

Scholarly Commons @ UNLV Boyd Law

Scholarly Works

Faculty Scholarship

1987

Legality and Empathy

Lynne Henderson

University of Nevada, Las Vegas -- William S. Boyd School of Law

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>



Part of the [Jurisprudence Commons](#), [Legal History Commons](#), and the [Rule of Law Commons](#)

Recommended Citation

Henderson, Lynne, "Legality and Empathy" (1987). *Scholarly Works*. 870.

<https://scholars.law.unlv.edu/facpub/870>

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

LEGALITY AND EMPATHY

Lynne N. Henderson*

I. INTRODUCTION

It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.

— Justice Thurgood Marshall¹

In 1976, John Noonan's *Persons and Masks of the Law*² appeared. In the first chapter, Noonan alluded to the unhinging of the law from human experience as well as the relationship of love to power and emotion to law. He conceded the need for the Rule of Law for social control — the alternative apparently being the war of all against all — but he also sought wistfully to incorporate human beings into legal thinking, stating, "Abandonment of the rules produces monsters; so does neglect of persons."³ Yet Noonan, like others troubled by the lack of humane responses in the law, could do no more than raise a cry against legality's denial of persons. He never developed a coherent approach to help us avoid the tendency of legality to abstract the problems of persons to the point of denying persons altogether.⁴

The troubling phenomenon produced by fidelity to the Rule of Law in legal theory and practice is captured in the quotation of Justice Marshall's dissent in *Kras*: Legal decisions and lawmaking frequently have nothing to do with understanding human experiences, affect, suf-

* Assistant Professor, Cleveland-Marshall College of Law. B.A. 1975, J.D. 1979, Stanford University. — Ed.

Robin L. West and Paul Brest provided me with support, encouragement, criticism, and nudging throughout this project. My colleagues Jim Wilson and Mickey Davis were very helpful and conscientious readers of various drafts. I owe thanks to Robert Weisberg and Mark Tushnet for some special assistance and to Joyce Sterling, Bill Simon, and Deborah Rhode for their help and interest. Mistakes that remain are mine.

1. *United States v. Kras*, 409 U.S. 434, 460 (1973) (dissenting opinion).

2. J. NOONAN, *PERSONS AND MASKS OF THE LAW* (1976).

3. *Id.* at 18.

4. Instead, the book is both an argument for historical investigation of law and a collection of essays on particular cases or legal issues, primarily from the point of view of legal decisionmakers. There are allusions to tensions produced and stabs at psychohistory. See, e.g., *id.* at 111-51 (discussing the *Palsgraf* case). But the book contains no coherent alternative to "rule boundedness." Judge Noonan's main scholarly concern has been abortion, however, and he has shifted his attention to other matters as well. He has indicated that he has not developed any subsequent theories of judicial interpretation based on the suggestions in *Persons and Masks of the Law* (Comments of Judge Noonan during faculty seminar, Cleveland-Marshall College of Law, Apr. 1, 1987).

fering — how people *do* live.⁵ And *feeling* is denied recognition and legitimacy under the guise of the “rationality” of the Rule of Law. Incorporating experiential understanding of persons or groups into an ideological system based on a reductionist concept of reason, a system that at times seems to have a fetish for predictability and control under the Rule of Law, raises terrifying specters of destabilization, chaos, and anarchy. Accordingly, the emotional, physical, and experiential aspects of being human have by and large been banished from the better legal neighborhoods and from explicit recognition in legal discourse (although they sometimes get smuggled in as “facts” in briefs and opinions). Ironically, while emotion may generate laws via “politics,” once those laws meet whatever criteria are necessary to constitute legitimacy in a system, they are cleansed of emotion under this vision of the Rule of Law.⁶ The law becomes not merely a human institution affecting real people, but rather The Law.

A scholar or a judge *may* react to the pain and anguish caused actual human beings by a given law or doctrine, but she will seldom point to the painful or existential consequences of that law as reason to change it. This is because the ideological structures of legal discourse and cognition block affective and phenomenological argument: The “normal” discourse of law disallows the language of emotion and experience.⁷ The avoidance of emotion, affect, and experiential understanding reflects an impoverished view of reason and understanding — one that focuses on cognition in its most reductionist sense. This impoverished view stems from a belief that reason and emotion are sepa-

5. *Kras* involved a challenge to the \$50 filing fee required to institute bankruptcy proceedings. The majority decision distinguished *Boddie v. Connecticut*, 401 U.S. 371 (1971), which had held that due process required waiver of court fees for indigents seeking dissolution of marriage, on the grounds that the interests in the marital relationship and association were “fundamental” under the Constitution. Bankruptcy, the *Kras* majority said, involved no such fundamental interest. 409 U.S. at 443 (1973). The majority also denied any equal protection problems, given the absence of a fundamental right to declare bankruptcy. Three dissenters focused on a right of access to the courts to litigate issues raised by government-imposed obligations. See 409 U.S. at 451-57 (Stewart, J., dissenting). Justice Marshall went farther, denying a public/private law distinction in the right to access. 409 U.S. at 462-63 (Marshall, J., dissenting). Marshall observed:

It may be easy for some people to think that weekly savings of less than \$2 are no burden. *But no one who has had close contact with poor people* can fail to understand how close to the margin of survival many of them are. . . . A pack or two of cigarettes may be, for them, not a routine purchase but a luxury The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. They have more important things to do with what little money they have

409 U.S. at 460 (emphasis added).

6. R. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 2, 9 (1986).

7. The distinction between “normal” discourse (the accepted method of thinking and speaking) and “abnormal” discourse (departures from the conventions of a particular discipline’s conversational practices) is Richard Rorty’s. See R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 320 (1979) (“Abnormal discourse is what happens when someone joins in the discourse who is ignorant of these conventions or who sets them aside.”).

rate, that reason can and must restrain emotion, that law-as-reason can and must order, rationalize, and control.⁸

As a result, an entire mode of understanding and interpreting is seemingly foreclosed by legal discourse — or, more likely, it rumbles underground, much like the Freudian unconscious, seldom explicitly breaking through. That mode of understanding is best captured by the word “empathy,” a word that at first seems counterintuitive in a world defined as legal. Yet empathy is a form of understanding, a phenomenon that encompasses affect as well as cognition in determining meanings;⁹ it is a rich source of knowledge and approaches to legal problems — which are, ultimately, *human* problems. Properly understood, empathy is not a “weird” or “mystical” phenomenon, nor is it “intuition.” Rather, it is a way of knowing that can explode received knowledge of legal problems and structures, that reveals moral problems previously sublimated by pretensions to reductionist rationality, and that provides a bridge to normatively better legal outcomes.

While there exists a tendency on the part of lawyers, judges, and — might I add — law professors, to deny a role to empathic responses in their approaches to legal problems, it is no hunch to claim that the better understanding we have of a situation at *all* levels, the better our decisionmaking is likely to be. To have total historical, empirical, emotional, experiential, and contextual understanding of a given legal problem before making a decision is an unreachable ideal. But empathy enables the decisionmaker to have an appreciation of the human meanings of a given legal situation. Empathy aids both processes of discovery — the procedure by which a judge or other legal decisionmaker reaches a conclusion — and processes of justification — the procedure used by a judge or other decisionmaker to justify the conclusion — in a way that disembodied reason simply cannot.¹⁰

This article rejects the assumption that legality — by which I mean the dominant belief system about the Rule and role of Law — and empathy are mutually exclusive concepts. Failure to recognize the phenomenon of empathy explicitly in legal decisions more generally may result from a fear of the emotional realm as *irrational*, rather than *arational*. It may stem from a belief that the divide between “subject” and “object” is uncrossable.¹¹ The resistance to empathy may be at-

8. See notes 72-99 *infra* and accompanying text.

9. See notes 26-38 *infra* and accompanying text.

10. R. WASSERSTROM, *THE JUDICIAL DECISION* 27 (1961).

11. Or frightening. For one discussion of the “subjective/objective” dichotomy, see R. RORTY, *supra* note 7, at 335-42. For an example of the posited fear of intimate connection with others, see R. UNGER, *PASSION: AN ESSAY ON PERSONALITY* (1984), especially at 220-39. *Cf.*

tributable to the adversarial ideology acquired during law school¹² — understanding the adversary is not important unless it serves one's instrumental purpose — or to the fact that little in the professional culture and scholarship encourages development and use of empathic skills.¹³ But empathy *can* contribute to meaning and interpretation and enlarge the universe of legal discourse and understanding. The stories or narratives of the law can be heard differently, and more meanings will be available to legal discourse through explicit attempts to understand the situation and experience of others. This can lead to revolutions in habitual legal thinking and transformation of legal problems.

This article argues that an understanding of the phenomenon of empathic knowledge has enormous explanatory power. It does so by examining from the perspective of empathy the stories of the Supreme Court's decisions in *Brown v. Board of Education (I)*,¹⁴ *Shapiro v. Thompson*,¹⁵ *Roe v. Wade*,¹⁶ and *Bowers v. Hardwick*.¹⁷ The article argues that *Brown I* can best be explained by empathy, that *Shapiro* again manifests the breakthrough of empathic understanding, and that *Roe v. Wade* and its progeny demonstrate the Court's failure to hear certain empathic narratives. Finally, the article examines the recent case of *Bowers v. Hardwick* as an example of the complete failure of empathy in a legal decision.¹⁸

Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 338-44 (1985) (discussing R. UNGER, *KNOWLEDGE AND POLITICS* (1975)).

12. But see Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1387-404 (arguing that formal procedures of adversary model may better counteract prejudice and lack of empathy than "alternative dispute resolution" models).

13. There has been some recognition of this, but it has largely fallen upon deaf, if not hostile, ears. Compare E. DVORKIN, E. HIMMELSTEIN & H. LESNICK, *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM* (1981) (book seeking ways to "humanize" professional legal education), with Gellhorn, "Humanistic Perspective": *A Critique*, 32 J. LEGAL EDUC. 99 (1982) (accusing authors of trying to "de-intellectualize" legal education). The "humanistic" approach does not specifically mention empathy. Two professors who perhaps tried to examine issues of personal and professional development having to do with empathy in a seminar entitled "Human Aspects of Legal Education" found that the results were mixed; from one professor's report of the outcome and from a discussion of the class with some participants, it does not appear that members of the group developed any particular empathy for one another. See Weinstein, *The Integration of Intellect and Feeling in the Study of Law*, 32 J. LEGAL EDUC. 87 (1982). See also Barkai & Fine, *Empathy Training for Lawyers and Law Students*, 13 SW. U. L. REV. 505 (1983) (concentrating primarily on the *affective* component of empathy).

14. 347 U.S. 483 (1954).

15. 394 U.S. 618 (1969).

16. 410 U.S. 113 (1973).

17. 106 S. Ct. 2841 (1986).

18. I chose these cases because they are familiar to the legal community and they appear to illustrate the role of empathy — or lack of it — particularly well, because they involved people

II. LEGALITY, EMPATHY, AND MORAL CHOICE

A. *What Empathy Means*

Empathy has become a favorite word in critical and feminist scholarship. Unfortunately, it is never defined or described — it is seemingly tossed in as a “nice” word in opposition to something bad or undesirable.¹⁹ Because I argue that empathy is a phenomenon that exists to expand understanding of others, I may or may not be writing in the traditions characterized as “critical” or “feminist.” But I share the concerns of these traditions about the lack of humanistic response in legal thinking and have drawn on them to shape my own thinking.

Duncan Kennedy’s article, *Distributive and Paternalist Motives in Contract and Tort Law*,²⁰ suggests some of the ideas developed here. He states that “the basis of paternalism is empathy or love,”²¹ but he fails to define empathy. It *appears* that he substitutes the words “intuition” and “intuitive” to describe what in fact are empathic phenomena,²² but he makes several mistakes while correctly arguing that this “intuitive” form of knowledge is a form of “real knowledge.”²³ First, he seems to assume that empathic understanding necessarily leads to intervention, “paternalist action,” or altruistic behavior.²⁴ Second, he alludes to intuitive understanding/empathy as a form of “unity” with the Other,²⁵ but it is not clear if he is alluding to the collapse of ego boundaries, which is not a necessary consequence of empathy, or simply fellow-feeling. Finally, he leaves tantalizingly unanswered the question of how empathic knowledge, particularly knowledge of people who are not intimate associates, can occur.

whose experiences and situations were different from, or outside of, mainstream American cultural understandings.

19. See note 26 *infra*. Other scholars have also referred to empathy without defining or explaining it. John Hart Ely refers to empathy almost as a “given” in his discussion of criteria for suspect classifications. See J.H. ELY, *DEMOCRACY AND DISTRUST* 160-61 (1980). Robert Burt defines empathy as a “benign, altruistic view” of relations. Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455, 491 (1984). John Denvir has recently written that racism prevents “the empathetic response essential to social harmony” Denvir, *William Shakespeare and the Jurisprudence of Comedy*, 39 STAN. L. REV. 825, 844 (1987).

20. Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982).

21. *Id.* at 563. According to Kennedy the basis of paternalism is “intersubjectivity,” the scope of which is “limited by our capacity for empathy.” *Id.* at 624.

22. In describing “strong paternalism,” for example, Kennedy writes: “The actor feels he has *intuitive* access to the other’s feelings and perceptions about the world, and that he participates directly in the suffering and happiness of the other.” *Id.* at 638 (emphasis added). This “condition of unity” can lead to sensing “false consciousness” as an “intuition of error.” *Id.*

23. *Id.* at 639.

24. *Id.* at 625, 638-49.

25. *Id.* at 638, 647.

Thus it is necessary to develop an explanation of what I mean by "empathy." While the word often appears to be used interchangeably with "love," "altruism," and "sympathy,"²⁶ it actually encompasses specific psychological phenomena. Although the literature of empathy manifests disagreement about what is or is not "empathy," rather than projection, sympathy, or what have you, there are three basic phenomena captured by the word: (1) feeling the emotion of another; (2) understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other; and (3) action brought about by experiencing the distress of another (hence the confusion of empathy with sympathy and compassion). The first two forms are ways of knowing, the third form a catalyst for action.

Some of the confusion about the meaning of empathy may result from its origins and comparatively recent entry into the language. "Empathy" came into English as a translation of the German word *Einfühlung*, a word describing aesthetic perceptions.²⁷ Translations of *Einfühlung* sometimes used the word "sympathy," however, and the confusion of meanings of "sympathy" and "empathy" — which perhaps could be said better to capture a specific *type* of sympathy that involves being flooded with emotion — has persisted. (Thus, some twentieth-century philosophers have scoffed at "empathy," while at the same time describing empathic phenomena as important to human understanding).²⁸

As originally coined, empathy simply meant a physical reaction to something: *e.g.*, people observing the leaning tower of Pisa tend to

26. See *id.* at 563; Cornell, *supra* note 11, at 340-44; West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817, 859-64 (1986); Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1178 & n.239 (1986).

27. Reed, *The Antithetical Meaning of the Term "Empathy" in Psychoanalytic Discourse*, in EMPATHY I 7 (J. Lichtenberg, M. Bornstein & D. Silver eds. 1984); Agosta, *Empathy and Inter-subjectivity*, in EMPATHY I, *supra*, at 43, 44.

28. Martin Buber, who perhaps more than any midtwentieth-century philosopher was concerned with describing empathic understanding, see M. BUBER, *BETWEEN MAN AND MAN* 1-39 (1965), declined to employ the "not very significant term 'empathy,'" which for Buber meant "the exclusion of one's own concreteness, the extinguishing of the actual situation of life, the absorption in pure aestheticism of the reality in which one participates." *Id.* at 97 (emphasis added). Yet Buber's use of "inclusion" or "dialogical relation" captures the understanding, affectively and cognitively, of the Other embodied in the psychotherapeutic definition of empathy:

It is the extension of one's own concreteness, the fulfillment of the actual situation of life, the complete presence of the reality in which one participates. Its elements are first, a relation, of no matter what kind, between two persons, second, an event experienced by them in common, . . . and, third, the fact that this one person, without forfeiting anything of the felt reality of his activity, at the same time lives through the common event from the standpoint of the other.

Id. at 97.

lean with the building. It also meant grimacing when someone else hit her thumb with a hammer — feeling the *physical* sensation of pain. This meaning quickly expanded to include the empathic response to *emotions*. Empathy thus captured the concept of feeling globalized emotions from others — anger, fear, joy, love — or understanding the *affect* of a communication by “tuning in to the feelings of another.” Globalized emotional reactions alert a person to the presence of emotion in an interaction or in another; however, these reactions may be misinterpreted or the emotion mislabeled. For example, because the physiological discomforts created by anger are virtually the same as those created by fear, cognitive attribution of “anger” or “fear” as the emotional state may be incorrect. Yet the detection of the strong emotional experience of another is a part of the meaning of an interaction or a phenomenon. Interpretation of that meaning, however, takes patience and sorting through, in order to understand the emotional state and what it means *to the person* experiencing it.²⁹ Moreover, it is quite possible to misattribute causal explanations or interpretations to an emotion, which can lead to inaccurate empathy.³⁰

The second common meaning of empathy is the one often referred to in psychotherapeutic literature: the understanding of the situation of another. “The function of empathy is to help one understand and relate to another person.”³¹ It is embodied in the idealized vision of the field anthropologist or participant-observer sociologist who understands totally, through empathic “magic,” the meanings, concepts, and way of being of a culture or group.³² Total understanding may be unachievable because of the social learning and cultural baggage the ethnographer, sociologist, or psychotherapist carries with her, yet it is an important mode of understanding the Other.³³ This second form of

29. See Agosta, *supra* note 27, at 54-55. Agosta describes empathy as a two-step process: “First, it involves a representation of another’s feeling. . . . Second, it entails a representation of the other as such as the *source* of the first representation [of another’s feeling].” *Id.* at 55. Finally, identification of the feeling is necessary. It could be said that empathy of this nature has three components, two cognitive and one affective: (1) the ability to identify and label the feeling states of others; (2) the ability to assume the perspective of others; and (3) “a capacity for emotional responsiveness.” P. MUSSEN, J. CONGER, J. KAGAN & A. HUSTON, *CHILD DEVELOPMENT AND PERSONALITY* 311 (6th ed. 1984) [hereinafter *CHILD DEVELOPMENT*].

30. Because we frequently misattribute causal explanations for our own emotional states, it seems highly likely that we will do so in assessing the source of another’s emotional state — although, arguably, we will be more “objective” about the state of another. See D. WESTEN, *SELF & SOCIETY* 51-52 (1985).

31. *Id.* at 94.

32. See C. GEERTZ, *LOCAL KNOWLEDGE* 55-59 (1983), for an amusing criticism of empathic “magic” in anthropology/ethnography.

33. In short, accounts of other peoples’ subjectivities can be built up without recourse to pretensions to more-than-normal capacities for ego effacement and fellow feeling. Normal capacities in these respects are, of course, essential But whatever accurate or half-

empathy is the foundation of what philosophers refer to as "intersubjectivity."

An early developmental form of empathy as understanding the situation of the Other exists in what has been termed "conceptual perspective taking" — the capacity to perceive others as having their own goals, interests, and affects.³⁴ Without empathy developed minimally, we would have the war of all against all or sociopathy. But beyond minimal conceptual perspective taking, empathy of this second type becomes historical, experiential, emotional, and cognitive.³⁵ It illuminates the situations of others. This form of empathy is *not* a dissolution of "ego boundaries" or absorption of self by other — it is a means of relating to another or making another intelligible.³⁶ A form of this kind of empathy is imaginative experiencing of the situation of another.³⁷ It is not the same as "getting it," as the "aha" experience, but it gives important clues to understanding. A means of imaginative experiencing is to analogize from similar experiences of one's own (something, by the way, at which one would expect lawyers to be adept given their use of analogy in argument and reasoning).³⁸

The third meaning of empathy that is commonly used is that of sympathy, care, or compassion, captured in Hoffman's notion of "an empathic distress response" — "an aversive [e.g., uncomfortable] affect that can result from the discrepancy between some desired state of

accurate sense one gets . . . comes from the ability to construe their modes of expression . . . which such an acceptance allows one to work toward developing.

Id. at 70.

34. J. BOWLBY, ATTACHMENT 368-70 (2d ed. 1982).

35. For example,

[e]mpathy is not an all-or-none quality of a child. It varies with the situation, the child's experience, and the people to whom the child is responding. In general, children show more empathy for people who are similar to themselves Perhaps it is easier to put oneself in the place of someone who is obviously similar. Children are also more apt to be empathic when they see someone in a situation they have experienced themselves than when they lack that experience.

CHILD DEVELOPMENT, *supra* note 29, at 312.

36. D. WESTEN, *supra* note 30, at 94.

37. Kennedy makes this point in his discussion of the intuition that someone is "suffering from some form of false consciousness The actor's sense that the other's consciousness is false is an intuition of error The basis of this kind of intuition is one's own experience of being mistaken" Kennedy, *supra* note 20, at 638. Analogizing, or drawing upon one's own experience to understand another's feelings or experiences, is a part of relating to another, if for no other reason than that no one has exactly the same experiences as anyone else. But this is an obvious point. The less obvious point is that it is possible to draw on one's own similar experiences to understand another. One could otherwise not empathize with another's grief at losing a parent at all if one could not draw on one's own experiences of loss, or empathize with another's joy at winning an important prize if one had never had a pleasant surprise. *See also* A. BANDURA, SOCIAL LEARNING THEORY 66 (1977).

38. I base this on the fact that legal *reasoning* frequently relies upon analogy; so that lawyers frequently are able to say situation *X* is more like situation *Y* than situation *Z*. Of course, this may be a purely "cognitive" use of analogy.

welfare of an object . . . and perceived/cognized reality."³⁹ This distress can lead to action in order to help or alleviate the pain of another.⁴⁰ It is this form of empathy that is linked to action and altruistic behavior. Yet, "[t]he relationship between action and the sharing of feelings is obviously not a simple or direct one,"⁴¹ and while empathy may lead to helping behavior, it does not necessarily do so. Indeed, a person feeling the distress of another may find ways of blocking the experienced distress by thinking of other things, rationalizing nonaction by rules or limits, or withdrawal.⁴² Thus there is not a direct causal relationship between empathy and helping behavior, but a connection between empathy and helping or altruistic behavior does exist.⁴³

Several "myths" about empathy have perhaps interfered with understanding of the phenomenon, making it more difficult to elucidate what empathic knowledge is. The most prevalent myth in recent scholarship is that women are "naturally" more empathic than men. Nancy Chodorow has claimed that empathy is "built into" the primary definition of self for girls.⁴⁴ Carol Gilligan's work also is widely cited for the proposition that empathy is a part of female moral judgment.⁴⁵ "The recent scholarly emergence and revaluation of epistemological and ethical perspectives that have been identified as feminine . . . claim a natural foundation for knowledge . . . in closeness, connectedness, and empathy."⁴⁶ The confusion may lie in the way "empathy" is used in the literature: Gilligan, in emphasizing an "ethic of care," that is, an "ethic of responsibility rest[ing] on an understanding that gives rise to compassion and care,"⁴⁷ and in describing the sensitivity to the needs of others and care for the feelings of others often

39. D. WESTEN, *supra* note 30, at 39.

40. *Id.* at 121.

41. E. STOTLAND, S. SHERMAN & K. SHAVER, *EMPATHY AND BIRTH ORDER 2* (1971) [hereinafter *EMPATHY AND BIRTH ORDER*]; see also sources cited in note 43 *infra*.

42. Hoffman, *The Development of Empathy*, in *ALTRUISM AND HELPING BEHAVIOR: SOCIAL, PERSONALITY AND DEVELOPMENTAL PERSPECTIVES* 41, 44, 54-55 (J. Ruston & R. Sorrentino eds. 1981) [hereinafter *ALTRUISM PERSPECTIVES*]; D. WESTEN, *supra* note 30, at 35.

43. See generally Batson & Coke, *Empathy: A Source of Altruistic Motivation for Helping?*, in *ALTRUISM PERSPECTIVES*, *supra* note 42, at 167; Hoffman, *supra* note 42, at 41; Aronfreed, *The Socialization of Altruistic and Sympathetic Behavior: Some Theoretical and Experimental Analyses*, in *ALTRUISM AND HELPING BEHAVIOR: SOCIAL PSYCHOLOGICAL STUDIES OF SOME ANTECEDENTS AND CONSEQUENCES* 103 (J. MacCaulay & L. Berkowitz eds. 1970) [hereinafter *ALTRUISM STUDIES*].

44. N. CHODOROW, *THE REPRODUCTION OF MOTHERING* 167 (1978).

45. See C. GILLIGAN, *IN A DIFFERENT VOICE* (1982).

46. Bordo, *The Cartesian Masculinization of Thought*, 11 *SIGNS* 439, 455 (1986).

47. See C. GILLIGAN, *supra* note 45, at 164.

learned by little girls,⁴⁸ invites the conclusion that empathy (particularly if it is mistakenly confused with compassion or care) *is* the domain of the female in American society. Yet the literature of empathy shows little sex difference in either children or adults.⁴⁹ Ability to empathize seems to be strongly influenced by socialization, learning, and early childhood experiences with separation and attachment, however.⁵⁰ To the extent that little girls are encouraged always to think of others, to be responsible for anticipating and taking care of the needs of others, and to be responsible for the emotional realm, they may be more likely to develop their empathic skills, but there simply isn't any real confirmation of this.

Later experience may influence empathic capacity as well. Bandura, in discussing empathy, notes that "[p]eople who have suffered pain are more likely to personalize the suffering of others and thus be more strongly affected by it. In studies . . . observers who have undergone prior painful experiences learn more through socially mediated suffering than observers who have experienced only mild unpleasantness or none at all"⁵¹ *Humans* seemingly have an innate capacity for empathy, but its development depends on learning and experience.⁵²

A second myth is that empathy *always* produces altruistic, helping, or caring responses. Duncan Kennedy seems to accept this link in his *Paternalism* article, for example.⁵³ The relationship of empathy to altruism is more complex than directly causal, however. While it is true that repeated studies seem to validate the relation of lack of empathy to sociopathic persons,⁵⁴ empathic responses do not inevitably elicit helping behavior. The altruistic behavior of high empathizers who are distressed by the suffering of others is contingent upon such factors as their skills, the means available to them, and their alternatives.⁵⁵ If the means for helping are lacking, high empathizers may avoid dealing

48. *Id.* at 165.

49. See E. MACCOBY & C. JACKLIN, 1 THE PSYCHOLOGY OF SEX DIFFERENCES 211-14, 349 (1974); Hoffman, *supra* note 42, at 52-53; cf. M.F. BELENKY, B.M. CLINCHY, N.R. GOLDBERBER & J.M. TARULE, WOMEN'S WAYS OF KNOWING 102-03, 113 (1986) ("connected knowing," the basis of which is capacity for empathy, "not gender-specific").

50. See Hoffman, *supra* note 42, at 59; EMPATHY AND BIRTH ORDER, *supra* note 41, at 11-12; J. BOWLBY, *supra* note 34, at 368-70; CHILD DEVELOPMENT, *supra* note 29, at 313.

51. A. BANDURA, SOCIAL FOUNDATIONS OF THOUGHT AND ACTION: A SOCIAL COGNITIVE THEORY 316 (1986).

52. See sources cited in note 50 *supra*. People can learn to be more empathic, it appears. See S. NATALE, AN EXPERIMENT IN EMPATHY 71 (1972).

53. Kennedy, *supra* note 20.

54. A. BANDURA, *supra* note 51, at 316.

55. *Id.* at 314.

with suffering altogether because it is too upsetting.⁵⁶ Extreme empathic distress may divert attention from a victim to oneself, or it may lead to nonaltruistic behavior, to blaming the victim, to thinking about something else, or to deferring to an authority.⁵⁷

A third "myth" about empathy is that it entails a dissolution of ego boundaries, a loss of self. This may be more true of the phenomenon now relegated to the word sympathy — a flooding of feeling, emotion, pain, without a cognitive component. Empathy, however, is the foundational phenomenon for intersubjectivity,⁵⁸ which is *not* absorption by the other, but rather simply the relationship of self to other, individual to community.

The final myth is that empathy leads to moral or decisional paralysis: thus, for example, we refuse to empathize with the criminal because to do so raises the level of awareness of moral ambiguity present in so many crimes, and we therefore block from our awareness the enormous brutalization done to a human being before he or she becomes a "criminal." Yet it is not impossible both to empathize with the suffering that often produces the sociopath and to accept the necessity of removing him or her from society.⁵⁹ Understanding may also free one from moral paralysis. In any event, whoever pretends moral choice is easy is ignoring the fact that sometimes — many times — moral choice is a choice among evils.⁶⁰

The reality of empathy is that we *are* more likely to empathize with people similar to ourselves,⁶¹ and that such empathic understanding may be so automatic that it goes unnoticed: elites will empathize with the experience of elites, men empathize with men, women with women, whites with whites. I would call this "unreflective" empathy. Empathy for those unlike oneself is, indeed, "more work," but certainly it is not impossible — as the discussions of *Brown*, *Shapiro*, and, to a lesser extent, *Roe v. Wade*, will illustrate.

It may also be that there are some individuals or groups with whom we simply *can't* empathize — Hitler, SS guards — but we should definitely ask ourselves first *why* we cannot empathize. We may *choose* not to attempt empathy for moral reasons, although ar-

56. *Id.* at 314-15; Hoffman, *supra* note 42, at 55.

57. Hoffman, *supra* note 42, at 57-58.

58. Agosta, *supra* note 27, at 43-44.

59. See A. MILLER, *FOR YOUR OWN GOOD* (1983), especially pages 198-239, for a particularly powerful discussion of this point.

60. W. KAUFMANN, *WITHOUT GUILT AND JUSTICE* 3-4 (1973); A. MACINTYRE, *AFTER VIRTUE* 224 (2d ed. 1984).

61. *EMPATHY AND BIRTH ORDER*, *supra* note 41, at 124-25; *CHILD DEVELOPMENT*, *supra* note 29, at 312.

guably understanding how and why Nazism was so attractive to the German people, or how and why lynchings were and are so attractive to members of the KKK, is important to preventing those evils from recurring. The fear that to understand all is to forgive all has led Bruno Bettelheim to state in a review of a study of Nazi doctors by Robert Lifton: "I believe there are acts so vile that our task is to reject *and prevent* them, not to try to understand them empathetically"⁶² No one should quarrel with Dr. Bettelheim's choice given his own experience in a Nazi concentration camp, but in arguing that the task is to prevent, he undermines his claim that there is no need to understand.

In a different way, I cannot empathize totally with the pain of blacks in racist societies, because I am white, and my whiteness both protects me and has influenced me at levels to which I do not have ready access.⁶³ Yet does that excuse me from reading black literature, hearing black pain and joy, listening to the experience of blacks *as* blacks? Does that mean I should not attempt an empathic understanding because it cannot be total? Or will my increased understanding allow me to be a more responsible moral agent, a more effective lawyer/law professor, a better legal decisionmaker? To the extent I understand what it is I face, I understand my moral options. I simply cannot pretend absolute certainty.

What about the role empathy may play in producing morally horrible results? To the extent Hitler understood the experience, pain, and desires of Germans, it may be that he was able to manipulate them. Or consider Bernard Williams' example: The sadist has access to the feelings and experiences of another and exploits that understanding to inflict pain most effectively. Williams claims: "But one thing that must be true is that the insightful understanding of others' feelings possessed by the sympathetic person is possessed in much the same form by the sadistic or cruel person; that is one way in which the cruel are distinguished from the brutal or indifferent."⁶⁴ Perhaps it is this abuse of empathic knowledge that is captured in the commonplace "you always hurt the one you love." Yet this does not refute the fact that "sympathetic identification with others . . . [is] basic to ethical experience."⁶⁵ Rather than negate the validity of empathy, Williams

62. Bettelheim, *Their Specialty Was Murder*, N.Y. Times, Oct. 5, 1986, § 7 (Book Review), at 1, 62 (reviewing R. LIFTON, *THE NAZI DOCTORS* (1986)) (emphasis added).

63. For an excellent discussion of the subtle and "unconscious" influences of culture on racial attitudes, see Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

64. B. WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 91 (1985).

65. *Id.* at 90.

simply reflects the truism that all knowledge is vulnerable to abuse. And it just does not seem to be the case that empathic understanding frequently leads directly to moral evil, because empathic understanding necessarily involves recognition of and regard for the other. Yet it may often indirectly lead to moral evil, if the empathizer becomes overwhelmed by the pain presented and hence retreats from, ducks, or ignores that pain.

Empathic responses *are* most likely to occur in situations of direct relationship to another, where concrete interaction occurs and incentive for understanding exists. This is not to say that they cannot occur where no relationship exists — the distress of a stranger may trigger an empathic distress response, for example. With a stranger, however, it is more likely that the individual experiencing the aversive response will minimize it “through various cognitive mechanisms . . . such as thinking about something else.”⁶⁶ Individuals also can be desensitized to empathic distress, and studies have shown individuals will have reduced empathic distress if they are instructed to view a victim in a detached way.⁶⁷ Moreover, empathic distress is unlikely to occur if the one in distress is not seen as a human or like oneself.⁶⁸

Empathic experiencing of emotion is probably influenced by cultural messages about which nonverbal and even verbal cues manifest particular emotions. Thus emotions are misunderstood cross-culturally. A Japanese woman may giggle when frightened — which to an American caucasian conveys entirely the wrong emotional message. Finally, affect plus cognition — empathy as a means of understanding and relating to another — is undoubtedly less difficult in instances of shared cultural experiences than in unfamiliar ones. As Geertz has noted, however, that does not mean an ethnographer, for example, should not strive to understand the experiences of those in a culture: only that she should recognize that understanding will always be only partial.⁶⁹

While these definitions and uses of empathy may initially sound foreign to us as members of the legal culture because of law's concern with social control and its commitment to rationality, predictability, and generalizability, empathy occasionally does surface in legal decisions. But before turning to some examples, it is necessary to examine

66. D. WESTEN, *supra* note 30, at 35; *see also* A. BANDURA, *supra* note 37, at 67.

67. D. WESTEN, *supra* note 30, at 35.

68. Hoffman, *supra* note 42, at 57-58; *cf.* Lerner, *The Desire for Justice and Reactions to Victims*, in ALTRUISM STUDIES, *supra* note 43, at 205.

69. *See* GEERTZ, *supra* note 32, at 70. *See also* Kirschner, “*Then What Have I to do with Thee*”: *On Identity, Fieldwork, and Ethnographic Knowledge*, 2 CULTURAL ANTHRO., May 1987, at 211; note 35 *supra*.

the aspects of the legal culture that may delegitimize empathic knowledge.

B. *Legality*

Legality, laws, and legal actors can and do respond to human pain at times, as I shall argue in the discussions of *Brown* and *Shapiro*. In fact, legal doctrine can be placed in service to empathy, as happened in the area of desegregation once the Court abandoned *Plessy v. Ferguson*⁷⁰ and developed the doctrine that separation of the races violated the equal protection clause.⁷¹ I do not question that law can serve to promote individual freedom and worth under some circumstances. But in this section I am concerned to show the myriad ways in which notions of the Rule of Law and legality provide a way to *avoid* empathic understanding and a way to *deny* moral choice in legal decisionmaking.

Much in the nature of legality can block empathic understanding.⁷² The structures and beliefs about law that constitute "legality" may allow legal decisionmakers to be relatively unreflective about their choice to ignore empathic phenomena. A value of legality in American culture is that the Rule of Law opposes some Hobbesian free-for-all. The Rule of Law is the reification of rules governing rights and duties to which we pay homage: thus, this is a "government of laws, not men"; the Rule of Law transcends humans and is superior to them. The virtue of the Rule of Law is that it is ostensibly "neutral" and prevents abuse of persons. The neutrality and generality of the Rule of Law seek to serve the goals of protecting individuals from arbitrary treatment and of respecting people as autonomous and equal. As such it is not in direct opposition to empathy. Yet to the extent the concern is with perpetuating the Rule of Law for its own sake, the importance of empathic understanding can disappear.

Essential to legality is the premise that fidelity to the law is necessary for predictability and control over outcomes and for social ordering. The Rule of Law provides us with an anchor, a grounding, that otherwise would not exist in modern postindustrial society; it keeps chaos and anarchy away from our door. Rules — whether explicit or

70. 163 U.S. 537 (1896).

71. See notes 176-214 *infra* and accompanying text.

72. My use of the term "legality" resembles Judith Shklar's definition of "legalism": "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules." J. SHKLAR, *LEGALISM* 1 (1964). Legalism "is what gives legal thinking its distinctive flavor on a vast variety of social occasions, in all kinds of discourse Legalism is, above all, the operative outlook of the legal profession, both bench and bar." *Id.* at 8.

open-textured — provide the illusion, if not the reality, of certainty; that certainty is reason enough to obey or acquiesce to the Rule of Law without question. For this reason the narrative of the suffering caused by the law to the Other can be ignored or suppressed.

The values of legality also can block empathic understanding. Professor Grey has termed legality's persistent values "completeness, formality, and conceptual ordering."⁷³ To this one might add autonomy from other structures and institutions of society. This "legal science" prevents ad hoc decisionmaking, and promotes "certainty, predictability and accountability of legal decision generally."⁷⁴ Formality, or "formalism," stresses "the importance of rationally uncontroversial reasoning in legal decision, whether from highly particular rules or quite abstract principles."⁷⁵ As Unger has described this characteristic of legality:

A system of rules is formal insofar as it allows its . . . interpreters to justify their decisions by reference to the rules themselves and to the presence or absence of facts stated by the rules *Everything will depend on where one draws the line between the factors of decision that are intrinsic to the system, and therefore worthy of consideration, and those that are not.*⁷⁶

Law as a closed system that is self-referential can draw the line in such a way as to *dismiss* empathic discourse or understanding as "irrelevant" or as "policy" argument beyond the auspices of the law.⁷⁷ It can also preclude the discourse entirely by mechanical application of rules, either by bureaucratic formalization and routinization⁷⁸ — the "checklist" method of decisions with legal consequences — or by judicial formalization.⁷⁹ (One is tempted to characterize this form of legal decisionmaking as the "garbage in, garbage out" method.)

An example of the effect of bureaucratic legal formality on empathic communication is contained in Professor Simon's critique of welfare reform.⁸⁰ Simon argues that the creation of a formalized, rule-bound approach to eligibility determination for the Aid to Families with Dependent Children (AFDC) program created "indifference, im-

73. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 42 (1983).

74. *Id.* at 41.

75. *Id.* at 9.

76. R. UNGER, *LAW IN MODERN SOCIETY* 204 (1976) (emphasis added).

77. *Id.*

78. See Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1225-40 (1983).

79. See Resnik, *Managerial Judging*, 96 HARV. L. REV. 374 (1982); Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985).

80. Simon, *supra* note 78.

personality, and irresponsibility.”⁸¹ While the formalization of AFDC rules and procedures “seem[s] to have reduced the claimant’s experience of oppressive and punitive moralism, of invasion of privacy, and of dependence on idiosyncratic personal favor . . . [it] also [has] reduced their experience of trust and personal care and [has] increased their experience of bewilderment and opacity.”⁸² Front-line eligibility workers view the people they are to serve as threats or nuisances;⁸³ applicants are burdened with chasing down documentation from multiple bureaucracies⁸⁴ and undoubtedly feel unheard and powerless. An effect of the formality is to render assistance “less sensitive to the circumstances of the applicant”⁸⁵ than under the earlier, less formal system. There is little understanding of clients by workers or workers by clients. As a result, empathic understanding is lost, and many suffer denials of assistance even though they are indeed eligible for it, because they fail to jump through the necessary “bureaucratic hoops.” The form of abuse in the administration of AFDC that existed before the institution of legalistic and formalized standards and procedures has been replaced by another form of abuse: an unreflective reliance on rules.⁸⁶

Similarly, the doctrinal development of the procedures for imposing the death penalty offers the opportunity to avoid empathic understanding by resorting to rules, as suggested in an article by Professor Weisberg.⁸⁷ In California, at least, prosecutors take “full advantage of the doctrinal formality of the penalty trial to make the case for death in the most lawyerly, legalistic, dispassionate form. The prosecutor often reinforces the judge’s instructions that if the formula of fact-finding produces a certain result, the jury has a duty to vote for death.”⁸⁸ Thus, formalistically, all a jury need do is add up aggravating circumstances and subtract mitigating ones; the law then tells the jury whether death is the logical penalty. Professor Weisberg correctly observes that this formalistic discourse places the defense at a disadvan-

81. *Id.* at 1198.

82. *Id.* at 1221.

83. *Id.* at 1222.

84. *Id.* at 1205.

85. *Id.* at 1204.

86. *Id.* at 1219-22.

87. Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305. See also Note, *Death and a Rational Justice: A Conversation on the Capital Jurisprudence of Justice John Paul Stevens*, 96 YALE L.J. 521 (1987).

88. Weisberg, *supra* note 87, at 375. See also *Hitchcock v. Dugger*, 107 S. Ct. 1821, 1824 (1987) (Florida advisory jury told by prosecutor “to consider mitigating circumstances and consider those by number”; judge imposed death sentence because “there [were] insufficient [enumerated] mitigating circumstances . . . to outweigh the aggravating circumstances.”).

tage and gives the jury a convenient way to avoid or escape the moral choice of whether to sentence the defendant to death.⁸⁹ While the defense will seek to have the jury empathize with the defendant, the defense narrative — unattached to legal form — is a difficult one to convey, and the legalistic formula can provide sanctuary from moral anxiety.⁹⁰

Apart from these particularized examples of legality's ability to provide refuge from empathy, more general characteristics of the legal actor's belief system can serve to block empathic understanding and moral choice. Fidelity to rules and to the autonomy of a legal system, and belief in its internal coherence, can support a judicial decisionmaker's avoidance of empathy and of his responsibility for human pain caused by law. As the late Professor Cover noted in his study of judicial responses to slavery:

The judicial conscience is an artful dodger and rightfully so. Before it will concede that a case is one that presents a moral dilemma, it will hide in the nooks and crannies of the professional ethics, run to the cave of role limits, seek the shelter of separation of powers.⁹¹

In other words, legality gives judges a number of ways to block human pain and escape responsibility. Thus, a judge who believed himself to have chosen "fidelity to law" as a "higher value" could discount any moral concern about enforcing fugitive slave laws.⁹² Mechanistic application of the law — applying "the law and the law alone" — was a "retreat to formalism" that sheltered the judge from recognizing the horror of keeping human beings in bondage.⁹³ Personal responsibility for choice was subsumed under strict adherence to the law as literally interpreted, or as coming from a higher authority, with the decisionmaker serving as a mere conduit: "I do not make law, I follow it."⁹⁴ Displacing responsibility for the decision to another decisionmaker was attractive as well, enabling the decisionmaker to retreat behind "separation of powers."⁹⁵ Thus, the problem of fugitive slave laws was for the people, or the legislature, or the executive to solve. Cover also described the "judicial can't" — the judge's claim that he simply did not have the power to avoid enforcing an evil law

89. Weisberg, *supra* note 87, at 379-83.

90. Weisberg, *supra* note 87, at 388-95; Note, *supra* note 87, at 546 ("[The People] have a right to know — indeed, if you are sensibly to consider their values in applying the Eighth Amendment, they must know — the nature of the choice.").

91. R. COVER, JUSTICE ACCUSED 201 (1975).

92. *Id.* at 229-30.

93. *Id.* at 233-34.

94. *Id.* at 232-36.

95. *Id.* at 236.

— as a way around moral choice and perhaps empathic understanding.⁹⁶ While it is possible that judges made a moral choice in favor of legality, it is equally probable that legality, that the doctrine of persons-as-property, foreclosed their consideration of the moral issues. And because abolitionist lawyers did their best to portray their clients as humans with human stories, it is highly probable that many judges did revert to legality to avoid facing the moral dimensions of the problem.⁹⁷

Fidelity to doctrine can justify caution as well. Because legal decisions have consequences, because they do at times affect behavior beyond that of the parties to the dispute, and because people do rely on judgments, constantly changing the rules would be deeply destabilizing. Yet the reassurance of predictability of outcome provided by consistent adherence to doctrine over time is perhaps more illusory than real. While doctrine can and does provide grounding and boundaries for decisions, it is not immutable.

Legal categories — whether created by doctrine, statute, or constitution — will define legal discourse, will indicate what is “relevant” and what is not.⁹⁸ Thus, legal discourse determined by category will often foreclose the narrative of experience of “out-groups” affected by a legal rule or doctrine. A stereotype — a belief that “acts both as a justificatory device for categorical acceptance or rejection of a group, and as a screening or selective device to maintain simplicity in perception and in thinking”⁹⁹ — embodied in a legal category can most certainly block empathic knowledge.

These characteristics of legality provide ample opportunity for “not hearing” the story of the Other, but they do not inexorably compel that result. They may submerge or mask awareness of moral choice and discourage reflexivity in the dialogue of law, but they need not do so. While abstract legal categories can strip persons of their very humanity, the narrative of that humanity often can also find a place in a legal category. For example, the categories of equal protec-

96. *Id.* at 122-23.

97. *Id.* at 216 (“Playing upon the potential for empathy, the abolitionists always tried to personify the victims . . .”).

98. This is obviously true of any form of normal discourse that establishes its structures and conventions for the purposes of communicating with one another and using categories to organize information. Yet legal categories can “freeze” human experience and reality unreflectively under the practice of legality. For a good discussion of how common ways of structuring relevant discourse define how we solve problems with “stock stories,” see Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984).

99. G. ALLPORT, *THE NATURE OF PREJUDICE* 192 (1st ed. 2d printing 1954).

tion analysis have demonstrated this receptivity — or lack of it — to the particular narratives of blacks, the poor, women, and gays.

It may seem intuitively “obvious” that empathy can take place at the “lower” levels of the legal system — say, in the attorney/client relationship or in trials. But empathy, by nature of its very concreteness, seems out of place in the appellate court world. The connection to persons and concrete situations that leads to empathic response does grow more attenuated at the appellate level. But this does not mean that appellate courts and even the Supreme Court do not occasionally show evidence in their opinions that empathy has been operative in their decisions: The language of empathic understanding, of feeling the feelings of the people affected by a case, occasionally surfaces. Whether empathic responses helped an appellate judge reach a decision that is then justified in terms of legal discourse is often difficult to know: Of all the powerful decisionmaking agents in American political life, a judge’s decisionmaking process is the least understood. But there may be some truth in Edmond Cahn’s observation that “if you wish a judge to overturn a settled and established rule of law, you must convince both his mind and his emotions, which together in indissociable blend constitute his sense of injustice.”¹⁰⁰

The argumentative steps taken to convey human situations to a judge might be described as creating affective understanding by use of a narrative that includes emotion and description (“thick” description, if you will)¹⁰¹ of a human situation created by, resulting from, or ignored by legal structures, and consciously placing that narrative within a legal framework. I shall refer to such arguments as “empathic narratives” in the remainder of this article. Empathic narrative, as I hope to demonstrate, includes descriptions of concrete human situations and their meanings to the persons affected in the context of their lives. It is contextual, descriptive, and affective narrative, although it need not be “emotional” in the pejorative sense of overwrought. It is, instead, the telling of the stories of persons and human meanings, not abstractions; it is a phenomenological argument.

The following discussion of three Supreme Court decisions in which signs of empathy may be found, or where the footprints of empathic narratives that evoke empathic responses exist, illustrates the (theoretically unrecognized) role that empathy has had in what could be considered politically and legally volatile situations. The fourth Supreme Court case provides an illustration of the effect of absence of

100. E. CAHN, *THE PREDICAMENT OF DEMOCRATIC MAN* 129 (1961).

101. C. GEERTZ, *THE INTERPRETATION OF CULTURES* 6-28 (1973).

empathic understanding. The discussion of these cases relies heavily on the narratives contained in the briefs and oral arguments, with particular reliance on quotation rather than paraphrase in order to recapture the stories and nuances as accurately as possible. The nuances of wording, the rhythm of discourse, the tones of the oral arguments cannot be reproduced directly, nor did I view the actual arguments,¹⁰² yet it is important to try to represent faithfully the narratives used in order to convey the presence or absence of empathic phenomena at the time the cases were argued and decided.

III. EXAMPLES OF EMPATHIC NARRATIVE: THE DISCOURSE OF "OTHERNESS"

The Supreme Court's decision in *Brown v. Board of Education (I)*¹⁰³ illustrates the existence of empathic understanding in the Supreme Court, leading to a transformation of legal understanding, an opening of opportunities for new legal categories and interpretations. The Court's decisions affecting the poor illustrate a tension between traditional legal thinking and narrative and the realm of empathic response.¹⁰⁴ The Court's abortion decisions show yet another combination: an empathic response to the fetuses may have negated the empathic response to the situation of women.¹⁰⁵ Finally, the Court's recent decision upholding Georgia's sodomy statute illustrates the effect of empathic failure.¹⁰⁶

A. *Brown v. Board of Education*

Richard Kluger's study, *Simple Justice*,¹⁰⁷ the arguments, and the language of the *Brown* opinion itself provide extensive evidence of the affective message presented in the case — and the resulting understanding of the meaning of being black in a racist American culture — that led the Court to reverse *Plessy* in principle, if not in literal terms. *Brown v. Board of Education (I)* may seem to be overworked as an example of the good in constitutional adjudication (a cynic might say it is the *only* example);¹⁰⁸ from the ambivalent perspective of the

102. I was able to listen to tape recordings of the arguments in *Shapiro* and *Roe* to capture some of the expressive nuances. After many months of trying, I was unable to obtain a recording of *Bowers* in time for this article.

103. 347 U.S. 483 (1954).

104. See text at notes 260-92 *infra*.

105. See text at notes 326-44 *infra*.

106. See text at notes 451-62 *infra*.

107. R. KLUGER, *SIMPLE JUSTICE* (1976).

108. The cynic may be right. See Kennedy, *Race Relations Law and The Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622 (1986).

1980s, *Brown I* may appear trite, or the product of a simpler age, or so clear-cut that no other result would be conceivable. Yet none of these particular objections is valid given the context of the decision.¹⁰⁹ *Brown I* was remarkable, and it remains so, in large part because it is a human opinion responding to the pain inflicted on outsiders by the law. In *Brown*, legality in its many forms clashed with empathy, and empathy ultimately transformed legality. The Supreme Court Justices' understanding of racism was radically illuminated; as a result, the Court subsequently delegitimized segregation in a series of decisions known as "the per curiams."¹¹⁰

Moreover, the Court's opinion itself speaks of feeling, of human pain, and of moral evil. The recognition of human experience and pain — of *feeling* — is obvious: "To separate [school children] from others of similar age and qualifications solely because of their race generates a *feeling* of inferiority as to their status in the community that may *affect their hearts and minds* in a way unlikely ever to be undone."¹¹¹

The opinion, varying as it did from the established form, was immediately and repeatedly attacked by legal scholars and the legal and political communities.¹¹² The favorite criticism was trashing the social scientific evidence that segregation stigmatized and harmed black children;¹¹³ there were also cries for "neutral principles" against "judicial legislation"¹¹⁴ and attacks on the opinion's departure from established form.¹¹⁵ Yet *Brown I* as a symbol of human dignity, of law as agent for the good, can hardly be questioned. The Court understood

109. Ronald Dworkin is just wrong when he asserts that upholding segregation would have been "almost unanimously rejected" by the American people in 1954 "as not faithful to their convictions about racial justice." R. DWORKIN, *LAW'S EMPIRE* 387 (1986). Instead, racism and segregation were alive and well and very much a part of American convictions, as Kluger and others have so ably demonstrated. See generally R. KLUGER, *supra* note 107; R. ELLISON, *INVISIBLE MAN* (1953); J. BALDWIN, *NOBODY KNOWS MY NAME* (1961); see also G. ALLPORT, *supra* note 99, at 462-77.

110. *Muir v. Louisville Park Theatrical Assn.*, 347 U.S. 971 (1954); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955); *Gayle v. Browder*, 352 U.S. 903 (1956); *New Orleans City Park Improvements Assn. v. Detiege*, 358 U.S. 54 (1958). The per curiams were criticized as "unprincipled" by one of the leading legalistic critics of *Brown*, Herbert Wechsler. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22-23 (1959).

111. 347 U.S. at 494 (emphasis added).

112. "Few opinions of the Supreme Court have been more controversial than Chief Justice Warren's Any decision dealing with so sensitive an issue was bound to be controversial, but both the reasoning and the style of *Brown* were criticized even by commentators who supported the outcome." P. BREST & S. LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 431 (2d ed. 1983); see also R. KLUGER, *supra* note 107, at 710-14.

113. See, e.g., Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150 (1955).

114. Wechsler, *supra* note 110.

115. See R. KLUGER, *supra* note 107, at 711.

the experience of being black in a racist culture, and even if it quickly backed away from the obvious implications of that understanding, the case transformed American constitutional law.

Kluger's book chronicles the painstaking work of the NAACP and its lawyers to create a different narrative about racism for the Court and to create the conditions for empathic understanding.¹¹⁶ *Brown I* was not the first case in which the Court was made aware of the effects of segregation. *Sweatt v. Painter*¹¹⁷ and *McLaurin v. Oklahoma*,¹¹⁸ cases involving the refusal to admit blacks to the University of Texas Law School and the graduate school of education at the University of Oklahoma, provided the background for *Brown*. Indeed, one commentator has observed that *McLaurin* "'provided the propulsive power of empathy and indignation'" in the school desegregation cases, because the Justices could identify more readily with a black graduate student than with blacks in general.¹¹⁹

There were three sets of arguments in *Brown*, two on the substantive issue of the constitutional legitimacy of segregated schools, and one on the issue of the remedy. After the first set of arguments in 1952, the Court, in a delaying maneuver inspired by Felix Frankfurter,¹²⁰ set the cases for reargument on five questions in 1953;¹²¹ in 1955 the Court heard arguments on remedies.¹²² While the NAACP's tone changed from an empathic narrative to a more legalistic argument through the course of the three sets of arguments, those favoring the upholding of school segregation shifted from almost purely legal to consequentialist and emotional appeals. The counterpoint of legality and empathy that appeared starkly in 1952 began to blur in 1953, but in 1955 it reemerged.

In the 1952 argument of the *Brown* Case itself, for example, counsel for Kansas made a purely "legal" argument. He urged the Court to ignore the District Court's eighth finding of fact because it was "legally insignificant" and immaterial "so far as the issues in this case are

116. See *id.*, especially at 508-40, 617-46.

117. 339 U.S. 629 (1950) (desegregating the University of Texas at Austin's Law School); see R. KLUGER, *supra* note 107, at 260-66, 274-84.

118. 339 U.S. 637 (1950) (forbidding the physical isolation of a black graduate student); see R. KLUGER, *supra* note 107, at 266-69, 274-84.

119. Kamisar, *The School Desegregation Cases in Retrospect*, in ARGUMENT xvi (L. Friedman ed. 1969) (quoting E. CAHN, *THE PREDICAMENT OF DEMOCRATIC MAN* 130 (1962)). For a history of the NAACP's legal strategy in school desegregation cases, see M. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987).

120. R. KLUGER, *supra* note 107, at 614-16.

121. 345 U.S. 972 (1953) (per curiam).

122. R. KLUGER, *supra* note 107, at 729.

concerned."¹²³ This was prescient, to say the least, for it was finding of fact number eight that found its way into the final opinion:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children¹²⁴

Counsel for Kansas argued that because the physical facilities of the schools were equal, that ended the matter under the law. The psychological reaction to segregation "is something which is something apart from the objective components of the school system, and something that the state does not have within its power to confer upon the pupils therein."¹²⁵ Counsel essentially argued that legality precluded empathy.

Because the arguments of Thurgood Marshall for the NAACP and John W. Davis for the state of South Carolina provide the greatest contrast in narratives, the remainder of the discussion of *Brown* will focus on their arguments. Having laid the groundwork in the Court before *Brown*, the NAACP, and particularly Thurgood Marshall, repeatedly in their arguments emphasized the narrative of the painful experience of being black in American society. Although Philip Elman has derogated the NAACP project and has claimed that "Thurgood Marshall could have stood up there and recited 'Mary had a little lamb,' and the result would have been exactly the same," the historical evidence and the arguments in the *Brown* case contradict his assertions.¹²⁶ At oral argument, it was Marshall who returned repeatedly to the experience of segregation, the story of racism and its contradictions, and the human pain inflicted by the law. In 1952, in 1953, and even in 1955, Marshall spoke not in conventional modes of legal argumentation (indeed, in 1953, he failed miserably in that discourse)¹²⁷ but instead used the narrative of the experience, the harm, the evil, and the irrationality of racism. As Yale Kamisar has observed, "If [John W.] Davis the mastercraftsman told the Court *how* to

123. ARGUMENT, *supra* note 119, at 33.

124. 347 U.S. at 494 (interpolation by the Court).

125. ARGUMENT, *supra* note 119, at 33.

126. Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 830-37, 852 (1987) (interview by Silber). Among other things, Elman claims the NAACP did not count votes on the Court and brought the cases too soon. These claims are contradicted by Kluger's and Tushnet's historical works. See R. KLUGER, *supra* note 107, at 617-26; M. TUSHNET, *supra* note 119, at 105-37.

127. R. KLUGER, *supra* note 107, at 669-70; see also ARGUMENT, *supra* note 119, at 194-206.

write an opinion reaffirming *Plessy*, Marshall, spokesman for an oppressed race, never let the Justices forget *why* they had to overrule it."¹²⁸

In 1952 Marshall, arguing in *Briggs v. Elliot*,¹²⁹ quickly summarized the procedural posture of the case and stated the language of the South Carolina statutory and constitutional provisions mandating segregated schools.¹³⁰ He then moved to the story of the South Carolina case, pointing out that the state *had* conceded at the first hearing that physical facilities were unequal, but that notwithstanding the concession, appellants were arguing about something *more* than physical equality.¹³¹ Although the state had remedied the physical inequalities, Marshall took the position "that these statutes were unconstitutional in their enforcement because they not only produced these inevitable inequalities in physical facilities, but that evidence would be produced by expert witnesses to show that the governmentally imposed racial segregation in and of itself was also a denial of equality."¹³² The NAACP's experts had testified that there was no real difference between the ability of black and white children to learn, but that

segregation deterred the development [of black childrens' personalities] [I]t destroys their self-respect [I]t denies them full opportunity for democratic social development [I]t stamps [the child] with a badge of inferiority.

The summation of the testimony is that the Negro children have road blocks put up in their minds as a result of this segregation, so that the amount of education that they take in is much less¹³³

Marshall went on to say that the District Court had ignored evidence of the harm caused by segregation, that

we have positive testimony from Dr. Clark that the humiliation that these children have been going through is the type of injury to the minds that will be permanent as long as they are in segregated schools, not theoretical injury, but actual injury.¹³⁴

Marshall in his opening argument fudged whether the Court had

128. Kamisar, *supra* note 119, at xix (emphasis in original).

129. The order of argument followed the ordering of the docket, with *Brown v. Board of Education* being the lead case. *Briggs v. Elliot* was the second of the five cases to be argued; presumably Marshall argued *Briggs* in part because he had litigated the case in the federal district court in South Carolina. R. KLUGER, *supra* note 107, at 302-05, 346-65, 570. Moreover, the fact that South Carolina had retained "the most accomplished and admired appellate lawyer in America," *id.* at 543, to argue its case undoubtedly influenced the decision to have the NAACP's most accomplished appellate lawyer argue in opposition to John W. Davis.

130. ARGUMENT, *supra* note 119, at 36-37.

131. *Id.* at 37.

132. *Id.*

133. *Id.* at 38.

134. *Id.* at 42.

to overrule *Plessy*,¹³⁵ but he returned frequently to the *fact* that children were harmed by the law of separate-but-equal to argue: "But my emphasis is that all we are asking for is to take off this state-imposed segregation. It is the state-imposed part of it that affects the individual children."¹³⁶

John Davis began with three points, all tied to settled legal doctrines. He argued first, that since the county had complied with the injunction to equalize the physical facilities, the case was moot;¹³⁷ second, that the South Carolina laws did not violate the fourteenth amendment;¹³⁸ and finally, that the evidence produced by the NAACP "deals entirely with legislative policy, and does not tread on constitutional right."¹³⁹ Davis used analogy to attempt to take the bite out of racial separation by pointing to "reasonable" separations — sex, age, and "mental capacity" — thus illustrating the reasonableness of segregation.¹⁴⁰ Davis told the Court that it need not decide the case, having "so often and so recently dealt with this subject that it would be a work of supererogation to remind you of the cases . . . or to argue with you, the authors, the meaning and scope of the opinions you have emitted."¹⁴¹ And later, in response to Justice Frankfurter's questioning about the openness of the language of the equal protection clause, Davis stated that "certainly this Court has spoken in the most clear and unmistakable terms to the effect that this segregation is not unlawful,"¹⁴² *Sweatt* and similar cases having been decided solely on the basis of physical inequality. He argued that "[i]t is a little late, . . . after this question has been presumed to be settled for ninety years — it is a little late to argue that the question is still at large."¹⁴³ This appeal to settled law, doctrine, and precedent captured the issues of predictability and control that justify legality and that offered the Court an escape.

Davis attacked the expert testimony Marshall had relied on, mocking social science in general and attacking Dr. Kenneth Clark in particular.¹⁴⁴ He pointed to the unfamiliarity of several witnesses with

135. *Id.* at 42.

136. *Id.* at 49.

137. *Id.* at 51, 53-54.

138. *Id.* at 51, 54-58.

139. *Id.* at 51, 61.

140. *Id.* at 51. He also made reference to Indians, *id.*, perhaps hoping to play on prejudices against another oppressed group.

141. *Id.* at 54.

142. *Id.* at 57.

143. *Id.*

144. *Id.* at 58-59.

the South, and argued that history and other experts supported segregated schools.¹⁴⁵ He effectively, if misleadingly and out of context, quoted from W.E.B. DuBois to support his claim that "If this question is a judicial question . . . certainly it cannot be said that the testimony will be all one way."¹⁴⁶ He argued that, if anything, segregation of schools was a local, legislative matter, and his closing statements hinted at the Court's institutional incompetence to decide the issue.¹⁴⁷ Having stated at the beginning of his argument that the question of segregation was solely one of legislative policy — a separation of powers argument reminiscent of those relied on by judges upholding fugitive slave laws — he returned to that point in closing.¹⁴⁸

In his rebuttal to Davis, Marshall observed:

[S]o far as the appellants are concerned in this case, at this point it seems to me that the significant factor running through all these arguments up to this point is that for some reason, which is still unexplained, Negroes are taken out of the main stream of American life in these states.¹⁴⁹

He followed up this assertion with an image to convey a meaning of segregation's impact to the Court, to anchor it in the Court's reality and experience:

[O]n this question of the will of the people of South Carolina, if Ralph Bunche [the Nobel laureate] were assigned to South Carolina, his children would have to go to a Jim Crow school. No matter how great anyone becomes, if he happens to have been born a Negro . . . he is relegated to that school.¹⁵⁰

Marshall began to answer Davis' claim that the expert testimony used to demonstrate harm was "a legislative argument at best" by emphasizing that the state had not contradicted the testimony of the NAACP's experts that it now mocked. Justice Frankfurter interrupted Marshall and asked "[c]an I not take judicial notice of Myrdal's book [Gunnar Myrdal's *An American Dilemma*] without having him called as a witness?"¹⁵¹ A discussion about the available evidence of the harmful consequences of segregation finally led Marshall to state: "I know of no scientist that has made any study . . . who does

145. *Id.* at 59-60. He also emphasized the "enormous weight of legislative and judicial precedent on [the] subject" and stated that "much of that which is handed around under the name of social science is an effort on the part of the scientist to rationalize his own preconceptions. They find usually . . . what they go out to find." *Id.* at 59. Thus, legality took precedence — especially over social science, which wasn't "real" science anyway.

146. *Id.* at 60-61; see also R. KLUGER, *supra* note 107, at 573-74.

147. ARGUMENT, *supra* note 119, at 61.

148. "I respectfully submit to the Court, there is no reason assigned here why this Court or any other should reverse the findings of ninety years." *Id.*

149. *Id.* at 61-62.

150. *Id.*

151. *Id.* at 63.

not admit that segregation harms the child."¹⁵²

During Marshall's rebuttal, Justice Reed questioned him about the purpose of segregation. Had the legislatures in the South instituted segregation in order "to avoid racial friction"?¹⁵³ Marshall's reply drew on his knowledge and experience, and it answered both the question of the legitimacy of overriding legislative policy and whether, in fact, racial friction was an issue for the children involved. His reply also underscored what it meant to be black in the United States, to be excluded, to be disempowered: "But I think, considering the legislatures, that we have to bear in mind that I know of no Negro legislator in any of these states, and I do not know whether they consider the Negro's side or not." And:

I know in the South where I spent most of my time, you will see white and colored kids going down the road together to school. They separate and go to different schools, and they come out and they play together. I do not see why there would necessarily be any trouble if they went to school together.¹⁵⁴

In 1953, the tone of argument for the prosegregation position changed somewhat. Counsel for Delaware characterized the NAACP's arguments as appeals to "emotion" and underscored the legalistic view that such an argument had no place in the Court:

If I may borrow from a statement made by the venerable Mr. John W. Davis . . . he said: "An emotional approach to this question is a poor substitute for a rational discussion of the problem at hand, which is to be judged by the application of well-settled principles governing the effect of the Fourteenth Amendment on the police power of the state."

The arguments . . . such as I have heard in this courtroom for three days by our adversaries, have great emotional appeal, *but they belong in an entirely different forum and in a different setting.*

Any change in state policy is for the legislature.¹⁵⁵

John W. Davis, on the other hand, while perhaps regarding the case "as a strictly legal matter"¹⁵⁶ and while arguing effectively that the history of the fourteenth amendment supported separate-but-equal segregated schools,¹⁵⁷ became "emotionally overwrought."¹⁵⁸ Davis

152. *Id.* at 64.

153. *Id.* at 67.

154. *Id.*

155. *Id.* at 319 (emphasis added).

156. R. KLUGER, *supra* note 107, at 673 (quoting Robert Figg, the state's lawyer at the trial of Briggs).

157. *Id.* at 671; ARGUMENT, *supra* note 119, at 207-14.

158. R. KLUGER, *supra* note 107, at 672. Earl Warren's memoirs are a little confusing on this point. He wrote, while discussing the 1955 arguments:

The arguments, for me at least, took a strange course. One might expect, as I did, that the lawyers representing black school children would appeal to the emotions of the Court based

effectively evoked empathy for whites by using a counterimage of 295 white children in Clarendon County being overwhelmed in the classroom by the nearly 2800 black children.¹⁵⁹ He made an indirect appeal to racial prejudice by mentioning miscegenation statutes,¹⁶⁰ and stated ominously that "the result [of a desegregation order] would not be pleasing."¹⁶¹ He argued that the state "is convinced that the happiness, the progress and the welfare of these children is best promoted in segregated schools"¹⁶² and invoked a fable in saying, "Here is equal education, not promised, not prophesied, but present. Shall it be thrown away on some fancied question of racial prestige?"¹⁶³

Marshall retorted:

This [argument] that Mr. Davis and Mr. Moore both relied on, these horrible census figures, the horrible number of Negroes in the South — and I thought at some stage it would be recognized by them that it shows that in truth and in fact in this country . . . two-thirds of the Negroes are compelled to submit to segregation.¹⁶⁴

* * * *

I understand them to say that it is just a little feeling on the part of Negroes, they don't like segregation. As Mr. Davis said yesterday, the only thing . . . the Negro has been trying to get [is] what was recognized in *Strauder v. West Virginia*, which is the same status as anybody else regardless of race.¹⁶⁵

* * * *

There is no way you can repay lost school years.¹⁶⁶

In response to the historical argument that Congress had approved

upon their many years of oppression, and that the states would hold to strictly legal matters. More nearly the opposite developed. Thurgood Marshall made no emotional appeal, and argued the legal issues in a rational manner as cold as steel. On the other hand, states' attorney Davis, a great advocate and orator, . . . displayed a great deal of emotion, and on more than one occasion broke down and took a few moments to compose himself.

E. WARREN, *THE MEMOIRS OF EARL WARREN* 287 (1977). But Davis did not argue in 1955, and one could hardly characterize Marshall's 1953 arguments on rebuttal as unemotional, although the transcript of his 1955 argument does appear "unemotional" based on his words. One can only assume Warren partially confused the two sets of arguments in his memoirs, hardly a surprising mistake given his many years on the bench and the 24 years that had passed. Part of Davis' emotionalism in 1953, moreover, may be attributable to the fact that it was the last argument he made in the Supreme Court. R. KLUGER, *supra* note 107, at 672.

159. R. KLUGER, *supra* note 107, at 672; ARGUMENT, *supra* note 119, at 215.

160. ARGUMENT, *supra* note 119, at 216. That the almost Freudian sexual phobia about blacks marrying white women was and is part of American racial prejudice goes without saying; the Court itself did not strike down miscegenation laws until 1967 in *Loving v. Virginia*, 388 U.S. 1 (1967).

161. ARGUMENT, *supra* note 119, at 216.

162. *Id.*

163. *Id.* Davis recounted Aesop's fable of the dog who lost his meat while attempting to seize its reflection in a stream.

164. *Id.* at 234.

165. *Id.* at 237.

166. *Id.* at 238.

of school segregation in enacting the fourteenth amendment and had continued to do so, Marshall stated: "And I think it makes no progress for us to find out who made what argument."¹⁶⁷ He started to condemn the "little pet feelings of race, little pet feelings of custom," and then, finding his voice, he described racism's irrationality and meaning:

I got the feeling on hearing the discussion yesterday that when you put a white child in a school with a whole lot of colored children, the child would fall apart or something. Everybody knows that is not true

. . . .

There is some magic to it. You can have them voting together, you can have them not restricted because of law in the houses they live in. You can have them going to the same state university and the same college, but if they go to elementary and high school, the world will fall apart

They can't take race out of this case

We charge [the school segregation statutes] are Black Codes

. . . [W]e submit the only way to arrive at [a decision affirming segregation] is to find that for some reason Negroes are inferior to all other human beings.

. . . .

The only [conceivable reason for segregation] is an inherent determination that the people who were formerly in slavery, regardless of anything else, shall be kept as near that stage as is possible, and now is the time, we submit, that this Court should make it clear that that is not what our Constitution stands for.¹⁶⁸

The argument that Marshall made in 1955 did not overcome the problems posed by a white-dominated society and Justices reluctant to go farther in their role than they had in *Brown I*, but it reemphasized the narrative. Against the "gradualism" the Court eventually adopted, Marshall pointed directly to the damage a "wait and see" attitude would cause:

We believe we are entitled to our rights as of the next school term, and if we cannot get that type of decree in the judgment of this Court, then what is going to happen?

. . . It is important to start that immediately . . . and to end it at a date certain. Otherwise, we will have . . . throughout the country the continuation of what has been branded . . . by this Court as unconstitutional.

. . . .

In my county they say my child will go to school, schools will be desegregated in five years. I move over into the next county, hoping that he will go in one year and they make it six years. I will be traveling all

167. *Id.* at 239.

168. *Id.* at 239-40.

around the country trying to get my constitutional rights.¹⁶⁹ As he had in 1952 and 1953, Marshall pointed to the incoherence of segregation and racism:

In Virginia, it is interesting to me that the very people . . . that would object to sending their white children to school with Negroes, are eating food that has been prepared, served and almost put in their mouths by the mothers of those children, and they do it day in and day out, but they cannot have the child go to school.¹⁷⁰

In *Brown* and its companion cases, the Court was directly facing the Other, who was telling his own story: all but one of the lawyers arguing for ending segregation 'were black.¹⁷¹ Thurgood Marshall, who had participated in fifteen cases before the Court,¹⁷² often departed from the usual forms of oral argument to "testify" as a black and to include his own observations of segregation in the South. He humanized the story, using specific examples and illustrations, and he expressed moral outrage as well: "We charge that these are Black Codes." The Other was in Court, and he was telling the Justices what it was *like* to be the Other. The Court heard from the very humans it would have to rule for or against. Whether this affected the Justices would be hard, if not impossible, to know; Justice Burton in 1952 appears to have considered it relevant to note "beside the name of each NAACP lawyer in *Brown*" the word "colored."¹⁷³

According to Kluger, the Justices who could be said to have been most dedicated to the ideology of legality and the Rule of Law, Jackson and Frankfurter, had the most trouble reconciling any empathic response with their perceived roles in deciding *Brown I*.¹⁷⁴ Justice Jackson, fully aware of the horrible effects of racial prejudice from his experience as chief prosecutor at the Nuremberg trials,¹⁷⁵ indicated that "[h]e did not doubt that segregation was painful to Negroes."¹⁷⁶ But he rejected the narrative presented by the NAACP lawyers as "sociological" and believed that the Court could not incorporate into *law* "these elusive psychological and subjective factors."¹⁷⁷ Jackson con-

169. *Id.* at 439.

170. *Id.* at 437.

171. The exception was Jack Greenberg, who argued *Gebhart v. Belton*, 33 Del. Ch. 144, 91 A.2d 137 (1952), *aff'd.*, 349 U.S. 294 (1955), the Delaware case, in 1952 and shared the argument with Marshall in 1953. R. KLUGER, *supra* note 107, at 438, 581, 677-78.

172. *Id.* at 561.

173. *Id.* at 611.

174. *Id.* at 596-98, 601, 603, 610, 681.

175. *Id.* at 603, 690.

176. *Id.* at 689.

177. *Id.* at 609, 689-90.

sidered the matter "political," not legal,¹⁷⁸ despite the blunt fact that law was heavily implicated in the perpetuation of segregation. On the other hand, "[a]s a political decision, he could go along with" striking down segregation.¹⁷⁹

During the arguments in *Brown*, Justice Frankfurter manifested some discomfort with and resistance to the narrative presented. At one point in 1952 he stated that the testimony in the trial courts about the harmful effects of segregation was "irrelevant" to the question of the remedy.¹⁸⁰ At another point, however, Frankfurter manifested concern with reconciling the narrative with legality (and, one may assume, cultural reality), by noting that "nothing would be worse than for this Court . . . to make an abstract declaration that segregation is bad and then have it evaded by tricks."¹⁸¹ A Justice who could be said to have "worshipped the law" and legality,¹⁸² he also had been advisory counsel to the NAACP¹⁸³ and was a member of a group subjected to the worst forms of racism, prejudice, and torture throughout history: he was a Jew who had tried to assimilate and who had only partially succeeded.¹⁸⁴ The pain of the experience of being Jewish could not help but resonate even if only slightly to the pain of another oppressed minority.

Frankfurter typically struggled to deny his "merely personal views" condemning racism while at the same time recognizing that "writ[ing] into the Constitution a belief in the Negro's natural inferiority or [a] personal belief in the desirability of segregat[ion]" was equally repugnant.¹⁸⁵ He very much wanted to strike down the school segregation statutes but ultimately found little help in the forms of legality in which he strongly believed. The history of the fourteenth amendment gave him no help. His commitment to separating the power of the federal government from that of state governments and his belief that the Court, as an unrepresentative decisionmaking body in a democracy, had very little power to change the law created seem-

178. *Id.* at 689.

179. *Id.* at 681.

180. ARGUMENT, *supra* note 119, at 63-64. Frankfurter questioned or interrupted Marshall 46 times, while asking John W. Davis only seven questions.

181. *Id.* at 48.

182. R. KLUGER, *supra* note 107, at 596.

183. *Id.* at 597, 599.

184. H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 19, 22-23, *passim* (1981). Ironically, Frankfurter despised John W. Davis, counsel for the State of South Carolina in *Briggs*, in part because Davis' Wall Street practice and WASP credentials undoubtedly stung. *Id.* at 76-77, 81, 94-95.

185. R. KLUGER, *supra* note 107, at 684.

ingly insurmountable obstacles to striking down school segregation.¹⁸⁶ A memo written by Frankfurter indicates, however, that he finally concluded that “[l]aw must respond to transformation of views as well as to that of outward circumstances”; this declaration served as a justification for striking down segregation because “[t]he effect of changes in men’s *feelings* for what is right and just” was “relevant in determining whether a discrimination denies the equal protection of the laws.”¹⁸⁷

Frankfurter may have empathized with blacks, but the explanation may also lie elsewhere: One of Frankfurter’s biographers has noted that, because of Frankfurter’s own experience, public education had utmost value for him.¹⁸⁸ In a footnote, Hirsch observed that “[a] fragment among his files suggests that the personal value [he] attached to the importance of public schools as a means of integration into American society contributed significantly to his willingness to agree with the Court’s revolutionary decision” in *Brown*.¹⁸⁹ The fragment noted: “If the negro is to make his due contribution . . . he must have the knowledge, the training and the skill which only good schools can vouchsafe.”¹⁹⁰ Hirsch concluded that the words “‘good schools’ . . . helped trigger in Frankfurter a willingness to ignore judicial self-restraint”¹⁹¹

Other Justices seemed to have had little trouble accepting the narrative, drawing on their own experiences and perhaps on imaginative placement of self in the black’s shoes. According to Kluger, Justice Black, a native of Alabama who had briefly belonged to the Klan, “did not need scholars or philosophers to tell him what the purpose of segregation was.”¹⁹² Having lived in the South, Black *knew* “[i]ts purpose . . . was to discriminate against Negroes in the belief that they were inferior beings”¹⁹³ Justice Minton thought that although

186. *Id.* at 599-602, 653-55, 683-85.

187. *Id.* at 685 (emphasis added).

188. H.N. HIRSCH, *supra* note 184, at 195-96.

189. *Id.* at 195 n.*.

190. *Id.* The fragment reproduced by Hirsch is a handwritten note by Frankfurter quoting an unidentified piece from the *Atlanta Journal*. The note is found in the Felix Frankfurter papers, Harvard Law School Library, at box 3, folder 34.

191. *Id.*

192. R. KLUGER, *supra* note 107, at 592-93.

193. *Id.* at 593. In fact, Black not only knew what segregation meant for blacks, he also knew the likely effect of reversing *Plessy*. Philip Elman at the Justice Department had heard that Black was saying “The guys who talked nigger would be in charge, there would be riots, the Army might have to be called out — he was scaring the shit out of the Justices, especially Frankfurter and Jackson But Hugo was determined to overrule [*Plessy*] on principle.” *Id.* at 594. Of course, Black’s assessment of southern reaction (and, one might add, later northern reaction) was all too accurate.

Plessy had given segregation an "aura of legitimacy," it was unconstitutional;¹⁹⁴ all that could support racial separation was a belief in black inferiority,¹⁹⁵ and this was a message that he was not willing to accept.

Chief Justice Warren, who as Attorney General of California had indulged in racism against Americans of Japanese descent by playing an instrumental role in the internment of Japanese Californians,¹⁹⁶ had no doubt that segregation existed simply to perpetuate "a belief in the inferiority of the Negro."¹⁹⁷ "On the merits, the natural, the logical, and practically the only way the case could be decided was clear. The question was *how* the decision was to be reached."¹⁹⁸ Empathy probably did play a role in Warren's decision to strike down school segregation laws, for the Chief Justice was frequently to decide cases by "putting himself 'in the other's shoes' . . . to 'get to the essence of the case.'"¹⁹⁹ Apparently, Warren was not especially concerned about the obstacles presented by legality, whether characterized by apparent congressional approval of segregation, the attitudes and laws of the South, or the long existence of the doctrine of *Plessy* and its progeny. Instead, to Warren, "the injustice of an enforced separation of human beings based on their color was apparent."²⁰⁰ In the Court's first conference after the 1953 arguments, Warren implied that the defenders of *Plessy* were white supremacists; he used "the argument to induce shame" to persuade the Justices to support striking down school segregation.²⁰¹

Reed appears to have been the only Justice who failed to be touched by the story of pain caused by segregation: "He did not accept the position that segregation was necessarily an act of discrimination"²⁰² Reed had written the opinions in *Smith v. Allwright*²⁰³

194. *Id.* at 613.

195. *Id.* at 682.

196. See E. WARREN, *supra* note 158, at 145-50; see also G.E. WHITE, EARL WARREN: A PUBLIC LIFE 68-75, 161-62 (1982) (describing Warren's personal bias against Japanese as well as his personal responsibility for the internment camps).

197. R. KLUGER, *supra* note 107, at 680. G.E. WHITE, *supra* note 196, at 162, indicates Warren had made strong public statements for civil rights for blacks and had encouraged antidiscrimination legislation for blacks when he was Attorney General, although he was not entirely free of racist sentiments.

198. R. KLUGER, *supra* note 107, at 678 (emphasis in original) (quoting interview with Chief Justice Warren).

199. G.E. WHITE, *supra* note 196, at 228.

200. *Id.* at 163; R. KLUGER, *supra* note 107, at 679-80.

201. G.E. WHITE, *supra* note 196, at 165; R. KLUGER, *supra* note 107, at 680.

202. R. KLUGER, *supra* note 107, at 595.

203. 321 U.S. 649 (1944).

and *Morgan v. Virginia*,²⁰⁴ important decisions invalidating whites-only primary elections and segregation on interstate buses, respectively. But he was "an austere and very proper Southern gentleman."²⁰⁵ He had had difficulty with a case holding segregated restaurants in the District of Columbia unlawful, because he did not like the notion that "a nigra [sic] can walk into the restaurant at the Mayflower Hotel and sit down . . . right next to Mrs. Reed."²⁰⁶ In 1952, he apparently took the position that "separation of races is for benefit of both."²⁰⁷ In 1953, after Warren's veiled moral challenge, Reed replied that "[n]o one had suggested . . . that segregation was permissible because the Negro belonged to an inferior race," although he offered no other justification for continuing segregation.²⁰⁸ One could argue that Reed failed to empathize with blacks but *did* empathize with white southerners; he could imagine Mrs. Reed's discomfort at having a black sitting next to her in a restaurant but couldn't imagine the discomfort caused the black by being excluded. At best, he engaged in unreflective empathy, empathizing with those like him; at worst, he was guilty of a racial prejudice that blocked his ability to hear the NAACP narrative and empathize with blacks. Racial stereotyping and prejudice seem to have rendered him deaf to the message of pain and stigma so powerfully presented in *Brown*.²⁰⁹ Reed was finally swayed by Warren with appeals to his conscience about the effect of a dissent.²¹⁰

All three types of empathy seem to have been present in *Brown I*: Feeling the distress of the blacks, understanding the painful situation created by segregation, and responding to the cry of pain by action:

We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated . . . are . . . deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.²¹¹

The narrative was one of the pain of segregation, the legal framework was the equal protection clause, the action was the de facto overruling of *Plessy*.

The *Brown II* decision seems in many ways to have been such a

204. 328 U.S. 373 (1946).

205. R. KLUGER, *supra* note 107, at 595.

206. *Id.* The case was *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100 (1953).

207. R. KLUGER, *supra* note 107, at 596 (quoting Justice Burton's notes).

208. *Id.* at 680.

209. *See id.* at 683 (after the 1953 arguments, Reed was still fixed on upholding segregation).

210. *Id.* at 698.

211. 347 U.S. at 495.

substantial retreat from *Brown I* that it may render *Brown I* less a triumph of empathy than I assert. Yet *Brown I* remains a powerful example of the ability of Supreme Court Justices to hear a different and affecting narrative; to see the world in a new way and to understand the pain created by law in that world; and to respond to that pain. Unlike Herbert Wechsler, who declared in a law review article that Charles Houston "did not suffer more than I in knowing we had to go to Union Station to lunch together during the recess" of Supreme Court arguments because of segregation in the District of Columbia,²¹² the Justices saw that a Charles Houston *did* suffer more. The pain caused by racism, the discrimination against blacks because they were black, the privilege whiteness gives in life, did reach the Justices. Wechsler missed altogether the point he could have lunch anywhere *he* chose, but Houston could not. In a variation of blaming the victim (segregation of blacks stamps them with a badge of inferiority because they choose to construe it that way; enforced separation of the sexes is not necessarily discriminatory "against females merely because it may be the females who resent it and it is imposed by judgments predominantly male"²¹³) Wechsler manifested a total lack of empathy — in addition to reiterating the logic of *Plessy*.

In contrast to the type of critique used by Herbert Wechsler, which could be said to manifest the worst use of legality to abstract human reality out of existence, is the defense of *Brown* by another legal scholar, Charles Black.²¹⁴ (Unfortunately, Black's defense of the desegregation decisions never gained the respect paid Wechsler's article by the established legal community.) Against legality, Black — a southern white who assisted the NAACP in briefing its reply to the questions used by the Court for reargument in 1953 — could be said to have argued for empathic understanding.²¹⁵ Making the "subjectively

212. Wechsler, *supra* note 110, at 34.

213. *Id.* at 33.

214. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

215. The article is rich with description of the meaning of segregation to black and white southerners, the formal and informal structures that result in "a whole race of people find[ing] itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior situation," *id.* at 424, and the intentional harm inflicted on human beings who happen to be black. Black's contribution to the brief for the reargument in 1953 included an insistence that the decree in the case not be one-mandating "gradual" desegregation. R. KLUGER, *supra* note 107, at 645. And he added language that emphasized the damage segregation inflicts:

These infant appellants are asserting the most important secular claims that can be put forward by children, the claim to their full measure of the chance to learn and grow, and the inseparably connected but even more important claim to be treated as entire citizens of the society into which they have been born.

Brief for Appellants in Nos. 1, 2 & 4 and for Respondents in No. 10 on Reargument at 191, *Brown v. Board of Educ.* (No. 1), *Briggs v. Elliot* (No. 2), *Davis v. County School Bd.* (No. 4), *Gebhart v. Belton* (No. 10), 347 U.S. 483 (1954).

obvious" point that segregation was meant to perpetuate the inferior position of blacks,²¹⁶ Black also drew on the history and culture of the South to state that any claim of "equality" in law was laughable: "Then we are solemnly told that segregation is not intended to harm the segregated race, or to stamp it with the mark of inferiority. How long must we keep a straight face?"²¹⁷ The evidence was "very clear" about what "segregation *means* to the people who impose it and to the people who are subjected to it."²¹⁸ Criticisms of the Court via legality, Black contended, simply stood for the lack of

[a] ritually sanctioned way in which the Court, as a Court, can permissibly learn what is obvious to everybody else and to the Justices as individuals. But surely, confronted with such a problem, legal acumen has only one proper task — that of developing ways to make it permissible for the Court to use what it knows; *any other counsel is of despair*.²¹⁹

After *Brown I*, however, the Justices were out on a limb. "The white-supremacists of the South were swift and shrill in their outcry."²²⁰ The Governor of Virginia declared, "I shall use every legal means at my command to continue segregated schools in Virginia."²²¹ The Eisenhower administration remained mute in the face of public outcry.²²² *Brown I*, by postponing the issue of remedy, increased the opportunity for second thoughts: Almost a year passed between the decision of May 17, 1954, and the arguments of April 11, 1955, a year in which Southern resistance, congressional criticism, and executive inaction may have reminded the Justices to stick to "legality."

B. *Making the Empathic Point for Poor People:* *Shapiro v. Thompson*

Shapiro v. Thompson,²²³ arguably is "just" the "right to travel" case. Certainly the more expansive hope that it would institute a doctrine of special protection for the poor was dashed in subsequent cases.²²⁴ Yet it provides an excellent example of the interweaving of

216. Black, *supra* note 214, at 424.

217. *Id.* at 425.

218. *Id.* at 426 (emphasis added).

219. *Id.* at 427-28 (emphasis added).

220. R. KLUGER, *supra* note 107, at 710.

221. *Id.* at 714. And tragically the battle goes on in Topeka and everywhere else. J.A. LUKAS, COMMON GROUND (1985); Robbins, *Historic Case on Rights is Reopened in Topeka*, N.Y. Times, Oct. 7, 1986, at 104, col. 1.

222. E. WARREN, *supra* note 158, at 289.

223. 394 U.S. 618 (1969).

224. See *Dandridge v. Williams*, 397 U.S. 471 (1970); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *United States v. Kras*, 409 U.S. 434 (1973); *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

empathic strategies and legal principles by Archibald Cox.²²⁵ Not involved in the first round of briefing and argument, Cox and Howard Lesnick entered the case when the Court set the matter for reargument.²²⁶

In terms of the existing law and legal ideology, the original plaintiffs in *Shapiro* had to lose. As in *Brown*, Congress and state legislatures had spoken; unlike *Brown*, there was no issue of explicit racial categorization. Choices about how to spend money were legislative, not judicial. And attempts to fit the claim that one-year residency requirements for welfare eligibility were unconstitutional into existing doctrine were strained. Unless the Court declared classifications based on wealth suspect, there was little doctrine or precedent to support striking down residency requirements.²²⁷ Indeed, the State of Connecticut's brief in the case was smug, because the legal issues were so obviously settled.²²⁸ The amicus briefs filed by other states were less smug in tone, yet they made full use of the doctrines and beliefs about legal structure to tell the Court, essentially, that it had no reason to get involved. Spending was a legislative matter. The states and Congress were doing their best with limited funds;²²⁹ the one-year requirement was necessary to protect the funds for longer-term residents of the states,²³⁰ to enable legislatures to budget money,²³¹ and to prevent opportunism and fraud.²³²

The states all conceded a constitutional right to travel from state to state, and either denied that the residency requirement infringed that right²³³ or asserted that no right to "subsidized" travel existed.²³⁴ A

225. "Justice Stewart for one, was strongly influenced by the Cox argument." B. SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE WARREN COURT* 387 (1985).

226. *Shapiro v. Thompson*, 392 U.S. 920 (1968).

227. *Shapiro*, 394 U.S. at 630 n.8, discussed the various doctrinal precedents and themes that had been developed up to the time of the Court's decision.

228. The original Connecticut brief was only 18 pages long; it contained a "we dare you" argument:

It would seem to be an exercise in judicial arrogance to hold that [the Connecticut statute] is unconstitutional. In effect the Court would be saying that it is much more competent to say what constitutes public welfare and what is justice than the members of the legislatures of 40 states who passed these laws . . . , the governors of the 40 states who sign these bills into law, and the Congress . . . who have expressly recognized the problem and agreed that residency requirements are fair and equitable . . . and the President who signed the bill into law. Brief for Appellant at 9, *Shapiro v. Thompson*, 394 U.S. 618 (1969) (No. 813). The brief dismissed the opinion of the district court finding for Thompson, stating that "one looks in vain to find a single case cited by them that could reasonably have upheld their decision." *Id.* at 11.

229. *Id.* at 17; Brief for California as Amicus Curiae at 5-7; Brief for Iowa as Amicus Curiae at 2.

230. Brief for Iowa at 2; Brief for Appellant at 17-18.

231. Brief for California at 5-6; Brief for Iowa at 2.

232. Brief for Iowa at 4; Brief for Delaware as Amicus Curiae at 4; Brief for Appellant at 10.

233. Brief for Appellant at 13-14; Brief for California at 10; Brief for Iowa at 10.

story of starving people would not have helped the states, so they exploited stories supportive of stereotypes and prejudices regarding the "undeserving poor." Thus, in its brief the State of Connecticut did all it could to portray Vivian Thompson, the original plaintiff, as a stereotypical welfare parasite. Thompson was "[a] 19 year old unwed mother of a minor child" who "was pregnant and later gave birth to another child."²³⁵ "There is nothing in the record . . . to show that either the appellee or her children suffered from poor health or had any other special problem . . . which kept her out of the labor market."²³⁶ Moreover, the brief and counsel for Connecticut at the first oral argument strongly implied Thompson had moved to the state simply to take advantage of its "generous" benefits.²³⁷ Rather than establishing a claim that Connecticut harshly allowed women and children to starve, Thompson's "[r]eal claim . . . is that Connecticut discriminates against a poor applicant who has no desire to enter the labor market"²³⁸

The initial briefs filed for the persons denied welfare, as well as the argument for the named appellee, Thompson, were legally weak and failed to present a concrete picture of the persons affected that could rebut the stereotypical portraits painted by the states. The brief on behalf of Thompson did make her a more sympathetic figure than the state had claimed — she had moved to Connecticut to be with her mother, a Connecticut resident for eight years, but her mother ultimately was unable to support her.²³⁹ Her pregnancy made her unable to work or get job training. She and her two children subsisted on the \$31.60 a week contributed by Catholic Family Services after she was denied AFDC by the state. But then she disappeared from the brief, which continued in the most general terms to a description of poverty in America and general legal arguments.²⁴⁰

It was not until reargument that the human issue — that poor people who moved to a new state could very well starve for a year — became clear.²⁴¹ In the Supplemental Brief for Appellees on Reargu-

234. Brief for California at 11-12; Transcript of Oral Argument, in 68 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 331-32 (P. Kurland & G. Casper eds. 1975) [hereinafter LANDMARK BRIEFS].

235. Brief for Appellant at 2-3.

236. *Id.* at 5.

237. *Id.*; Transcript of Oral Argument, 68 LANDMARK BRIEFS, *supra* note 234, at 332.

238. Brief for Appellant at 5.

239. Brief for Appellee at 2.

240. *Id.* at 3; Transcript of Oral Argument, 68 LANDMARK BRIEFS, *supra* note 234, at 343.

241. See Brief for Appellee at 4-9 (description of poverty in America). The legal arguments asserted that, although there was disagreement as to the exact textual source of the right to travel, "[i]t is now recognized without dissent that the right to travel from one State to another is

ment, the Summary of Argument made the Cox-Lesnick strategy apparent:

Abstractly stated, therefore, the question presented by all three cases is whether this discrimination [in AFDC benefits] on the basis of length of residence in a State violates the Fifth and Fourteenth Amendments.

But this abstract statement conceals the flesh, blood and heart of the true questions. The *facts* of these cases make three points clear that frame — and limit — the constitutional issue.²⁴²

Just as the abolitionist lawyers stressed the *persons* affected by the fugitive slave laws,²⁴³ Cox and Lesnick in the brief and Cox at oral argument returned again and again to the individuals involved. Cox's argument used their names and their stories to make his points. The plaintiffs were "going back home";²⁴⁴ "they are mothers of dependent children without present husbands who moved into the new jurisdiction either to go back home . . . , or rejoin their families, or to get help from some person, or perhaps to get a job; and then who are left absolutely destitute when misfortune occurs."²⁴⁵ With the one-year residency requirement for eligibility, a woman who left Pennsylvania to help aging grandparents and was absent a few years before returning to Pennsylvania was denied AFDC;²⁴⁶ Vera Barley, a woman committed to St. Elizabeth's Hospital in the District of Columbia for "20-odd years" and who became competent to be released had not been a "resident" for one year in the District of Columbia and was forced to remain in the hospital.²⁴⁷ Families not eligible for AFDC would be separated: In the case of Juanita Smith, who had virtually grown up in Pennsylvania and who had returned home from Delaware after an absence of "a few years," the residency requirement left her with the alternative of going back to Delaware or losing custody of her children: "Well . . . we'll take your children away from you and provide institutional care which might run anywhere from six months to two years. And this, at least, will provide them with shelter."²⁴⁸

Cox, having set a descriptive stage of the personal realities of those

a fundamental right." *Id.* at 10. The Connecticut statute interfered with the right of indigent individuals to travel to Connecticut, *id.* at 11, and the "right to establish residence" in the state. *Id.* at 19. And, "[a]s to those persons who choose to remain in Connecticut [despite their ineligibility for AFDC, the statute] in effect makes the right to enjoy residence meaningless because it forces on them a life devoid of any humane quality." *Id.* at 20.

242. Supplemental Brief for Appellees on Reargument at 3 (emphasis added).

243. R. COVER, *supra* note 91, at 216.

244. Transcript of Reargument, in 68 LANDMARK BRIEFS, *supra* note 234, at 382.

245. *Id.* at 383.

246. Supplemental Brief for Appellees on Reargument at 29.

247. Transcript of Reargument, in 68 LANDMARK BRIEFS, *supra* note 234, at 384.

248. *Id.* at 382.

denied benefits solely by virtue of failing to meet a one-year residency requirement then tied the narrative to the legal arguments:

First, . . . the one-year residence requirement discriminates in relation to the fundamental necessities of life between two classes of persons who are identically situated in terms of need . . . or any other thing of that kind save how long they've been there or where they came from.

Second, the sole basis of classification is the differentiation between new and old residents. . . . [T]hat discrimination against newcomers, against those who Mrs. Williams [counsel for Iowa] said during her oral argument "are not *our* people" . . . reveals that this sort of thing rests on prejudice against outsiders. It's invidious in that sense But it also penalizes the exercise of a . . . liberty, a freedom, an aspect of freedom which has long constitutional recognition.

And then the third element is that the classification . . . has no substantial relation to the accomplishment of any permissible state policy. . . .

. . . .

. . . I'm suggesting that this isn't a discrimination like one between a business that may claim it's entitled to a subsidy for \$5 million, and that it's unfair as compared to another business getting a subsidy of \$20 million. This is something that operates in relation to not only the rudiments of existence . . . , but in relation to such things as keeping families together. The answer to Juanita Smith was: "The only thing we can do is put your children in institutional care." In relation to Vera Barley, the discrimination operated, literally, in relation to human liberties.²⁴⁹

Later in the argument he stated, "I think that I have sought to stress the right to live where you please as a basic right. . . . Your Honors emphasized a point I should have made more sharply, perhaps. Our case deals with the right to *live* where you please to seek better opportunities."²⁵⁰

What is difficult to capture is the total ease with which Cox wove the individual stories into the legal arguments; to break out one or the other fails to convey the manner in which he made the stories and the legal points one. For example, in rebutting the state's proffered justifications for the rationality of the residency requirements, he observed:

The additional point that I would make is that while I think no discrimination can be justified on the assumption that the higher relief payment operates as a magnet . . . I do suggest to the Court that even if it be assumed that a state might deal with this problem in an appropriate way, that *this* way of dealing with it is unconstitutional I point out that it's excessively broad in a number of respects.

First, the one-year residency requirement applies even to people . . . who come from states with higher or equal benefit levels

Second, it applies to people who come for reasons that demonstrably

249. *Id.* at 387-88 (emphasis on tape recording of reargument).

250. *Id.* at 397 (emphasis added).

are unrelated to the benefit level; and the *facts* of these cases are the best evidence of that. *Five out of seven were coming back to where they'd lived before.* Another five out of seven were coming to join families. And of course most people move for hoped-for jobs.²⁵¹

Against these narratives, skillfully and at times movingly spoken, interwoven with cases and legal doctrines, the legalistic arguments of counsel for the states and the District of Columbia appeared to be unresponsive. More “emotional” appeals, which might better be characterized as appeals to stereotyped beliefs about the poor, also seemed unresponsive to the narrative Cox used. Iowa as amicus claimed that the need to “know, within one year, who wants to contribute, who are our people, who wants to live here and contribute, and [who] we want to help,”²⁵² justified the one-year requirement. Connecticut argued that “an adverse decision by this Court would have the effect of penalizing every liberal welfare benefit state, by putting a premium on the poor benefit states to encourage their needy and dependent to migrate to greener pastures,”²⁵³ and claimed that its welfare rolls already had been “skyrocketing.”²⁵⁴ Counsel for the District of Columbia argued that the residency requirement was a “mere discouragement” to the right to travel.²⁵⁵ The states and the District of Columbia also stressed that, because of limited funding, budget increases or cuts in grants to all recipients would be necessary — implying that a decision to find for Thompson would cause greater hardship for the poor.²⁵⁶ To negate the apparent harshness of the rule, counsel for Pennsylvania stated with confidence that the purpose of the law was “of course, to encourage self-respect, self-dependency, and the desire to motivate the individual to be a good and useful citizen in society. It is to encourage him [sic] to go to work”²⁵⁷ Counsel for Iowa began her argument

251. *Id.* at 405 (emphasis on tape recording of reargument; wording conforms to tape rather than transcript).

252. *Id.* at 363.

253. *Id.* at 356.

254. *Id.* at 358.

255. *Id.* at 371.

256. *Id.* at 358-59 (counsel for Connecticut); *id.* at 367 (counsel for the District of Columbia).

257. *Id.* at 408. Counsel had to retract this claim about legislative purpose when questioned at the end of his argument:

The Court: Could I ask you — I still don't understand. Do I properly understand that you've suggested that this statute . . . rests its justification on the desire to encourage people to work, rather than to save money?

Mr. Sennett: I think it rests on both grounds. . . . [W]e have spelled out that one of the legitimate purposes of the Pennsylvania statute is a budgetary requirement; that limited resources are available and that these [can] only be distributed in a certain way and that that is a legitimate purpose; and that . . . in order for us to determine how much money is going to be available for welfare, [that] is also a legitimate purpose.

Id. at 414 (words in brackets based on tape recording of reargument, not transcript).

by acknowledging there *was* a problem but stated essentially “this is not the forum” for making the decision. “And again they point out that there is a ‘need’ — and we are all aware that there is a need for people who are suffering, and are in want in our country — but this is not sufficient reason” to overlook the law.²⁵⁸ “It is a legislative problem, and not a judicial problem.”²⁵⁹

Some members of the Court appeared during oral argument to hold stereotyped beliefs or concerns about poor people (and probably worse, about that creature, the Welfare Mother). Justice Black apparently assumed that spending six months in Massachusetts and six months in Florida is “a very common thing” and “doubt[ed]” Cox’s assertion that it was not common “in relation to the types of people we’re talking about here.”²⁶⁰ Chief Justice Warren was very concerned with the figures for AFDC migrants to California, “some of the Western states and Florida.”²⁶¹ He sharply disputed Cox’s assertion that the places most affected were New York City and the District of Columbia based on the fact that the “flow of migration of the people who end up with ADC care is, for the most part, from the rural areas and very largely from the South”²⁶² The Chief Justice pushed for information about increases for “states like California, Arizona, and Florida”²⁶³ from Cox, who finally offered to prepare a memo on the subject.

On the other hand, other members of the Court sharply disputed the government lawyers’ claims. One Justice skeptically engaged counsel for Connecticut: “And my other question is: Do you think they can just not eat for a year?” And: “You want to convince me that Connecticut is one of the few states in the Union that has no unemployment?”²⁶⁴

The majority opinion itself could have been written only by a Court that heard the stories the indigent persons had presented — indeed, it reads like Cox and Lesnick’s brief and Cox’s oral argument. It begins with stories of the individuals:

[A]ppellee Vivian Marie Thompson . . . was a 19-year-old unwed mother

258. *Id.* at 362.

259. *Id.*

260. *Id.* at 394.

261. *Id.* at 400.

262. *Id.* at 401.

263. *Id.* at 403.

264. *Id.* at 360, 361. A Justice also asked Counsel for the District of Columbia during his argument if he wanted the Court “to note that this Government is unable to pay people enough money so they can eat?” *Id.* at 368. I could not ascertain from the tapes — nor do the transcripts indicate — which Justice(s) asked these questions.

... [who had moved to Connecticut] to live with her mother Because of her pregnancy, she was unable to work or enter a work training program. . . .”

....

Appellee Minnie Harrel, now deceased, had moved with her three children from New York to Washington She suffered from cancer and moved to be near members of her family who lived in Washington.

Appellee Barley . . . returned to the District in March 1941 and was committed a month later to St. Elizabeth's Hospital as mentally ill She was deemed eligible for release in 1965, and a plan was made to transfer her The plan depended, however, upon Mrs. Barley's obtaining welfare assistance Her application . . . was denied because her time spent in the hospital did not count in determining compliance with the one-year requirement.

Appellee Brown lived with her mother and two of her three children in Fort Smith, Arkansas. Her third child was living with . . . Brown's father in the District of Columbia. When her mother moved . . . to Oklahoma, appellee Brown . . . returned to the District of Columbia where she had lived as a child. Her application for AFDC . . . was approved insofar as it sought assistance for the child who had lived in the District with her father but was denied . . . for the other two children.²⁶⁵

The story for the other D.C. appellee was similar. The Pennsylvania mothers both had spent much of their lives in Pennsylvania: Appellee Smith had returned with her five children and lived with her father until he lost his job. Appellee Foster had gone to South Carolina for approximately two years “to care for her grandfather and invalid grandmother and had returned to Pennsylvania.”²⁶⁶ Each of the appellees, the Court noted, had “met the test for residence in their jurisdictions, as well as all other eligibility requirements except [the one-year residence requirement].”²⁶⁷

The opinion by Justice Brennan continued: “There is weighty evidence that exclusion from the jurisdiction of the poor who need or may need relief was the specific objective of these provisions”;²⁶⁸ “the purpose of deterring the in-migration of indigents cannot serve as a justification . . . , since that purpose is constitutionally impermissible”;²⁶⁹ and “none of the statutes [was] tailored to serve [the] objective” of discouraging “those indigents who would enter the State solely to obtain larger benefits.”²⁷⁰ The implication that the poor were

265. 394 U.S. at 623-25.

266. 394 U.S. at 625-26.

267. 394 U.S. at 627.

268. 394 U.S. at 628.

269. 394 U.S. at 631.

270. 394 U.S. at 631.

somehow less deserving was wrong: "Surely such a mother is no less deserving than a mother who moves into a particular State in order to take advantage of its better educational facilities."²⁷¹ The "contribution to the community" argument failed as well:

We have difficulty seeing how long-term residents who qualify for welfare are making a greater present contribution to the State in taxes than indigent[s] . . . who have recently arrived [T]here is some question, as a factual matter, whether this argument is applicable in Pennsylvania where the record suggests that some 40% of those denied . . . had lengthy prior residence in the State. . . . [This] would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection.²⁷²

The majority opinion walked a fine doctrinal line, relying both on a finding that the one-year residency requirement impermissibly interfered with the fundamental right to travel and on some kind of "interest in subsistence."²⁷³ States could not require people to starve for a year; neither could Congress. Professor Michelman was undoubtedly correct in stating that the Court's concern was with "minimum protection" rather than equal protection per se,²⁷⁴ but equal protection was the best legal category to appeal to in striking down an unjust law.

The dissents took a "fact"-less tack insofar as the story of those individuals portrayed by the arguments and the majority opinion was concerned: If there was any understanding of the situation of the people involved on the part of Chief Justice Warren and Justices Black and Harlan, it is not readily apparent. Warren's dissent, joined by Black, includes among other things an odd essay on the commerce clause in which congressional power to regulate and tax airlines and common carriers and Congress' interest in enhancing the flow of commerce is somehow equated with refusing to provide food, clothing, and shelter for the poor.²⁷⁵ In a peculiar footnote, with a "let them eat cake" ring to it, Warren stated, "All of the appellees in these cases found alternative sources of assistance after their disqualification."²⁷⁶

271. 394 U.S. at 632.

272. 394 U.S. at 632.

273. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 40 n.94 (1969).

274. *See id.* at 9.

275. 394 U.S. at 647-54. The opinion also contains a discussion of Congress' "plenary" power to regulate commerce, combined with cases involving the freedom of Americans to travel out of the country. *Kent v. Dulles*, 357 U.S. 116 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Zemel v. Rusk*, 381 U.S. 1 (1965). Additionally, Warren suggested that the existence of federal statutes on residency requirements ("Congress has imposed a residence requirement in the District of Columbia and authorized the states to impose similar requirements") might have mandated such requirements. 394 U.S. at 647-48.

276. 394 U.S. at 650 n.5.

(True, all but one of the original plaintiffs were still alive;²⁷⁷ they had not starved to death.) For the Chief Justice to have dissented in a case crying with human need and evidencing apparent capriciousness and prejudice against poor people seems remarkable given his apparent reliance on empathy to reach many decisions. His failure to empathize in this case might be explained by his political experiences as attorney general and governor of California. In fact, he was attorney general of California when the Supreme Court found unconstitutional a California statute making it a criminal offense to bring an indigent person into the state.²⁷⁸ He had been a California Progressive, and California Progressivism had a strong nativist and xenophobic streak;²⁷⁹ California itself had been decidedly hostile to poor immigrants seeking a better life during the Depression.²⁸⁰ This is somewhat speculative, but a bias against poor immigrants could easily have blocked Warren's usual capacity for empathic understanding.²⁸¹

Justice Harlan's dissent is thorough, careful, and very legalistic; he was honest in stating his underlying objection to the majority opinion as a violation of his belief that "it is an essential function of this Court

277. Minnie Harrell had died of cancer by the time the case was reargued. Ironically, Warren's original majority opinion acknowledged that "the plight of the poor has pricked the Nation's conscience To the extent that the appellees have attempted to show that durational residency requirements impose hardships upon the poor . . . they appeal to the right instincts of all men." B. SCHWARTZ, *supra* note 225, at 326. But Warren then shifted deference to the legislature: "[I]nstance cannot be our guide when we are asked to declare unconstitutional part of a statutory scheme enacted by Congress" *Id.*

278. *Edwards v. California*, 314 U.S. 160 (1941). Warren, as attorney general, signed the Brief on Reargument in the case. California had made it a misdemeanor to transport nonresident indigents into the state; Edwards, a "sometime preacher," was convicted of violating the law. The ACLU of Northern California took the case and based its argument in the Supreme Court on the commerce clause. Cray, *California Here I Come*, CAL. LAW. DEC. 1986, at 50, 52. The Court majority agreed with the commerce clause theory, but Justices Douglas, Black, Murphy, and Jackson based their concurrences on the privileges and immunities clause of the fourteenth amendment. 314 U.S. at 177 (Douglas, J., concurring); 314 U.S. at 182 (Jackson, J., concurring).

279. G.E. WHITE, *supra* note 196, at 18-19, 35, 42.

280. Cray, *supra* note 278, at 50-52. John Steinbeck's *The Grapes of Wrath* captures the California attitude toward the "Okies" as perhaps only literature can.

281. Chief Justice Warren had originally found the case "an easy one," controlled by the Social Security Act's provision that residency requirements could not exceed one year. B. SCHWARTZ, *supra* note 225, at 304. At conference, Warren argued that Congress "allowed the one-year requirement" and that it had the power to do so. The conference voted 6-3 to uphold one-year residency requirements, and Warren assigned the majority opinion to himself. *Id.* at 305.

Warren's original circulated opinion manifested a concern with the Depression, the impact of welfare on state treasuries, and the history of the Social Security Act. *Id.* at 315-19, 326-27. Warren did acknowledge that the requirement imposed hardships, *see id.* at 326, and concluded the opinion with the observation that although the one-year residency requirements were not unreasonable and were within Congress' power, "[t]here is nothing to prevent Congress in the future from requiring the elimination of all residence requirements" *Id.* at 341.

Justice Brennan, who had originally voted to uphold the residency requirements, read Justice Fortas' draft dissent and changed his vote at the next conference. *Id.* at 387. Justice Stewart refused to cast a vote; the Court was split 4-4 and the case was set for reargument. *Id.*

to maintain the constitutional divisions between state and federal authority and among the three branches of the Federal Government”²⁸² Harlan was principled in his adherence to what he believed the proper role of the Court should be; what he failed to acknowledge implicitly or explicitly in his opinion were the human realities underlying the case. His only reference to the narrative of the poor people was his agreement with the plaintiff’s claim that the one-year residency requirement had only a “minuscule” effect on the choice to move;²⁸³ he interpreted this as having an “indirect impact” on the right to travel,²⁸⁴ rather than as an indication that several of the original plaintiffs were returning to their home state, or rejoining their families, or migrating for reasons other than increased benefits. His list of “legitimate reasons” for imposing the one-year residency requirement favored predictability and control, as well as endorsed a rather xenophobic approach to legislative allocation of resources: the residency requirement “will make more funds available for those whom the legislature deems more worthy of subsidy”²⁸⁵ and who have “recently made some contribution to the state’s economy.”²⁸⁶ This was the “our people” argument of the state of Iowa.²⁸⁷ It was a singularly unempathic response, legality at its best and worst, disembodied principles and an underlying political belief system that limited the Court’s role in addressing apparent injustices created by more “democratic” political bodies. Harlan never recognized the human beings affected in his dissent, perhaps because to have done so while reaffirming the one-year residency requirement would have entailed a “let them eat cake” dismissal of the narrative. His not unjustified reticence to dictate spending programs to Congress or the states²⁸⁸ was undermined by the facts of the cases in *Shapiro*: it was more expensive to keep Barley at St. Elizabeth’s; foster or institutional care for children was more expensive than AFDC.²⁸⁹ Harlan, troubled by the Court’s fundamental rights analysis, argued that “[r]ights such as” “the right to pursue a particular occupation,” “to receive greater or smaller wages or to work more or less hours,” and “the right to inherit property” were “in principle indistinguishable from those involved here.”²⁹⁰ He protested

282. 394 U.S. at 677.

283. 394 U.S. at 672.

284. 394 U.S. at 672.

285. 394 U.S. at 672.

286. 394 U.S. at 674.

287. Transcript of Reargument, in 68 LANDMARK BRIEFS, *supra* note 234, at 363-64.

288. See 394 U.S. at 674-75, 677.

289. Transcript of Reargument, in 68 LANDMARK BRIEFS, *supra* note 234, at 384.

290. 394 U.S. at 661.

"the Court's cryptic suggestion . . . that the 'compelling interest' test is applicable *merely* because the result of the classification may be to deny the appellees 'food, shelter, and other necessities of life'. . . ."291 If one is talking about the requisites for existing at all, however, it seems that Harlan's failure to see a principled distinction between a law depriving the poor of having food to eat and a law making it unlawful to supply lenses without a prescription written by an ophthalmologist or optometrist292 is almost deliberate obtuseness. Harlan's dissent highlighted the tension between devotion to legality and use of empathy as ways of seeing the world.

C. *Abortion*

Professor Sylvia Law has written, "Nothing the Supreme Court has ever done has been more concretely important for women"293 than its decision to permit them access to abortions in *Roe v. Wade*294 and *Doe v. Bolton*.295 However true that statement may be, one must recognize that *Roe* has been as severely criticized as *Brown I*, if not more so.296 Perhaps even more than they had in the race cases, many members of the Court and the legal academy have shown a rather peculiar flight from the reality of women in the abortion cases. Thus, even though *Roe* was a victory for American women, the nature of the victory has rendered it vulnerable. In *Brown*, the Court saw the pain and stigma of being black in America; in the abortion cases, the Court has arguably failed to see the pain, despair, and stigma of women with "unwanted" pregnancies and "unwanted" children. (The two frequently go together; as a social fact, it is women who have responsibility for child-rearing.) In part, perhaps, members of the Court have been unable to identify with women facing disastrous pregnancies. Perhaps because the narrative of "unwanted" pregnancy and its effect on women was underdeveloped when *Roe* was decided, the Court lacked appreciation of the human issues involved. Justice Powell, af-

291. 394 U.S. at 661 (emphasis added).

292. 394 U.S. at 661 n.11 (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955)).

293. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 981 (1984).

294. 410 U.S. 113 (1973).

295. 410 U.S. 179 (1973).

296. The Reagan Administration, for example, has sought to "overrule" *Roe* by constitutional amendment, litigation, and legislation. See Roberts, *Reagan Said to Back Measure to Bar Any Federal Aid for Abortion*, N.Y. Times, Feb. 10, 1987, at A20, col. 1; see also notes 375-76 *infra* and accompanying text. The Court's decision in *Roe* has been trashed in countless articles and law school classrooms. John Ely fired off an early volley in Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); see also Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159; Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U. L. REV. 231.

ter his retirement from the Court in 1987, said, "I don't think I'd ever really thought about [abortion] seriously before."²⁹⁷ Perhaps members of the Court did feel some empathy and concern for women, but did not have a way to articulate it. Perhaps the Court's failure was because of the enormous moral complexities of empathizing with fetuses — recharacterized as human infants — *and* women simultaneously.

The briefs and the tapes of the oral arguments in *Roe* patently reveal that an empathic narrative about fetuses was developing. An appeal to emotional identification with the fetus was obviously present in the brief for the State of Texas: the brief contained pictures of human development, together with a narrative humanizing the fetus, making the fetus capable of "conscious experience"²⁹⁸ and, indeed, making it "autonom[ous]."²⁹⁹ Women, in contrast, warranted only a two-page discussion in the Texas brief of their "interests"; they had a limited "right of privacy" versus the "right of the child to life."³⁰⁰ An amicus brief filed by dissenting members of the American College of Obstetrics and Gynecology argued that "the unborn child is as much a patient as is the mother."³⁰¹ They declared:

The unheard voices of these little ones are our concern, and we deplore this violent trend which is turning the healing art of medicine into a source of efficient swift and sure destruction of human life. A trend which will yield a "body count" unlike any we have seen in our nation's history [sic].³⁰²

The use of the words "child" and "mother" in the brief cannot have been accidental — any more than the allusion to "body counts" at a time when the war in Vietnam was causing increased consternation. "Mother" and "child" evoke an image of caring and need for protection, respectively; only a mother who is evil would kill her child, and she is unworthy of empathy.

Roe v. Wade was not well argued — counsel for both sides, none experienced advocates before the Court, seemed unprepared to answer questions, did not respond to questions, did not have facts at their

297. Taylor, *Powell on His Approach: Doing Justice Case by Case*, N.Y. Times, July 12, 1987, at 1, col. 3.

298. Brief for Appellee at 52, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18).

299. *Id.* at 30; see generally Part D, *The Human-ness of the Fetus*, *id.* at 29-54. The woman's role in nurturing this autonomous human being seems almost trivial — she is, perhaps, simply the vessel.

300. *Id.* at 28-29. Women are tangential even to the state's argument about the right to privacy in this section, however.

301. Motion and Brief Amicus Curiae of Certain Physicians, Professors, and Fellows of the American College of Obstetrics and Gynecology in Support of Appellees at 31.

302. *Id.* at 46.

disposal.³⁰³ According to *The Brethren*, Justice Blackmun, the author of the opinion in *Roe*, thought the presentations “poor” and felt that the “abortion issue deserved a better presentation.”³⁰⁴ Yet during oral arguments in *Roe v. Wade* in 1971, counsel for the state of Texas rather movingly referred to a Texas case that “held that the State had a compelling interest because of the protection of fetal life — of fetal life protection. They [the Texas court that upheld the statute] recognized the humanness of the embryo, or the fetus, and they said we have an interest in protecting fetal life.”³⁰⁵ In 1972, a different lawyer arguing for Texas immediately asserted: “But it is the position of the State of Texas that, upon conception, we have a human being . . .”³⁰⁶ And in a slowly paced summary of the “rights of the unborn child,” counsel stated:

This Court has been diligent in protecting the rights of the minority . . . — a silent minority — the true silent minority. Who is speaking for these children? Where is the counsel for these unborn children whose life is being taken? Where is the safeguard of the right to trial by jury? Are we to place this power in the hands of a mother, and a doctor [said dismissively] — all of the constitutional rights . . . ?³⁰⁷

These are *children*, not “fertilized eggs,” “blastocysts,” “fetuses,” “blobs of protoplasm,” or even “babies.” In other words, the image is recognizably human. The Court in its questioning reflected a great concern with the argument that fetuses were children, grasping for historical, medical, and legal meanings of “person.”³⁰⁸ Indeed, at one point, a member of the Court remarked that if fetuses were persons within the meaning of the Constitution, “you can sit down, you’ve won your case.”³⁰⁹ And Justice Stewart in questioning counsel for *Roe*, stated, “Well, if — if it were established that an unborn fetus is a person, within the protection of the Fourteenth Amendment, you would have almost an impossible case here, would you not?” To

303. Unlike *Brown* and *Shapiro*, the case was not argued by well-known law professors or seasoned Supreme Court advocates on either side. In listening to the tapes of the arguments, one becomes aware of substantial pauses, gaps, and misunderstandings. From a 1987 perspective, the opening remarks of counsel for the State of Texas in the first set of arguments is deeply offensive: “Mr. Chief Justice, may it please the Court: It’s an old joke, but when a man argues against two beautiful ladies like this, they are going to have the last word.” Transcript of Oral Argument, in 75 LANDMARK BRIEFS, *supra* note 234, at 796. The silence on the tape recording of the argument following this remark suggests the “joke” did not amuse anyone; a different lawyer for Texas on reargument avoided such gaffes.

304. B. WOODWARD & S. ARMSTRONG, *THE BRETHERN* 167 (1979) (Woodward and Armstrong’s words, not Blackmun’s).

305. Transcript of Oral Argument, in 75 LANDMARK BRIEFS, *supra* note 234, at 800.

306. *Id.* at 818.

307. *Id.* at 824.

308. *See id.* at 795-96, 802-04, 813-14, 816-17, 818-20, 822-23, 825-29.

309. *Id.* at 822.

which she replied, with a laugh(!): "I would have a very difficult case."³¹⁰ (This concession returned to haunt women in the Court's opinion.)³¹¹

On the other hand, the Court appeared to be singularly unable to hear the narrative of "unwanted" pregnancy. "Unwanted" may be an unfortunate word here, but I do not know of another word that captures the situation better. But "unwanted" seems to cover a continuum from an inconvenient pregnancy that was wanted but not at the particular time to a pregnancy resulting from rape or incest or a life-threatening pregnancy. Thus, it leaves the issue of choosing to have an abortion vulnerable to a male assumption that such choices can be or are frivolously or odiously made.³¹² While the brief for Jane Roe was strikingly lacking in facts or narrative about the pain and anguish of unwanted pregnancy, some of the amicus briefs did discuss the issue of *women*, of their pain, their reality; they developed a partial narrative.³¹³ And in 1971, during oral argument, counsel for Jane Roe did try to tell the narrative of women faced with unwanted pregnancy:

Texas . . . would not allow any relief at all, even in situations where the mother would suffer perhaps serious physical and mental harm. . . . If the pregnancy would result in the birth of a deformed or defective child, she has no relief. Regardless of the circumstances of conception, whether it was because of rape, incest, whether she is extremely immature, she has no relief.

I think it's without question that pregnancy to a woman can completely disrupt her life. Whether she's unmarried; whether she's pursuing an education; whether she's pursuing a career; whether she has family problems; all of the problems of personal and family life, for a woman, are bound up in the problem of abortion.³¹⁴

After listing the consequences of pregnancy for women — abandonment of education because they were forced, by the schools themselves, to quit school, loss of jobs and support because they were forced to leave employment and were ineligible for unemployment compensation or welfare, the lack of a duty for employers to rehire women who had to "drop out" because of pregnancy, and the emotional investment in raising a child — counsel argued:

310. *Id.* at 817. Counsel earlier had suggested some form of "balancing" the "rights" of fetuses and women if fetuses were persons. *Id.* at 813.

311. *Roe v. Wade*, 410 U.S. 113, 156-57; see note 332 *infra* and accompanying text.

312. These are not my words. The accusation is Robert Nagel's. See Nagel, *supra* note 79, at 175 & n.49.

313. See generally Motion for Permission to File Brief and Brief Amicus Curiae on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Action Coalition; Motion for Leave to File Brief Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case and Brief Amici Curiae.

314. Transcript of Oral Argument, in 75 LANDMARK BRIEFS, *supra* note 234, at 786-87.

So, a pregnancy to a woman is perhaps one of the most *determinative* aspects of her life. It disrupts her body. It disrupts her education. It disrupts her employment. And it often disrupts her entire family life. And we feel that, because of the impact on the woman, this certainly . . . is a matter which is of such *fundamental* and basic concern to the woman involved that *she* should be allowed to make the choice as to whether to continue or to terminate her pregnancy.³¹⁵

Very shortly thereafter, a member of the Court interjected:

Mrs. Weddington, so far on the merits, you've told us about the important impact of this law, and you made a very eloquent policy argument against it. And I trust you are going to get to what provisions of the Constitution you rely on. Sometimes the Court — we would like to, sometimes — but we cannot here be involved simply with matters of policy, as you know.³¹⁶

Was Mrs. Weddington's argument a "mere" policy argument — unlike the arguments of counsel for Texas — or was she describing an important experiential truth about unwanted pregnancies that the Court chose to avoid?³¹⁷ True, the need to hook up the narrative to a legal category was there, but there was also an apparent discomfort with the narrative that subsequently squelched the story. The argument shifted to legalism, standing, and the rights of "unborn children."³¹⁸

In the reargument of the case, counsel concentrated on standing and mootness, supporting the claims with fairly conclusory statements that the injury of unwanted pregnancy was irreparable.³¹⁹ The Court then asked counsel if she agreed "that one of the important factors that has to be considered in this case is what rights, if any, does the unborn fetus have?"³²⁰ Counsel tried to argue, "It seems to me that it is critical, first, that we prove this is a fundamental interest on behalf

315. *Id.* at 787 (emphasis on tape recording).

316. *Id.* at 788. Counsel replied that the grounds were the ninth amendment and the fourteenth amendment's due process clause:

We had originally brought this suit alleging both the due process clause, equal protection clause, the Ninth Amendment, and a variety of others.

The Court: And anything else that might obtain.

Mrs. Weddington: Yeah, right.

Id.

317. The Court, for example, explicitly manifested concern for women and the consequences of unwanted pregnancy in only one short series of questions:

The Court: Texas doesn't grant any exemption in the case of a rape, where the woman's pregnancy has resulted from rape — either statutory or otherwise — does it?

Mr. Floyd: There is nothing in our statute about that. Now, the procedure —

The Court: And such a woman wouldn't have had a choice, would she?

Id. at 805. Perhaps the Court assumed it knew all it needed to know about women and pregnancy. But this would seem doubtful.

318. *Id.* at 789-96.

319. Transcript of Reargument, in 75 LANDMARK BRIEFS, *supra* note 234, at 811.

320. *Id.* at 812.

of the woman, that it is a constitutional right.”³²¹ But she had no answer to “balancing” the questions raised if the Court were to determine the fetus was a person. Moreover, she never returned to the facts of unwanted pregnancy and failed to weave any narrative of women’s experience back into her legal points.

At least some members of the Court apparently have lacked empathy when it comes to the experience of pregnant women. Furthermore, few indications exist that *any* of the Justices experienced — imaginatively or from knowing women faced with the choice — what it means to be a woman with an unwanted pregnancy. Empathy for fetuses — particularly third-trimester fetuses that look like human infants — was much more present in *Roe*. Counsel for Roe herself stated, “Obviously I have a much more difficult time saying that the State has no interest in late pregnancy. . . . I think that’s more the emotional response to a late pregnancy . . .”³²² Women were not the explicit concern of the Justices, although the argument of counsel for Texas that any choice about pregnancy the woman makes is “prior to the time she becomes pregnant,” prompted a Justice to ask about the woman who is raped: “And such a woman wouldn’t have had a choice, would she?”³²³ In the final arguments on rebuttal, when Roe’s counsel attempted to bring women back into the picture, the Court’s questions shifted to doctors and medical judgments.³²⁴

The opinion by Justice Blackmun in *Roe v. Wade*, while beginning with an anguished tone (“We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy . . .”³²⁵), quickly invoked the words of legality: “Our task, of course, is to resolve the issue by constitutional measurement, *free of emotion and predilection*.”³²⁶ The opinion was virtually free of the story of women. The story of unwanted pregnancy received comparatively short shrift, a paragraph in an opinion that is fifty-one pages long. The story of women appeared toward the end of the opinion, and it began with some emphasis placed on medical harm, concern for unwanted children, and a passing acknowledgement that “[m]aternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care [T]he additional difficulties

321. *Id.* at 813.

322. *Id.* at 790.

323. *Id.* at 798, 805.

324. *Id.* at 832-33.

325. 410 U.S. at 116.

326. 410 U.S. at 116 (emphasis added).

and continuing stigma of unwed motherhood may be involved.”³²⁷ But “[t]he pregnant woman cannot be isolated in her privacy. She carries an embryo, later, a fetus, if one accepts the medical definitions of the developing young in the human [sic] uterus”³²⁸ The story of women was almost nonexistent; the story of the law of abortion, of medical knowledge, and of doctors took its place. The focus was less on women, and more on fetuses, fetal life, and the responsibility of physicians and their “right” to administer treatment.³²⁹ In truth, *Roe* can be characterized as the “case of the Incredible Disappearing Woman.”³³⁰ Even though the opinion stated that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn,”³³¹ it also stated that “[i]f [the] suggestion of personhood is established, the appellant’s case, of course, collapses *The appellant conceded as much on reargument.*”³³²

The standard — or at least easy — explanation for the opinion of the Court in *Roe* is that its author, Justice Blackmun, having been general counsel for the Mayo clinic, was more concerned with the “rights” of doctors than of women.³³³ Yet this fails to explain why the other Justices who joined the opinion would “empathize” with doctors rather than women to the extent that Blackmun’s opinion would suggest. And in retrospect, it fails to explain why Justice Blackmun’s subsequent opinions have increasingly articulated the story of women.³³⁴ According to *The Brethren*, Brennan, Marshall, and Douglas all supported an opinion based on “broad grounds of women’s constitutional rights.”³³⁵ Brennan reportedly felt the Blackmun opinion “focused on the rights of the doctor and the rights of the state. [But] [t]he most important party, the woman, had been largely neglected. Her rights were the ones that needed to be upheld.”³³⁶ Stewart, however, believed Douglas’ rationale in a 1971 case³³⁷ — that abortion was a pro-

327. 410 U.S. at 153.

328. 410 U.S. at 159.

329. 410 U.S. at 165-66.

330. I am indebted to Professor George Alexander for this characterization.

331. 410 U.S. at 158.

332. 410 U.S. at 156-57 (emphasis added).

333. I hear this repeatedly; *The Brethren* seems to permit this breezy inference, although the book also suggests Blackmun was aware of the importance of abortion to women, see B. WOODWARD & S. ARMSTRONG, *supra* note 304, at 183, 238-39, and that he agonized over how best to write the opinion. *Id.* at 182-84, 229-37.

334. See notes 383-84 *infra* and accompanying text.

335. B. WOODWARD & S. ARMSTRONG, *supra* note 304, at 169.

336. *Id.* at 231.

337. *United States v. Vuitch*, 402 U.S. 62 (1971) (holding District of Columbia statute making it a felony for doctors to perform abortions unless necessary to preserve woman’s life or health not unconstitutionally vague); see 402 U.S. at 80 (Douglas, J., dissenting).

fessional medical judgment — was the proper approach. Stewart was the justice who insisted that the opinion state the “fetus was not . . . a person. If [it] were a person, it had rights Weighing two sets of rights would be dangerous.”³³⁸ Stewart allegedly was relieved that the first conference on *Roe* and *Doe* “focused on the professional rights of a doctor . . . , rather than on the rights of a woman trying to obtain” an abortion.³³⁹ Justice Powell apparently relied on his own knowledge of well-to-do women going away to Switzerland or New York for abortions, and horror stories about back-alley abortionists from his in-laws who were obstetricians, to conclude the antiabortion laws were “atrocious.”³⁴⁰ He has recently indicated that he also “had been shocked that the Texas law . . . appeared to bar abortion even in cases of rape and that he had been moved by arguments” that the constitutional right of “liberty” included reproductive choices.³⁴¹ Powell apparently also was persuaded by a lower court’s rationale that the moral decision to have an abortion was a judgment people couldn’t “impose upon others by force of law.”³⁴²

It is difficult to ascertain whether there was much empathy for women from this limited information. Certainly, seven Justices lent their authority to a ruling virtually excluding the story of women and framing the legal issues more in terms of medical information and decision-making. At the time the Court decided *Roe*, the women’s movement was noticeably active, and concern with world overpopulation was on the political agenda. But recognition of the singular impact of pregnancy on one-half the population was not well articulated in the narratives given the Court or in the language of the opinion.

Another possible explanation for the opinion is that the Justices resolved the issues by denying the humanity of fetuses and women simultaneously.³⁴³ In the frequently if-then world of legality, if fetuses are persons, the state has an obligation to protect their lives by banning abortions. If they are not persons, they have no more “right to life” than plants. If women are not persons, then their bodies and lives may be strictly controlled as well. (Doctors, who at the time the

338. B. WOODWARD & S. ARMSTRONG, *supra* note 304, at 233 (Woodward and Armstrong’s words, not Stewart’s).

339. *Id.* at 169.

340. *Id.* at 230.

341. Taylor, *supra* note 297, at 18, col. 4.

342. B. WOODWARD & S. ARMSTRONG, *supra* note 304, at 230. The statement quoted by Woodward and Armstrong is found in *Abele v. Markle*, 351 F. Supp. 224, 231 (D. Conn. 1972) (Newman, J.).

343. I am indebted to Robin West for pointing this out to me.

Court reached its decision were predominantly male,³⁴⁴ were full-fledged human beings whose "rights" merited protection from prosecution, however.) The if-then structure of legality could create an either/or that had to be suppressed or denied; alternatively, any simultaneous empathy for fetuses and women could arguably also have led to decisional paralysis.

But as Donald Regan later put it, "anyone who attempts simply to deny that there is an intrinsic horror to unwanted pregnancy lacks either imagination or compassion."³⁴⁵ Imagination and compassion, empathic understanding of women with unwanted pregnancies or compassion for them leading to action to help them, seem strangely lacking in *Roe* and in subsequent criticisms of the opinion, given that there was some effort to tell the story of the effect of unwanted pregnancy on women in amicus briefs and at oral argument.³⁴⁶ The state has an interest in protecting "potential life": Is not the woman an "existing life" or at a minimum also a potential life? Perhaps the failure of empathy for women who somehow find themselves pregnant became evident in the reargument of *Roe*, when one Justice posed the question of choosing which life to protect: "Well, what would you choose? Would you choose to kill the *innocent* one, or what?"³⁴⁷ The implication seemed to be that women who "get themselves" pregnant are somehow blameworthy. By failing to see that forcing women with unwanted pregnancies to bear children causes the women great harm and suffering, calls upon them to endure physical and mental torment in a way we do not ask of any Good Samaritan,³⁴⁸ and chains them to serve other human wishes,³⁴⁹ the Court created a doctrine extremely vulnerable to antiabortionist attack and unintelligible in its development since *Roe* was decided. Not only had the Court engaged in the sin of "Lochnering," but it had done so badly.³⁵⁰

The focus on fetuses rather than the women forced to bear them to

344. STATISTICAL ABSTRACT OF THE UNITED STATES 1975, at 75 (in 1973 there were 335,800 male doctors and 30,600 female doctors).

345. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1617 (1979).

346. The outside legal record was not completely bare, either. See Law, *supra* note 293, at 972-73.

347. Transcript of Reargument, in 75 LANDMARK BRIEFS, *supra* note 234, at 820 (emphasis added).

348. Regan, *supra* note 345, at 1569, 1588.

349. See Motion for Leave to File Brief Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case and Brief Amici Curiae at 6-16 (arguing forced pregnancy a violation of thirteenth amendment prohibition against involuntary servitude); see also Brief Amicus Curiae on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Action Coalition at 25-33 (equal protection argument).

350. Ely, *supra* note 296, at 937-43.

term by antiabortion laws may explain the doctrinal muddle of the *Roe* opinion itself as well as the peculiar development of post-*Roe* doctrine. By omitting consideration of over one-half of the narratives, a majority of the Court has frequently managed in subsequent opinions to retreat even farther from hearing the narrative of women. The meaning, the experience, of unwanted pregnancy for a woman is one a majority of the Court has often simply not accounted for in its written opinions or even at oral argument. In an area highly charged with emotion, the Court has often hidden in legalistic formulations, such as "statutory interpretation" and "deference" to legislative judgment.³⁵¹ At times, the Court has been singularly unable to hear the horror and pain of women and girls faced with unwanted pregnancy, even pregnancy caused by rape or incest.³⁵²

Subsequent majority opinions between 1973 and 1986 on the topic of abortion have failed again to say much about *women*. In part, this may be the result of reliance on the conceptual and legal category of "privacy" rather than "equal protection."³⁵³ In part, it may have been an unacknowledged (explicitly, that is) empathy for fetuses: The trimester divisions of *Roe v. Wade* become intelligible when one sees pictures of third trimester fetuses. The women, however, were faceless, and indeed nameless — disembodied accumulations of medical and social data. The facts about Jane Roe were sparse and conclusory; the narrative of *her* experience was nonexistent. The facts about other Does, Roes, and Moes were sketchy. Achieving empathy for such disembodied women may have been extremely difficult. Without some information about *why* women choose to have an abortion, it may have been impossible for many of the male Justices and male legal scholars to understand that simple interference with "the life plans of the mother"³⁵⁴ or merely inconveniently timed pregnancy — "frivolous"

351. See, e.g., *Harris v. McRae*, 448 U.S. 297, 300-01 (1980); *Beal v. Doe*, 432 U.S. 438, 443-44 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 52, 63-67 (1976).

352. See *Maier v. Roe*, 432 U.S. 464, 474 (1977); *Harris v. McRae*, 448 U.S. 297, 326 (1980); see also Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 32 STAN. L. REV. 1113, 1122-28 (1980) (arguing the Court overlooked illicit motives for legislation in praising democratic processes); Argument for Appellees at 14-16, *Harris v. McRae*, 448 U.S. 297 (1980) (No. 79-1268).

353. Professor Law has argued that the language of equal protection had been affected by the lack of success of equal protection analysis in other areas of the law affecting women, which, combined with the focus on the rights of fetuses and medical professional standards growing out of the *Roe* opinion itself, deflected discourse and legal argument from an equal protection analysis. Law, *supra* note 293, at 985-87.

354. Ely, *supra* note 296, at 926. While conceding that "[h]aving an unwanted child can go a long way toward ruining a woman's life," Ely then recharacterizes the question as "cramp[ing] the life style of an unwilling mother" while "the *other* side of the balance looks very different. . . . Abortion ends (or if it makes a difference, prevents) the life of a human being . . ." *Id.* at 923-24.

or "odious" motives³⁵⁵ — seldom has much bearing on a woman's decision to have an abortion.³⁵⁶ The category of "privacy" also carries an injunction — being "private" means one does not speak of such things, certainly not in public discourse.³⁵⁷ "Privacy" silences, even as it may tell the government that this is a subject it may not regulate. Indeed, recent strategies of Planned Parenthood and abortion rights advocates seem to have attempted to break the silence. Advertisements showing pictures of real women (and girls) telling real stories of their abortions — women "just like" middle-class women throughout America — have appeared in national magazines. And the National Abortion Rights Action League brief in the *Thornburgh* case in 1986 contained the stories of actual women who had had abortions.³⁵⁸

By the time *Harris v. McRae*³⁵⁹ was decided, a majority of the Court had transformed what had seemed to be *Roe*'s "fundamental right" to an abortion in the first trimester (and when the woman's health was at stake) into a nonright. Although "[i]t is well settled that . . . if a law 'impinges upon a fundamental right explicitly or implicitly secured by the Constitution, [it] is presumptively unconstitutional,'"³⁶⁰ the Court "concluded that the Hyde Amendment violates no constitutionally protected substantive rights."³⁶¹

The Hyde Amendment, in its most restrictive form, abolished federal funding of all abortions unless "the life of the mother would be endangered if the fetus were carried to term. . . ."³⁶² The Court found it perfectly reasonable that

355. See note 312 *supra* and accompanying text.

356. "By restricting access to abortion, the state necessarily denies the capacity of women as independent moral decision-makers." Law, *supra* note 293, at 1019. In support of this denial of a woman's moral capacity to choose, I have heard endless horror stories about women who simply use abortion as a primary or backup birth control method. I do not deny that some individuals do abuse their freedom to choose; but I have also had experience listening to women confronted with unwanted pregnancies, and their choice entailed much moral agonizing. See also C. GILLIGAN, *supra* note 45, at 64-127 (describing results of abortion decision study). As a woman, I do not accept the characterization of moral cretin simply because I would choose to have an abortion in some instances and not in others.

357. Cf. Brest & Vorenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607 (1987) (study *inter alia* of women breaking silence about effects of pornography and sexual abuse in Minnesota and transformation of public discourse).

358. Brief for the National Abortion Rights Action League, et al. as Amici Curiae in support of Appellees, *Thornburgh v. American College of Obstetricians*, 106 S. Ct. 2169 (1986) (Nos. 84-495 & 84-1379).

359. 448 U.S. 297 (1980) (upholding Hyde Amendment's prohibition on Medicaid funding for abortion even in form that included rape and incest cases).

360. 448 U.S. at 312 (quoting *Mobile v. Bolden*, 446 U.S. 55, 76 (1980) (plurality opinion)).

361. 448 U.S. at 322.

362. 448 U.S. at 302 (quoting the Hyde Amendment, Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979)).

[b]y subsidizing the medical expenses of indigent women who carry their pregnancies to term while not subsidizing the comparable expenses of women who undergo abortions . . . Congress has established incentives that make childbirth a more attractive alternative than abortion for persons [sic] eligible for Medicaid. These incentives bear a direct relationship to the legitimate congressional interest in protecting potential life.³⁶³

This version of the story is startling in human terms: A congressional judgment that "childbirth" is somehow reducible to "economic incentives" was acceptable. The majority found no equal protection problems, although the law affected three groups that arguably called for some form of heightened scrutiny: (1) women, (2) the poor, and (3) racial minorities.³⁶⁴ A rational relationship to protection of potential life was sufficient to uphold a law effectively prohibiting Medicare funding for abortions for poor women.³⁶⁵ The Court noted, "Abortion is inherently different from other medical procedures, because no other procedure involves the *purposeful termination of a potential life*."³⁶⁶

The dissenters, on the other hand, were well aware of the narrative of poor women. Justice Blackmun stated:

There is "condescension" in the Court's holding that "she may go elsewhere for her abortion"; this is "disingenuous and alarming"; the Government "punitively impresses upon a needy minority its own concepts of the socially desirable, the publicly acceptable, and the morally sound"; . . . *there truly is "another world 'out there,' the existence of which the Court, I suspect, either chooses to ignore or fears to recognize"*³⁶⁷

Justice Marshall, quoting Blackmun's language that another world exists, asserted, "In my view, it is only by blinding itself to that other world that the Court can reach the result it announces today."³⁶⁸ Marshall had argued in his dissent in *Beal v. Doe* that

[a]n unwanted child may be disruptive and destructive of the life of any woman, but the impact is felt most by those too poor to ameliorate those effects. If funds for an abortion are unavailable, a poor woman may feel that she is forced to obtain an illegal abortion that poses a serious threat to her health and even her life. . . . If she refuses to take this risk, and undergoes the pain and danger of state-financed pregnancy and childbirth, she may well give up all chance of escaping the cycle of poverty.

363. 448 U.S. at 325.

364. See 448 U.S. at 343-44 (Marshall, J., dissenting).

365. See 448 U.S. at 325.

366. 448 U.S. at 325 (emphasis added).

367. 448 U.S. at 348-49 (quoting *Beal v. Doe*, 432 U.S. 438, 462-63 (1977) (Blackmun, J., dissenting) (emphasis added)).

368. 448 U.S. at 347 (Marshall, J., dissenting).

Absent day-care facilities, she will be forced into full-time child care for years to come All chance to control the direction of her own life will have been lost.³⁶⁹

In *Harris v. McRae*, Marshall reiterated that “[a]n indigent woman denied governmental funding for a medically necessary abortion is confronted with two grotesque choices.”³⁷⁰ He concluded:

In this case, the Federal Government has taken upon itself the burden of financing practically all medically necessary expenditures. One category of medically necessary expenditure has been singled out for exclusion, and the sole basis for the exclusion is a premise repudiated for purposes of constitutional law in *Roe v. Wade*. The consequence is a devastating impact on the lives and health of poor women. I do not believe that a Constitution committed to the equal protection of the laws can tolerate this result. I dissent.³⁷¹

Justice Brennan, noting that “the Hyde Amendment is nothing less than an attempt by Congress to circumvent the dictates of the Constitution,”³⁷² wrote in a lengthy footnote:

It is important to put this congressional decision in human terms. . . . Even were one of the view that legislative hostility to abortions could justify a decision to fund [childbirth] . . . while refusing to fund nontherapeutic abortions, the present statutory scheme could not be saved. . . . Its consequence is to leave indigent sick women without treatment simply because of the medical fortuity that their illness cannot be treated unless their pregnancy is terminated. Antipathy to abortion, in short, has been permitted not only to ride roughshod over a woman’s constitutional right to terminate her pregnancy . . . , but also to distort our Nation’s health-care programs.³⁷³

Depending upon which narrative the Justices paid heed to, and with whose story they appeared to empathize, the moral or metaethical structure of their opinions differed. The dissenters in *Maher*, *Beal*, and *Doe* invoked consequentialist and contextual ethical arguments; the majorities in those cases appeared to rely on deontological, syllogistic ethical arguments.³⁷⁴ And these differences appeared to be based on whether the Justices grappled with the issue of the humanity of women or denied it.

A bare majority of the Court staved off an attempt to have *Roe v. Wade* overruled in *Thornburgh*³⁷⁵ in 1986. The Reagan administra-

369. *Beal v. Doe*, 432 U.S. 438, 458-59 (Marshall, J., dissenting).

370. *Harris v. McRae*, 448 U.S. at 343 (Marshall, J., dissenting).

371. 448 U.S. at 348.

372. 448 U.S. at 331 (Brennan, J., dissenting).

373. 448 U.S. at 331 n.4.

374. Lake, *The Metaethical Framework of Anti-Abortion Rhetoric*, 11 SIGNS 478 (1986).

375. *Thornburgh v. American College of Obstetricians*, 106 S. Ct. 2169 (1986).

tion had joined the case as amicus to urge the overruling of *Roe*,³⁷⁶ and given the original weakness of the doctrine, together with the absence of recognition of the experience of women, *Roe* was vulnerable. But in *Thornburgh* a bare majority upheld *Roe* — and the majority opinion acknowledged explicitly the actual meaning of the experience for women.

In a running battle with the courts since *Roe*, the state of Pennsylvania had enacted laws in 1974, 1978, and 1982 to restrict abortion in a number of ways, including requiring spousal consent, abolishing advertisements for abortion clinics, and limiting funding for abortions. The 1982 legislation, titled the "Abortion Control Act,"³⁷⁷ was designed to limit abortions; it was patterned after an antiabortion organization's model statute.³⁷⁸ In *Thornburgh*, physicians, clergy, counselors, and others had sought declaratory and injunctive relief under section 1983 and had obtained a preliminary injunction against enforcement of the statute. Inter alia, the Pennsylvania law required "informed consent" for the abortion, which included requiring a doctor to tell the woman that "medical assistance benefits may be available for prenatal care, childbirth, and neonatal care" and that the father would be liable to assist in supporting a child.³⁷⁹ As part of "informed consent," a woman had to be told:

There are many public and private agencies willing and able to help you carry your child to term, and to assist you and your child . . . whether you choose to keep your child or place her or him for adoption. *The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion.* . . .³⁸⁰

In addition, a woman had to read materials printed and supplied by Pennsylvania that had to describe "the probable anatomical and physiological characteristics of the unborn child [sic] at two-week gestational increments . . . including any relevant information on the possibility of the unborn child's [sic] survival."³⁸¹

376. Brief for the United States as Amicus Curiae in Support of Appellants at 2, 23-30. *Thornburgh* thus became a battle over *Roe*; "82 members of Congress" urged the Court to overrule *Roe*, see Brief Amicus Curiae of U.S. Sen. Gordon J. Humphrey (R-N.H.), U.S. Sen. Orrin G. Hatch (R-Utah), U.S. Rep. Christopher H. Smith (R-N.J.), U.S. Rep. Alan B. Mullohan (D-W. Va.) and certain other members of the Congress of the United States in Support of Appellants at 2, 5, 25. But 81 members of Congress filed a brief in opposition to the Reagan administration's position and urged the upholding of *Roe*. Brief Amicus Curiae of Senator Bob Packwood (R-Ore.), Representative Don Edwards (D-Calif.), and certain other members of the Congress of the United States in Support of Appellees at 1, 3-4.

377. 18 PA. CONS. STAT. ANN. §§ 3201-20 (Purdon 1983).

378. See *Thornburgh*, 106 S. Ct. at 2173-74.

379. 106 S. Ct. at 2178-79.

380. 106 S. Ct. at 2179 (emphasis added).

381. 106 S. Ct. at 2179.

The perception of the majority was of a law meant to intimidate women into having children, no matter what the cost to those women. The perception of the dissenters was that *Roe* was bad law and, essentially, that the fetus, not the woman, was the state's legitimate concern. Women were *just not* "present" in the dissents, while they were very present in Blackmun's opinion. Acknowledging the Court's running battle with the states after the *Roe* decision, Justice Blackmun's majority opinion made reference to the resistance to school desegregation by quoting *Brown v. Board of Education II*: "[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies."³⁸²

The opinion by Justice Blackmun stated that the "informed consent" requirements and materials

seem . . . to be nothing less than an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between a woman and her physician. . . . [I]t may serve only to confuse and punish her and to heighten her anxiety, contrary to accepted medical practice. . . .

The requirements . . . that the woman be advised that medical assistance benefits may be available, and that the father is responsible for financial assistance in the support of the child similarly are poorly disguised elements of discouragement for the abortion decision. . . . *For a patient with a life-threatening pregnancy, the "information" in its very rendition may be cruel as well as destructive of the physician-patient relationship. As any experienced social worker or counsellor knows, theoretical financial responsibility often does not equate with fulfillment. And a victim of rape should not have to hear gratuitous advice that an unidentified perpetrator is liable for support if she continues the pregnancy to term.*³⁸³

These observations by Blackmun appear to illustrate an empathic understanding of the experience of women who have an unwanted — disastrous — pregnancy.

The majority opinion in *Thornburgh* also reflected some of the narrative of women with unwanted pregnancies that had been largely untold in *Roe* and its progeny; it rescued abortion as a fundamental right from the clutches of the *Harris v. McRae* majority's denigration of that right. The conclusion of the majority opinion in *Thornburgh* stated,

Our cases long have recognized that the Constitution embodies a

382. 106 S. Ct. at 2178 (citation omitted) (quoting *Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955)). The language and analogy to *Brown II* also appeared in the Brief Amicus Curiae of Senator Bob Packwood, et al., *supra* note 376, at 4.

383. 106 S. Ct. at 2179-80 (emphasis added).

promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. *That promise extends to women as well as men.* Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision — with the guidance of her physician and within the limits specified in *Roe* — whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.³⁸⁴

The National Abortion Rights Action League (NARAL) had submitted an amicus brief in *Thornburgh* “to place the realities of abortion in women's lives before this Court and to urge this Court to reaffirm *Roe* The circumstances of women's lives and women's compelling reasons for choosing to have abortions elucidate the strong Constitutional foundations for [*Roe*].”³⁸⁵ The brief consisted largely of excerpts from letters written by women who, although remaining anonymous perhaps because of fear of retaliation by “the anti-choice people,”³⁸⁶ do tell the stories of their own abortion experiences and make concrete the reality of women. The narratives do seem directed toward appealing to the Justices' possible visions of family planning and the central role of the family, which Professor Grey had posited earlier as the real reason behind the privacy decisions.³⁸⁷ Of the thirty-eight excerpted stories of abortion, it is evident that in twelve the woman was married and the question of abortion was a family-planning matter; in several other stories, the women had subsequently married and become mothers.³⁸⁸ Nevertheless, the stories do support NARAL's claim that “[t]he condition of the law determines the condition of women's lives,”³⁸⁹ and they illustrate the reality of those lives.

NARAL's narratives first established the effect of laws prohibiting or restricting abortion on women wanting one:

I remember Tijuana. I remember bugs crawling on walls as I waited for the “second part” of my abortion to take place. The first part was done in comparatively clean surroundings — “a clinic” — but I was too far along for the abortion to be done in one procedure, so I was sent to a “hotel” to wait three hours — a stinking cesspool of urine, sweat, filthy sheets and bugs Where else could I have gone in 1963? A name from a hairdresser passed through the underground grapevine by other

384. 106 S. Ct. at 2184-85 (citations omitted) (emphasis added).

385. Brief for the National Abortion Rights Action League, *supra* note 358, at 5.

386. *Id.* at 6 n.2.

387. Grey, *Eros, Civilization and the Burger Court*, LAW & CONTEMP. PROBS., Summer 1980, at 83.

388. See Brief for the National Abortion Rights Action League, *supra* note 358, at 8-30.

389. *Id.* at 8.

desperate women seeking a life of dignity and choice.³⁹⁰

* * * *

Having an abortion in Illinois in 1957 was a demeaning experience. I had to lie, two doctors who did not know me had to lie, and my own doctor had to lie. . . . No matter that I had had a miscarriage one month previously, and my uterus looked like chopped liver, and I was in a great deal of pain³⁹¹

Next, the brief argued for upholding *Roe* on the basis of the due process rights of privacy and liberty relied upon in *Roe*. "The right to choose to have an abortion is so personal and so essential to women's lives and well-being that without this right women cannot exercise other fundamental rights and liberties guaranteed by the Constitution."³⁹² The rights and liberties were those mentioned in *Meyer v. Nebraska*,³⁹³ the brief tied the narratives to

the right of the individual . . . to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his [sic] own conscience, and generally to enjoy those privileges . . . essential to the orderly pursuit of happiness by free men [sic].³⁹⁴

The brief included narratives that told how *actual* women would have had to leave their jobs, quit their schooling, marry. They would have exhausted themselves in trying to meet responsibilities to family members, bowed to religious beliefs not their own, and surrendered control of their lives and destinies had they not had abortions.³⁹⁵ No longer anonymous abstractions, women became concrete — if unnamed — human beings.³⁹⁶ These women were not moral idiots; they had carefully considered their choice. For example:

As for adoption, I very much respect those women having gone that route. It is a truly selfless act of love. But for myself, I knew if I was to have a baby, I would want to keep it. Envisioning what my life would be, an unskilled, unwed mother, my child would not have two parents but one working parent. That's not the life I wanted to give my child and not what I wanted myself Now almost ten years after, I am married and a full-time mother of two. When we first heard my son's fetal heartbeat I cried tears of joy.³⁹⁷

* * * *

390. *Id.* at 8-9.

391. *Id.* at 10.

392. *Id.* at 18.

393. 262 U.S. 390, 399 (1923).

394. Brief for the National Abortion Rights Action League, *supra* note 358, at 22-23 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

395. *See id.* at 23-30.

396. *See id.* at 5-6 & n.2 (explaining need for anonymity because of privacy concerns and concerns about harassment).

397. *Id.* at 26.

I am a junior in college and am putting myself through because my father has been unemployed and my mother barely makes enough to support the rest of the family. I have promised to help put my brother through when I graduate next year and it's his turn. I was using a diaphragm for birth control but I got pregnant anyhow. There is no way I could continue this pregnancy because of my responsibilities to my family. I never wanted to be pregnant and if abortion were not legal I would do one on myself.³⁹⁸

Although the brief framed the narratives to fit the doctrinal limitations of *Roe* and the cases upon which *Roe* relied, it gave them an equal protection gloss: "With the right to choose abortion, women are able to enjoy, *like men*, the right to fully use the powers of their minds and bodies."³⁹⁹

The dissenters attacked both *Roe* and the majority opinion in *Thornburgh*. Justice White urged overruling *Roe*, by implication making it synonymous with two constitutional horror stories, *Lochner* and *Plessy*.⁴⁰⁰ White, agreeing "that a woman's ability to choose an abortion is a species of 'liberty,'" denied that it is so " 'fundamental' that restrictions upon it call into play anything more than the most *minimal* judicial scrutiny."⁴⁰¹ White concentrated on the fetus: "The governmental interest at issue is in protecting those who will be citizens if their lives are not ended in the womb. . . . [T]he state's interest, if compelling after viability, is equally compelling before viability."⁴⁰² Therefore, permitting the legislature to enact a broad range of limitations on or outright prohibition of abortion would be a "highly desirable" result "from the standpoint of the Constitution."⁴⁰³ "Such issues, in our society, are to be resolved by the will of the people"⁴⁰⁴

The women's side of the story never appeared in Justice White's opinion: Because abortion was "a hotly contested moral and political issue,"⁴⁰⁵ states presumably could ignore the pain inflicted on women as a result of forcing them to bear children. White dismissed the majority's concern for the pain women *would* experience in receiving Pennsylvania's information as "primarily rhetorical," rather than an acknowledgment of the experience of women.⁴⁰⁶ (Since when did

398. *Id.* at 24.

399. *Id.* at 23 (emphasis added).

400. 106 S. Ct. at 2193 (White, J., dissenting).

401. 106 S. Ct. at 2194 (emphasis added).

402. 106 S. Ct. at 2196-97.

403. 106 S. Ct. at 2197.

404. 106 S. Ct. at 2197.

405. 106 S. Ct. at 2197.

406. 106 S. Ct. at 2199.

rhetoric, a perfectly good method of argument, become a pejorative?) White narrowed his analysis to "maximization of choice," missing entirely the larger issue: the coercive aspects of the Pennsylvania law and its effect on women. Instead, he found "legitimate" state interests present, denied that the effect of unwanted pregnancy could be devastating for women, and denied the existence of any fundamental privacy interest. The accepted story for White was exclusively that of the human fetus.

D. *The Power of Prejudice: Bowers v. Hardwick*

I have endeavored to illustrate how narratives of feeling and the meaning of human experience may lead to empathic understanding of the human dimensions of a legal problem, and, accordingly, to a redefinition of the legal issues. By grasping the human dimension, the decisionmaker is faced with a moral dimension as well. That law can have moral consequences is inescapable; to decide responsibly requires awareness of those consequences. The strong claim for empathic understanding is that the moral decision, the moral result, will be closer to the good than it otherwise would be. When empathic knowledge fails, or is not even attempted, the resulting decision can be appalling in human terms. A recent extreme example of the point may be found in the Supreme Court's majority opinions in *Bowers v. Hardwick*.⁴⁰⁷ *Hardwick* bristles with emotion, to be sure, but it is the emotion of hate, not that of empathy. The majority opinions powerfully manifest the phenomena of prejudice, stereotyping, blind categorization, and denial of the humanity of a group of people. As a result, the question of whether the state may invade a person's home to monitor his or her sexual practices appears to have been answered in the affirmative, and at least ten percent of the population may be persecuted because of their sexual practices. (While one author might call the majority's reaction "contrast empathy,"⁴⁰⁸ I prefer to omit that term from the lexicon, because it appears to encompass something other than a perversion of empathy.)

Michael Hardwick had been cited for drinking in public by an officer concerned by "big city 'garbage.'" ⁴⁰⁹ He missed his first court appearance, and a warrant for his arrest was issued and given to the citing officer. Hardwick learned that the officer had come by his home

407. 106 S. Ct. 2841 (1986).

408. EMPATHY AND BIRTH ORDER, *supra* note 41, at 3, 9 (Sadistic persons might feel joy at another's pain; others may feel envy at another's joy, etc.).

409. Harris, *The New Symbol of Gay Rights*, Cleveland Plain Dealer, Sept. 7, 1986, at 1G, col. 1, 2G, col. 1.

with the warrant, raced down to the courthouse, paid his fine, and forgot about it. The issuing court never recalled the warrant, and the officer never found out that Hardwick had paid his fine. He appeared with the warrant at Hardwick's home one afternoon. A house guest admitted the officer, who found Hardwick engaging in oral sex with another man in his own bedroom. The officer also saw some marijuana in the room. Hardwick said he had paid the fine; but the officer had seen him committing a felony under Georgia law and arrested him on the warrant and the felony committed in his presence.⁴¹⁰

The ACLU found the case to be a "dream" for challenging the Georgia sodomy law. "Hardwick, a bartender whose activism was limited to marching in the Gay Pride parade," was in his own bedroom with another male adult.⁴¹¹ The case was not one which involved someone who had also been charged with a serious violent crime. Hardwick chose to challenge the Georgia sodomy statute after having been contacted by the ACLU; he lost his job as a result. His neighbor came to the preliminary hearing and congratulated the officer for cracking down, reportedly fed up with "the naked sunbathing, the wild parties."⁴¹²

Hardwick had had a brush with heroin when he was a teenager, had been rehabilitated, and had counseled other kids. At twenty-one, he realized he was gay, moved to Atlanta, and "melted into the gay world."⁴¹³ At one point "a good-time guy," according to his ex-lover, Hardwick now is serious, active in gay rights, and active in publicizing the meaning of the sodomy statutes to heterosexuals as well.⁴¹⁴

Mr. Hardwick never appeared in the briefs or arguments as a human being. Except for one paragraph at the beginning of the Eleventh Circuit's opinion, stating that he was arrested "because he had committed the crime of sodomy with a consenting male adult in the bedroom of his own home,"⁴¹⁵ the courts' opinions contain no clue as to who the man was. He became another disembodied person onto whom fears, prejudices, and false beliefs could be projected.

The Georgia statute by its terms covered all "sodomy" — defined as both oral and anal sex — committed by heterosexuals or homosexuals.⁴¹⁶ Yet the state argued the statute was meant to apply only to

410. *Id.* at 2G, col. 2.

411. *Id.*

412. *Id.* at 2G, col. 3.

413. *Id.* at 2G, col. 6.

414. *Id.* at 1G, cols. 1-2.

415. *Hardwick v. Bowers*, 760 F.2d 1202, 1204 (11th Cir. 1985).

416. 760 F.2d at 1204 n.1. The statute provides as follows:

homosexuals, despite a legislative history indicating that it also covered heterosexuals.⁴¹⁷ Moreover, a married couple who had joined in the suit had been declared to have no standing to challenge the statute. The focus of the case for Georgia became *homosexual* sodomy.⁴¹⁸ And, by focusing on homosexual sodomy, the Georgia briefs and oral arguments, together with the briefs filed in support of the statute, were left free to smuggle in a homophobic message and appeals to prejudice — something that would have been far more difficult if the arguments had also been against permitting married couples to engage in oral sex in their own homes in the 1980s. At oral argument, counsel for Georgia returned again and again to homosexual sodomy.⁴¹⁹

The stereotypes of homosexuals as dangerous, perverted, and child molesters, coupled with the fear of AIDS, were fully exploited by the State of Georgia and amici. Georgia's opening brief argued:

If morality is a legitimate state purpose, the identification of that morality, "the widely held values" of the people, should be voiced through their representatives. The legislative process is acutely [sic] designed for this purpose, whereas the judiciary *may be inclined to make determinations upon more empirical evidence*, to which this area is not particularly amenable. . . . For example, it should be permissible for the General Assembly to find *as legislative fact* that homosexual sodomy leads to other deviate practices such as sado-masochism, group orgies, or transvestism, to name only a few. Homosexual sodomy is often practiced outside the home such as in public parks, rest rooms, "gay baths," and "gay bars," and is marked by the multiplicity and anonymity of sexual partners, a disproportionate involvement with adolescents, *and, indeed a possible relationship to crimes of violence*. Similarly, the legislature should be permitted to draw conclusions concerning the relationship of homosexual sodomy in the transmission of [AIDS], . . . anorectal gonorrhea, Hepatitis . . . enteric protozoal diseases, and Cytomegalovirus . . .

But perhaps the most profound legislative finding that can be made is that homosexual sodomy *is the anathema* of the basic units of our society — marriage and the family. . . .

. . . If the legal distinctions between the intimacies of marriage and homosexual sodomy are lost, it is certainly possible to make the assump-

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . .

GA. CODE ANN. § 16-6-2 (1984).

417. 106 S. Ct. at 2857; Brief of Petitioner Michael J. Bowers, Attorney General of Georgia at 6, 20, *passim*; Official Transcript Proceedings Before The Supreme Court of the United States at 5, 9-10, Bowers v. Hardwick (No. 85-140) [hereinafter Official Transcript].

418. Official Transcript, *supra* note 417, at 3 ("This case presents the question of whether or not there is a fundamental right under the Constitution of the United States to engage in consensual private homosexual sodomy.").

419. *Id.* at 3, 7, 9, 11, 16.

tion . . . that the order of society, our way of life, could be changed in a harmful way.⁴²⁰

Sodomy, bestiality, incest, and adultery are mentioned in the same breath. Children and teenagers would fall prey to all sorts of sexual perversions, abuses, and exploitation if the Court struck down a sodomy statute directed at all, but allegedly enforced only against same-sex offenders.

"Concerned Women for America" filed an amicus brief proclaiming, "We oppose any laws designed to grant special legal protection to those who engage in homosexuality. Such laws are an affront to public morality and our dedication to family life."⁴²¹ The brief argued that the history of sodomy laws compelled a finding of constitutionality.⁴²² Another amicus brief raised the specter of AIDS, "[a]s counsel [for Georgia] indicated that they would probably not raise the public health concerns before this Court"⁴²³ But the brief went beyond the issue of AIDS and argued that "[i]n responding to the current health crisis, a state legislature should be free to conclude that there is a need for reinforcement of traditional sexual mores."⁴²⁴ Moreover, the brief condoned the questionable use of criminal sanctions to prevent AIDS.

Historical hatred, the terror of AIDS, and stereotypes of gays as child molesters and criminals haunt these briefs. Stereotypy blocks empathy,⁴²⁵ and in the case of an out-group so characterized solely

420. Brief of Petitioner Michael H. Bowers at 36-38 (emphasis added).

421. Brief of Concerned Women for America Amicus Curiae in Support of Petitioner at 2.

422. *See id.* at 4 ("For most of American history, all states have had criminal sodomy laws. . . . [N]o historical evidence exists that the Framers . . . intended to eliminate the states' power to regulate homosexual activity.").

423. Brief of David Robinson, Jr. as Amicus Curiae in Support of Petitioners at 2.

424. *Id.* at 30.

425. G. ALLPORT, *supra* note 99, at 192, 434-36. Stereotypy "acts both as justificatory device for categorical acceptance or rejection of a group, and as a screening or selective device to maintain simplicity in perception and in thinking." *Id.* at 192. The difficulties encountered in trying to cut through a common stereotype of homosexuals are illustrated by the following exchange between Senator Strom Thurmond and Jeffrey Levi, executive director of the National Gay and Lesbian Task Force, during the hearings on the appointment of Justice Rehnquist as Chief Justice:

Mr. Thurmond: Does your organization advocate any kind of treatment for gays and lesbians to see if they can change them and make them normal like other people?

Mr. Levi: Well, Senator, we consider ourselves to be quite normal

Mr. Thurmond: You don't think gays and lesbians are subject to change or you don't think they could

Mr. Levi: No more so, Senator, than

Mr. Thurmond: . . . don't think they could be converted so they'd be like other people, in some way?

Mr. Levi: Well, we . . . think we are like other people with one small exception. And unfortunately it's the rest of society that makes a big deal out of that exception.

Mr. Thurmond: A small exception? It's a pretty big exception, isn't it?

because of sexual orientation, prejudices and irrationality about human sexuality also block an ability to understand.⁴²⁶

What of the "other side"? Michael Hardwick is a real human being, but his particular story was absent in the Supreme Court. The story of gays was largely absent as well. Professor Lawrence Tribe's brief responded to Georgia's claims about homosexuals and morality by arguing that "the only issue is the relevant standard of [constitutional scrutiny], *not* the validity" of the statute.⁴²⁷ Only at trial "may the untried questions of fact to which Georgia alludes in its brief become relevant."⁴²⁸ This was an argument of legality, not empathy, and it failed to provide the Court a way to understand homosexuality beyond the effective appeals to prejudice contained in the petitioner's brief. As a legal tactic, it may have made sense to attempt to give the Court a narrow way out of having to decide whether the statute violated constitutional principles. But the brief only perfunctorily rebutted Georgia's claims that the statute could prevent the transmission of disease (particularly AIDS), or could "deter its citizens from defecting to a homosexual lifestyle";⁴²⁹ nor did it seriously deal with whether the statute deterred at all. These issues took up only a page at the end of the brief,⁴³⁰ hardly enough to counter the appeal to prejudice. Only in a footnote did the respondent's brief explicitly confront Georgia's appeal to prejudice:

Even if the State's imaginative recasting of the 30 million Americans who comprise our homosexual population as a furtive criminal underclass . . . had the slightest basis in fact, rather than in irrational fear and prejudice . . . , the State appears to have missed the point that nothing in Respondent's argument claims any special protection for [public] sexual activity⁴³¹

Both in the respondent's opening brief and in many of the amicus briefs, there was much discussion of *heterosexuals*.⁴³² This was not

Mr. Levi: Unfortunately, society makes it a big exception. We wish it wouldn't and we would — that's why our organization exists.

Mr. Thurmond: Well, we thank you all for coming and testifying, and you're now excused.

Required Reading: Thurmond on Homosexuality, N.Y. Times, Aug. 2, 1986, at 6, col. 4.

426. See, e.g., Brief for Respondent at 27; see also *id.* at 3-4.

427. *Id.* at 27 (emphasis in original).

428. *Id.*

429. *Id.* at 28. This was apparently a response to Georgia's assertion that homosexuals are disproportionately involved with adolescent "recruitment." The recruitment claim seemed to be less an issue in the brief than the shocking sexual perversity of gays. See, e.g., Brief for Petitioner at 36-37.

430. See Brief for Respondent at 27-28.

431. *Id.* at 22 n.38.

432. See *id.* at 5, 12-13, 17, 28; Brief of Amici Curiae American Psychological Association and American Public Health Association in Support of Respondents at 5-6, 7-8, 12-19; Brief

"wrong," because the statute was extremely vulnerable to attack as invalid on its face, and the right-to-privacy decisions which were being relied on to argue for a right to noninterference with sexual intimacy involved heterosexuals. But again the brief failed to tell the story of the actual plaintiff and of gay people, thus leaving the stereotype unanswered.⁴³³ Because the heterosexual married couple's attack on the statute was co-opted early, when the state admitted it would not enforce the statute against married couples and stressed that it was *homosexual* sodomy it sought to prevent, the state challenged Hardwick's lawyers to answer the stereotype and they failed to respond.

Surely it was a good, reasonable approach to argue that the Georgia sodomy statute did not just punish "them" but also punished fine, upstanding husbands and wives.⁴³⁴ Moreover, the likelihood of at least some of the Supreme Court's Justices being more at ease with the notion of married heterosexuals engaging in these particular sexual practices would seem to aid the challenge to the statute on the grounds of its facial invalidity. Yet the focus in the Georgia brief and the briefs in support of the statute *was* on the Other, and the fact that Hardwick was a homosexual and that the stress was *on* homosexuality seems to demand a response narrative *about* the Other. The vision of the macho, leatherclad, gay male or the drag queen was never dispelled. That gays are members of Congress, stockbrokers, lawyers, doctors, truck drivers, authors, athletes — in other words, human beings — never appeared in the briefs or arguments.

At oral argument, Professor Tribe began by stating, "This case is about the limits of governmental power," listed what the case was *not* about, and finished his opening statement by saying:

The power invoked here, and I think we must be clear about it, is the power to dictate in the most intimate and, indeed, I must say, embarrassing detail how every adult, married or unmarried, in every bedroom in Georgia will behave in the closest and most intimate association with another adult.⁴³⁵

Amicus Curiae for Lesbian Rights Project, Women's Legal Defense Fund, Equal Rights Advocates, Inc., et al. at 5-6, 17-19.

433. Saying "almost everyone does it" might have had merit if the *only* concern had been whether particular sexual practices were common, but the stereotype is far more global than that, as indicated by the Georgia brief. See text at note 420 *supra*.

434. See Brest, *Supreme Court Proscribes a View of Privacy*, L.A. Times, July 13, 1986, § V, at 2, col. 5. Professor Brest pointed out that "[h]ad the Court invalidated the statute as written, the legislature might have responded with a law that punished only homosexuals." This certainly provided an "excuse" for the Court to preempt future challenges. Brest's further point that the legislature "likely . . . would have let the matter rest — for political, moral or humanitarian reasons" — seems optimistic given the fear of AIDS as a "gay plague."

435. Official Transcript, *supra* note 417, at 17-18.

Perhaps this approach was meant to deflect any discomfort with the sexuality issue, but it was an extremely defensive tack for argument. Tribe went on to make a somewhat incoherent and tentative argument that government regulation of sexual intimacy in the home called for some form of "heightened scrutiny" — although exactly what kind of scrutiny he called for was unclear.⁴³⁶ There was no real attempt to elucidate a freedom of intimate association⁴³⁷ or explicitly to confront and rebut Georgia's claim that the Constitution does not protect a "right which is little more than one of self-gratification and indulgence."⁴³⁸ Nor did the argument address the problem of prejudice. Tribe stated, instead:

I think it is important to stress, [the principles of liberty] do not place on a constitutional pedestal as though receiving this Court's particular approval, the particular acts involved in a case like this. I think . . . it is misleading to say that we are championing a fundamental right to commit a particular sexual act.

We are saying that there is a fundamental right to restrict government's intimate regulation of the privacies of association like in the home. The principle that we champion is a principle of limited government, it is not a principle of a special catalogue of rights.⁴³⁹

Many of the amicus briefs attempted to argue gays were no different than heterosexuals in their sexual practices, but the focus on sex alone may have been unfortunate. Ironically, the rubric of privacy does not appear to have curbed explicit discussion of human sexual functioning. At times the briefs read more like sex manuals than life stories of human beings who happen to be attracted to the same gender.⁴⁴⁰ The amicus brief filed by the Lesbian Rights Project et al. noted that "the overwhelming majority of persons engaging in sexual activities that would violate Georgia's law, then, are persons of heterosexual orientation."⁴⁴¹ While the brief also forthrightly characterized Georgia's arguments as "homophobic,"⁴⁴² it relied on examples of heterosexual sexual practices as well to illustrate, time and again, that homosexuals were essentially no different in their mode of sexual ex-

436. See *id.* at 20-21, 23-24, 25-26, 32. "Heightened scrutiny" may have meant the type of "substantial and important state interest" or "intermediate standard of review" approach used in gender classification cases. See P. BREST & S. LEVINSON, *supra* note 112, at 584.

437. For an excellent, sensitive discussion of the meaning and importance of this concept, see Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

438. Official Transcript, *supra* note 417, at 16.

439. *Id.* at 36-37.

440. See Brief of Amici Curiae American Psychological Association and American Public Health Association in Support of Respondents at 5, 8, 15-19; Brief Amicus Curiae for Lesbian Rights Project at 4-11, 17-18.

441. Brief Amicus Curiae for Lesbian Rights Project at 6.

442. *Id.* at 12-13.

pression. The brief observed candidly that it may be likely that "police officers, judges, jurors, prosecutors and others involved in enforcing the Georgia law" were likely to be lawbreakers themselves.⁴⁴³ (And the argument appears to have some merit: the officer who arrested Hardwick refused to answer a polygraph test question of whether he had ever broken the law, until it was rephrased to ask whether he had ever committed "a serious undetected felony.")⁴⁴⁴ The American Psychological Association's amicus brief argued that homosexuals were no more or less psychologically disturbed than heterosexuals,⁴⁴⁵ and that both homosexuality and "sodomy" were common in western cultures.⁴⁴⁶ Homosexuals were like everyone else in their need for intimate, continuous relationships.⁴⁴⁷

Only one amicus brief *explicitly* made an equal protection argument. The National Organization for Women argued that homosexuality should be considered a suspect classification.⁴⁴⁸ The brief argued that homosexuals were subject to "pervasive and damaging" discrimination, evidenced "by certain briefs filed in this case."⁴⁴⁹ No evidence in the record supported the assertion that homosexuality was a matter of choice or that it "has a detrimental effect upon an individual's contributions to society."⁴⁵⁰ Thus, NOW argued, the Court should have subjected the Georgia statute to heightened scrutiny, and, under that scrutiny, should have held the statute violative of the equal protection clause.

The briefs and arguments by Georgia and its supporters found a receptive audience in a majority of the Supreme Court Justices. The majority opinion of Justice White was as poorly crafted legally as was the opinion in *Roe* and arguably the opinion in *Brown*. Perhaps the appeal to, or at least the availability of, prejudice explains the hostility of Justice White's and Chief Justice Burger's opinions to Hardwick's claim. In an opinion "so lacking in legal craft that it makes one wonder what was going on,"⁴⁵¹ Justice White relied on the "ancient

443. *Id.* at 19.

444. "[H]e flashed on the sodomy statute . . ." Harris, *supra* note 409, at 2G, col. 5.

445. Brief of Amici Curiae American Psychological Association at 10.

446. *Id.* at 11.

447. *Id.* at 13-15.

448. Brief of the National Organization for Women as Amicus Curiae in Support of Respondents at 22-27 & n.13 (arguing that homosexuals met standards for scrutiny applied to suspect classifications).

449. *Id.* at 24-25 & n.11.

450. *Id.* at 26.

451. Brest, *supra* note 434, at 2, col. 5.

roots"⁴⁵² of prohibitions against sodomy. "[T]o claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty,' " he declared, "is, *at best*, facetious."⁴⁵³ White equated permitting consenting adult homosexuals to engage in oral or anal sex in their homes with allowing adultery, incest, "and other sexual crimes" to be committed in the home.⁴⁵⁴ But the horror at adultery seems false, and rape, forcible oral copulation, or forcible sodomy — possible "other sexual crimes" — do not, by their definitions, involve consenting adults. Incest, technically a crime of blood relation, is horrible because it frequently involves sexual abuse of children and adolescents who do not "consent." White's vision of sexual perfidy blinded him to the very real distinctions and harms among these acts. Incest is not a "sexual" crime; neither is rape, even if they are primarily crimes of gender that involve sex organs. Rather, as Professor Tribe had pointed out, these are all crimes of violence, domination, and exploitation.⁴⁵⁵ Against a rational-basis challenge to the statute, White dismissively wrote, "The law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."⁴⁵⁶ He entirely ignored ninth amendment, equal protection, and eighth amendment claims, despite the fact that Professor Tribe explicitly made reference to the ninth amendment in his oral argument,⁴⁵⁷ Justice Powell specifically considered the eighth amendment in his concurrence,⁴⁵⁸ and equal protection was implicated by the singling out of homosexuals for prosecution under the Georgia statute and was explicitly raised in the NOW brief.⁴⁵⁹

Chief Justice Burger dwelt even more obsessively on the "crime against nature," essentially quoting verbatim from the State of Georgia's brief.⁴⁶⁰ Indeed, Burger appeared to agree with Blackstone that "sodomy" was "an offense of 'deeper malignity' than rape"⁴⁶¹ — demonstrating an apparent lack of empathy for gays and women simulta-

452. 106 S. Ct. at 2844.

453. 106 S. Ct. at 2846 (emphasis added).

454. 106 S. Ct. at 2846.

455. Official Transcript, *supra* note 417, at 21-22.

456. 106 S. Ct. at 2846.

457. Official Transcript, *supra* note 417, at 35.

458. 106 S. Ct. at 2847 (Powell, J., concurring).

459. See notes 448-50 *supra* and accompanying text.

460. Compare 106 S. Ct. at 2847 (Burger, C.J., concurring) with Brief for Petitioner at 20-23 (arguing Judeo-Christian tradition and law has condemned sodomy for centuries).

461. 106 S. Ct. at 2847 (quoting 2 W. BLACKSTONE, COMMENTARIES *216).

neously, a real tour de force. While it is true that "taunting a conservative Reagan court with a homosexual case in a Falwellian era of Rambo, Eastwood and AIDS" may have meant a foregone conclusion,⁴⁶² one cannot help but wonder if at least one of the Justices who joined the majority *might* have been open to another narrative had it been more available.⁴⁶³

The dissenters saw the human issues. Justice Blackmun's opinion was singularly undisturbed by the subject of sex or homosexuality:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.⁴⁶⁴

Blackmun observed: "The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others."⁴⁶⁵

Blackmun agreed with Justice Holmes that

"[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."⁴⁶⁶

In rebuttal to the claim that "the majority" abhorred the conduct, Blackmun stated, "[i]t is precisely because the issue raised by this case touches *the heart of what makes individuals what they are* that we should be especially sensitive to the rights of those whose choices upset the majority."⁴⁶⁷ "A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus."⁴⁶⁸ There was no interference with the rights of others, "for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest . . . let alone an interest that can justify invading the houses, hearts, and

462. Harris, *supra* note 409, at 1G, col. 1.

463. Justice Powell *might* have stayed with his original intention to strike the statute, for example. Taylor, *supra* note 297, at 18, col. 4.

464. 106 S. Ct. at 2851 (Blackmun, J., dissenting) (emphasis in original).

465. 106 S. Ct. at 2852.

466. 106 S. Ct. at 2848 (quoting Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

467. 106 S. Ct. at 2854 (emphasis added).

468. 106 S. Ct. at 2855.

minds of citizens who choose to live their lives differently.”⁴⁶⁹ Blackmun concluded:

I can only hope . . . the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation’s history than tolerance of nonconformity could ever do.⁴⁷⁰

Justice Stevens’ dissent groped for an equal protection theme, and pointed to the irrationality of Georgia’s claim that the statute was designed solely to punish homosexuals. The prohibition in the predecessor to the current Georgia statute “was not purely hortatory.”⁴⁷¹ Indeed, Stevens noted, the statute had at one point been construed to permit lesbians to engage in oral or anal sex while forbidding these acts for heterosexuals.⁴⁷² The opinion then argued that the Court’s cases had established the unconstitutionality of prohibiting private, consensual sexual activity between married couples as violating the right to privacy and the due process clause’s protection of individual liberty.⁴⁷³ This was, indeed, a point conceded by counsel for Georgia at oral argument.⁴⁷⁴ The second section of Stevens’ opinion examined whether homosexuals could be singled out for prosecution in light of Georgia’s concession. Either Georgia must say that homosexuals do not have the same “liberty” interest “that others have,” which is “plainly unacceptable,” or there must be a “neutral and legitimate interest” in differential treatment, “something more substantial than a habitual dislike for, or *ignorance about*, the disfavored group.”⁴⁷⁵ Georgia, “at this early stage of the litigation,” had failed to meet its burden of justification, and “[a]t the very least . . . respondent has alleged a constitutional claim sufficient to withstand a motion to dismiss.”⁴⁷⁶

There simply was no reason for Justice White’s venomous attack or for Burger’s thundering about the Judeo-Christian tradition other than prejudice and lack of empathic understanding. Even legality went by the wayside as a result: it would have been perfectly plausible within the realm of legality to write an opinion upholding the statute.

469. 106 S. Ct. at 2856 (citation omitted).

470. 106 S. Ct. at 2856.

471. 106 S. Ct. at 2857 n.6 (Stevens, J., dissenting) (citing *Comer v. State*, 21 Ga. App. 306, 94 S.E. 314 (1917) (affirming prosecution for consensual heterosexual sodomy)).

472. 106 S. Ct. at 2857 (citing *Thompson v. Aldredge*, 187 Ga. 467, 200 S.E. 799 (1939)).

473. 106 S. Ct. at 2857-58.

474. Official Transcript, *supra* note 417, at 7-8.

475. 106 S. Ct. at 2858-59 (emphasis added).

476. 106 S. Ct. at 2859.

(Justice Powell recently suggested such an approach, indicating that his fear of abusing substantive due process analysis strongly influenced his vote in *Hardwick*.⁴⁷⁷) Perhaps it was less disingenuous that these Justices did not mask their dislike of an outgroup through a rhetoric of “balancing” or “legal principles” that would have more effectively disguised empathic failure. Their revulsion certainly is not open to the accusation of being “liberal,” namby-pamby, toothless, pluralistic tolerance such as that advocated by Blackmun’s dissent. To assert that Blackmun was unprincipled, however, is to miss the point of his dissent entirely. Blackmun was speaking for humans and for the positive values of a liberal state — respect for human freedom from oppression and tyranny.

E. Summary

The purpose of the foregoing discussion has been to demonstrate that empathic narrative is a part of legal discourse, and that empathic understanding can play a role in legal decisionmaking. The discussion is admittedly ahistorical, confined as it is to the particular narratives rather than any broader cultural or historical influence that affected the Court’s decisions in these cases. Because of the ahistorical approach, among other things, the cases may seem too easily to be characterized as “obvious” examples of good guys having empathy on their side and bad guys not. But *Brown*, *Shapiro*, and *Roe*, at least, did raise issues of empathy on both sides, the strongest example being *Roe*.⁴⁷⁸ The foregoing discussion might also be characterized as wildly optimistic or ambitious about the prospects of empathic knowledge: as “everyone” knows, *Brown II* canceled *Brown I*, *Dandridge*⁴⁷⁹ and *Kras*⁴⁸⁰ canceled *Shapiro*, and *Roe* will disappear now that Justice Powell has resigned.⁴⁸¹ And, as everyone “knows,” distrust of others and xenophobia are an inevitable part of human nature; the argument that empathy had anything to do with the outcome of *Brown* or *Shapiro*, for example, may seem to be merely the wishful thinking of a

477. Taylor, *supra* note 297, at 18, col. 4.

478. I hope to develop this issue more fully in a subsequent piece; the conclusion provides some preliminary thoughts on this topic. See text at note 490 *infra*.

479. *Dandridge v. Williams*, 397 U.S. 471 (1970).

480. *United States v. Kras*, 409 U.S. 434 (1973).

481. Before this article went to press, President Reagan had nominated Judge Robert Bork, a declared opponent of *Roe v. Wade*, to replace Justice Powell. See Taylor, *The Battle over Bork*, N.Y. Times, July 5, 1987, at E1, col. 3. And despite a clear Senate majority’s opposition to the apparent vision of the Constitution held by Bork — and Reagan — Senate Minority Leader Dole has vowed that the next nominee will be “someone who believes in the same things that Judge Bork believes in, and . . . that person will be confirmed.” Shenon, *Leaders Predict Early Bork Vote on Senate Floor*, N.Y. Times, Oct. 12, 1987, at 1, col. 5, 14, col. 6.

frustrated “liberal” academic, longing for a “liberal” Court. Another possible objection to my interpretation is that empathy is an unstable phenomenon, with no “staying power” or transformative potential; arguably, it is quickly overwhelmed by dominant, unreflective ideologies and beliefs. Dominant modes of discourse won’t be shaken; they are too resilient. Besides, people just don’t want to hear these narratives — at least not for very long. Understanding the Other takes too much work and is too disturbing to keep up.

Yet these criticisms would overlook the fact that the result in *Brown* came from an understanding that segregation, no matter how it was rationalized, caused human beings pain; the change in doctrine facilitated empathic understanding of blacks, by forcing whites to acknowledge their humanity. Racism persists, but many whites by virtue of becoming accustomed to being with blacks rather than separated have recognized our common humanity; while “contact . . . cannot always overcome the personal variable in prejudice,” people “with a normal degree of prejudice” will become less prejudiced as a result of “equal status contact between majority and minority groups in the pursuit of common goals.”⁴⁸² Unfortunately, empathy for the poor has not continued, perhaps because “the poor” can trigger so many prejudices — racial, ethnic, and sexual. Empathy for the poor also conflicts with the work ethic of capitalism and the belief that poverty is never inescapable. Empathic understanding of the experience of women seems to wax and wane; with an administration bent on appointing Justices with a definite opposition to abortion, the issue of openness to empathic narrative in that area may in the immediate future be moot.

IV. CONCLUSION

The tentative conclusions that can be drawn about legality and empathy are that empathic understanding *is* possible and that empathic narrative can and should be a proper and influential part of legal discourse. Empathic narrative need not be fulsome rhetoric — the argument of Archibald Cox in *Shapiro* was simply phrased and the stories were told in a matter-of-fact tone. Appeals to emotion are not necessarily appeals for empathy: The emotional argument of the state in *Bowers v. Hardwick* opposed empathy. But to be effective, empathic narrative does seem to require concrete human stories rather than simple abstract appeals to legal principles. And the presence or absence

482. G. ALLPORT, *supra* note 99, at 280-81.

of empathic understanding does help us to understand why the four cases studied were decided the way they were.

To the extent that "horror stories" dominate our emotional grasp of an experience, might the resulting decision be skewed if we were to encourage empathic knowledge? I have argued elsewhere that the parade of horrible stories of criminal victimization has led to some destructive laws.⁴⁸³ Is this not inevitable? Horror stories, however, do not constitute all of empathic understanding. Because they work at the level of affect in the hearer, they evoke emotional response. Yet frequently that emotional response is *not* empathic, *because it is not the perception of the emotion or experience of another*, but rather one's own response. One's *own* emotional response is certainly something to explore or consider, but it is *not* empathy.

How to determine if the component of emotional response in empathy is one's own or a resonance with the Other is not quickly answered. The psychological phenomenon of projection — attributing one's own mental or emotional state to another — complicates things further.⁴⁸⁴ This is, of course, part of the larger problem of empathic accuracy — the ability not only to empathize, but to understand correctly what another is experiencing. It may not be possible to empathize totally with another from a completely different culture, for example, and it is not always possible to interpret correctly the empathic messages received. As Kennedy notes, you may be wrong.⁴⁸⁵ But these concerns neither disprove the existence of empathy nor excuse a decisionmaker from considering empathic narratives. Instead, as with attaining other forms of knowledge and understanding, these concerns indicate that empathic understanding takes practice and work. Part of that practice can be accomplished in the form of questioning whether the received message is the correct one or asking for clarification. Part of it can be accomplished through attentiveness to empathic narrative.

In *The Wrongs of Victim's Rights*,⁴⁸⁶ I attempted to demonstrate that the so-called "Victims' Rights Movement" largely ignored the phenomenological dimension of a crime victim's experience and that, accordingly, laws passed ostensibly in the crime victim's name may have worsened conditions for victims. Undoubtedly, the victims' rights movement evoked an empathic response in at least some voters and legislators, and that response led to action to remedy perceived injus-

483. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937 (1985).

484. D. WESTEN, *supra* note 30, at 94.

485. Kennedy, *supra* note 20, at 639.

486. Henderson, *supra* note 483.

tices. Yet the genuine empathic response seemed quickly to be sublimated into existing ideological debates about the criminal process. Certainly, I have argued, many of the laws passed in the name of "victims" often seemed to be anything but altruistic or caring toward those victims. The stories of victims were expropriated; few, if any, empathic narratives were developed in the public discourse about victims' rights laws. Instead, "advocates" paraded horror stories before legislators and the public; the need for counseling, support services, and understanding of the experience of victims of violent crime as perhaps the most appropriate response to the distress of crime victims was lost in the shuffle. Another possible explanation for the divergence of empathic response and actual outcome was that the empathic response to crime victims was inaccurate or incomplete. For example, the unreflective translation of the anger of victims into a desire for retaliatory retribution might have been inaccurate.⁴⁸⁷ Furthermore, the initial empathic response to the stories of victims may have been so distressing that the listener avoided empathizing further, and instead withdrew from victims, recharacterized the story, or stopped listening — all characteristic reactions to empathic distress. Finally, the existing structures of legality in the criminal process may have provided refuge from empathic response, so that those structures and debates about them replaced the very real debate over the pain a crime victim experiences and how the legal system might address that pain.

In other instances, empathy for victims may have so dominated thinking that empathy for other actors in the criminal justice "system" was obliterated. As Professor Lawrence Becker has accurately noted, "incompleteness in the range of empathic powers can produce moral error."⁴⁸⁸ This is *not*, however, an argument that eliminates the usefulness of empathy as a morally relevant mode of understanding, as Becker appears to assume. *Absence* of empathy produces moral error as well. It is simply a caution that selective empathy or unreflective empathy can mask moral choice. This is especially likely in the case of something like affirmative action, where a white decisionmaker unreflectively empathizes with whites to the exclusion of minorities and reaches a decision "in favor" of whites.⁴⁸⁹ As a result, patterns of covert discrimination are legitimated and become more entrenched; this, I would argue, constitutes "moral error."

Becker and others also imply that empathizing with morally "rele-

487. *Id.* at 996-99.

488. L. BECKER, RECIPROCITY 159 (1986).

489. *Cf.* Lawrence, *supra* note 63.

vant 'types' of people" can be "disabling."⁴⁹⁰ Does empathy with all concerned create decisional paralysis? The affirmative action problem and the problem of abortion, for example, seem to present insoluble dilemmas if one empathizes with both — or all — affected. If legality — in the form of categories, accepted analogies, rules, habits — provides a solution to the dilemma by negating one side or another of the moral choice, it will perhaps overcome the moral paralysis we assume would follow. But ducking of moral choice via refuge in legality is irresponsible. Moreover, the view that decisional paralysis necessarily will follow is based on a kind of Manichaeism — the belief that there is one, and only one, "right" answer. Empathy may enable the decisionmaker to see other "right" answers, or a continuum of answers. Or it may simply make the decisionmaker aware that what once seemed like no choice or a clear choice is instead a tragic one. To mask the tragedy of choice by taking refuge in rules does not negate the tragedy.

Empathy cannot necessarily tell us what to do or how to accomplish something, but it does alert us to moral choice and responsibility. It also reminds us of our common humanity and responsibility to one another. We could do worse — indeed we have done worse — than to employ the knowledge empathy imparts to us.

490. L. BECKER, *supra* note 488, at 159.

ANNOUNCEMENT OF AWARDS AND PRIZES

JASON L. HONIGMAN AWARD FOR 1986-1987

This award has been given to Nancy J. King in recognition of her outstanding contribution as editor of the *Michigan Law Review*.

HOWARD B. COBLENTZ PRIZE FOR 1986-1987

This prize has been awarded to Nancy T. Hammar, Alan M. Koschik, Mary Jo Newborn, and Miriam I. Pickus in recognition of their contributions as editors of the *Michigan Law Review*.

HELEN L. DEROY MEMORIAL AWARD FOR 1986-1987

This award has been given to Geoffrey Garver, author of the best student contribution to Volume 85 of the *Michigan Law Review*.

SCRIBES AWARD FOR 1986-1987

An honorary membership in Scribes, the Society of Writers on Legal Subjects, is given for an outstanding published written contribution to the *Michigan Law Review* to Samuel M. and Paula E. Hill.

ABRAM N. SEMPLINER MEMORIAL AWARD FOR 1986-1987

This award has been given to Melissa H. Maxman, Editor-in-Chief of Volume 86 of the *Michigan Law Review*, in recognition of her superior scholastic record, effective leadership, and outstanding contribution to the *Review*.

BODMAN-LONGLEY AWARD FOR 1986-1987

This award has been given to Steven G. Bradbury, Lissa M. Cinat, Patrick T. Connors, Ann H. Coulter, Mark A. Grannis, Ward A. Greenberg, Jeffrey A. Hall, and Judith L. Hudson in recognition of their superior scholastic records and their contributions to the *Michigan Law Review* in their junior year.

RAYMOND K. DYKEMA AWARD FOR 1986-1987

This award has been given to Richard A. Kaba, Gregory A. Kalscheur, M. Sean Laane, Marilyn Mann, Gary A. MacDonald, Andrew J. McGuinness, Jeffrey G. Moran, Maryelena Pardo, and Frank G. Zarb for significant contributions to the *Michigan Law Review* during their junior year and in recognition of qualities that indicate the likelihood of future contributions to the legal profession.

SIMPSON & MORAN AWARD FOR 1986-87

This award has been given to the members of the Editorial Board of Volume 86 of the *Michigan Law Review* in recognition of their contribution to the field of legal scholarship.

ANNOUNCEMENT OF EDITORIAL BOARD 1987-1988

Editor-in-Chief

MELISSA H. MAXMAN, of Washington, D.C.

Managing Editor

GARY A. MACDONALD, of Michigan

Book Review Editors

LISSA M. CINAT, of Michigan
JUDITH L. HUDSON, of Michigan

Executive Article Editor

RICHARD A. KABA, of Michigan

Executive Note Editor

GREGORY A. KALSCHOUR, of Wisconsin

Executive Editors

PATRICK T. CONNORS, of Michigan
MARILYN MANN, of Michigan

Article Editors

ANN H. COULTER, of Connecticut
JEFFREY A. HALL, of Michigan
M. SEAN LAANE, of Illinois
ANDREW J. MCGUINNESS, of Michigan

Note Editors

STEVEN G. BRADBURY, of Oregon
MARK A. GRANNIS, of Ohio
WARD A. GREENBERG, of New York
JEFFREY G. MORAN, of Illinois
MARYELENA PARDO, of Indiana
FRANK G. ZARB, of New York

Contributing Editors

ERIC M. ACKER, of California
DAVID T. AZRIN, of Florida
MARK S. BERNSTEIN, of Illinois
DAVID H. BROMFIELD, of Massachusetts
PATRICK B. CAREY, of Michigan
MICHAEL L. CHIDESTER, of Utah
STEVEN T. CORLISS, of Michigan
BARRY L. JOHNSON, of Iowa
ALISON R. KEAN, of Ohio
ANDREW M. KENEFICK, of Washington

BRIAN K. KNOX, of Ohio
SCOTT M. KOSNOFF, of Indiana
JONATHAN H. MARGOLIES, of New York
TODD J. MAYBROWN, of New York
DONALD S. PLUM, of Ohio
FRANK C. SHAW, of New York
HARRY R. SILVER, of Colorado
JAMES L. THOMPSON, of Indiana
CHARLES F. WEISS, of Maryland