

67. *See* Grossman, *supra* note 64; MODEL CODE OF JUDICIAL CONDUCT Canon 3 R. 3.6, cmt. 4 (2010) ("A judge's membership in a religious organization [is] a lawful exercise of freedom of religion" and does not violate the Judicial Conduct Rule, generally prohibiting membership in discriminatory organizations.).

68. *See generally* U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States.") Similarly, Article I, Section 10, Clause 1 bars the states, rather than the federal government, from granting titles of nobility. *Id.* art. 1, § 10, cl. 1.

69. *See, e.g.*, Sears v. Upton, 130 S. Ct. 3259, 3261 (2010) ("It is plain from the face of the state court's opinion that it failed to apply the correct prejudice inquiry we have established for evaluating Sears's Sixth Amendment claim. We therefore grant the petition for writ of certiorari, vacate the judgment, and remand for further proceedings").

70. *See* Lisa Desjardins, *Sotomayor Would Be a Part of Court's Catholic Shift*, CNN, May 27, 2009, http://edition.cnn.com/2009/POLITICS/05/27/sotomayor.catholic/ (stating that as Sonia Sotomayor "breaks ground for Hispanics, she is poised to add an exclamation point to another historic demographic shift: the move to a Catholic court . . . . Of the 110 people . . . 11 have been Catholic. Five of those justices—Samuel Alito, Anthony Kennedy, Antonin Scalia, Clarence Thomas and Chief Justice John Roberts—are currently on the court").

71. U.S. CONST. amend. I ("Congress shall make no laws representing an establishment of religion, or prohibiting the free exercise thereof . . . ."). *See generally* REDLICH, *supra* note 11, at 690 ("Two competing approaches to interpretation of the religion clauses . . . the wall of separation between church and state, and the accommodation of religion—continue to dominate the Court's decisions today").

72. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 164–66 (1973) (identifying a woman's right to privacy in abortion matters).

73. Ian Fisher & Larry Roher, *Pope Opens Trip with Remarks Against Abortion*, N.Y. TIMES.COM, May 10, 2007, http://www.nytimes.com/2007/05/10/world/americas/10pope.html (reporting that Pope Benedict XVI said that "'Legislative action in favor of abortion is incompatible with participation in the Eucharist,' . . . and politicians who vote that way should 'exclude themselves from communion.' . . . [C]ertain values, including protecting human life from conception to natural death, [are] 'not negotiable' and . . . Catholic politicians [have] a 'grave responsibility' to promote such laws.").

74. Gregory C. Sisk et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 491–503 (2004) (on the influence of religion on judicial decision making).

qualify her from hearing those cases.[75] Similarly, a judge should not recuse herself merely because it appears that she is an advocate for a group that is appearing before her.[76] 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*,[77] 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.[78] In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*[79] the court

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.").

76. *See* Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs, 388 F. Supp. 155, 162–63 (E.D. Pa. 1974) (denying a recusal motion against black judge who had demonstrated an appearance of partiality towards the black plaintiffs).

77. 130 S. Ct. 876, 913–14 (2010) (holding that the government may not, under the First Amendment, "suppress political speech on the basis of the speaker's corporate identity," overruling Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) (a federal statute barring independent corporate expenditures for electioneering communications violated the First Amendment), and overruling McConnell v. Federal Election Comm'n, 540 U.S. 93 (2003) (the disclaimer and disclosure provisions of Bipartisan Campaign Reform Act of 2002 did not violate the First Amendment, as applied to nonprofit corporation's film and three advertisements for the film)).

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: Repeating* 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-

again used a formalistic analysis to allow large, sometimes unscrupulous, financial institutions to exploit consumers[80] Similarly, in *McDonald v. City of Chicago*,[81] the Court applied a formalistic analytical method to the Second Amendment, which resulted in greater gun availability in urban centers, resulting in more homicides.[82] Finally, in *Safford Unified School District No. 1 v. Redding*,[83] the Court yet again exercised a formalistic approach to deny constitutional privacy protection to a 13-year-old girl in a public school setting,[84] against one seasoned Justice's heated objection.[85]

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.[86] Relative to the

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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 justice[92] 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

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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-justicee-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.'").

87. Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 CARDOZO L. REV. DE NOVO 133, 135–38 (2009).

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.").

90. BARACK OBAMA, THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM 66–69 (2006) [hereinafter OBAMA, AUDACITY] (defining empathy as "a call to stand in someone else's shoes and see through their eyes"). *See also* WILLIAM SAFIRE, SAFIRE'S POLITICAL DICTIONARY 139 (2008) (discussing how the Republican Party used "compassion" to appeal to the average, working voter). *Cf.* DOUGLAS WEAD, THE COMPASSIONATE TOUCH (1977). "In 1979, Wead's 'The Compassionate Conservative' speech at an annual Washington Charity Dinner reportedly inspired President George W. Bush to adopt the phrase ["compassionate conservatism"] JACOB WEISBERG, THE BUSH TRAGEDY 92–93 (2008)."

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.[95] Later, upon Justice John Paul Stevens's retirement[96] 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.[97] 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.[98]

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

95. *Remarks by the President in Nominating Judge Sonia Sotomayor to the United States Supreme Court*, WHITE HOUSE (May 26, 2010), http://www.whitehouse.gov/the-press-office/remarks-president-nominating-judge-sonia-sotomayor-united-states-supreme-court.

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").

97. *Remarks by the President and Solicitor General Elena Kagan at the Nomination of Solicitor General Elena Kagan to the Supreme Court*, WHITE HOUSE (May 10, 2010), http://www.whitehouse.gov/the-press-office/remarks-president-and-solicitor-general-elena-kagan-nomination-solicitor-general-el.

98. *Genesis* 18:20–33 (New American). *See generally* Robert A. Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455 (1984) (analyzing the use of parables to facilitate constitutional law development). *Cf.* Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) (promoting a natural

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.[99] In a classic empathic dialogue with God, Abraham inquires whether it would be just to treat the innocent and guilty alike.[100] God decides that for fifty innocent people he would not destroy the cities.[101]

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.[102] 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.[103] 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.[104] 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.[105] Utilizing empathic dialogue to assess this controversial issue would result in identifying and applying a value principle: it is

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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.

99. *Genesis* 18:20–33 (New American).

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.[106] 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.[107] 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] Em-

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.'").

110. *See Genesis* 18:20–33 (New American).

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.,

pathy, 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

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IMPLEMENTING THE CONSTITUTION 10 (2001) (analyzing the Court's independent judgment as "likely, over time, to lead to better specification and implementation of constitutional values than would an alternative regime"); ANDRÁS SAJÓ, CONSTITUTIONAL SENTIMENTS 4 (2011) (analyzing how "emotions, through complicated mechanisms, do have an actual impact on constitutional design and law").

113. *See generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (3d ed. 2005); REDLICH, *supra* note 11, at 160–66.

114. *See* U.S. CONST. art. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.").

115. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.").

116. *Id.*

right to a trial by jury in civil matters, yet again reinforcing the empathy principle.[117] Furthermore, the Fourteenth Amendment ensures and expressly extends the protections of a speedy and public trial and of an impartial trial against the states,[118] demonstrating that its drafters readopted 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.[119] The Founders also showed empathy for the accused by guaranteeing citizens the protections afforded by a grand jury indictment[120] and by establishing Fifth Amendment protections against double jeopardy; self-incrimination; deprivation of life, liberty, and property without due process of law;[121] and the right to "just compensation" for governmental takings.[122] Furthermore, the Founders expressly granted the President the authority "to grant Reprieves and Pardons"[123] 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"[124] plea, the "insanity defense,"[125] 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 (1897) ("[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.").

124. *See, e.g.*, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010); District of Columbia v. Heller, 554 U.S. 570 (2008); Brown v. United States, 256 U.S. 335 (1921).

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,[126] the "mentally retarded"[127] defense rules, as well as the mitigating factors in federal sentencing guidelines.[128] 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.*,[129] the Supreme Court reassessed the self-recusal standards,[130] wherein a judge's campaign contributor was a party to a case before him.[131] The Court recognized that a judge's inquiry into actual bias is "often a private one," which "underscores the need for objective rules."[132] The Court concluded that the Fourteenth Amendment's Due Process Clause[133] provides objective standards for self-recusal that do *not* require proof of actual bias.[134]

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tive Criminal Law, 33 STAN. L. REV. 591, 594 n.4 (1981) ("For example, we incorporate facts about a defendant's personal history in raising the insanity defense.").

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).

127. *See* U.S. CONST. amend. VIII; *see also* Atkins v. Virginia, 536 U.S. 304, 321, 352 (2002) (holding that the execution of mentally retarded criminals constituted "cruel and unusual punishment" and that it was prohibited by the Eighth Amendment). *See generally* Note, *Implementing* Atkins, 116 HARV. L. REV. 2565 (2003) (discussing the impact of the *Atkins* decision on state criminal cases).

128. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (2011).

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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position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'").

135. *See id.* at 883–85; Citizens United v. Federal Election Comm'n, 130 S. Ct. 876, 896–914 (2010).

136. *Citizens United*, 130 S. Ct. at 913–14.

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.

Id. (emphasis added).

See generally James Bopp, Jr. & Josiah Neeley, *How Not to Reform Judicial Elections: Davis, White, and the Future of Judicial Campaign Financing*, 86 DENV. U. L. REV. 195, 197 n.10 (2008) (citing George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1560–61 (2008) (showing that popular opinion polls in New York, Ohio, Pennsylvania, and the nation, which show that between 75 percent and 95 percent of registered voters believe that campaign contributors influence judges)); Bert Brandenburg, *Big Money and Impartial Justice: Can They Live Together?*, 52 ARIZ. L. REV. 207, 213–17 (2010); Norman L. Greene, *How Great Is America's Tolerance for Judicial Bias? An Inquiry into the Supreme Court's Decisions in* Caperton *and* Citizens United*, Their Implications for Judicial Elections, and Their Effect on the Rule of Law in the United States*, 112 W. VA. L. REV. 873, 897–98 (2010); Adam Liptak, Caperton *After* Citizens United, 52 ARIZ. L. REV. 203, 205 (2010); Jonathan H. Todt, Note, Caperton v. A.T. Massey Coal Co.*: The Objective Standard for Judicial Recusal*, 86 NOTRE DAME L. REV. 439, 447–49 (2011); Senator Tom Udall, *Amend the Constitution to Restore Public Trust in the Political System: A Practitioner's Perspective on Campaign Finance Reform*, 29 YALE L. & POL'Y REV. 235, 238–43 (2010).

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.

low,[141] several groups have proposed model reforms[142] and a few states have begun reexamining their recusal rules.[143]

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.*[144] 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,[145] 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.[146] In a ceremonial signing, President Obama noted that empathy played a role in the development of this legislation,[147] making each unfair paycheck an act of

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141. *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.").

142. JAMES SAMPLE ET AL., BRENNAN CENTER FOR JUSTICE, FAIR COURTS: SETTING RECUSAL STANDARDS 25–35 (2008), *available at* http://www.brennancenter.org/content/resource/fair_courts_setting_recusal_standards/ (establishing a menu of ten ideas, including empanelling outside judges to hear recusal motions against a particular judge, creating per se rules for disqualification, and enhancing disclosure requirements for judges as well as litigants); U.S.L. WR., DRAFT ABA REPORT REVIEWS RULES AND PROCESSES FOR JUDICIAL RECUSAL, RECOMMENDS IMPROVEMENTS 5 (June 16, 2009), *available at* http://www.americanbar.org/content/dam/aba/images/judicial_independence/lawweek_case_focus.pdf. The American Bar Association is exploring new model recusal rules.

143. Tresa Baldas, *Judges Slow To Toughen Up Recusal Rules*, NAT'L L.J., Feb. 15, 2010.

144. 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified at 42 U.S.C. § 2000e-5 (2010)). *Cf. Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 644 (Ginsburg, J., dissenting). Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, was particularly critical of the majority's narrow interpretation of the statute, although she didn't specifically use the word empathy in her opinion. *Id.*; *see* Slevin, *supra* note 86 (discussing that during the 2008 presidential campaign, candidate Obama often criticized the Supreme Court's decision as an example of a lack of empathy); Barack Obama, Discussion with Working Women (June 23, 2008), *available at* http://www.asksam.com/ebooks/releases.asp?doc_handle=1264117&file=Obama-Speeches.ask&query=lillyledbetter&search=yes. During the presidential campaign, then Senator Obama announced his co-sponsoring of a bill to redress violations of equal pay legislation. *See generally* FRED I. GREENSTEIN, THE PRESIDENTIAL DIFFERENCE: LEADERSHIP STYLE FROM FDR TO BARACK OBAMA (3rd ed. 2009) ("Even if he wasn't African-American, he'd have a considerable entry in the history books.").

145. *Ledbetter*, 550 U.S. at 628–29.

146. Lilly Ledbetter Fair Pay Act of 2009, 123 Stat. at 5.

147. 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.[148] Though controversial, Obama's overall motivation for his first term's legislative agenda is his sense of empathy.[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.

V. OBJECTIONS TO EMPATHIC DIALOGUE

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

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.[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.[151] In contrast, the Third Circuit, in *Lutz v. City of York*,[152] applied the substantive due

148. *Id.*

149. *See, e.g.*, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at 42 U.S.C. § 18091 (2011) and 26 U.S.C. § 5000A (2011)); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5411 (2011)); Credit Card Accountability, Responsibility and Disclosure Act, Pub. L. No. 111-24, 123 Stat. 1734 (2009) (codified as amended in scattered sections of 15 U.S.C.); Higher Education Opportunity Act, Pub. L. 110–315, 122 Stat. 3078 (2008) (codified as amended in scattered sections of 20 U.S.C.).

150. *See, e.g.*, John Amato, *McCain Calls Obama a Socialist, but McCain Voted for the Bail Out and Wants to Spend Government Money on the Mortgage Crisis*, CROOKS & LIARS (Oct. 19, 2008, 2:59 PM), http://crooksandliars.com/john-amato/mccain-calls-obama-socialist-mccain-vot ("MCCAIN: I think his plans are redistribution of the wealth. He said it himself, 'We need to spread the wealth around.' . . . That's one of the tenets of socialism."); Fred Barnes & Mort Kondracke, *Is President Obama Taking Us Toward Socialism?*, FOX NEWS, (Feb. 23, 2009), http://www.foxnews.com/story/0,2933,498909,00.html.

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, *Enslaved Constitution: Obstructing Freedom to Travel*, 70 U. PITTS. L. REV. 233, 233–34 (2008) [hereinafter Crusto, *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).

152. 899 F.2d 255 (3d Cir. 1990).

process test[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."[154] While the *Dickerson* court employed a formalistic approach to reach an unjust result, the *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 *Lutz* court's empathic approach to this question is consistent with a moral reading of the Constitution.[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 *Brown v. Board of Education*[156] decision, showed empathy to segregationists when it ordered the desegregation of public schools "with all deliberate speed."[157] Similarly, in *Johnson v. M'Intosh*,[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.[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.[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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153. *Id.* at 267–68 (quoting 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.").

154. *Id.*

155. 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").

156. *(Brown I)*, 347 U.S. 483 (1954).

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

158. 21 U.S. (8 Wheat.) 543 (1823).

159. *Id.* at 562; *see also* 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").

160. *See generally* Robert Lenzner, *Bernie Madoff's $50 Billion Ponzi Scheme*, 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. *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.

168. 305 F.2d 343 (5th Cir. 1962), *recalled for more explicit judgment*, 306 F.2d 374 (5th Cir. 1962), *cert. denied*, 371 U.S. 828 (1962). *See generally* Crusto, *New Federalism*, *supra* note 9; Mitchell F. Crusto, *Federalism and Civil Rights: The Meredith Case*, 11 NAT'L BLACK L.J. 233 (1989).

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,[170] but this alone does not ensure just decisions since judges who are alike sociologically do not necessarily think the same.[171] Compared to current proposals, empathic dialogue works best because it promotes the integrity of the federal judiciary. Relative to mandatory recusal proposals,[172] 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,

170. *See generally* Ciara Torres-Spelliscy et al., *Improving Judicial Diversity*, BRENNAN CENTER FOR JUSTICE (2008), http://brennan.3cdn.net/96d16b62f331bb13ac_kfm6bplue.pdf (evaluating the impact of a lack of diversity on judicial decision making).

171. *See generally* MICHAEL G. LONG, MARSHALLING JUSTICE: THE EARLY CIVIL RIGHTS LETTERS OF THURGOOD MARSHALL (2011) (documenting the courage of the NAACP Legal Defense Fund's key litigator in countless courtroom battles including the *Brown* decision); JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY (2000) (documenting the civil rights contributions of America's greatest civil rights advocate and jurist). *Cf.* SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS (2002); SAMUEL A. MARCOSSON, ORIGINAL SIN: CLARENCE THOMAS AND THE FAILURE OF THE CONSTITUTIONAL CONSERVATIVES (2002); Jagan Nicholas Ranjan, *The Politicization of Clarence Thomas*, 101 MICH. L. REV. 2084, 2102 (2003); *see also* Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1510 (2007) (naming Justice Thomas as "today's most extreme conservative" on the Supreme Court).

172. *See* Mauro, *supra* note 4.

with fear and hate, with community of prejudice, but with our hearts.[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 *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.

173. A TIME TO KILL, *supra* note 1 (Jake Tyler Brigance's closing argument).