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**Using a Narrative Lens to Understand Empathy and
How it Matters in Judging**

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Andrea McArdle*

I. Introduction

In 2009, President Obama announced that his criteria for selecting a Supreme Court Justice included evidence of a capacity for empathy, which, as Supreme Court commentator Dahlia Lithwick noted, he had previously described as “a call to stand in somebody else’s shoes and see through their eyes.”¹ These remarks were consistent with statements he had made when, as a United States Senator, he described the approach to judging called for by the difficult cases that reached the Court. Such cases, he averred, “can only be determined on the basis of one’s deepest values, one’s core concerns, one’s broader perspectives on how the world works, and the depth and breadth of one’s empathy.”²

The President’s remarks triggered a contentious debate over the attributes of empathy and its legitimacy in judicial decisionmaking. Several months later, during widely followed Senate confirmation hearings, Supreme Court nominee Sonia Sotomayor appeared to distance

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¹ Dahlia Lithwick, Slate, *Once More, Without Feeling: The GOP’s Misguided and Confused Campaign against Judicial Empathy* (May 11, 2009) (available at http://www.slate.com/articles/news_and_politics/jurisprudence/2009/05/once_more_without_feeling.html).

² 151 Cong. Rec. S10366 (daily ed. Sept. 22 2005) (statement of Sen. Obama) (cited in Orrin G. Hatch, *The Constitution as the Playbook for Judicial Selection*, 32 Harv. J. L. & Pub. Pol’y 1035, 1041–42 n. 26 (2009)).

herself from the President's embrace of empathetic judging, asserting that "judges can't rely on what's in their heart" and that "[t]he job of a judge is to apply the law. And so it's not the heart that compels conclusions in cases, it's the law."³ At the same time, she suggested that a judge's background knowledge and experience have value in the process of reaching a decision.⁴ In the aftermath of this testimony and seeming disavowal of the President's use of the term "empathy," the question of what empathy is, how it may function in judicial decisions, and its relationship to concepts of emotion, identity, and experience continue to challenge thinking about how and why a capacity for empathy may matter in judging.

In section II of this article, I examine the contested understandings of empathy that the Sotomayor confirmation process illuminated—and consider whether empathy is primarily an emotional or a cognitive capacity, or a multidimensional concept partaking of both. To address the attributes of empathy, I draw from a range of disciplinary treatments and commentators, and situate the concept in relation to an individual's personal experience and social identity.

In section III, I consider what empathy can offer to judging, using a narrative analysis to illuminate the workings or absence of empathy in two Supreme Court opinions decided in the same term of the Rehnquist court—*DeShaney v. Winnebago County Department of Social Services*,⁵ and *Michael H. v. Gerald D.*⁶ Both cases required the Court to address the scope of "liberty" under the Due Process Clause, and both presented compelling facts implicating family relationships involving judicial review of (in *DeShaney*) a state's failure to intervene in, and (in *Michael H.*) a failure to entertain, a father-child relationship. Both illustrated the divisions that existed within the Court at that time, divisions in epistemic practices and interpretive frameworks—that is, between category- and

3 The full exchange with Senator Kyl that elicited this statement from Judge Sotomayor is as follows:

SEN. KYL: Let me ask you about what the president said—and I talked about in my opening statement whether you agree with him. He used two different analogies. He talked once about the first 25 miles of a 26-mile marathon, and then he also said in 95 percent of the cases the law will give you the answer and the last 5 percent legal process will not lead you to the rule of decision. The critical ingredient in those cases is supplied by what is in the judge's heart. Do you agree with him that the law only takes you the first 25 miles of a marathon and that that last mile has to be decided by what's in the judge's heart?

JUDGE SOTOMAYOR: No, sir. That's—I don't—wouldn't approach the issue of judging in the way the president does. He has to explain what he meant by judging. I can only explain what I think judges should do, which is judges can't rely on what's in their heart. They don't determine the law. Congress makes the laws. The job of a judge is to apply the law. And so it's not the heart that compels conclusions in cases, it's the law.

Nomination of Judge Sonia Sotomayor to Assoc. Justice of the S. Ct. before Sen. Comm. on the Jud., 111th Cong., 1st Sess., 2009 Fed. News Serv., at *18 (July 14, 2009, afternoon sess.) (LEXIS).

4 See e.g. *id.* at *9–10 (July 14, 2009, morn. sess.) (colloquy with Sen. Sessions); *id.* at *23 (July 14, 2009, afternoon sess.) (colloquy with Sen. Kyl); *id.* at *3, 5 (July 15, 2009, morn. sess.) (colloquy with Sen. Cornyn) (LEXIS).

5 489 U.S. 189 (1989).

6 491 U.S. 110 (1989).

situation-centered approaches⁷—for recognizing a liberty interest. Both made salient the crucial relationship between these epistemologies and the narratives that illustrated and shaped the Court’s divergent approaches. Taken together, these cases offer an opportunity to assess through narrative analysis the link between a judge’s mode of interpretation and a capacity for empathy.

Specifically, I will model an approach to analyzing the existence or absence of judicial empathy that is informed by narrative and lawyering theory. Drawing on the framework for understanding narrative developed in Anthony Amsterdam and Jerome Bruner’s *Minding the Law*, I first analyze majority and dissenting opinions in *DeShaney*, in which the Court ruled that the substantive component of the Due Process Clause does not impose a duty on local officials to protect a child in response to reports of abuse inflicted by the child’s father.⁸ Using a narrative lens, I consider the majority’s efforts to neutralize the “tragic” facts with a flat, category-centered narrative of the law that drew a bright line between the challenged failure to act and legal liability. I then turn to the dissenters’ characterization of Chief Justice Rehnquist’s majority opinion as formalistic and consider the differences in narrative perspective between the majority opinion and Justice Brennan’s dissent, and the alleged emotionalism of Justice Blackmun’s separate dissenting opinion.⁹ These dissents, I argue, offer a distinct “due process” narrative about the choices entailed in judicial interpretation. In this way, I will seek to identify through narrative analysis whether and how empathy operated in the various *DeShaney* opinions.

Section III then turns to the plurality and principal dissenting opinion in *Michael H. v. Gerald D.*, which declined to recognize that a putative biological father had a constitutionally protected liberty interest in a relationship with a child born while her mother was married to and living with another man.¹⁰ Applying the tools of narrative analysis, the discussion seeks to elucidate what the addition of empathy—as a capacity or a perspective—could have contributed to the plurality’s category-centered understanding of Michael H.’s efforts to formalize a parental relationship with a child who, under a presumption of legitimacy, was recognized as the child of another. Thus, in section IV, I conclude that a capacity for empathy can contribute to a richer, situation-centered inter-

7 The terminology is that of Anthony G. Amsterdam and Jerome Bruner in *Minding the Law* (Harv. U. Press 2000).

8 *DeShaney*, 489 U.S. at 196–97.

9 See *infra* nn. 77–91 and accompanying text.

10 *Michael H.*, 491 U.S. at 129.

pretive framework for understanding a party's perspective or experience and for applying rules flexibly, in recognition of context.

II. Explaining Empathy

If the conception of empathy discussed in the politically charged atmosphere of the Sotomayor hearings was identified with "what's in the judge's heart," the understandings of empathy drawn from a broader academic context indicate a more complex phenomenon, encompassing both one's emotional identification with another and a cognitive capacity to see a situation as another would. In an oft-cited psychological study of empathy, Mark H. Davis identified a multidimensional concept, which includes perspective-taking, empathic concern, fantasizing, and experiencing distress at another's distress.¹¹ On that understanding of the term, an exclusive emphasis on compassion or the emotive register in assessing the role of empathy in judging is reductive.

Lynne Henderson's pre-Sotomayor-era discussion of empathy in a legal context similarly draws on a thicker conception informed by psychological understandings of the term. Thus, her definition encompasses

(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).¹²

Related to concerns voiced in the Senate Judiciary Committee inquiry about a heart-based jurisprudence was the attention given to Judge Sotomayor's statements in past speeches about her Latina identity and its potentially positive contribution to judging.¹³ For Judge Sotomayor's interlocutors, drawing on one's particularity (of background and social identity) raised concerns about bias and thus about the nominee's qualification to serve. However, Judge Sotomayor's statements about how her background might enhance the process of judging find support in the field of philosophy, specifically in epistemology. In *Sotomayor's Reasoning*,¹⁴

¹¹ Mark H. Davis, *A Multidimensional Approach to Individual Differences in Empathy*, 10 JSAS Catalog of Selected Docs. in Psychol. 85, 85 (1980).

¹² Lynne N. Henderson, *Legality and Empathy*, 85 Mich. L. Rev. 1574, 1579 n. 7 (1987).

¹³ See e.g. Nomination of Judge Sonia Sotomayor to Assoc. Justice of the S. Ct., 11th Cong., 1st Sess., Exec. Sess., 155 Cong. Rec. S8822, at *8823 (daily ed. Aug. 5, 2009) (statement of Sen. Coburn discussing Judge Sotomayor's remarks in a speech in which she stated that "transcending personal sympathies and prejudices" might be difficult to achieve) (LEXIS).

¹⁴ Linda Martín Alcoff, *Sotomayor's Reasoning*, 48 S. J. Phil. 122, 122–38 n. 1 (2010).

Philosopher Linda Martín Alcoff offers a different understanding of how social identity operates epistemologically. The Senators' insistence that "Lady Justice be blind"¹⁵ seems to assume that any marker of difference from a perceived norm (the unmarked category) is an index of partiality (toward persons similarly situated). However, Martín Alcoff has recognized that, rather than indicate partiality, or bias, toward those similarly circumstanced, one's social identity, and the experience to which it offers access, contribute to one's baseline knowledge.¹⁶ Martín Alcoff points out, as Sonia Sotomayor had averred in her addresses, that in the context of judging, one's background can serve as a resource in approaching the analysis of facts and law; specifically, one's identity–experience affords a perspective, a mode of attentiveness,¹⁷ to some facts and argument that others' experiences might not capture. Thus, to the extent that empathy encompasses a capacity to take the perspective or understand the situation of another, the particularity of a judge's experience can facilitate that understanding, and that perspective-taking, as judges consider the situations and litigants that come before a court.

In the aftermath of the Sotomayor hearing, judicial and academic commentators reinforce this epistemic view of empathy as a capacity relevant to judging, emphasizing its cognitive function as a tool for understanding others' perspectives and experiences. Expanding on President Obama's use of empathy in the judicial-selection context, legal commentator Dahlia Lithwick distinguishes empathy from favoritism or emotionalism:

Empathy in a judge does not mean stopping midtrial to tenderly clutch the defendant to your heart and weep. It doesn't mean reflexively giving one class of people an advantage over another because their lives are sad or difficult. When the president talks about empathy, he talks not of legal outcomes but of an intellectual and ethical process: the ability to think about the law from more than one perspective.¹⁸

Similarly, Susan Bandes, long a scholar on the role of emotion in law, has focused attention on the cognitive dimensions of empathy in the post-Sotomayor landscape. Over time, Bandes' treatment of empathy evolved from that of a "benign emotion"¹⁹ to an account that differentiated it from

¹⁵ See e.g. Nomination of Judge Sonia Sotomayor to Assoc. Justice of the S. Ct. before Sen. Comm. on the Jud., 111th Cong., 1st Sess., 2009 Fed. News Serv., at *22 (July 14, 2009, afternoon sess.) (Sen. Kyl) (LEXIS).

¹⁶ Martín Alcoff, *supra* n. 14, at 127–31, 132.

¹⁷ *Id.* at 123, 125–26, 127, 131.

¹⁸ Lithwick, *supra* n. 1.

¹⁹ Susan A. Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. Chi. L. Rev. 361 n. 2 (1996) (concluding that neither benign emotions nor the narratives that are used to convey them are necessarily appropriate in every legal context).

sympathy or compassion.²⁰ Empathy, as Bandes recently described it, is the capacity to “*understand* what others are thinking, feeling, or perceiving, and predicting how others will react.”²¹ Focusing in her later account on empathy in judging, Bandes argues that the relevant question for judges is not “*whether* judges should exercise empathy . . . [but] *for whom* they exercise it, how accurately they exercise it, how aware they are of their own limitations and blind spots, and what they do to correct for those blind spots.”²² Perspective-taking includes using one’s experience to consider the perspectives of similarly situated actors, such as judges who uphold rules granting absolute judicial immunity from liability for judicial decisionmaking.²³ Such perspective-taking should operate as well for those for whom judges may be differently situated. Thus, empathy was needed for the Justices to appreciate the extent of the humiliation and intrusiveness experienced by an adolescent girl subjected to a strip search by school officials.²⁴

Commentators who have acknowledged the importance of empathy also note that it is not, however, to be exercised to the exclusion of everything else, but rather in conjunction with a regard for precedent and other institutional limits upon the judicial function.²⁵ In clear cases, presumably, precedent will dictate the outcome. In the unclear cases, empathy—informed by life experience and a capacity to appreciate others’ perspectives and situations—helps guide the exercise of judgment or discretion. As Ninth Circuit Court of Appeals Judge Kim McLane Wardlaw has observed, the umpire model of judging espoused by then–Supreme Court nominee John Roberts does not account for judges’ interpretive functions. Drawing on Judge Cardozo’s rich insights about the judicial role, Judge McLane Wardlaw discusses judging contexts in which the umpire approach falls short: when a case calls for interpreting an undefined concept, for applying law to a novel set of facts, or for selecting a line of precedent when two or more appear to apply.²⁶ When the umpire model of judging has no application, judges need access to the capacity for empathy. Judge McLane Wardlaw points out that it is in addressing these

²⁰ See e.g. Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 Cardozo L. Rev. de novo 133, 136 (2009) (recognizing the distinction in characterizing Justice Blackmun’s dissenting opinion in *DeShaney v. Winnebago Co. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989), as manifesting both empathetic understanding of and sympathy for the plight of young Joshua DeShaney, who had been badly beaten by his father during a time when the County’s Department of Social Services was managing his case).

²¹ Bandes, *supra* n. 20, at 138–39 (emphasis added).

²² *Id.* at 135–36.

²³ *Id.* at 141.

²⁴ *Id.* at 143–45 (discussing *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009)).

²⁵ *Id.* at 137–38; Kim McLane Wardlaw, *Umpires, Empathy, & Activism: Lessons From Judge Cardozo*, 85 Notre Dame L. Rev. 1629, 1646–47 n. 4 (2010).

²⁶ McLane Wardlaw, *supra* n. 25, at 1637. It is, as Judge Cardozo recognized, “when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins.” Benjamin N. Cardozo, *The Nature of the Judicial Process* 21 (1921) (quoted in McLane Wardlaw, *supra* n. 25, at 1636).

unclear cases that Judge Cardozo acknowledged a need for the exercise of judicial discretion, in which a judge may invoke an “individual sentiment of justice.”²⁷ And it is in these cases that a judge’s particular experience can be brought to bear to help illuminate the way toward an outcome.²⁸

Jurisprudential scholar Robin West also emphasizes the key role of empathy in doctrinally based reasoning, while noting a shift in the way American judging is increasingly carried out. In an extended discussion of common law “policing doctrines” such as unconscionability in contract law, West discusses the relevance of empathy to the traditional view of these doctrines, which engaged a court’s moral sensibilities as part of a particularistic, situation-based decisional process.²⁹ To determine whether a contract was unconscionable typically entailed reasoning by analogy to situations in past cases.³⁰ That inquiry, in turn, required at its core an exercise of empathy that West defines as “the ability to understand not just the situation but also the perspective of litigants on warring sides of a lawsuit.”³¹ Like Bandes, West distinguishes empathy from sympathy, but she sees the two conjoined under the traditional paradigm of judging. Thus, “to decide that a contract is unconscionable requires empathic engagement with the situation of both parties, and a dollop of situation sense as well,”³² but to relieve a party of an unconscionable contract term “requires sympathy.”³³

Yet West also notes a tension between this traditional view of judging and a more recent trend in applying these common law doctrines. This development, which she names an “anti-empathic turn”³⁴ in American jurisprudence, reflects a scientific orientation, focused not on assessing the propriety of the behavior of the particular litigants before the court, but rather on maximizing social welfare and developing rules to guide future behavior.³⁵ This orientation is rooted in part in the claims of economists that we are all incapable of understanding the subjective needs, wants, pains, and pleasures of others and thus that an exercise of empathy would not enable a judge to reach the kind of analogical determination that the traditional model of judging presupposes is possible.³⁶ Under this view, a view augmented by a widespread sense of law’s indeterminacy,³⁷

27 Cardozo, *supra* n. 26, at 140 (quoted in McLane Wardlaw, *supra* n. 25, at 1644).

28 McLane Wardlaw, *supra* n. 25, at 1645–46.

29 Robin L. West, *The Anti-Empathic Turn* (Geo. Pub. L. Research Paper forthcoming 2011) (available at <http://ssrn.com/abstract=1885079>, at 11–13, 26–29).

30 *Id.* at 9.

31 *Id.* at 1.

32 *Id.* at 32–33.

33 *Id.* at 33.

34 *See id.* at 11–13, 26–29.

35 *Id.* at 23. West identifies the start of the trend in Holmes’ famous exhortation in *The Path of the Law* to banish moral considerations from law. *Id.* at 31.

36 *Id.* at 40–41. Rather, the economic argument goes, individual wants, needs, and experiences of pain or other sensations that might justify compensation or some other response from the legal system are manifested more reliably through behavioral choices that are, in effect, objective, and discernible empirically. *Id.* at 42.

37 *Id.* at 43.

the work of judging should “use the slide rule rather than the heart to ascertain social welfare.”³⁸

The implications of this shift in orientation, and an attendant downgrading of empathy, West argues, is that we “lose the idea of the common law and of the judicial opinion as a repository for wisdom that can flexibly mutate to meet changing facts, but that emerges from particularistic decision making.”³⁹ If, as West suggests, the change that she discerns explains why recent Supreme Court nominees have distanced themselves from empathy,⁴⁰ the shift also underscores the degree to which, under a traditional approach to judging, empathy has long been understood as a fundamental element in common law reasoning.

For empathy—when its relevance is recognized—to be effective, it must tap into the cultural narratives and expectations that are meaningful for others.⁴¹ Legal writing and lawyering scholar Ian Gallacher analyzes empathy as a lawyering skill needed to make strategic decisions, particularly in the courtroom—trial setting, that resonate with non-lawyer audiences.⁴² Gallacher’s treatment of empathy as centrally connected with narrative applies with equal force to the work of judging. Yet the typical law school curriculum does not emphasize the value of narrative—as a resource and complement to the study of logic—that would help develop this empathic capacity. Rather, Gallacher argues, the dominant approach to legal education “drains the landscape of the color and nuance presented by the cases the students study,” which brings some features into a “sharper focus . . . [while] render[ing] the entire picture monochromatic, flat, and sterile.”⁴³ Gallacher highlights a problem of professional training and orientation that applies to judges, no less than lawyers, and that both must strive to overcome.

III. Empathy and Judging: A Narrative Approach

As the work of these commentators suggests, an essential component of empathy is cognitive, the capacity to understand the perspectives⁴⁴ and situation or experience⁴⁵ of others as well as to think about law from multiple perspectives.⁴⁶ In the context of judicial reasoning, empathy

38 *Id.* at 44.

39 *Id.* at 45.

40 *Id.* at 46.

41 Ian Gallacher, *Thinking Like Non-Lawyers: Why Empathy Is A Core Lawyering Skill And Why Legal Education Should Change To Reflect Its Importance*, 8 J. ALWD 109, 122–23 (2011).

42 *Id.* at 110, 124–38.

43 *Id.* at 116.

44 See e.g. Martín Alcoff, *supra* n. 14; Bandes, *supra* n. 20; West, *supra* n. 29.

45 See e.g. Henderson, *supra* n. 12; West, *supra* n. 29.

46 See e.g. Lithwick, *supra* n. 1; McLane Wardlaw, *supra* n. 25.

includes drawing on one's identity, experience, and appreciation of narrative, facts, and values to support the exercise of interpretive judgment, particularly when rule-based guides are lacking, conflicting, or require elaboration, analogy, or expansion. In their illuminating collaboration, *Minding the Law*,⁴⁷ Anthony Amsterdam and Jerome Bruner examine the relationship between narrative and legal reasoning that the work of West, Martín Alcoff, and Gallacher suggests. Legal rules and principles, they argue, are rooted in what is significant to a culture, which in turn is identifiable in its "stories, its genres, [and] its enduring myths."⁴⁸ They identify a theory of narrative, compatible with the way narratives operate in law, that conceives of narrative as a way of knowing as well as a way of telling about experience.⁴⁹ The value of narrative, in their view, is that it is flexible, and responsive to different ways of understanding and interpreting experience:

Narrative, moreover, differs from purely logical argument in that it takes for granted that the puzzling problems with which it deals do not have a single "right" solution—one and only one answer that is logically permissible. It takes for granted, too, that a set of contested events can be organized into alternate narratives and that a choice between them may depend upon perspective, circumstances, interpretive frameworks.⁵⁰

If narrative is a form of knowing and reasoning in its own right, and if narrative is compatible with varying "perspectives" and "interpretive frameworks," then a mode of narrative analysis should aid our understanding of when and whether a judicial decision manifests empathy in its approach, and possibly in its outcome. Analyzing a judicial opinion narratively reveals how judges think about law and facts, specifically, whether they take a category-centered or a situation-centered interpretive approach. Building on these insights, this section uses the tools of narrative analysis to investigate the workings or absence of empathy in judicial reasoning, and considers the difference that the exercise of empathy can make. Using a narrative lens, it is possible to identify various narrative structures of judicial decisionmaking—narratives of facts,

47 Amsterdam & Bruner, *supra* n. 7.

48 *Id.* at 111.

49 *Id.* at 117.

50 *Id.* at 141. Linda Martín Alcoff makes a related argument about the complex, multifaceted nature of reasoning in the context of the debate over empathy, identity, and experience in the Sotomayor confirmation hearings: "overly volitional accounts of reasoning" that "portray reasoning as an entirely conscious or transparent operation" run counter to how decisions are made. Martín Alcoff, *supra* n. 14, at 127; rather, in judging as in other decisionmaking processes, the "non-volitional as well as volitional aspects of our epistemic practices" matter—just as judgments aided by one's baseline knowledge can be as useful and as valid as "informed deliberation." Martín Alcoff, *supra* n. 14, at 137.

narratives of law, and narratives of modes of interpretation—that can help uncover how empathy operated or might have operated in judicial opinions.

A. Attributes of narrative

In their “austere definition” of narrative, Amsterdam and Bruner set out what in narrative theory might be considered the irreducible minimum of a narrative: a set of “human-like” characters with the capacity to exercise agency; a plot with a sequence of phases (“a beginning, a middle, and an end”); a structure for the plot that includes a “steady state”—a set of usual circumstances that Trouble upsets or interrupts; initiatives to address the Trouble; a return to or a transformation of the original state; and an effort to draw meaning from what happened.⁵¹ In this conception, Trouble entails the clash of “telos and obstacle” and is not random but rooted in a predictable, expected way in which things occur in the world.⁵²

Narrative is also central to the way in which law develops and operates. Law does not inhere only in rules of broad applicability, and in the processes and institutions through which they are applied. Law needs a mechanism for moving from the general to the particular of individual cases; and narrative, Amsterdam and Bruner argue, constitutes the method.⁵³ Drawing on Ronald Dworkin’s extended chain-novel metaphor of judicial interpretation,⁵⁴ Amsterdam and Bruner note how a series of judicial cases resembles a story that unfolds in stages or linked installments, each successive step continuing from the one preceding it.⁵⁵ As Dworkin developed the metaphor, the work of interpreting precedent might be imagined as an endeavor that each contributor seeks to make continuous and unified:

In this enterprise a group of novelists writes a novel *seriatim*; each novelist in the chain interprets the chapter he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on . . . Each novelist aims to make a single novel of the material he has been given, what he adds to it, and (so far as he can control this) what his successors will want or be able to add. He must try to make this the best novel it can be[,] construed as the work of a single author rather than, as is the fact, the product of many different hands. That calls for an overall judgment on his part, or a series of overall judgments as he writes and rewrites. He must take up some view about the novel in progress, some working theory about its characters, plot,

51 Amsterdam & Bruner, *supra* n. 7, at 113–14.

52 *Id.* at 129–30.

53 *Id.* at 140–41.

54 Ronald Dworkin, *Law’s Empire* 229–30 (Harv. U. Press 1986).

55 Amsterdam & Bruner, *supra* n. 7, at 141–42.

genre, theme, and point, in order to decide what counts as continuing it and not as beginning anew. If he is a good critic, his view of these matters will be complicated and multifaceted, because the value of a decent novel cannot be captured from a single perspective. He will aim to find layers and currents of meaning rather than a single exhaustive theme.⁵⁶

Considered in this way, the ongoing development of legal doctrine is a narrative in its own right, with each successive decision advancing or receding, reinforcing or refining an understanding of what the law has come to mean. Further, judges have choices in the way they apply narrative in service of legal doctrine, that is, choices whether to tie the law tightly to categories that the law has come to recognize over time, or whether to write a more holistic, contextual narrative, one that is more responsive to the parties' broader situation. These choices about which kind of narrative to write are linked, I argue, with a judge's capacity for empathy. In the discussion to follow, I will address narrative in this multifaceted way, identifying various narrative readings that the opinions call forth.

B. *DeShaney*

I begin this narrative-analytic approach with *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). In discussing the law and the parties' arguments, the Court fashioned what might be termed a due-process narrative, guided by its view of how the Due Process Clause operates. The due process analysis proceeds as a narrative in the sense that it presents the development of doctrine, chain-novel-like, as a series of interlinked cases that hews to a circumscribed understanding about the role and proper scope of government, that is, an understanding of government as having no affirmative responsibility for the welfare of its constituents. As Supreme Court commentator and former New York Times Supreme Court correspondent Linda Greenhouse has observed, after twenty years the opinion has continued to resonate and to generate animated responses, even notoriety, over its outcome, and its approach to understanding the role of government in the lives of community members. The Court denied Joshua DeShaney, a child who became permanently disabled after repeated abuse by his father, a right to pursue a Section 1983 lawsuit against the Winnebago County Department of Social Services (DSS) on the legal theory that the DSS had deprived Joshua of liberty under the Fourteenth Amendment's Due Process Clause by failing to intervene and prevent that abuse.⁵⁷ Whether the intense responses to

⁵⁶ Dworkin, *supra* n. 54, at 229–30 (italics in original).

⁵⁷ Linda Greenhouse, N.Y. Times, *A Second Chance for Joshua*, <http://opinionator.blogs.nytimes.com/2010/06/17/a-second-chance-for-joshua/> (June 17, 2010).

DeShaney are attributable to its facts, to a sense of frustration about the law that it affirms, or to the way in which the main opinion was *written*, is less clear.

As Greenhouse notes in her essay, it has been suggested that the *DeShaney* majority and dissenting opinions project “different visions of society and the uses to which the law is put.”⁵⁸ These visions, in turn, reflect an ongoing debate about whether the Constitution points to the primacy of one vision—a more active responsibility of government for individual welfare—over that which prevailed in *DeShaney*, in which the Court took a narrower view of the “liberty” protected in the Due Process Clause. I offer a narrative analysis of the case as one way to gain insight into the relationship of empathy with these conflicting visions.

1. Narrative structure of the majority opinion

The 6–3 majority opinion that Justice Rehnquist authored was a model of narrative economy that, in light of the complex, thickly textured situation it confronts, failed to do justice—to the narrative and to its legal implications. The unnumbered opening section of the opinion straightforwardly identifies the parties and their conduct: “Petitioner is a boy who was beaten and permanently injured by his father, with whom he lived” and “Respondents are social workers who received complaints that petitioner was being abused by his father and had reason to believe that this was the case, but nonetheless did not act to remove petitioner from his father’s custody.”⁵⁹ In light of the Court’s conclusion that no liability attached to Winnebago County’s DSS for failing to take steps to prevent injuries to Joshua DeShaney actually inflicted by Joshua’s father, the Court’s seemingly unvarnished telling of these facts also made clear that, in the majority’s view, these facts were legally irrelevant. In the Court’s narrative, the critical fact—and the source of Trouble—was the violent behavior of Joshua’s father.

The opinion opens with an admission: “The facts of this case are undeniably tragic.”⁶⁰ The Court goes on to narrate the facts chronologically, and they contribute cumulatively to a picture in which government actors, despite an extensive degree of involvement in monitoring the violent dynamics of the DeShaney household, seem exceedingly, frustratingly, cautious in taking protective action:

⁵⁸ John R. Howard, *Rearguing DeShaney*, 18 T.M. Cooley L. Rev. 381, 408 (2001) (quoted in Greenhouse, *supra* n. 57).

⁵⁹ *DeShaney*, 489 U.S. at 191.

⁶⁰ *Id.*

⁶¹ *Id.* at 191–93.

⁶² *Id.* at 193.

- Joshua is born in 1979.
- Father (custodial parent) and Joshua move to Winnebago County.
- Father's second wife, at time of their divorce in January 1982, alerts police in the county that father had hit Joshua causing marks and "was a prime case for child abuse."
- County DSS interviews father, who denies abuse, and the matter is dropped.
- In January 1983, Joshua is admitted to a local hospital with multiple bruises and abrasions; suspecting abuse, examining physician notifies DSS, which "immediately" secures an order from juvenile court placing Joshua in hospital's temporary custody.
- Three days later, the county convenes ad hoc "Child Protection Team," including medical personnel, caseworkers, a police detective, and county lawyer, and decides there is insufficient evidence of child abuse to retain Joshua in the custody of the court.
- The juvenile court dismisses the case and returns Joshua to father's custody.
- One month later, emergency room personnel call DSS caseworker to report once again suspicious injuries.
- The caseworker concludes there is no basis for action.
- For the next six months, the caseworker makes monthly visits to the DeShaney home, observes a number of suspicious injuries on Joshua's head, and learns that Joshua's father had not enrolled Joshua in school, or arranged for his girlfriend to move out, as he had voluntarily agreed with DSS to do before the case was dismissed.
- The caseworker "dutifully" records incidents in files, and her "continuing suspicions that someone in the DeShaney household was physically abusing Joshua," but does not otherwise act.
- In November 1983, the emergency room notifies DSS that Joshua is again being treated for injuries apparently caused by child abuse.
- The caseworker is told in next two visits to the DeShaney home that Joshua is "too ill" to see her. DSS takes no action.

- In March 1984, father beats 4-year-old Joshua “so severely that he [falls] into a life-threatening coma.” Joshua undergoes emergency surgery revealing a series of hemorrhages caused by traumatic head injury “inflicted over a long period of time.” Joshua suffers brain damage “so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded.”
- Father is tried and convicted of child abuse.⁶¹

The Court then briefly recites the procedural facts: Joshua and his mother sued Winnebago County, the (DSS), and individual DSS employees alleging that they deprived Joshua of his liberty without due process of law, in violation of the Fourteenth Amendment, by failing to intervene to protect him against a risk of violence at his father’s hands of which they knew or should have known. The District Court granted summary judgment for the County respondents, and the Seventh Circuit affirmed,⁶² in an opinion by Judge Richard Posner.⁶³

In structural terms, the opinion’s second section constructed a tight judicial narrative of the scope of the Due Process Clause, keeping in the foreground the majority–Posner view of the nature of the clause as a guarantee against government interference:

- Due Process Clause is quoted.
- Brief summary of DeShaney’s argument—legal theory that the DSS and its employees were liable for failure to protect Joshua against his father, given their documented awareness of risks to his safety and prior interventions in the household⁶⁴
- Response to DeShaney’s argument invoking Due Process Clause language, history, and cases interpreting it; court cites cases and

63 *DeShaney v. Winnebago Co. Dept. of Soc. Servs.*, 812 F.2d 298, 301–03 (7th Cir. 1987) (holding that the County Department of Social Services did not owe a legal duty to protect Joshua from his father and that it was not “complicit” with the father in the beatings). As Linda Greenhouse notes in her essay on the *DeShaney* case, Judge Posner’s opinion holding that the Due Process Clause did not create a duty in government to protect Joshua against his father was a critical juncture in the case; it created a conflict in the circuits’ treatment of the issue in *DeShaney* and thus raised the stakes in favor of a decision by the Supreme Court to grant certiorari. Greenhouse, *supra* n. 57. The Third Circuit in *Est. of Bailey by Oare v. Co. of York*, 768 F.2d 503, 510–11 (3d Cir. 1985) and the Fourth Circuit in dicta in *Jensen v. Conrad*, 747 F.2d 185, 190–94 (4th Cir. 1984) recognized the existence of a “special relationship” with a child once a state had undertaken to protect a child facing apparent abuse, and that it was then under a constitutional obligation to follow through with that protection.

Yet, as the case came up for consideration on a certiorari petition, then—judicial clerk Elena Kagan wrote in what would prove a prescient memo to Justice Thurgood Marshall, for whom she had recently begun a one-year clerkship, that, although the facts were “horrific,” she was concerned that a court majority might adopt Judge Posner’s view rather than the more expansive notion of a government’s responsibility that other circuits had supported. *Id.* As Greenhouse relates, Kagan originally recommended that Justice Marshall vote for certiorari only if three other Justices did, but after Justice White wrote a dissent from the initial denial of certiorari, Justices Marshall and Blackmun signed on to join Justices White and Brennan in voting to hear the case. *Id.*

follows with explanatory parentheticals suggesting settled nature of the cases it cites⁶⁵

- Return to DeShaney’s argument in somewhat more detail⁶⁶
- Rejection of DeShaney argument, with reasons, distinguishing the *Estelle-Youngberg* lines of substantive due-process cases relied upon by DeShaney and reasoning that the harms in those cases occurred to plaintiffs who were in custody of state institutions⁶⁷
- Due Process Clause claim differentiated from tort law theory of government responsibility for negligence⁶⁸
- Sympathetic facts distinguished from what the Due Process Clause allows:

Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua’s father. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them. In defense of them it must also be said that had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent–child relationship⁶⁹

- Return to the tort law theme, reiterating that it is not at issue in this claim⁷⁰

In emphasizing the view that Randy DeShaney’s delivery of blows to Joshua was the operative conduct causing harm, rather than any conduct on the government’s part that restricted Joshua’s liberty, the majority’s due-process narrative sees the world as clearly demarcated between public and private spheres. It portrays the line separating private from government conduct as indissolubly connected with the bright line separating an affirmative and a negative view of liberties protected by the Due Process Clause.⁷¹ In this understanding of the role of law and the obli-

64 *DeShaney*, 489 U.S. at 194–95.

65 *Id.* at 195–97.

66 *Id.* at 197.

67 *Id.* at 197–201.

68 *Id.* at 201–02.

69 *Id.* at 202–03.

70 *Id.* at 203.

71 *Id.* at 195, 200.

gations of the state vis-à-vis protecting individual bodily security, the Court credited and reinforced the DSS's narrative version of reality that it had discharged its duty under state law by investigating reports of alleged abuse and that it had incurred no federal constitutional duty to take protective action.⁷²

In its straightforward, admit-no-doubt legal narrative of the scope of liberty under the Fourteenth Amendment, the majority identified with the position of the DSS and its employees, who, in their "defense," the Court noted, "had they moved too soon to take custody of the son away from the father . . . would likely have been met with charges of improperly intruding into the parent-child relationship."⁷³ As Susan Bandes has observed, the Justices often, as here, take the perspective of other government actors, with whom they are in some respects similarly situated. This perspective-taking may not be recognized for what it is, selective empathy, limited to those with whom the Justices' professional or life circumstances have more in common.⁷⁴ Although acknowledging "natural sympathy in a case like this," the majority was ultimately unable to empathize with Joshua—unable to appreciate how coercive his situation was, how he lived as a prisoner in his father's home, from which only the department and its employees, who apparently were aware of and actively monitoring the family's situation, could have set him free. This failure to appreciate fully Joshua's situation, including the DSS's ongoing role in documenting the family dynamics, provoked two vigorous dissents, written in decidedly different registers, and with distinct narrative frameworks, which embraced a broader vision of government responsibility for protecting individual liberty.

2. Narrative-analytic structure of Justice Brennan's dissent

Justice Brennan's magisterial dissent, joined by Justices Marshall and Blackmun, bears the earmarks of a counter-narrative to the majority's due-process narrative. Using terms that resonate with the literature analyzing empathy, the Brennan dissent approaches the Court's "baseline" analysis from a different "perspective," one that sees Joshua's situation as more intertwined with the DSS and its employees, and his claim as involving government action rather than inaction.

72 *Id.* at 192–93, 201–02.

73 *Id.* at 203.

74 Bandes, *supra* n. 20, at 139, 141. Lynne Henderson makes a similar point, observing that when we, as we are apt to do, empathize with people like ourselves, "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." Henderson, *supra* n. 12, at 1584.

Beginning the opinion by echoing the majority's own language limiting the responsibility of the government officials in the case, Justice Brennan stakes out the terms of a contrary action narrative that links facts with legal doctrine. He follows with a more complete "story" of action that the state of Wisconsin had taken with respect to children situated like Joshua. That story, in turn, calls for a more affirmative role for the government in this case:

- "The most that can be said of the state functionaries in this case,' the Court today concludes, 'is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.' Ante, at 1007. Because I believe that this description of respondents' conduct tells only part of the story and that, accordingly, the Constitution itself 'dictated a more active role' for respondents in the circumstances presented here, I cannot agree that respondents had no constitutional duty to help Joshua DeShaney."
- Brennan's dissent presents the idea of a different "perspective."
- Brennan's dissent notes that the Court's "baseline" is the absence of positive rights in the Constitution.
- Brennan's dissent points out that, from this perspective, the DeShaneys' claim is about inaction.
- Brennan's dissent argues that the Court should begin from the opposite direction: focus on action that Wisconsin *has* taken with respect to Joshua and children like him.
- Brennan's dissent does not see in *Youngberg* (involving claim by an institutionalized person of the state's failure to provide safe conditions) a neat and decisive divide between action and inaction: "the fact of hospitalization was critical in *Youngberg* not because it rendered Romeo helpless to help himself, but because it separated him from other sources of aid that, we held, the State was obligated to replace."
- Brennan's dissent observes that "[a] State's prior actions may be decisive in analyzing the constitutional significance of its inaction."⁷⁵

In this more complete story, Justice Brennan includes details about Wisconsin's child-protective statutory scheme that were missing in the majority's narrative and highlighted the responsibility of local

75 489 U.S. at 203–08 (Brennan, J., dissenting).

departments of social services to decide whether to intervene to protect a child. In this narrative of government action, the “steady state” is the Department’s ongoing responsibility for following up on reports of child abuse, and Trouble is the Department’s practice—its hesitations, and its dutiful but seemingly desensitized recording of detail and incident, which are tantamount to willful blindness.⁷⁶

- Wisconsin has established a child-welfare system that places upon local departments of social services a duty to investigate reports of child abuse.
- Wisconsin law directs all such reports to local departments of social services to evaluate and, if necessary, take further action.
- The only exception occurs when the person reporting fears for the child’s “immediate safety.”
- Each time someone raised suspicion that Joshua was being abused, information was conveyed to DSS for investigation and possible action.
- One social worker reacted to the news that Joshua’s injuries resulted in his serious brain damage by saying, “I just knew the phone would ring some day and Joshua would be dead.”
- DSS controls decision whether to take steps to protect a particular child from suspected abuse; it is up to the people at DSS to make the ultimate decision (subject to the approval of the local government’s counsel) whether to alter the family’s current arrangements.
- Through its child-welfare program, Wisconsin relieves ordinary citizens and governmental bodies of sense of obligation to do anything other than report suspected child abuse to DSS.⁷⁷

By setting out how the state vested all responsibility to investigate and act in the county departments, and by showing that it was the child-protective program that in effect imprisoned Joshua in his father’s home, the narrative arc of the Brennan dissent built up to a conclusion that the State had taken an active role in Joshua’s life that gave it access to knowledge of his vulnerability:

⁷⁶ Alternatively, following the majority’s view, it is possible to understand Trouble to be Randy DeShaney’s violent behavior. However, because the Brennan dissent, unlike the majority, starts the narrative from the baseline of government *action*, the dissent’s narrative structure points to a different resolution, requiring remediation by the *government* rather than a private actor. Under either version, the Trouble goes unremedied, resulting either in an interrupted, incomplete narrative or otherwise transforming Joshua’s ultimate situation into a worse state of permanent disability.

⁷⁷ *Id.* at 208–10.

- “Wisconsin’s child-protection program thus effectively confined Joshua DeShaney within the walls of Randy DeShaney’s violent home until such time as DSS took action to remove him”
- “Through its child-protection program, the State actively intervened in Joshua’s life and . . . acquired ever more certain knowledge that Joshua was in grave danger”
- “[O]ppression can result when a State undertakes a vital duty and then ignores it.”⁷⁸

In this way, the Brennan dissent was able to see “oppression” in the department’s assumption of a “vital duty” that it then disregarded and to analogize the *DeShaney* facts to those in *Youngberg v. Romeo*,⁷⁹ a case in which the Supreme Court held that a person involuntarily committed to a state institution by reason of a severe developmental disability had a liberty interest under the Due Process Clause in “conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests.”⁸⁰ Justice Brennan’s action narrative demonstrates a capacity for empathy for Joshua’s situation by building an alternative factual foundation for the legal discussion. The dissent was then able to counter the majority’s traditional due-process narrative that the DSS had no affirmative responsibility to protect Joshua with a narrative that the government had by legislative design assumed responsibility for children situated like Joshua and then had abandoned that responsibility, with tragic consequences.

3. The narrative–emotive structure of Justice Blackmun’s dissent

In a brief separate dissent, Justice Blackmun offered a narrative of constitutional interpretation that reflects both empathy and sympathy. However, the opinion’s rhetoric betrayed an emotional response that is less common in judicial discourse, leading Laura Krugman Ray, a thoughtful commentator of judicial writing, to describe his approach as “the overwhelming of reason by understandable but undisciplined sympathy.”⁸¹ Agreeing with Justice Brennan that the facts entail more than “mere passivity,” Justice Blackman offered a more truncated, pointed rendering of those facts, while deploring the majority’s resort to formalistic line drawing:

⁷⁸ *Id.* at 210–12.

⁷⁹ 457 U.S. 307 (1982).

⁸⁰ 489 U.S. at 324 (Brennan, J., dissenting).

⁸¹ Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 Wash. & Lee L. Rev. 193, 231 (2002).

- “The Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts.”
- “[T]he facts here involve not mere passivity, but active state intervention in the life of Joshua DeShaney.”
- “The Court fails to recognize this duty because it attempts to draw a sharp and rigid line between action and inaction.”⁸²
- Linking the Court’s interpretive approach to that of antebellum judges who denied freedom to fugitive slaves on the basis of “existing legal doctrine,” the Blackmun dissent offered a narrative of constitutional interpretation that rejected formalism⁸³ and instead presented Fourteenth Amendment doctrine as open to readings of varying breadth, as presenting a “choice”:
- “[T]he broad and stirring Clauses of the Fourteenth Amendment . . . were designed, at least in part, to undo the formalistic legal reasoning that infected antebellum jurisprudence.”
- “Like the antebellum judges who denied relief to fugitive slaves, . . . the Court today claims that its decision, however harsh, is compelled by existing legal doctrine.”
- “Our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them.”
- “Faced with the choice, I would adopt a ‘sympathetic’ reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.”⁸⁴

Justice Blackmun next uttered the oft-cited exclamation that many readers most immediately associate with the *DeShaney* case:

- “Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and

⁸² 489 U.S. at 212 (Blackmun, J., dissenting).

⁸³ In similar fashion, Lynne Henderson recognized that adherence to legality in the case of judges who enforced the fugitive slave laws offered a refuge from moral choice: “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.” Henderson, *supra* n. 12, at 1590.

⁸⁴ 489 U.S. at 212–13 (Blackmun, J., dissenting).

who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, *ante*, at 1001, ‘dutifully recorded these incidents in [their] files.’”

- It is “a sad commentary upon American life, and constitutional principles . . . that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.”
- “Joshua and his mother, as petitioners here, deserve—but now are denied by this Court—the opportunity to have the facts of their case considered in the light of the constitutional protection that 42 U.S.C. § 1983 is meant to provide.”⁸⁵

The power and passion of Justice Blackmun’s rhetoric are undeniable. Reflecting the views of a number of other commentators, Krugman Ray concludes that here Justice Blackmun substituted an appeal to emotion for legal argument.⁸⁶ However, Justice Blackmun had joined in the Brennan dissent and presumably did not wish to duplicate its arguments. Moreover, Krugman Ray’s assessment perhaps insufficiently appreciates an approach that fused facts and emotion with an inchoate legal-narrative structure. That structure followed a distinct, if incompletely developed, narrative trajectory—a narrative about a mode of constitutional reasoning and interpretation. In this account, Justice Blackmun offered his own narration of the “broad and stirring” Clauses of the Fourteenth Amendment, a narration designed to counter formalism that “infected antebellum jurisprudence.” In this narrative of law, Fourteenth Amendment precedents are open to a reading that is neither formalistic nor mechanistic, but rather contextual, rooted in particulars. (As Amsterdam and Bruner remind us, “the individual cases to which these timeless abstract principles must be applied are here and now, often painfully particular.”⁸⁷

Although the Blackmun dissent does not disguise its compassion for Joshua, the opinion, as Susan Bandes has pointed out, manifests sympathy in conjunction with empathy: “Justice Blackmun’s famous ‘Poor Joshua’ lament in *DeShaney* is a good example of an expression of sympathy. It reflects not just empathetic understanding of Joshua’s perspective, but a visceral sense that Joshua had been dealt with unjustly and deserved a different outcome.”⁸⁸ That empathy is revealed, in part, in Justice Blackmun’s capacity to step outside a government-institutional perspective (that is, his own) to “recogniz[e] that compassion need not be exiled from the province of judging” and in his attention to what the

⁸⁵ *Id.* at 213.

⁸⁷ Amsterdam & Bruner, *supra* n. 7, at 140.

⁸⁶ Krugman Ray, *supra* n. 83, at 230–31.

⁸⁸ Bandes, *supra* n. 20, at 136 (emphasis added).

majority, in his view, failed to see: its formalistic approach to precedent “prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts.” Returning to this theme, the opinion goes on to aver that the “the court fails to recognize” its legal duty by drawing a bright line between action and nonaction.

By fashioning an alternative narrative that exercised an interpretive “choice” about how the Due Process Clause and precedents worked, Justice Blackmun’s dissent seemed to eschew choosing between Randy DeShaney’s violence and the Department’s abandonment of Joshua as the source of Trouble. His more-encompassing understanding of the scope of government responsibility sat comfortably with a complicated, less sharply differentiated rendering of factual culpability in which the boundaries of government and private action were not clearly discernible. In Lynne Henderson’s terms, it was an “empathic narrative”—“contextual, descriptive, and affective . . . the telling of the stories of persons and human meanings, not abstractions.”⁸⁹

C. *Michael H. v. Gerald D.*

In this section I offer the narrative–analytic approach modeled in the discussion of *DeShaney* to deconstruct the plurality’s and principal dissenting approach in *Michael H. v. Gerald D.*⁹⁰ The decision addressed whether the presumption of legitimacy codified in California law infringed upon the due-process rights of a man who sought to establish his paternity of a child born to the wife of another man, and upon the right of the child to maintain a relationship with her biological father. To use Amsterdam and Bruner’s lexicon, it engaged the definitional or categorical question⁹¹ whether the relationship between the biological father and daughter was protected by a liberty interest.

1. Narrative–historical framework of the plurality

Amsterdam and Bruner have persuasively elaborated how, in determining that the Fourteenth Amendment did not confer such rights, the plurality opinion of Justice Scalia, joined in by Chief Justice Rehnquist and in all but footnote six by Justices Kennedy and O’Connor, conceived of the case in terms of culturally embedded combat myths.⁹² This combat ideology portrayed the claims of the protagonists—the biological and marital fathers—as well as the interpretive frameworks of the plurality opinion and Justice Brennan’s dissent as in competition, as mutually incompatible, and as resolvable only in zero-sum terms.⁹³ In doing so, Justice Scalia,

⁸⁹ Henderson, *supra* n. 12, at 1592.

⁹¹ Amsterdam & Bruner, *supra* n. 7, at 78.

⁹⁰ 491 U.S. 110 (1989).

⁹² *Id.* at 91–94.

apparently presented with a family situation that was unrecognizable, and unimaginable, cast the facts as “extraordinary” and thus beyond the pale of traditions that his opinion presented as sacrosanct and “natural.” And, by starting with the assertion of extraordinariness, the opinion signaled that it had taken up a narrative in progress—“in medias res”⁹⁴—when Trouble had already overtaken the situation:

- “The facts of this case are, we must hope, extraordinary.”
- Carole D., an international model, and Gerald D., a top executive in a French oil company, married on May 9, 1976, and lived in a home in Playa del Rey, California, when one or the other was not out of the country on business.
- In the summer of 1978, Carole became involved in an “adulterous affair” with a neighbor, Michael H. In September 1980, she conceived a child, Victoria D., born on May 11, 1981. Gerald was listed as father on the birth certificate and has always held Victoria out to the world as his daughter.
- Soon after Victoria was born, Carole told Michael that he might be the father.
- “In the first three years of her life, Victoria remained always with Carole but found herself within a variety of quasi-family units.”
- In October 1981, while Gerald was residing in NYC for business, blood-testing indicated a 98.07% probability that Michael was Victoria’s biological father.
- In January 1982, Carole visited Michael in St. Thomas, and he held Victoria out as his daughter.
- In March, Carole left Michael, returned to California, and lived with “yet another man” (Scott K.).
- Later in spring and in summer, Carole and Victoria spent time with Gerald in NYC, and also in Europe.
- In fall, they went back to Scott in California.
- Denied permission to visit Victoria, Michael filed an action in November 1982 to establish paternity and visitation rights.

93 *Id.* at 94–102.

94 A Latin phrase meaning “straight into the main part of a story or account without giving any introduction,” Oxford Advanced Learner’s Dictionary, *in medias res*, <http://www.oxfordadvancedlearnersdictionary.com/dictionary/in-medias-res> (accessed Mar. 10, 2012).

- Attorneys appointed to represent Victoria's interests asserted that if she had more than one psychological parent, she was entitled to maintain a filial relationship with both.
- Carole, then living with Gerald in NYC, moved for summary judgment.
- Returning to California in the summer of 1983, Carole became involved with Michael again and instructed her attorneys to remove his summary judgment motion from the calendar.
- For the next eight months, Michael stayed with Carole and Victoria when he was in California and held Victoria out as his daughter.
- In April 1984, Carole and Michael signed a stipulation that Michael was Victoria's biological father.
- The following month, Carole instructed her attorneys not to file the stipulation.
- In June 1984, Carole and Gerald reconciled and have since lived in NYC with Victoria and two other children born to the marriage.
- In May 1984, Michael and Victoria sought visitation rights for Michael; the court allowed him restricted visitation rights during pendency of litigation.
- In October 1984, Gerald intervened and moved for summary judgment on the basis of a California statute establishing conclusive presumption of legitimacy when a child is conceived and born during a marriage while the husband and wife are cohabiting and the husband is not impotent or sterile.
- In January 1985, the court granted Gerald summary judgment and denied Michael's and Victoria's challenges to constitutionality of the statute. It denied their motion for continued visitation under a statute allowing court to grant (or deny) visitation rights to any person having an interest in the welfare of a child, finding that such visitation would "impugn[] the integrity of the family unit."
- On appeal, Michael and Victoria challenged the legitimacy statute on due-process grounds, and Victoria also challenged it on equal protection grounds. The appellate court affirmed court judgment, and the California Supreme Court denied discretionary review.⁹⁵

As the facts unfold, it is only by way of contrast with these “extraordinary” arrangements that we can know the “steady state” of narrative theory, the “legitimate ordinariness of things”⁹⁶—which, for the plurality, was the “marital family,” fittingly protected by the state’s presumption of legitimacy. Dwelling on the extraordinary, the plurality offers in microscopic chronological detail the vicissitudes of what were in fact two interlocking family relationships during a period in which the mother, Carole, traveled extensively with her young daughter, Victoria, and resided, serially, with her husband, with Michael H. (Victoria’s likely biological father), and with a third man who does not figure in the litigation. The specific cataloguing of dates presents a surface sense of fidelity to clinically objective fact-gathering but in cumulative effect presents Victoria and her changing partners and household arrangements as a frenetic, dizzying, and unstable scenario. This obsessive—one might even suggest voyeuristic—narration, what Amsterdam and Bruner refer to as “Justice Scalia’s cuckold-phobic vision of the ‘unitary family,’”⁹⁷ draws on culturally embedded seduction narratives—Trouble—involving the disruption of an ordinary marital relationship,⁹⁸ and sets the stage for the opinion’s analysis in the third section, after it sets out the California statute at issue in the second.⁹⁹

In that analysis, the plurality constructs its own due-process narrative and resolves the question whether to entertain Michael’s effort to establish his paternity of Victoria and assert a liberty interest in maintaining a relationship with her. In one stroke, the plurality naturalizes the marital-family arrangement that the California legislature, through a legal construct, had chosen to clothe with a presumption of legitimacy, and asserts that, under that arrangement, paternity is exclusive to the marital father, even without the existence of a biological connection:

At the outset, it is necessary to clarify what [Michael] sought and what he was denied. California law, like nature itself, makes no provision for dual fatherhood. Michael was seeking to be declared *the* father of Victoria. The immediate benefit he evidently sought to obtain from that status was visitation rights. *See* Cal. Civ. Code Ann. § 4601 (West 1983) (parent has statutory right to visitation “unless it is shown that such visitation would be detrimental to the best interests of the child”). But if Michael were successful in being declared the father, other rights would follow—most importantly, the right to be considered as the parent who

95 491 U.S. at 113–16 (plurality).

98 *Id.* at 46–47, 81–91, 95.

96 Amsterdam & Bruner, *supra* n. 7, at 113.

99 491 U.S. at 117–18 (plurality).

97 *Id.* at 82.

should have custody All parental rights, including visitation, were automatically denied by denying Michael status as the father. While [the statute] places it within the discretionary power of a court to award visitation rights to a nonparent, the [courts here] held that California law denies visitation, against the wishes of the mother, to a putative father who has been prevented . . . from establishing his paternity.¹⁰⁰

First, the plurality rejects Michael's procedural-due-process claim on the ground that the statute embodies a substantive policy-based rule of law rather than a matter of procedure.¹⁰¹ Then the opinion goes on to address whether Michael's asserted constitutionally protected liberty interest in a relationship with Victoria is protected by tradition, which it casts in terms of such specificity in footnote six that only Justice Rehnquist was prepared to sign on to it:

In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a "liberty" be "fundamental" (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society [Cases addressing liberty interest] rest . . . upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family¹⁰²

Next, the plurality makes explicit what it had alluded to at the opening of section III: the paternal claims of Michael and of Gerald D., Carole's husband with whom she was living at the time Victoria was conceived and born, could be imagined only as a zero-sum game; because dual fatherhood is unnatural, the recognition of paternal rights in one of the contenders would necessarily displace the claim of the other:

100 *Id.* at 118–19.

101 *Id.* at 119–21.

102 *Id.* at 121. Justice Scalia elaborates this view of tradition in the text of footnote six, in large part a rebuttal to Justice Brennan's suggestions, in dissent, concerning an appropriate level of generality to describe the governing tradition:

[W]e do not understand why, having rejected our focus upon the societal tradition regarding the natural father's rights vis-à-vis a child whose mother is married to another man, Justice Brennan would choose to focus instead upon "parenthood." Why should the relevant category not be even more general—perhaps "family relationships"; or "personal relationships"; or even "emotional attachments in general"? Though the dissent has no basis for the level of generality it would select, we do: we refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent

Id. at 127 n.6.

The footnote's reliance on the "most specific level" at which a tradition pertaining to the asserted interest could be framed went too far even for concurring Justice O'Connor, joined by Justice Kennedy, to accept: "On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available. *Ante*, at [127], n. 6. I would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis." *Id.* at 132 (citations omitted) (O'Connor, J., concurring in part).

Here, to *provide* protection to an adulterous natural father is to *deny* protection to a marital father, and vice versa. If Michael has a “freedom not to conform” (whatever that means), Gerald must equivalently have a “freedom to conform.” One of them will pay a price for asserting that “freedom”—Michael by being unable to act as father of the child he has adulterously begotten, or Gerald by being unable to preserve the integrity of the traditional family unit he and Victoria have established. Our disposition does not choose between these two “freedoms,” but leaves that to the people of California.¹⁰³

The plurality thus concluded that the statute stands against the unnatural “dual fatherhood” that recognizing Michael’s asserted liberty interest would necessarily open up. The plurality’s reasoning depended on a highly specific framing of tradition and a historic practice to “limit and guide interpretation” of liberty—whether States had ever recognized parental rights in the “natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child.” Concluding that such a tradition did not exist, the plurality was able to resolve the contest against Michael, the adulterer, and in favor of Gerald, the husband and head of household whose function Michael had sought to displace. In the fourth section, the plurality similarly disposed of Victoria’s liberty claim as unsupported by “history or traditions.”¹⁰⁴ Identifying with combat myth and its all-or-nothing, either-or, zero-sum, conflictual terms, the plurality sees only one side—a failure of empathy that Justice Brennan’s dissent calls to account.

2. The narrative–interpretive framework of Justice Brennan’s dissent

Recalling his role in the *DeShaney* case, Justice Brennan’s dissent¹⁰⁵ engages an interpretive framework distinct from the main opinion, a framework informed by an empathic capacity to imagine a broader range of family relationships than the “relationships that develop within the

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In addition to the O’Connor opinion, Justice Stevens wrote separately to concur in the judgment, stating that, unlike the plurality, he would not foreclose the possibility that a constitutionally protected relationship between a biological father and child might exist in such a case as this one, that he was willing to assume that Michael’s relationship with Victoria gave him a constitutional right to seek to demonstrate that it was in Victoria’s best interests to grant him visitation, and that the California statute, contrary to Michael’s claim, afforded him an opportunity to do so. *Id.* at 133 (Stevens, J., concurring in the judgment).

¹⁰³ *Id.* at 130 (plurality) (emphasis in original).

¹⁰⁴ *Id.* at 130–31. The plurality in this part of the opinion also rejected Victoria’s equal-protection claim that the state did not afford her an opportunity congruent with that of her mother and “marital” father to rebut the presumption of legitimacy. *Id.* at 131–32.

¹⁰⁵ *Id.* at 136–57. Justice Brennan’s dissent was joined by Justices Marshall and Blackmun. Justice White filed a separate dissent, joined by Justice Brennan, stating that the legitimacy statute, as applied, should be held unconstitutional under the Due Process Clause because it deprived him of any opportunity to establish his paternity. *Id.* at 160–63 (White, J., dissenting).

unitary family.” Initially, he takes issue with the plurality’s highly specific application of tradition to define (and cabin) the concept of “liberty”:

- “Apparently oblivious to the fact that this concept can be as malleable and as elusive as “liberty” itself, the plurality pretends that tradition places a discernible border around the Constitution”
- “Because reasonable people can disagree about the content of particular traditions, and because they can disagree even about which traditions are relevant to the definition of “liberty,” the plurality has not found the objective boundary that it seeks.”
- “Even if we could agree, moreover, on the content and significance of particular traditions, we still would be forced to identify the point at which a tradition becomes firm enough to be relevant to our definition of liberty and the moment at which it becomes too obsolete to be relevant any longer. The plurality supplies no objective means by which we might make these determinations.”¹⁰⁶

Having questioned how the plurality conceives of tradition, the Brennan dissent then narrates how the law has in fact treated tradition, identifying the “theme” that illuminates the meaning of “liberty”:

- “It is not that tradition has been irrelevant to our prior decisions. Throughout our decisionmaking in this important area runs the theme that certain interests and practices—freedom from physical restraint, marriage, childbearing, childrearing, and others—form the core of our definition of “liberty.” . . . In deciding cases arising under the Due Process Clause, therefore, we have considered whether the concrete limitation under consideration impermissibly impinges upon one of these more generalized interests.”
- “Instead, the plurality asks whether the specific variety of parenthood under consideration—a natural father’s relationship with a child whose mother is married to another man—has enjoyed such protection.”
- “In the plurality’s constitutional universe, we may not take notice of the fact that the original reasons for the conclusive presumption of paternity are out of place in a world in which

106 *Id.* at 137–38. (Brennan, J., dissenting).

blood tests can prove virtually beyond a shadow of a doubt who sired a particular child and in which the fact of illegitimacy no longer plays the burdensome and stigmatizing role it once did.”

- “Moreover, by describing the decisive question as whether Michael’s and Victoria’s interest is one that has been ‘traditionally *protected by our society*,’ *ante*, at 2341 (emphasis added), rather than one that society traditionally has thought important (with or without protecting it), and by suggesting that our sole function is to ‘*discern the society’s views*,’ *ante*, at 2345, n. 6 (emphasis added), the plurality acts as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States.”
- “I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold.”¹⁰⁷

In the dissent’s second section, Justice Brennan identifies a preferred approach to assessing whether the concept of “liberty” encompassed and protected Michael’s relationship with Victoria: he frames the question in terms of whether the relationship under consideration is sufficiently close to protected liberty interests to qualify for similar protection. In pursuing that question, Justice Brennan traces an alternate narrative of the law—“commanded by our prior cases”—of what family means:

“The better approach—indeed, the one commanded by our prior cases and by common sense—is to ask whether the specific parent-child relationship under consideration is close enough to the interests that we already have protected to be deemed an aspect of ‘liberty’ as well. On the facts before us, therefore, the question is not what ‘level of generality’ should be used to describe the relationship between Michael and Victoria, see *ante*, at 2344, n. 6, but whether the relationship under consideration is sufficiently substantial to qualify as a liberty interest under our prior cases”¹⁰⁸

Justice Brennan’s reading of precedent establishing that unwed biological fathers having a “substantial” parental relationship with a child qualify for protection, and his reference to the facts of Michael’s relationship with Carole and Victoria, reveal a narrative understanding of family relationships, informed by his capacity for empathy, that is, a capacity to understand and recognize *as family* a nontraditional relationship of affiliation. Under that view, the plurality’s definition of family is unduly narrow:

107 *Id.* at 137–41 (Brennan, J., dissenting).

108 *Id.* at 142.

- “Though different in factual and legal circumstances, these [prior unwed-father] cases have produced a unifying theme: although an unwed father’s biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so.”
- “Claiming that the intent of these cases was to protect the ‘unitary family,’ *ante*, at 2342, the plurality waves *Stanley*, *Quilloin*, *Caban*, and *Lehr* aside. In evaluating the plurality’s dismissal of these precedents, it is essential to identify its conception of the ‘unitary family.’”
- “The evidence is undisputed that Michael, Victoria, and Carole did live together as a family; that is, they shared the same household, Victoria called Michael ‘Daddy,’ Michael contributed to Victoria’s support, and he is eager to continue his relationship with her. Yet they are not, in the plurality’s view, a ‘unitary family,’ whereas Gerald, Carole, and Victoria do compose such a family. The only difference between these two sets of relationships, however, is the fact of marriage.”
- “The plurality’s exclusive rather than inclusive definition of the ‘unitary family’ is out of step with other decisions as well. This pinched conception of ‘the family,’ crucial as it is in rejecting Michael’s and Victoria’s claims of a liberty interest, is jarring in light of our many cases preventing the States from denying important interests or statuses to those whose situations do not fit the government’s narrow view of the family.”¹⁰⁹

In Justice Brennan’s more capacious, functional definition of family, he imagines alternate scenarios of family life and, unlike the plurality, he is prepared to fit them within the existing legal constructs.¹¹⁰ Under such a definition, Michael and Victoria’s relationship is sufficiently familial (a family in all but the “fact of marriage”) to be clothed with a liberty interest protected by the Due Process Clause. His dissent then offers its own due-process narrative. First it concludes that the statute at issue created a conclusive presumption of paternity,¹¹¹ and then it focuses on whether California had an interest sufficiently strong that it warranted denying Michael an opportunity for a hearing:

109 *Id.* at 142–45.

110 Amsterdam & Bruner, *supra* n. 7, at 106, 108.

- “The question before us, therefore, is whether California has an interest so powerful that it justifies granting Michael *no* hearing before terminating his parental rights.”
- “[I]nvalidation of [the presumption of legitimacy] would not, as Gerald suggests, subject Gerald and Carole to public scrutiny of . . . private matters. Family finances and family dynamics are relevant, not to paternity, but to the best interests of the child—and the child’s best interests are not . . . in issue at the hearing that Michael seeks.”
- “The only private matter touching on the paternity presumed by [the statute] is the married couple’s sex life. Even there, [the statute] pre-empts inquiry into a couple’s sexual relations, since ‘cohabitation’ consists simply of living under the same roof together; the wife and husband need not even share the same bed.”
- “[The statute] does not foreclose inquiry into the husband’s fertility or virility . . . [H]owever, proving paternity by asking intimate and detailed questions about a couple’s relationship would be decidedly anachronistic. Who on earth would choose this method of establishing fatherhood when blood tests prove it with far more certainty and far less fuss?”
- “The State’s purported interest in protecting matrimonial privacy . . . does not measure up to Michael’s and Victoria’s interest in maintaining their relationship with each other.”¹¹²

In this consideration of what procedural process is due, Justice Brennan addressed the question that the plurality rejected, concluding that the interest in marital privacy enshrined in the California presumption statute did not trump the interest that Michael and Victoria asserted in maintaining a parent-child relationship. Making the narrative move from the abstraction of the law to the particulars of the case, the dissent’s analysis of due process entailed a more exacting narrative examination of the factual circumstances that underpinned the statute—the uncovering of intimate scenes from a marriage—and that the presumption of legitimacy purported to protect. In doing so, Justice Brennan’s opinion demonstrated an empathic capacity not only to understand the kinds of concerns about intrusion into marital privacy that might arise, but also to explain why those concerns in the context of a paternity hearing (where

111 491 U.S. at 148–53 (Brennan, J., dissenting).

112 *Id.* at 154–55.

family finances and interactions did not pertain) and advanced blood-testing techniques (whereby a couple's claim to have had intimate relations could be rebutted by a reliable procedure) were implausible, and lacking in narrative power. Instead, with narrative imagination and a storyteller's attention to detail, Brennan's dissent addressed the range of interests implicated in this case, including the government–institutional interest represented in the existence of the legislative judgment at issue, the privacy concerns behind that judgment generated by public inquiry into officially recognized family relationships, developments in science that obviated the need for intrusion into the details of marital intimate life, and the broader realities of familial experience that exist beyond those relationships having official sanction.

The dissent's narrative–analytic approach exemplified “the ability to understand not just the situation but also the perspective of litigants on warring sides of a lawsuit.”¹¹³ Whereas the plurality saw Trouble and transgression not only in Michael's relationship with Carole and Victoria but in his effort to *assert* it judicially, the dissent saw a more complex and contextually rich landscape for family life in which the source of Trouble was courts' continuing to give effect to the law's constructed categories and bright lines. The courts' interpretive move, however, created a narrative problem that the dissent understood all too clearly: in truncating the possibilities for a richer conception of family life, the courts' approach that the dissent critiqued left Trouble, and thus the narrative, unresolved.

The dissent also made clear that affording Michael the opportunity for a paternity hearing had no bearing on whether he would be entitled to visitation rights, which would be determined in a separate best-interests hearing:

Make no mistake: to say that the State must provide Michael with a hearing to prove his paternity is not to express any opinion of the ultimate state of affairs between Michael and Victoria and Carole and Gerald. In order to change the current situation among these people, Michael first must convince a court that he is Victoria's father, and even if he is able to do this, he will be denied visitation rights if that would be in Victoria's best interests. . . . It is elementary that a determination that a State must afford procedures before it terminates a given right is not a prediction about the end result of those procedures.¹¹⁴

By narrating and translating the interests that lay behind the statutory process, Justice Brennan's dissent was able to defuse the dire consequences predicted by the plurality: “[I]f Michael were successful in being declared

113 West, *supra* n. 29, at 1.

114 491 U.S. at 156 (Brennan, J., dissenting).

the father, other rights would follow—most importantly, the right to be considered as the parent who should have custody.”¹¹⁵ Such consequences would not occur simply upon Michael’s having access to a process to establish his biological relationship with Victoria. To establish visitation or custody rights would require its own narrative inquiry—implicating relationships and interests—and would be aided by an empathic capacity to imagine various configurations of a family.

IV. Conclusion

Benjamin Cardozo’s observations about the indeterminacy of the Due Process Clause have a special resonance in the context of *DeShaney* and *Michael H.*: “Liberty is not defined. Its limits are not mapped and chartered. How shall they be known?”¹¹⁶ The main and dissenting opinions in each case diverged in their approach to setting limits. Justices Rehnquist and Scalia held fast to existing legal categories and excluded the asserted interests in both cases. By contrast, Justice Brennan and Justice Blackmun were prepared to stretch the liberty category to fit the asserted interests within it. Using Amsterdam and Bruner’s terms, I have treated the approach of the main opinions as category-centered and particularly Justice Brennan’s approach in dissent as situation-centered.¹¹⁷

At root, every act of categorization involves matching *some awareness of the situation one is in* with *some standard for what a situation of this sort should be like*. . . . Will the situation get carved down, in the manner of Procrustes, to fit the system of concepts? Or will a patch get sewn onto the system of concepts, to fit the situation? Or a bit of both? The answer is likely to turn in part on the value one attaches to preserving the coherence of the system, on the one hand, and the richness of the situation, on the other.¹¹⁸

Building on this description, one might conclude that a situation-centered jurist is more likely to pay attention to context, nuance, and detail, and to draw on his or her own background knowledge to better understand the significance of the facts for the parties and other interested persons. In writing an opinion, a situation-centered jurist is also more likely to interpret and apply rules flexibly, in relation to facts rather than in

115 *Id.* at 118.

116 Cardozo, *supra* n. 26, at 76 (quoted in McLane Wardlaw, *supra* n. 25, at 1638).

117 Amsterdam & Bruner, *supra* n. 7, at 108.

118 *Id.* at 109.

disregard or dismissal of them. In being a judge for the situation, such a jurist is likely to exercise empathy. By contrast, a judge who sees the world categorically is more likely to focus on differences, to see things as “relevant” or not and to “foreclose the narrative of experience” offered by groups less favored in the law.¹¹⁹ If both situation-centered and category-centered judges use narratives in part to convey their legal rationales and interpretive approaches, the quality of the narratives, marked by differences in the level of attention to detail and the capacity to imagine and capture different perspectives, will offer evidence of the extent to which empathy is at work, for whom, and to what end.

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¹¹⁹ Henderson, *supra* n. 12, at 1591.