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### Do Judges Cry? An Essay on Empathy and Fellow-Feeling

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# DO JUDGES CRY? AN ESSAY ON EMPATHY AND FELLOW-FEELING

*Richard Delgado<sup>†</sup> and Jean Stefancic<sup>††</sup>*

## ABSTRACT

Can judges and other lawmakers understand the full human impact of the decisions they hand down? Or are they likely to decide incredibly important cases purely in light of their favorite hundred-year old precedent—or, even worse, their preferred ideological refrain?

If empathy is both an emotion and a form of practical knowledge, how can judges develop that faculty so as to avoid mistakes that will haunt them in history's judgment?

Noting that empathy has been expanding over time, this Article identifies some of the forces that fuel that expansion, including literature, travel, and experience. It discusses categories of empathy, including the false or misleading kind, as well as an empathic fallacy that can induce us to believe that we understand others' suffering more than we really do.

It concludes that exposure to fiction and personal narratives expressing outrage over human adversity are means to humanize members of a profession, like law, who can easily become enmeshed in abstraction and formalism.

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## INTRODUCTION: EMPATHY IN LAW AND LIFE

The two of us have been writing about empathy for much of our careers.<sup>1</sup>

Here, we revisit that body of work, prompted by reflections on recent events, including the Trump administration's policy of separating children and parents at the border<sup>2</sup> and President Obama's nomination of Sonia Sotomayor, whom he hoped would display that very quality—empathy—during her term on the Supreme Court.<sup>3</sup>

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1. *E.g.*, Richard Delgado, *Rodrigo's Eleventh Chronicle, Empathy and False Empathy*, 84 CALIF. L. REV. 61 (1996) [hereinafter Delgado, *False Empathy*] (discussing the many types of empathy and their ramifications for legal regulation); Richard Delgado, *Watching the Opera in Silence, Disgust, Autonomy, and the Search for Universal Human Rights*, 70 U. PITT. L. REV. 277 (2008) [hereinafter Delgado, *Watching Opera*] (discussing how failure to consider another's point of view can backfire, in economic terms, for one who fails to take it into account); Richard Delgado, *Rodrigo's Thirteenth Chronicle: Legal Formalism and Law's Discontents*, 95 MICH. L. REV. 1105 (1997) (discussing how rote formalism can impair judicial empathy); JEAN STEFANCIC & RICHARD DELGADO, HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS (2005) [hereinafter STEFANCIC & DELGADO, LOSE THEIR WAY] (same); Richard Delgado, *Four Reservations on Civil Rights Reasoning by Analogy: The Case of Latinos and Other Nonblack Groups*, 112 COLUM. L. REV. 1883 (2012) (discussing the limitations of the black white binary of race); Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1629 (1991) [hereinafter Delgado & Stefancic, *Norms and Narratives*] (considering whether access to outsider texts can improve judges' ability to identify with frames of reference other than their own); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 33 35 (3d ed. 2017) (discussing the role of frame-shifting in critical analysis); Richard Delgado, *J'Accuse: An Essay on Animus*, 52 U.C. DAVIS L. REV. ONLINE 119 (2019) [hereinafter Delgado, *J'Accuse*] (noting that President Trump's tweets and public statements evince outright antipathy toward minority groups, minority religions, and African nations). As series editors, we also published THE PASSIONS OF LAW (Susan Bandes ed., 1999), which discusses the role of emotions in the law.
  2. *See infra* notes 30, 31, 181 and accompanying text (discussing the child-separation policy); *see also* Delgado, *J'Accuse*, *supra* note 1, at 127 32 (discussing the Trump administration's animus toward groups and nations of color).
  3. *See Transcript of Obama-Sotomayor Announcement*, CNN (May 26, 2009, 12:49 PM), <http://www.cnn.com/2009/POLITICS/05/26/obama.sotomayor.transcript/index.html> [<https://perma.cc/M5SC-MCP2>] (noting that President Obama appointed Justice Sotomayor because of her personal history and humanism).

In an effort to situate and understand those recent actions—and to find out what we can learn from them—we analyze how empathy expands and contracts over time. We identify some of the forces that propel those shifts<sup>4</sup> and offer some thoughts on how judges can avoid handing down decisions that will strike observers as inhumane years later.<sup>5</sup> We examine some obstacles that lie in anyone’s way, including the ease by which one can become entrapped in the prevailing mindset of one’s time.<sup>6</sup> We also address how that mindset can change, even in a time when the President has been nominating a string of judges who are largely white, male, and conservative.<sup>7</sup>

We undertake today’s task with renewed urgency for a second reason. Courts seem likely to play major roles in allocating power and authority between the other two branches of government, which are now at odds.<sup>8</sup> Will newly appointed judges and justices fully understand what, in human terms, is at stake? Or will they decide incredibly important cases purely in light of their favorite hundred-year-old precedent?

Although much of what we offer centers on the role of texts, fans of law and economics will be glad to know that we believe empathy also has an economic side, since it enables its possessor to understand what the other side wants and make trades that enable him or her to get what he or she wants in return.<sup>9</sup> The empathic businessman, like the empathic lover or worldly detective, is thus apt to be more successful than one lacking that quality.<sup>10</sup> By the same token, an empathic judge

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4. *See infra* Part I.

5. *See infra* Parts II, III.

6. *See infra* Part IV.

7. Caroline Johnson & Renee Klahr, *Trump Is Reshaping The Judiciary. A Breakdown By Race, Gender, And Qualification*, NPR (Nov. 15, 2018, 5:00 AM), <https://npr.org/2018/11/15/667483587/trump-is-reshaping-the-judiciary-a-breakdown-by-race-gender-and-qualification> [<https://perma.cc/U6GU-4M3Y>]; Tom McCarthy, *Trump’s Legacy: Conservative Judges Who Will Dominate U.S. Law for Decades*, THE GUARDIAN (Mar. 20, 2019, 4:00 AM), <https://www.theguardian.com/us-news/2019/mar/10/trump-legacy-conservative-judges-district-courts> [<https://perma.cc/72BB-YXEU>].

8. *See Who’s in Charge? Donald Trump v Congress*, THE ECONOMIST (Jan. 19, 2019), <https://www.economist.com/united-states/2019/01/17/donald-trump-v-congress> [<https://perma.cc/2HXE-S9LW>]; *see also* Jordan Fabian & Jacqueline Thomsen, *Courts Become Turbocharged Battleground in Trump Era*, THE HILL (July 22, 2019, 6:00 AM), <https://www.thehill.com/homenews/administration/453881-courts-become-turbocharged-battleground-in-trump-era> [<https://perma.cc/H39C-WV7J>].

9. *See infra* note 105 and accompanying text. *See also* Delgado, *False Empathy*, *supra* note 1, at 75.

10. *See* Delgado, *False Empathy*, *supra* note 1, at 75.

who is sensitive to his or her times and nuance is less likely to go down in history as obtuse or a monster.<sup>11</sup>

We regard empathy then as both an emotion and a form of practical knowledge.<sup>12</sup> It is also a quality that develops over time, so that some end up possessing more of it than others.<sup>13</sup> It may also be, to some unknown extent, innate.<sup>14</sup>

In all its guises, empathy seems to operate most effectively in recognizable situations and with other persons that are like us, familiar and easily knowable. An emerging branch of social science known as “norm theory” holds that our reaction to an individual in distress is a function of how normal or abnormal their predicament strikes us.<sup>15</sup> We see images of people starving in Africa, but we tell ourselves that this sort of thing happens all the time over there.<sup>16</sup> So we do not get terribly excited, since, we reason, those people are probably used to it by now.<sup>17</sup> Think, for example, of newspaper articles you may have seen about Puerto Rico’s poverty and colonial past, as though that past justifies our feeble response to recent disasters there.<sup>18</sup>

But we are immediately alarmed if our suburban neighbor shows up at our door, not having eaten in three days because she lost her job and her husband ran off with another woman. That sort of thing is not supposed to happen in nice neighborhoods like ours. We fix her a sandwich and tell her how to seek emergency assistance from the county.<sup>19</sup>

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11. See sources cited *infra* notes 129, 180.
  12. See ARISTOTLE, NICOMACHEAN ETHICS 12 14 (Terrence Irwin trans., Hackett Publ’g Co. 2d ed. 1999) (c. 384 B.C.E.) (noting that the end, or purpose, of human life is happiness, which in turn requires deliberation and moderate action).
  13. *Id.* at 12.
  14. Delgado, *Watching the Opera*, *supra* note 1, at 282; see LYNN HUNT, INVENTING HUMAN RIGHTS: A HISTORY (2007); Emma Seppälä, *Compassion: Our First Instinct*, PSYCHOL. TODAY (June 3, 2013), <https://www.psychologytoday.com/us/blog/feeling-it/201306/compassion-our-first-instinct> [<https://perma.cc/X3LQ-4WBF>] (noting that many authorities consider empathy an inborn trait).
  15. See, e.g., Delgado, *False Empathy*, *supra* note 1, at 76.
  16. *Id.* at 76 77.
  17. *Id.* at 77.
  18. See Emily Cochrane, *House Approves Disaster Relief and Puerto Rico Aid over Trump’s Opposition*, N.Y. TIMES (May 10, 2019), <https://www.nytimes.com/2019/05/10/us/politics/disaster-relief-house-trump-puerto-rico.html?action=click&module=Latest&pgtype=Hoepage> [<https://perma.cc/UFU8-R4FM>].
  19. Delgado, *False Empathy*, *supra* note 1, at 76.

On another occasion, we might be out for a drive in the country and see a Hispanic-appearing family standing beside a broken-down car on the side of the road. We drive by, thinking to ourselves that this is a farming region, after all, and another carload of people will probably come along and help. We are in a hurry, and they probably are not. Besides, we think, farm workers are always driving beat-up old cars and undoubtedly know what to do when they break down.<sup>20</sup> A few miles later, we see a neatly dressed Anglo-appearing woman standing beside her car with the hood up. We slow down and ask if she needs help.<sup>21</sup>

What about judges? Recently, empathy was in the news when conservatives challenged then-President Obama on the need for empathic judges, which conservatives saw as a kind of favoritism.<sup>22</sup> If you empathize with the plaintiff, they reasoned, you are showing a lack of it for the defendant.<sup>23</sup> If you go easy on a criminal, perhaps because he grew up in poverty,<sup>24</sup> what about the feelings of the victim? And so on.

For many conservatives, legal judgment presupposes a relatively well-balanced system with few cases requiring looking beyond readily available precedent.<sup>25</sup> That is, the answer to most legal questions is predetermined in the natural-law sense.

But no system is completely self-contained or comprehensive. Take a simple example: An adult is playing a board game with a child and

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20. *Id.* at 77 (discussing a study of stranded motorists to show how empathy decreases over time). See Stephen G. West et al., *Helping a Motorist in Distress: The Effects of Sex, Race, and Neighborhood*, 31 J. PERSONALITY & SOC. PSYCHOL. 691 (1975) for more details on the stranded-motorist study.
  21. See West et al., *supra* note 20, at 691 (finding motorists driving in white neighborhoods more willing to help stranded white women than any other demographic).
  22. Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944, 1945, 1951 52 (2012); see also Nigel Barber, *Why Liberal Hearts Bleed, and Conservatives Don't*, PSYCHOL. TODAY (Oct. 8, 2012), <https://www.psychologytoday.com/us/blog/the-human-beast/201210/why-liberal-hearts-bleed-and-conservatives-dont> [<https://perma.cc/VW7C-NRJX>] (discussing the difference between liberal and conservative empathy).
  23. See Colby, *supra* note 22, at 1957.
  24. See David Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 403 (1976); Richard Delgado, *Rotten Social Background: Should the Law Recognize a Defense of Severe Environmental Deprivation?*, 3 J. INEQ. & L. 9 (1985) (discussing the advantages and disadvantages of such a defense); see also *United States v. Alexander*, 471 F.2d 923, 957 65 (D.C. Cir. 1975) (same).
  25. See Randy E. Barnett, *Judicial Conservatism v. A Principled Judicial Activism: Foreword to the Symposium on Law and Philosophy*, 10 HARV. J.L. & PUB. POL'Y 273, 274 76 (1987).

beats him or her ten times in a row. The rules say one should play as hard as one can. But no sane adult does this. With a child, the game is not fair, and, after all, winning is not the only value.<sup>26</sup> On another occasion, the same viewer might demonstrate abundant empathy, for example, toward unborn fetuses<sup>27</sup> or operators of small businesses weighed down by taxes.<sup>28</sup> So, empathy is often selective, and someone who feels it in one situation might not in another. One needs to know when a situation calls for reflection on a human element and when it does not.<sup>29</sup> And what should one do in situations like that of children separated from their parents at the border, where the rule of law has seemingly broken down completely? Elementary empathy and basic human common sense would seem to be the only reasonable resort.<sup>30</sup>

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26. After all, we want the child to preserve a little dignity and learn to improve his or her game without becoming defeatist.
27. Alan Blinder, *Amid Chaos, Alabama Lawmakers Delay Vote on Far-Reaching Abortion Ban*, N.Y. TIMES (May 9, 2019), <https://www.nytimes.com/2019/05/09/us/alabama-abortion.html> [<https://perma.cc/7V86-J4YD>] (noting that many legislators considered fetuses persons in their own right and entitled to protection).
28. See Robb Mandelbaum, *Will Higher Taxes Hurt Small Businesses? You Tell Us*, N.Y. TIMES: YOU'RE THE BOSS (Nov. 12, 2012, 12:44 PM), <https://boss.blogs.nytimes.com/2012/11/12/will-higher-taxes-affect-small-businesses-you-tell-us/> [<https://perma.cc/X436-UFVL>] (discussing the effect of high taxes on small businesses).
29. The literature on empathy is vast. In addition to our own work, the reader may wish to consult two classic works or authorities on how empathy develops toward members of races other than one's own: GORDON ALLPORT, *THE NATURE OF PREJUDICE* (3d ed. 1979); and the writings of Kenneth Clark, Harvard psychologist who served as expert witness in *Brown v. Board of Education*, 347 U.S. 483 (1954). See, e.g., Kenneth B. Clark, *Beyond Brown v. Board of Education: Housing and Education in the Year 2000*, 80 MINN. L. REV. 745 (1996). More recent scholarship includes SUSAN LANZONI, *EMPATHY: A HISTORY* (Yale Univ. Press 2018), and, in a more popular vein, HELEN RIESS, *THE EMPATHY EFFECT* (2018). Law review articles addressing the role of empathy in the law include: Robin West, *The Anti-Empathic Turn*, 53 NOMOS 243 (2013); Toni Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds*, 87 MICH. L. REV. 2099 (1989); and Colby, *supra* note 22.
30. See *supra* p. 3 (“Will newly appointed judges and justices fully understand what, in human terms, is at stake? Or will they decide incredibly important cases purely in light of their favorite hundred-year old precedent?”).

## I. HOW EMPATHY EXPANDS OVER TIME

A recent book by Lynn Hunt analyzes how one's capacity for empathy tends to expand over time.<sup>31</sup> Much the way Christopher Stone did in a famous article about environmental rights,<sup>32</sup> Hunt shows that Western societies' identification with outsider groups has been on a slow but steady rise.<sup>33</sup> Peter Singer,<sup>34</sup> Jeremy Rifkind,<sup>35</sup> and David Wallace-Wells<sup>36</sup> make similar points in recent books.

Stone points out that early in history, humans recognized rights for members of their immediate group or family.<sup>37</sup> Others were outlaws; literally, outside the law.<sup>38</sup> Gradually, sympathies expanded to include other clans, then foreigners, women, Jews, and members of other races.<sup>39</sup> Today, laws in Western societies protect animals from certain sorts of mistreatment, and one day, Stone writes, we will endow natural objects, like trees, rivers, and rocks, with legal protection, and not merely because doing so may sometimes benefit us.<sup>40</sup> Indeed, in today's debate over climate change, scientists are beginning to point out how even a small increase in the atmosphere's temperature will endanger millions of species, which may become extinct, and that, whether we care or not today, our actions will bring terrible and irreversible consequences.<sup>41</sup>

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31. See HUNT, *supra* note 14.
  32. Christopher D. Stone, *Toward Legal Rights for Natural Objects: Should Trees Have Standing?*, 45 S. CAL. L. REV. 450 (1972) [hereinafter Stone, *Legal Rights*] (positing environmental protection as an intrinsic good); CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING?* 3 4 (1974) (same); CHRISTOPHER D. STONE, *EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM* (1st ed. 1987) (same).
  33. HUNT, *supra* note 14, at 18 21, 213 14.
  34. PETER SINGER, *THE EXPANDING CIRCLE: ETHICS, EVOLUTION, AND MORAL PROGRESS* 169 70 (2011) (positing that one's concern should extend beyond her kin to include other people, animals, and the environment).
  35. JEREMY RIFKIN, *THE EMPATHIC CIVILIZATION: THE RACE TO GLOBAL CONSCIOUSNESS IN A WORLD IN CRISIS* 425 (2009).
  36. DAVID WALLACE-WELLS, *THE UNINHABITABLE EARTH: LIFE AFTER WARMING* 25 28 (2019) (explaining the need for immediate action to protect the environment); NATHANIEL RICH, *LOSING EARTH: A RECENT HISTORY* (2019) (same).
  37. Stone, *Legal Rights*, *supra* note 32, at 450.
  38. *Id.* at 450 57.
  39. *Id.* at 451.
  40. *Id.*
  41. See Stephen Leahy, *One Million Species at Risk of Extinction*, *UN Report Warns*, NAT'L GEOGRAPHIC (May 6, 2019), <https://www.nationalgeographic.com/environment/2019/05/ipbes-un-biodiversity-report-warns-one-million->



What propels this gradual expansion of a society's circle of concern? Hunt writes that the answer may lie in new forms of writing, beginning with the advent of the epistolary novel around 1750, when readers learned that persons of different groups had feelings, hopes, plans, and lives of their own.<sup>42</sup> Over time, additional forms of engagement with texts—reading newspapers, viewing plays, conversations in coffee-houses—contributed to empathy, the ability to see others as like oneself, resulting in documents like the French Declaration of the Rights of Man and Citizen, the American Declaration of Independence, and the United Nation's Universal Declaration of the Rights of Man.<sup>43</sup> Eventually, according to Hunt, we may “go the limit” and recognize human rights for all, including groups that do not have them such as gays and lesbians seeking full equality, felons wishing to vote, immigrants wishing to come out of the shadows, and the mentally ill.<sup>44</sup>

She describes the expansion of human rights and what must happen for it to continue. Feeling and emotion are key elements, she writes: a person knows that a human right has been violated if she feels horrified by its violation.<sup>45</sup> This conviction is closely tied to notions of bodily integrity or sanctity.<sup>46</sup> For example, in the late-Middle Ages, ladies would regularly undress in front of their male servants, whom they did not consider fully human and thus unlikely to notice or take offense.<sup>47</sup>

Soon, however, new feelings about hygiene and delicacy arose—including disgust toward such things as spitting, sneezing in public without covering one's mouth, or urinating in the street—marking the beginning of a new attitude and concern for the rights of others.<sup>48</sup> This expansion led to new convictions about the inviolability and sanctity of

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species-at-risk/#close [<https://perma.cc/9AXW-GM9Y>]; John Lanchester, *Two New Books Dramatically Capture the Climate Change Crisis*, N.Y. TIMES (Apr. 12, 2019), <https://nytimes.com/2019/04/12/books/review/david-wallace-wells-uninhabitable-earth-nathaniel-rich-losing-earth.html> [<https://perma.cc/XVL9-LPKF>] (reviewing WALLACE-WELLS, *supra* note 36 and RICH, *supra* note 36) (discussing the scientific case for immediate action).

42. HUNT, *supra* note 14, at 32–35, 40–42, 48, 50.

43. *Id.* at 17–19, 203–08, app. at 223–29.

44. *Id.* at 18–21, 28, 209–14; *see also* Stone, *Legal Rights*, *supra* note 32, at 450–57.

45. HUNT, *supra* note 14, at 26.

46. *Id.* at 29–30.

47. *Id.* at 38.

48. *Id.* at 82, 111–12.

others and their bodies and a growing aversion to mutilation and torture.<sup>49</sup>

Early readers of novels such as Samuel Richardson's *Pamela* and *Clarissa* or Jean-Jacques Rousseau's *Julie* reported torrents of emotion as they read about the mistreatment of the heroines by older suitors or employers.<sup>50</sup> Some wrote that they had cried or howled upon learning of the death of a heroine like Julie.<sup>51</sup> The vicarious experiences that readers found in texts such as these appeared in the period immediately preceding various official declarations of "the rights of man" and, for Hunt, seem bound up with those declarations.<sup>52</sup> Although many of the early novels concerned the rights of women, later ones, such as those of Charles Dickens, exposed readers to the suffering and struggles of workers and the poor,<sup>53</sup> and still others to those of sexual minorities.<sup>54</sup>

Political essayists added their voices. Voltaire wrote against torture,<sup>55</sup> Cesare Beccaria against cruel punishments.<sup>56</sup> Slaves and former slaves like Toussaint L'Ouverture<sup>57</sup> and Frederick Douglass,<sup>58</sup> and abolitionists like Harriet Beecher Stowe,<sup>59</sup> turned nonfiction to the same purpose.

## II. HOW EMPATHY'S ADVANCE IS SLOW AND HALTING

If human rights and sympathies have been expanding, one may ask, why did they do so more rapidly in some regions, such as Europe, than in others, such as the United States, where today they appear to be, in

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49. *Id.* at 33 34, 81 82; *see also* MANFRED NOWAK & ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY, at iii iv (1950).
50. HUNT, *supra* note 14, at 35 69.
51. *Id.* at 36 37.
52. *Id.* at 39.
53. *See, e.g.*, CHARLES DICKENS, OLIVER TWIST 1 2 (Kathleen Tillotson ed., Oxford Univ. Press 1966) (1839) (describing the cruelties of the factory system).
54. *See, e.g.*, JAMES BALDWIN, GIOVANNI'S ROOM 110 (3d ed. 1988); text accompanying *infra* note 128.
55. HUNT, *supra* note 14; DICKENS, *supra* note 53.
56. *Id.* at 80, 81, 103 08.
57. *Id.* at 166.
58. FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS: AN AMERICAN SLAVE (Benjamin Quarles ed., Harvard Univ. Press 1960) (1849).
59. HARRIET BEECHER STOWE, UNCLE TOM'S CABIN (The Splendid ed., Oxford Univ. Press 2001) (1852) (depicting the evils of slavery).

some respects, contracting?<sup>60</sup> On most fronts, including slavery's abolition,<sup>61</sup> women's and prisoners' rights,<sup>62</sup> environmental protection,<sup>63</sup> and the abolition of capital punishment,<sup>64</sup> Europe, not the United States, has generally led the way.

Although the United States has at times acted generously toward foreign peoples (as with the Marshall Plan<sup>65</sup> or its bailout of Argentina's economy)<sup>66</sup> and Europe abominably (as during its colonial era, for example), the U.S. has generally not been thought of as an empathic power. We were not among the first dozen nations to abolish slavery,<sup>67</sup> and others have made formal apologies to their indigenous populations far exceeding what we have done.<sup>68</sup> We have resisted signing treaties

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60. Consider, for example, that the current administration sees no problem with torture and waterboarding, and deems Muslims and Mexicans dangerous, dirty, or criminal. See Delgado, *J'Accuse*, *supra* note 1, at 127-28.
  61. See STEVEN M. WISE, *THOUGH THE HEAVENS MAY FALL: THE LANDMARK TRIAL THAT LED TO THE END OF HUMAN SLAVERY* (2006) (discussing the history of abolition in different countries); DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 13-43 (6th ed. 2008) (same).
  62. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130 (1873) (ruling that women, by reason of their sensitive nature, are unsuited to the practice of law).
  63. Michael D. Shear, *Trump Will Withdraw U.S. From Global Climate Agreement*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html> [<https://perma.cc/2KTT-SVTX>] (discussing the President's intention to withdraw the nation from an international climate-change agreement).
  64. See *French Cabinet Backs Ending Death Penalty*, N.Y. TIMES, Aug. 27, 1981, at A5, available at <https://www.nytimes.com/1981/08/27/world/around-the-world-french-cabinet-backs-ending-death-penalty.html> [<https://perma.cc/SY69-43NC>] (noting that France was the last European country to abolish capital punishment). The U.S., of course, has not yet abolished the death penalty, placing us behind each country in Europe in this regard.
  65. Barbara C. George et al., *The 1988 OECD Convention*, 37 BUS. L.J. 485, 488 (2000).
  66. Jessica W. Miller, Comment, *Solving the Latin American Sovereign Debt Crisis*, 22 U. PA. J. INT'L ECON. L. 677, 691-92 (2001). Of course, both programs may well have been motivated by self-interest, too, as the U.S. needed trading partners and geopolitical allies.
  67. See WISE, *supra* note 61 and accompanying text; BELL, *supra* note 61.
  68. See generally JUAN PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 96-284 (2d ed. 2007) (discussing reparations from a cross-cultural perspective).

combating the effects of global warming,<sup>69</sup> protecting women's rights,<sup>70</sup> and prohibiting genocide.<sup>71</sup> We reserve the right to torture,<sup>72</sup> detain indefinitely those accused of terrorism,<sup>73</sup> and engage in pre-emptive war.<sup>74</sup> American law recognizes no duty to retreat<sup>75</sup> or to rescue,<sup>76</sup> even when one could do so without danger to oneself.<sup>77</sup> We executed the mentally disabled until very recently,<sup>78</sup> and juveniles until 2005.<sup>79</sup> Britain's Civil Partnership Act gave same-sex couples rights similar to marriage many years before we did,<sup>80</sup> and we still are the only industrialized nation in the world without some form of universal health insurance.<sup>81</sup>

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69. See Shear, *supra* note 63 (reporting Trump's opposition to an international climate-change agreement).
70. See Jeffrey Huffines, *The Role of N.G.O.s in U.S. Ratification of Human Rights Treaties*, 3 ILSA J. INT'L & COMP. L. 641 (1997).
71. Evelyn Irritani, *U.S. Gives Cold Shoulder to Treaties*, L.A. TIMES (Mar. 23, 2005), <https://www.latimes.com/archives/la-xpm-2005-mar-13-na-treaties13-story.html> [<https://perma.cc/9PKN-6BC4>].
72. Jack Goldsmith, *The Laws in Wartime*, SLATE (Apr. 2, 2008, 7:12 AM), <https://slate.com/news-and-politics/2008/04/fixing-legal-policy-in-the-war-on-terrorism.html> [<https://perma.cc/MT5K-565T>] (discussing the U.S.'s tolerance for torture and rendition).
73. *Id.*
74. Jedediah Purdy, *The Lesser Evil: Political Ethics in an Age of Terror*, 104 MICH. L. REV. 1501, 1517-18 (2006) (discussing U.S. law's refusal to take this step).
75. Joseph Beale, *Duty to Retreat from Murderous Assault*, 16 HARV. L. REV. 567 (1902).
76. See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 56, at 338-43 (4th ed. 1971) (discussing the tort system's refusal to recognize a duty of rescue); Shalini Ray, *Saving Lives*, 58 B.C. L. REV. 1225 (2017); see also Shalini Ray, *The Law of Rescue*, 108 CALIF. L. REV. (forthcoming 2020) (manuscript at 12), <http://ssrn.com/abstract=3392117> [<https://perma.cc/N334-AN8F>].
77. PROSSER, *supra* note 76.
78. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).
79. See *Roper v. Simmons*, 543 U.S. 551, 551 (2002).
80. Josie Green, *29 Countries Where Same-Sex Marriage is Officially Legal*, USA TODAY (June 13, 2019), <https://www.usatoday.com/story/money/2019/06/13/countries-where-same-sex-marriage-is-officially-legal/39514623/> [<https://perma.cc/2FNX-Z4WG>].
81. Atul Gawande, *Is Health Care a Right?*, NEW YORKER (Sept. 25, 2017), <https://www.newyorker.com/magazine/2017/10/02/is-health-care-a-right> [<https://perma.cc/48VA-8RLA>] (noting that the U.S. lags far behind other industrialized countries in recognizing a duty to provide universal health coverage).

We were slow to forbid child labor,<sup>82</sup> while Britain put in place legislation to prevent abuse of children in mills in the nineteenth century.<sup>83</sup> Animal rights receive much more attention in that country than they do here.<sup>84</sup> The doctrine of employment at will, under which workers can be fired without the employer having to give any justification, still receives broad protection in the U.S.<sup>85</sup> And when doctrines such as unconscionability, contracts of adhesion, and the duty to bargain in good faith entered American law they did so via European émigrés such as Friedrich Kessler.<sup>86</sup>

Readers will no doubt be able to think of many other examples, and perhaps a few counter-examples, but a fair comparison shows that the United States has lagged behind most other advanced nations in extending protection to outsider groups.

### III. INHIBITING INFLUENCES

The question is why. We posit two answers: America's early literature, and its way of doing business. Fiction may promote the development of empathy, as Hunt maintains.<sup>87</sup> But, as we shall see, early American fiction celebrated warriors, settlers who chopped down trees, Native American killers, and plantation owners who managed large numbers of slaves—not Dickensian factory workers, the homeless, criminals, or slaves.<sup>88</sup>

Fiction may instill empathy, but the exploiting class can use fiction just as effectively as the exploited class. Early writers and political

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82. Statutes forbidding this practice in the U.S. began to appear only in the late 1800s and early 1900s. *See generally* WALTER L. TRATTNER, *CRUSADE FOR THE CHILDREN* 45 163 (1970).
83. Clark Nardinelli, *Child Labor and the Factory Acts*, 40 J. ECON. HIST. 739, 741 (1980).
84. *See Ethics Guide: Animal Welfare Legislation*, BBC, [http://www.bbc.co.uk/ethics/animals/defending/legislation\\_1.shtml](http://www.bbc.co.uk/ethics/animals/defending/legislation_1.shtml) [<https://perma.cc/ES8Q-NBLD>] (last visited Oct. 13, 2019).
85. *See* Clyde Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 484 85 (1976) (noting the majority rule that workers have no rights to a job).
86. *See* Friedrich Kessler, *Contracts of Adhesion Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943) (positing that form contracts violate freedom in contracting).
87. HUNT, *supra* note 14, at 38 43; *see also* P. Matthjis Bal & Martjin Veltkamp, *How Does Fiction Reading Influence Empathy? An Experimental Investigation on the Role of Emotional Transportation*, 8 PLOS ONE, Jan. 2013, at 1, 2 4.
88. *See infra* notes 89 96 and accompanying text. *See also* Delgado, *Watching Opera*, *supra* note 1, at 292 95 (noting that early America fiction celebrated adventurers and pioneers).

figures, even ones with towering reputations like Thomas Jefferson, Benjamin Franklin, and Abraham Lincoln, depicted blacks and Native Americans in disparaging terms, perhaps to better justify their harsh treatment of those groups.<sup>89</sup> Movies such as D.W. Griffith's *The Birth of a Nation*, based on the novel, *The Clansman*, by Thomas Dixon, romanticized the Southern way of life,<sup>90</sup> as did *Gone with the Wind*.<sup>91</sup> Even white abolitionist writing such as *Uncle Tom's Cabin* portrayed gentle, kindly blacks, not impatient revolutionaries like Denmark Vesey or Toussaint L'Ouverture.<sup>92</sup> Most novels and short stories about westward expansion or war glorified those concepts; the few that questioned them, such as *Red Badge of Courage*,<sup>93</sup> found them bitter-sweet.<sup>94</sup>

Native American captivity tales entertained female readers with stories of savage Native Americans carrying off white women to unimaginable fates.<sup>95</sup> James Fenimore Cooper, perhaps the most sympathetic of storytellers about Native Americans, nevertheless painted them as radically unlike white men and women.<sup>96</sup> Frontier narratives depicted heroic trappers and settlers battling Native Americans, wild animals, raging blizzards, treacherous rivers, and other hazards.<sup>97</sup> Even Steven Crane, who wrote admiringly of Native Americans, wrote disparagingly of Mexicans.<sup>98</sup> Nineteenth-century travel writers and journalists depic-

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89. See PEREA ET AL., *supra* note 68, at 99, 100-03 (citing passages by these historic figures).

90. THOMAS DIXON, *THE CLANSMAN* (The Univ. of Ky. Press ed. 1970) (1905) (depicting the early Klan in sympathetic terms).

91. MARGARET MITCHELL, *GONE WITH THE WIND* (1936).

92. Compare HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN* (Wordsworth Ltd. ed. 1995) (1852) (depicting the South in glorified terms), with DAVID ROBERTSON, *DENMARK VESEY: THE BURIED STORY OF AMERICA'S LARGEST SLAVE REBELLION AND THE MAN WHO LED IT* (1st ed. 1999).

93. STEVEN CRANE, *RED BADGE OF COURAGE* 32, 90-91 (Max J. Herzberg ed., D. Appleton Century Comp. 1937) (1895).

94. *Id.* at 91.

95. See, e.g., MARY ROWLANDSON, *THE SOVEREIGNTY AND GOODNESS OF GOD* 67, 77-78 (Neal Salisbury ed. 1997) (1682) (depicting the horrors of being a white woman captured by wild Native Americans); FRANCES ROWE KESSLER, *THE NATIVE AMERICAN CAPTIVITY NARRATIVE: A WOMAN'S VIEW*, at xiii-xiv (1990) (same).

96. JAMES FENIMORE COOPER, *LAST OF THE MOHICANS* 18-19 (David McKay Co. 1928) (1826).

97. See *supra* notes 87-96 and accompanying text (discussing works celebrating these rugged adventurers).

98. See Steven Crane, *A Man and Some Others*, 53 *CENTURY ILLUSTRATED MONTHLY MAG.* 601, 606 (Nov. 1896), available at <https://babel.hathitrust.org/cgi/pt?id=mdp.39015062272128&view=1up&seq=7> [<https://perma.cc/>

ted conquered people as drunken, wicked, and cowardly, casting white people as their victims or saviors.<sup>99</sup>

Not only did America's early fiction promote sympathy for the overlords, its geography and economic attitudes encouraged it as well. The wide-open spaces encouraged a spirit of acquisition and self-interest. Consider that the colonists decamped from Europe for a life of log cabins and Native American raids at the very time when Europe was undergoing the social and cultural changes of the Enlightenment and talk there was rife with the glories of science, art, and the rights of man.<sup>100</sup> The settlers missed out on one humanizing influence, and immersed themselves in another that had the opposite effect. Aristocratic Virginians living civilized lives on the East Coast may have read Enlightenment authors; but the rest of the country, including the rugged settlers carving out a living on the frontier, did not.

As mentioned, economics may have played a part, as well.<sup>101</sup> In Great Britain, mercantilism rewarded empathy, just as novel-reading did. A merchant or employer who could place himself in the shoes of a customer or worker might gain an edge on the competition. He could understand what the other party coveted and aim to satisfy those wants and needs in return for something he himself wanted. But in most of the young country, an economy based on labor-intensive cotton or tobacco farming, hunting, trapping, logging, ranching, or mining required little of that quality. In fact, a settler who hesitated to cut down a stand of old-growth trees could easily lose out to one who quickly lifted the axe.<sup>102</sup>

Of course, capitalism could be cruel, too. But shop owners and factory operators at least had to negotiate with their hired hands. In England, Parliament could, and did, pass child-labor laws.<sup>103</sup> In the United States, a slave owner did not have to negotiate with his slaves, and the Constitution protected that institution in at least six clauses.<sup>104</sup>

Empathy does not come easily. Living in a rude, threatening environment inhibits it, just as do hyper-competitive and bureauc-

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99. See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1261-75 (1991) (describing racial depictions over the years).

100. See *supra* notes 42-43 and accompanying text.

101. See Delgado, *False Empathy*, *supra* note 1, at 75-77.

102. See SHANE (Paramount Pictures 1953) (discussing the hardy spirit of the West).

103. See *supra* note 83 and accompanying text (discussing three British factory acts).

104. See PEREA ET AL., *supra* note 68, at 103-04 (listing some of these clauses).

ratized settings where human relationships are distant and impersonal.<sup>105</sup> Since legal formalism depersonalizes, it probably inhibits empathy as well.<sup>106</sup> (Hence, in the words of our title, judges may actually not cry). Living with crime and terror does the same.<sup>107</sup> Extreme inequality also discourages empathy, since there is little point in cultivating a close relationship with a destitute stranger who has little to trade.<sup>108</sup>

Still, in most settings, empathy is an advantage and one of the most prized human traits.<sup>109</sup> It makes others eager to deal with you, confident that you will reciprocate their friendship later. This is why nations that exhibit an empathy deficiency eventually tread a lonely path, a lesson that President Trump and his administration are beginning to learn as allies abandon us one by one.<sup>110</sup> One benefit of reading Lynn Hunt, Wayne Booth, or Christopher Stone is that it invites reflection about our national culture and reading habits and their relation to self-rule.

We believe this holds true for lawyers and judges, which is where President Obama's remarks about wise judges come in.

#### IV. JUDGING AND THE ROLE OF TEXTS

All of us like to think of the common law as evolving toward ever-higher levels of wisdom, and we have even higher hopes for our public or constitutional jurisprudence. Yet, our judicial system has yielded a number of decisions that mar the reputations of famous judges and prompt us, years later, to ask: *What were they thinking?*

Of course, appellate judges are the most text-based in their daily work, but trial judges consult texts, too, particularly in the form of statutes, prior decisions, and jury instructions.

For this reason, the role of texts and reading bears examination in connection with judging. To be sure, judges also consult social

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105. See STEFANCIC & DELGADO, LOSE THEIR WAY, *supra* note 1, at 56 (discussing the arid atmosphere in many law firms); Delgado, *False Empathy*, *supra* note 1, at 76 (same).

106. STEFANCIC & DELGADO, LOSE THEIR WAY, *supra* note 1, at 48.

107. See Delgado, *supra* note 24 (noting the criminogenic effect of an impoverished childhood).

108. See Delgado, *False Empathy*, *supra* note 1, at 77.

109. *Id.* at 75.

110. Gerald F. Seib, *Capital Journal: Allies Fear U.S. Retreat into 'Unisolationism'*, WALL ST. J. (June 26, 2018), <https://www.wsj.com/articles/a-europeans-worries-about-american-retreat-1529938558> [<https://perma.cc/W5AS-UHMD>] (arguing that the U.S. is, indeed, doing so); Doyle McManus, *Why is the Great Negotiator Falling Short?*, SEATTLE TIMES (May 19, 2018), <https://www.seattletimes.com/opinion/why-is-the-great-negotiator-falling-short/> [<https://perma.cc/WX3B-NKJT>] (same).



knowledge, which includes not only their first-hand experiences but also vicarious experiences gained from reading.

In an earlier article,<sup>111</sup> we identified a number of Supreme Court decisions for our personal hall of infamy: such as *Dred Scott v. Sandford*<sup>112</sup> and *Plessy v. Ferguson*,<sup>113</sup> which considered the rights of blacks, and certain Native American cases, including *Johnson v. M'Intosh*,<sup>114</sup> which approved the so-called Discovery Doctrine. We also nominated the Chinese Exclusion Case, *Chae Chan Ping*,<sup>115</sup> the Japanese Internment cases,<sup>116</sup> *Bradwell v. Illinois*,<sup>117</sup> which denied a bar application to a woman, *Buck v. Bell*,<sup>118</sup> the “three generations of imbeciles” sterilization case, and *Bowers v. Hardwick*,<sup>119</sup> the case that approved Georgia’s statute outlawing sodomy.<sup>120</sup>

It struck us that one could see these cases, which stain the reputations of famous judges, as products of their inability to see immigrants, gays, Muslims, Chinese, Native Americans, or blacks as persons like us, with feelings, hopes, and fears. We wondered whether this might suggest a role for law and literature, since reading texts humanizing all these groups might, conceivably, enable judges to avoid handing down embarrassing opinions; “Lynn Hunt 101 for judges,” in short.

We found, at best, weak support for this supposition. In most of the abovementioned cases, a counter-narrative was, in fact, close at hand. For example, Justice Holmes, who wrote *Buck v. Bell*,<sup>121</sup> was a camp follower of the American eugenics movement, which was then in

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111. See Delgado & Stefancic, *Norms and Narratives*, *supra* note 1, at 1934 (discussing entrapment in the current social mindset).

112. 60 U.S. 393 (1856).

113. 163 U.S. 537 (1895).

114. 21 U.S. (8 Wheat.) 543 (1823).

115. 130 U.S. 581 (1889).

116. *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

117. 83 U.S. 130 (1873).

118. 274 U.S. 200, 207 (1927).

119. 478 U.S. 186 (1986).

120. Today, we could name others: for example, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (upholding indefinite detention of persons charged with terrorism), and *Bush v. Gore*, 531 U.S. 98 (2000) (awarding the election to the Republican candidate on the basis of very strained reasoning). See also Editorial Board, *Bigoted and Feckless, the Travel Ban is Pure Trump*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/26/opinion/trump-travel-ban-supreme-court.html> [https://perma.cc/5CCE-VAYH] (deploring the travel bans and related cases).

121. *Buck*, 274 U.S. at 205.

its heyday.<sup>122</sup> To him, his depiction of allegedly simple-minded Carrie Buck must have seemed obvious and true. Yet even then the scientific community was beginning to reject eugenicists' exaggerated claims. Early editions of the Encyclopedia Britannica, for example, eschewed crass eugenic claims and took a more moderate view of the role of heredity in mental disorders and retardation,<sup>123</sup> and leading biologists were beginning to weigh in, as well.<sup>124</sup> Justice Holmes might have educated himself by seeking out and reading texts like these—they were available—but evidently he did not.

Much the same holds true for *Bowers v. Hardwick*. In 1986, when Justice White based his decision to uphold Georgia's statute outlawing sodomy on a history of social condemnation of that practice, he focused on statutes in a number of states—in short, comparatively old texts.<sup>125</sup> He also rejected the very idea that sodomy might be implicit in the concept of ordered liberty or deeply rooted in the nation's history and tradition.<sup>126</sup> Yet, writings by Walt Whitman, Christopher Isherwood, E.M. Forster, W.H. Auden, and James Baldwin all had described homosexual relations as potentially loving and constructive.<sup>127</sup>

Consider the following passage from James Baldwin's first novel, *Giovanni's Room*, published in 1956, thirty years before *Bowers*, in which the narrator describes his thoughts of Giovanni:

We were both insufferably childish and high-spirited that afternoon and the spectacle we presented, two grown men, jostling

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122. See STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 365–66 (2d ed. 1996) (discussing how early eugenic beliefs contributed to a cavalier attitude toward reproductive freedom).
123. See 13 *THE ENCYCLOPAEDIA BRITANNICA* 353–54 (11th ed. 1910) (noting how eugenic-determinist beliefs were beginning to change).
124. *E.g.*, DANIEL J. KEVLES, *IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY* 122 (1st ed. 1985) (noting that the scientific view was known to be changing at the time Holmes wrote); KENNETH M. LUDMERER, *GENETICS AND AMERICAN SOCIETY: A HISTORICAL APPRAISAL* 121–24 (1972) (same).
125. *Bowers v. Hardwick*, 478 U.S. 186, 193–94 (1986).
126. *Id.* at 194.
127. See BALDWIN, *supra* note 54; Jonathan H. Fryer, *Sexuality in Isherwood*, 22 *TWENTIETH CENTURY LITERATURE* 343, 350 (1976); Roz Kaveney, *An Introduction to W H Auden's 'Lullaby'*, BRITISH LIBR. (May 25, 2016) <https://www.bl.uk/20th-century-literature/articles/an-introduction-to-w-h-audens-lullaby> [<https://perma.cc/EZ7U-LWQU>]; James E. Miller, Jr., *Sex and Sexuality*, WALT WHITMAN ARCHIVE [https://whitmanarchive.org/criticism/current/encyclopedia/entry\\_49.html](https://whitmanarchive.org/criticism/current/encyclopedia/entry_49.html) [<https://perma.cc/JQ6T-U2LR>] (last visited Oct. 2, 2019); Kate Symondson, *E M Forster's Gay Fiction*, BRITISH LIBR. (May 25, 2019) <https://www.bl.uk/20th-century-literature/articles/e-m-forsters-gay-fiction> [<https://perma.cc/2A47-VLLC>].

each other on the wide sidewalk, and aiming cherry-pits, as though they were spitballs, into each other's faces, must have been outrageous. And I realized that such . . . happiness out of which it sprang yet more so; for that moment I really loved Giovanni, who had never seemed more beautiful than he was that afternoon. And watching his face, I realized that it meant much to me that I could make his face light so bright . . . . And I felt myself flow toward him, as a river rushes when the ice breaks up.<sup>128</sup>

Reading such a lyrical passage full of love and excitement over another being, one is tempted to ask how the authors of *Bowers v. Hardwick* could have written as they did, if they had read the passage at all.

We found similar texts extant at the time of the other cases—our personal parade of horrors—that we mentioned earlier. Articles and books depicting Japanese as loyal were available at the time *Hirabayashi* and *Korematsu* came down.<sup>129</sup> Abolitionist writing such as *Uncle Tom's Cabin* was in print and circulating at the time of *Dred Scott* and *Plessy*. And so on.

## V. DO JUDGES CRY?

*Why should that be?*, we wondered. We posited that humanizing narratives like the ones mentioned above seldom alter judges' behavior, much less engage their emotions, because, simply, they are rarely found in the canon, the group of texts recognized as valid and important during a given period in history.<sup>130</sup> They may be available in a technical sense, but they are unlikely to come to the attention of busy judges. If they do come to their attention, they are apt to strike them as coercive, political, or unrepresentative.<sup>131</sup> The very forces that lead judges astray are the ones that lead to the formation of a literary canon that is bland, uniform, and unlikely to save judges from serious errors. Judges, then, rarely have reason to cry.

As a test case, we selected one period—the last fifty years or so—and looked at the canon of works both contained in the law-and-literature movement and found in popular anthologies used in law schools.<sup>132</sup> Despite the objective of at least some of these anthologies'

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128. BALDWIN, *supra* note 127 at 110.

129. ETSU INAGAKI SUGIMOTO, *A DAUGHTER OF THE SAMURAI* 206 09 (Special ed., Doubleday, Page & Co. 1925) (depicting Japanese Americans as normal, and loyal to the United States).

130. *See infra* note 132.

131. Delgado & Stefancic, *Norms and Narratives*, *supra* note 1, at 1956 57.

132. *Id.* at 1954 (listing the current canon).

compilers to present aspirational, liberating works, the range of those included in the lists was remarkably narrow, with most of the novels written by white men writing about white men and their experiences.<sup>133</sup> The canon contained little more than a token representation of the views of indigenous people, Latinos, Muslims, or feminists of color, to name just three groups whose legal problems are now or are likely soon to be on law's front burner. We attached a second, broader list that contained outsider writing as an appendix, but had little faith that judicial conferences and colleges would adopt it any time soon.<sup>134</sup> (And, indeed, to our knowledge, they have not.)<sup>135</sup>

Subsequently, we examined a little more closely the mechanisms that suppress texts and messages that go against the common sense of the time.<sup>136</sup> We also examined why outrageous texts containing biased or derogatory messages and stereotypes are only recognized as such years later, at which point we recoil in wonder, and ask how anyone could have believed *that*.<sup>137</sup>

## VI. THE EMPATHIC FALLACY

In an article on First Amendment ideology, we coined an *empathic fallacy* to explain resistance to new narratives, particularly in the area of racial images and stereotypes.<sup>138</sup> We examined the historical and social depiction in cartoons, posters, household kitsch, and films of each of four major minority groups in the United States. We noted that the images—the Sambo, the murderous Native American, the dirty Mexican, the sneaky Asian, and so on—changed from era to era, depending on what the surrounding society needed.<sup>139</sup> In one era, the images might depict a group as so dim-witted that it is hard to see how they survived to adulthood.<sup>140</sup> At other times, images would portray them as terrifying, larger than life, and with designs on white women—

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133. *Id.* at 1955, 1961 app. A.

134. *Id.* at 1980 app. B.

135. See Robert C. Berring, *Suggestions for American Judges: Ten Books that Merit Reading*, 10 J. APP. PRAC. & PROCESS 347 (2009) (recommending a narrow range of books).

136. See Delgado & Stefancic, *supra* note 99, at 1277 n.151.

137. See STEVEN BENDER, MEA CULPA: LESSONS ON LAW AND REGRET FROM U.S. HISTORY 1 (2015).

138. Delgado & Stefancic, *supra* note 99, at 1281.

139. *Id.* at 1260.

140. *Id.* at 1259 60.

that is, not at all stupid, shiftless, or incompetent, but indeed the opposite: cruel and bloodthirsty.<sup>141</sup>

Seeing these appalling images, one is tempted to ask, how could these cartoonists, writers, film-makers, and graphic designers—individuals, certainly, of higher-than-average education—create them? We concluded that they simply did not see the images as grotesque at the time.<sup>142</sup> They rang true to them and their readers, were not particularly demeaning, and certainly fell well within artistic license.<sup>143</sup> Our much-vaunted system of free expression, with its marketplace of ideas, cannot easily correct serious systemic ills such as racism, homophobia, or sexism because we simply do not see them as problematic at the time.<sup>144</sup>

No one can formulate an effective contemporaneous counter-message to challenge such a depiction. This happens only later, after consciousness shifts and society adopts a different narrative, sometimes just as demeaning in its way. Before then, any counter-narrative would seem humorless, ridiculous, or wrong.<sup>145</sup> At any era, a diligent researcher may be able to find counter-narratives such as the peace-loving Native American, the intelligent black teacher, or hard-working Mexican.<sup>146</sup> But works such as these are apt to have very small audiences.<sup>147</sup> Sometimes they are “discovered” many years later, like the works of Zora Neale Hurston or Tomás Rivera, and we wonder why they failed to catch on with the readers of their day.<sup>148</sup> In our era, one who insists on a truthful depiction—of the law-abiding immigrant, for example—runs the risk of being derided by President Trump as “P.C.”<sup>149</sup> If the

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141. *Id.* at 1264, 1269, 1271–75.

142. *See* BENDER, *supra* note 137.

143. *See* Delgado & Stefancic, *supra* note 99, at 1278–79, 1281.

144. *Id.* at 1278, 1282, 1284–88. TV images can provoke the same response. *See*, for example, the current controversy that arose when Alabama Public Television refused to air an episode of the children’s show “Arthur” that featured a same-sex wedding. Paul P. Murphy, *An Episode of the Kid’s Show ‘Arthur’ Featuring a Same-sex Wedding Won’t Air in Alabama*, CNN (May 21, 2019, 8:22 PM), <https://www.cnn.com/2019/05/21/us/arthur-alabama-public-television-trnd/index.html> [<https://perma.cc/FQ8J-QZ5H>].

145. Delgado & Stefancic, *supra* note 99, at 1277–79.

146. *E.g.*, DANCES WITH WOLVES (Tig Productions 1990).

147. Delgado & Stefancic, *supra* note 99, at 1281.

148. *Id.*

149. *See, e.g.*, MICHIKO KAKUTANI, THE DEATH OF TRUTH 89–103 (2018).

media publish such a story, President Trump derides it as “fake news.”<sup>150</sup>

It turns out, then, that many of our fellow citizens simply may not see many forms of discrimination, bias, and prejudice as wrong at the time. The racism of other times and places does stand out and strike us as glaringly wrong. But this happens only decades or centuries later; we acquiesce today with few qualms, little realizing that a later generation will ask the *How could they?* question about us.<sup>151</sup>

Incorporated into the way we see and organize the world, differences among human groups are among the preconceptions we use to make sense of what is in front of us.<sup>152</sup> If these beliefs—about Mexican immigrants, say, as dangerous and greedy—form part of the dominant narrative, how could they come into serious question? History shows that the dominant narrative changes very slowly; we interpret new stories in light of the old. Ones that deviate too markedly from our current stock are dismissed as extreme, “politically correct,” or just plain wrong.<sup>153</sup>

The only such stories that we seem prepared to condemn are the old ones giving voice to the racism of an early age, ones that society has already begun to reject. Thus, we can condemn Justice Brown for writing as he did in *Plessy v. Ferguson*, but not free-speech absolutists who today reject remedies for campus hate speech, failing to notice the remarkable parallels between the two.<sup>154</sup>

In short, we always interpret new narratives in light of the old ones. The belief that we can somehow control our consciousness despite limitations of time and positionality is what we have termed the *empathic fallacy*.<sup>155</sup> The fallacy consists of believing that we can enlarge

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150. *Id.* at 135–49.

151. Delgado & Stefancic, *supra* note 99, at 1277–81.

152. *Id.* at 1278–80.

153. *Id.* at 1279–81; see also KAKUTANI, *supra* note 149 (noting some of the mechanisms by which Trump’s worldview tends to take root and spread).

154. Delgado & Stefancic, *supra* note 99, at 1277–79. Indeed, some judicial nominees today are beginning to treat *Brown v. Board of Education* as an open question. See Eugene Scott, *Many Trump Judicial Nominees Won’t Affirm the Brown v. Board Ruling. And That Concerns Some Legal Experts.*, WASH. POST (May 17, 2019), [https://www.washingtonpost.com/politics/2019/05/17/many-trump-judicial-nominees-wont-affirm-brown-v-board-ruling-that-concerns-some-legal-experts/?noredirect=on&utm\\_term=.742314f43311](https://www.washingtonpost.com/politics/2019/05/17/many-trump-judicial-nominees-wont-affirm-brown-v-board-ruling-that-concerns-some-legal-experts/?noredirect=on&utm_term=.742314f43311) [<https://perma.cc/BS5V-6E8Y>].

155. Delgado & Stefancic, *supra* note 99, at 1261, 1281. Its correlate, the *pathetic fallacy*, holds that nature is like us; that it is endowed with feelings, moods, and goals we can understand. A poet, for example, noticing that it is raining and feeling sad, might write that “the world

our sympathies through linguistic means alone. By exposing ourselves to ennobling narratives, we can broaden our experience, deepen our empathy, and achieve new levels of identification with other people.

History shows, however, that we can only do this to a limited extent. New statements, messages, texts, novels, and even experiences that deviate too sharply from what we know strike us as dubious, or a mere exception to a well-established rule. They may even fail to register at all. They simply don't "compute."<sup>156</sup>

## VII. EMPATHY AND FALSE EMPATHY

Empathy can also be false or misconceived. Recall that we mentioned earlier that empathy contains a cognitive component, which, when used accurately, can make both parties to a transaction better off.<sup>157</sup>

But it can also be one-sided and end up benefitting only one party, consciously or not. Everyone knows of husbands who give their wives a lug wrench for their birthday, or wives who give their husbands two tickets to the opera, thinking, of course, that would make the other happy.<sup>158</sup> Similarly, white folks looking for ways to help blacks or Latinos may put themselves in the place of those groups and ask what they, the white person, would want if they were black or brown. They end up providing the kinds of help or services that they think a Latino or a black person would want if they, the white person, were Latino or black, but with all the same history, experiences, perspective, and needs that they have now.<sup>159</sup> Rarely do white people benefit from the double consciousness that W.E.B. Du Bois articulated, the ability to see oneself through the eyes of others.<sup>160</sup> Lack of it results in a kind of hubris, overestimating one's competence because one is not in touch with another's reality. One can easily end up inadvertently harming the other person or thinking one has benefitted him when one has not.

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weeps with me." Both are forms of hubris, the belief that we can be more than we are.

156. *Id.* at 1281 82.

157. *See* Delgado, *False Empathy*, *supra* note 1, at 75 (discussing how empathy "ought to benefit the possessor . . . because it enables him or her to make beneficial trades"); Delgado, *Watching Opera*, *supra* note 1, at 291 92 (considering "the function of empathy in a society's economy").

158. Delgado, *False Empathy*, *supra* note 1, at 75.

159. *Id.* at 70 71.

160. *See* W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 3 (U. of Mass. Press 2018) (1903) (discussing double consciousness).

Take an actual white-to-white illustration: the Settlement House movement of the early nineteen-hundreds.<sup>161</sup> Many of the upper middle-class ladies who lived and worked in these houses as volunteers a hundred years ago professed great concern over the plight of the European immigrants to whom they provided services.<sup>162</sup> Yet their sympathies did not extend to learning the immigrants' languages or ways. Instead, the volunteers taught them personal hygiene, house-keeping, English, and how to prepare American food, such as roast beef and mashed potatoes, when the immigrants ate perfectly good food of their own, such as pierogis, goulash, or borscht.<sup>163</sup>

Derrick Bell pointed out a similar paradox in his famous *Serving Two Masters* article in the *Yale Law Journal*, in which he notes the conflict of interest inherent in much public-interest lawyering, where the lawyer—perhaps at a major reform center like the ACLU or NAACP—may want a sweeping breakthrough, while the client wants something more modest, such as better-funded schools or just a pair of sturdy work shoes.<sup>164</sup>

Empathy can also be shallow and short-lived. With all of the disasters taking place in the world, it is easy to develop compassion fatigue. Your best friend, channeling President Trump, may call you an un-American, soft-hearted liberal who is out of touch with current realities.<sup>165</sup>

All these mechanisms, then, work against empathy—at least the kind that stems from reading texts or talking with others. Perhaps their

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161. Delgado, *False Empathy*, *supra* note 1, at 70–71 (describing a movement in which wealthy society ladies like Jane Addams volunteered to tutor recent immigrants from southern and eastern Europe in how they were expected to behave in America); *see also* Debra Michaels, *Jane Addams*, NAT'L WOMEN'S HIST. MUSEUM (2017), <https://www.womenshistory.org/education-resources/biographies/jane-addams> [<https://perma.cc/X5A4-DUD6>].

162. Delgado, *False Empathy*, *supra* note 1, at 70–71; Michaels, *supra* note 161.

163. Delgado, *False Empathy*, *supra* note 1, at 70, 74; *see also* Michaels, *supra* note 161.

164. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 489–91 (1976) (noting the inherent clash between a lawyer's desire to aid the client and to press for broad social change); *see also* Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 4 (1990) (tracing how the legal system has reinforced negative stereotypes by “excluding the speech of subordinated groups from legal rituals altogether, or by systematically devaluing their speech”).

165. *See* Adriana Cohen, *The Out-of-Touch Party*, REAL CLEAR POLS., (Jan. 19, 2018), [https://www.realclearpolitics.com/articles/2018/01/19/the\\_out-of-touch\\_party\\_136038.html](https://www.realclearpolitics.com/articles/2018/01/19/the_out-of-touch_party_136038.html) [<https://perma.cc/3ZW6-XA64>].



combined force accounts for the relative slow rate of change that Lynn Hunt describes. We live in a faster-paced world now. Many have given up novel reading.<sup>166</sup> Others get their news or accounts of reality from the like-minded or from social media.<sup>167</sup> If they hear about radically different people or the poor, it is often in disparaging terms.<sup>168</sup>

### VIII. BOOSTING ONE'S OWN EMPATHY

Unless the reader is willing to accept change that happens at a glacial pace, spanning decades if not centuries, we have two small suggestions. We are speaking of change emanating from writers, lawyers, teachers, and other knowledge workers, not activists. Derrick Bell, Black Lives Matter, and the open-borders movement have some ideas for anyone who will listen, but they are not what we are talking about here, which is namely change that proceeds at the level of imagination or ideation.

One way to broaden empathy is to introduce discordance or inconsistency in the belief system of one's audience, so as to provoke reflection or change.<sup>169</sup> A friend related an example of how this might work. He described a man, a Nazi sympathizer, who despised the weak and poor and thought them, by and large, a bunch of whiners eager to feed from the public trough. One day, the man attended a rally at which a white-supremacist speaker was railing along those lines and, of course, agreed with much of what he heard. The speaker then went on to say that society needed to cut back on aid to the disabled, most of whom were unlikely to contribute much to society anyway, so that if they died young, no one would be the worse off.<sup>170</sup>

The listener happened to have a daughter who he was very fond of and who had been born with a cleft palate. On hearing the speaker's

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166. Christopher Ingraham, *Leisure Reading in the U.S. is at an All-Time Low*, WASH. POST (June 29, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/06/29/leisure-reading-in-the-u-s-is-at-an-all-time-low/> [<https://perma.cc/69MY-U5TC>].

167. Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RES. CTR. (Dec. 10, 2018), <https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/> [<https://perma.cc/9S2V-FY2R>]; Nick Funnell, *Bubble Trouble: How Internet Echo Chambers Disrupt Society*, THE ECONOMIST, <http://shapingthefuture.economist.com/bubble-trouble-internet-echo-chambers-disrupt-society/> [<https://perma.cc/PY89-F48C>] (last accessed Oct. 6, 2019).

168. See Delgado, *J'Accuse*, *supra* note 1, at 128-32 (noting that President Trump often speaks in this manner).

169. See Delgado, *False Empathy*, *supra* note 1, at 85 (discussing the need for a due process of storytelling).

170. Interview with anonymous in Tuscaloosa, Ala. (2019).

careless remarks, he began reconsidering his own position, eventually denouncing white supremacy entirely. One can create such doubts by getting to know one's audience and using that knowledge to plant seeds of doubt.

A second approach is a variation on the first. A pair of French movies starring Gerard Depardieu help to explain what we mean. In *Jean de Florette*<sup>171</sup> and *Manon of the Spring*<sup>172</sup> a French family consisting of an earnest hunchback, Jean, played by Depardieu, and his wife and young daughter, Manon, leave their bourgeois lives in the city for the French countryside, where they hope to make a fresh start with clean air and healthy work and food, far from big-city problems such as noise and congestion.<sup>173</sup>

They are able to make the switch when Jean inherits a small tract of land in Provence, an agricultural province in the south of France. A tax accountant by training, Jean approaches his new calling, agriculture, with boundless energy coupled with book-learning. Because he considers himself an expert in numbers, he sets out to apply the theory of exponential increase to raising rabbits, which he can sell for food. Beginning with an expensive, very large breeding pair, he will cross their offspring producing four rabbits, then eight, then sixteen, then thirty-two, and so on. To feed the animals, he will raise lettuce, which in turn requires water.

He thinks he has allowed for that, having studied charts showing that the region typically receives enough rainfall for all his needs. The neighbors in the nearby village know better, however, and make fun of him behind his back when he plants his lettuce garden in the sun. They have traditionally planted in the shade. One well-meaning neighbor asks him about it, but Jean gives a scientific explanation. He confidently expects enough rain to ward off parching, and the vegetables will grow faster in the sun than they would in the shade.

It turns out, however, that the neighbors, even the helpful one, have a dark side. The local village elder, played by Yves Montand, and his nephew, have long had their eyes on Jean's land. They know that if the hunchback fails at his harebrained venture, they can buy the land from him cheap. When Jean inherited the property, it came with a map showing a spring inside a nearby cave. He never expected it to be important because the charts show that the area gets plenty of rain.

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171. JEAN DE FLORETTE (Orion Pictures 1986).

172. MANON DES SOURCES (Pathé Distribution 1986).

173. The following accounts of *Jean de Florette* and *Manon des Sources* is taken from *Rodrigo's Homily: Storytelling, Elite Self-Interest, and Legal Change*. See Richard Delgado, *Rodrigo's Homily: Storytelling, Elite Self-Interest, and Legal Change*, 87 OR. L. REV. 1259, 1272-76 (2008) (discussing the two films.).

The neighbors know better. They know that Montand and his nephew long ago blocked the spring with concrete, changing its course. But they say nothing and wait for the inevitable.

Sure enough, summer arrives, and with it unremitting heat and drought. Jean's vegetables start to wither and his rabbits droop as well. He frantically carries water by mule and on his own back, filling heavy containers from a communal well in the distant village. His mule soon dies from overwork. His wife pitches in, but repeat trips with heavy barrels on their backs bring them both close to break-down.

In desperation, Jean beseeches Montand to lend him his mule. Montand turns him down, explaining that he needs it for work around his own farm.

Montand's nephew is an appealing young fellow, but, alas, homely. His uncle fears that the lad will never marry, and the family line will end. The movie ends with Montand aging, the unfortunate nephew still single, the hunchback dead, and his family forced to abandon the farm. After Jean dies, it emerges that he and Montand, unknown to either, are blood relatives. If Montand had come to his aid, the family line would have continued. Montand dies a broken man.

The sequel, *Manon*, begins some years later. The ugly nephew has prospered from raising carnations on a farm of his own, but is still unmarried. Jean is dead from overwork, and his farm lies idle. His daughter, however, has grown up and is now a beautiful recluse making a living as a shepherd in the surrounding hills. One day, the ugly nephew sees her bathing in a stream and falls desperately in love with her. She finds him repulsive, however, and her revulsion only increases when she discovers the hidden spring, blocked with concrete, and realizes that had it not been for his and Montand's dirty work, her father would have made a success of the farm and would still be alive.

Vowing revenge, the young woman changes the course of the spring a second time, so that the village's well grows dry. The villagers realize that Montand's greed has brought about disaster for the town as well as the end of his family line.

Jean's good nature and boundless energy have proved no match for his neighbors' superior knowledge and greedy designs. The villagers, all of whom were complicit in the plot to destroy him, end up destitute themselves. Failing to see the newcomers as like themselves, they did not identify with them and even made fun of their fumbling efforts. If they had seen the connection between themselves and the struggling family, both sides would have been better off. The hunchback would have had plenty of water, while the villagers would have had enough, too. Jean's book-learning and imaginative approach to farming might have helped them break out of old habits, as well. They might, for example, have planted roses in addition to carnations and made even larger profits off their farms.

The films are powerful parables enabling us to see struggling groups, perhaps like Latino immigrants today, in ways that quicken

empathy's development. They also illustrate the main points of this essay. They can prompt an audience to mentally connect a new group with values they themselves already hold dear. At the same time, the stories remind us of personal interests, such as who will pick our food,<sup>174</sup> take care of us in our old age,<sup>175</sup> or replenish the country's rapidly declining birth rate.<sup>176</sup> If the current story about immigrants that you tend to hear on right-wing radio or Fox News is both unsympathetic and untrue—painting them as dirty, grasping, criminal, and unwilling to learn English,<sup>177</sup> when the truth is just the opposite<sup>178</sup>—then stories of hard-working, law-abiding newcomers who merely want to take care of their families, stay out of trouble, and send money home to educate children or provide medicine for an ailing grandmother can perhaps serve as a partial antidote.<sup>179</sup>

All such stories, however, will confront the empathic fallacy and will have trouble finding their way into the canon. If they do, many readers will think that they have grasped their meaning, but will have

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174. Chris Morris, *California Crops Rot as Immigration Crackdown Creates Farmworker Shortage*, FORTUNE (Aug. 8, 2017), <http://fortune.com/2017/08/08/immigration-worker-shortage-rotting-crops/> [<https://perma.cc/AHM2-SQLW>].
175. See Richard Delgado, *Rodrigo's Roundelay: Hernandez v. Texas and the Interest-Convergence Dilemma*, 41 HARV. C.R. C.L. L. REV. 23, 60 (2006).
176. Gretchen Livingston, *Is U.S. Fertility at an All-Time Low? Two of Three Measures Point to Yes*, PEW RES. CTR.: FACTTANK (May 22, 2019), <https://www.pewresearch.org/fact-tank/2018/01/18/is-u-s-fertility-at-an-all-time-low-it-depends/> [<https://perma.cc/LV57-7HVZ>].
177. Katie Reilly, *Here Are All the Times Trump Insulted Mexico*, TIME (Aug. 31, 2016), <http://time.com/4473972/donald-trump-mexico-meeting-insult/> [<https://perma.cc/5689-E5XF>]; see also, Carola Suárez-Orozco & Marcelo Suárez-Orozco, *What are the Predominant Stereotypes About Immigrants Today?*, RE-IMAGINING MIGRATION, <https://reimaginingmigration.org/what-are-the-predominant-stereotypes-about-immigrants-today/> [<https://perma.cc/WZA3-YJXF>] (last accessed Oct. 6, 2019).
178. Suárez-Orozco & Suárez-Orozco, *supra* note 177.
179. *Id.*; see also Niall McCarthy, *Immigrants In The U.S. Sent Over \$148 Billion To Their Home Countries in 2017*, FORBES (Apr. 8, 2019), <https://www.forbes.com/sites/niallmccarthy/2019/04/08/immigrants-in-the-u-s-sent-over-148-billion-to-their-home-countries-in-2017-infographic/#5ed4872411f6> [<https://perma.cc/X3PC-LFCF>]; Tracy Jan, *'They said I was going to work like a donkey. I was grateful.'*, WASH. POST (Jul. 11, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/07/11/they-said-i-was-going-to-work-like-a-donkey-i-was-grateful/> [<https://perma.cc/UCS2-FUK8>].

done so only at a superficial level; their empathy will be shallow, even false.<sup>180</sup>

### CONCLUSION

Will judges cry, then? Probably not. As a group, they tend toward narrow, formalistic forms of reasoning,<sup>181</sup> they do little broad reading,<sup>182</sup> and they live upper-class lives with relatively little daily contact with poor people or cultures other than their own.<sup>183</sup> But if one is a devoted storyteller (or moviemaker or brief-writer), one may be able to give pause to an occasional judge or other decisionmaker—even get one to shed a tear or two.

After all, Judge David Bazelon decided *United States v. Alexander*<sup>184</sup> and wrote a law review article urging the consideration of a “rotten social background” defense.<sup>185</sup> Justice Blackmun wrote a stirring opinion in *DeShaney v. Winnebago County*, the “poor Joshua” case.<sup>186</sup> Judge Nancy Gertner rejected the wooden application of the federal three-strikes guidelines in a case of a black motorist (*Leviner*).<sup>187</sup>

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180. Recall the Settlement House ladies who offered European immigrants training that they did not need. See Delgado, *False Empathy*, *supra* note 1, at 94.

181. See STEFANCIC & DELGADO, *LOSE THEIR WAY*, *supra* note 1, at xi xiv, 33 51, 77 80.

182. See Berring, *supra* note 135.

183. See Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 140 142 (2013).

184. *United States v. Alexander*, 471 F.2d 923, 957 65 (D.C. Cir. 1973) (pondering whether to recognize a defense of severe environmental deprivation).

185. Bazelon, *supra* note 24, at 388 398.

186. *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 192 93, 212 13 (1989). There, the Supreme Court rejected a claim brought by five-year old Joshua DeShaney, permanently disabled after sustained abuse despite lackadaisical home visits by social workers responsible for checking up on his welfare. *Id.* at 192 93. The court held that the state had no duty to shield citizens from private violence, even when its officers knew or should have known of it. *Id.* at 198 200. Many commentators lamented that *DeShaney* erected a nearly insuperable obstacle in the way of actions for negligent child abuse and is at odds with the underlying values of the Constitution. See, e.g., JOHN R. HOWARD, *POOR JOSHUA* 121 139 (2018).

187. See *United States v. Leviner*, 31 F. Supp. 2d 23, 24 25 (D. Mass. 1998) (declining to apply a mandatory federal three-strikes (recidivist) sentencing guideline to a black defendant whose earlier convictions had been automobile-related and likely to have been the product of police racism).

And in earlier times, Justice Harlan dissented indignantly in *Plessy v. Ferguson*, the separate-but-equal case.<sup>188</sup>

Although the Trump administration shows little appetite for human empathy—separating children from their parents at the border<sup>189</sup> and labelling African countries “s-holes,”<sup>190</sup> to name just a few examples—empathy does tend to expand over time, if only slowly. Even today, President Trump’s crude messages have sparked vigorous condemnation from a few.<sup>191</sup> If one wants to be on the right side of history, it behooves one, whether a lawyer or a judge, but especially the latter, to carefully analyze what one is doing for a living. Consulting outsider texts, like this one or the many others mentioned herein, may be a useful start.

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188. *Plessy v. Ferguson*, 163 U.S. 537, 556–59 (1896) (Harlan, J., dissenting) (lamenting the sterile formalism by which the majority found nothing wrong with a railroad ordinance that required separate seating for white and black passengers and predicting that the case would suffer poorly in history’s judgment).

189. *E.g.*, Roger Cohen, *Here There Is Nothing*, N.Y. TIMES (May 10, 2019), <https://www.nytimes.com/2019/05/10/opinion/border-immigration-crisis-guatemala.html> [<https://perma.cc/3XT3-4BL2>] (describing the family-separation policy).

190. *See* Delgado, *J’Accuse*, *supra* note 1, at 127–33 (noting that President Trump’s tweets and speeches display animus toward minorities, immigrants, and African Nations).

191. *See, e.g., id.* at 132.

