The Truth About Empathy

Author : Howard M. Wasserman

Date : June 28, 2013

Thomas B. Colby, *In Defense of Judicial Empathy*, 96 **Minn. L. Rev.** 1944 (2012).

President Obama was widely criticized when he stated that he viewed a "quality of empathy, of understanding and identifying with people's hopes and struggles" as an essential attribute in a judge, one that he would look for in choosing Supreme Court justices and other federal judges. Conservative commentators attacked this as endorsing naked judicial activism, a call for more liberal judges running amok and deciding cases to suit their political preferences in favor of the "little guy" rather than based on "law." Neither of the President's Supreme Court nominees would openly endorse the empathy standard in their confirmation hearings, although Justice Kagan subtly defended the underlying idea, if not the terminology, at her confirmation hearing. And Republican members of Congress used the President's words (or at least their (mis)interpretations of those words) to oppose his Supreme Court nominees.

With *In Defense of Judicial Empathy*, Thomas Colby undertakes the first comprehensive scholarly treatment and defense of the President's arguments and of empathy as an essential and unavoidable component of good judicial decisionmaking. And he ties the centrality of empathy to broader debates over the judicial role.

Colby begins by identifying and correcting the arguable cause of much of the controversy over the President's standard—the confusion between empathy and sympathy. While empathy is a relatively new word of contested meaning, Colby adopts the dictionary definition: the "action of understanding, being aware of, being sensitive to, and vicariously experiencing the feelings, thoughts, and experience of another of either the past or present without having the feelings, thoughts, and experience fully communicated in an objectively explicit manner." Empathy is the cognitive skill of being able to see a situation from someone else's perspective and to understand how and why someone sees, feels, and acts as they do. That is fundamentally different than sympathy, through which a person is affected by and acts in support of the feelings of another. As Colby puts it, sympathy is feeling *for* someone; empathy is feeling *with* someone.

Importantly, the ability to empathize—to experience, feel, and understand what another person experiences, feels, and understands—says nothing about what a judge should do with the information gained from her empathy. Empathy does not tell a judge to decide in a particular way. *Contra* many conservative political and scholarly critics, Colby insists that empathy merely guides judges in hearing and thinking about the case, not in deciding for or against any party. A judge can exercise empathy even if she ultimately decides not to adopt the position of the party into whose shoes she steps. Although Colby does not use the term, we can understand empathy as procedural—as governing the "manner and means" by which judges hear and think about cases. Empathy enables judges to identify, understand, and consider all the variables that should be analyzed, including the positions, feelings, and experiences of the parties; it says nothing about the outcome of that analysis.

Colby does recognize a "nontrivial concern" that a judge's empathy may turn into sympathy, prompting her to rule based on feeling sorry for one side of a dispute (particularly the poor, disadvantaged, or underdog side) rather than on the law. But this is not solely a liberal danger, as arguably demonstrated by Justice Alito's dissents in Snyder v. Phelps (invalidating civil judgment against public protests outside funeral) and United States v. Stevens (invalidating federal statute prohibiting video depictions of animal cruelty). Alito alone argued that expression lost its constitutional protection when it was aimed at the grieving parents of a deceased soldier "at a time of acute emotional vulnerability" or when the expression depicted animals experiencing "excruciating pain." In his view, the harm and pain suffered by mourners and kittens, for which he clearly felt an affinity, trumped standard free-speech principles. In any event, that

empathy might bleed into sympathy cannot mean that a judge should not possess or exercise empathy, only that she should (and likely will) strive to be aware of how one can lead to the other and to ensure that her empathy does not lead to subconscious sympathy-based decisionmaking.

Having properly defined empathy and disaggregated it from sympathy, Colby then argues that, rather than being undermined by empathy, a judicial system in fact cannot properly function without it. Empathy is essential in an adversary system, where each side is given an opportunity to present its best legal and factual arguments, and the judge is charged with selecting the better of those arguments. For that opportunity to be meaningful, the judge must be truly capable of hearing, listening to, and understanding the legal and factual arguments that each party presents. That empathy is many-sided. A judge should hear and understand the feelings, experiences, and needs of all parties, not just one. And it is politically neutral—a liberal judge cannot only hear and understand the "little guy" and ignore the positions of corporate actors, the government, or crime victims. Empathy, Colby insists, is the "capacity to understand the perspective and feel the emotions of others—*all* others." (emphasis in original).

Finally, Colby ties empathy to the debate over the "judge-as-umpire" analogy that Chief Justice Roberts famously offered at his confirmation hearing. Colby rejects the analogy as "bankrupt," because it erroneously assumes that law is as determinate and capable of producing objectively correct answers as whether a pitch is a ball or strike.

But it isn't, as Colby demonstrates through a range of constitutional and subconstitutional doctrines defined by multi-factor balancing tests. These require a judge to weigh competing interests and concerns, which she only can do if she genuinely understands those interests and concerns through an exercise of empathy. Judges routinely predict future behavior, balance competing individual interests, and apply "reasonable person" tests that "require judges to assume the perspective of various actors to determine whether their behavior was objectively reasonable." A court can properly decide whether a school principal acted reasonably in strip-searching a female student only if the justices truly can put themselves in the shoes of both the principal and the student and understand the concerns that motivate and affect each. A court can only determine whether a law has a rational basis if the judge understands the positions of all involved—the legislators trying to solve problems with imperfect lines, the people sought to be protected, and the people subject to the law's regulatory reach. A court can only decide whether an objective observer would view a religious display as endorsing religion if the judge can put herself in that observer's shoes.

Unlike baseball, law requires judging. And judging requires the ability to truly understand and process the arguments, positions, and feelings presented by the parties. Judging, in other words, is an exercise in empathy, and judges simply cannot perform their functions without it. As Colby persuasively shows, our legal, political, and academic discourse about courts and judicial decisionmaking will be better served if everyone understands this.

Cite as: Howard M. Wasserman, *The Truth About Empathy*, JOTWELL (June 28, 2013) (reviewing Thomas B. Colby, *In Defense of Judicial Empathy*, 96 **Minn. L. Rev.** 1944 (2012)), https://courtslaw.jotwell.com/the-truth-about-empathy/.