Is Moral Imagination the Cure for Misapplied Judicial Empathy?: Bandes, Bastiat, and the Quest for Justice

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I. Introduction

It is both an honor and a challenge for me to be invited to comment on Professor's Bandes's Foulston Siefkin Lecture, *Moral Imagination in Judging*. It is an honor because Professor Bandes is one of the nation's leading scholars on the judicial craft. It is a challenge because I am not. Although I find judicial decision-making to be a fascinating topic to consider, it is one that is well outside my area of expertise–something that may account for the disconcerting experience I had when reading the lecture. For I found myself in profound agreement with many of Professor Bandes's contentions, while in equally profound disagreement with others.

My effort to account for this uncomfortable alternation between "Yes, of course" and "Definitely not" convinced me that I needed a better understanding of the fundamental concepts being discussed in order to say anything intelligent on the subject. Hence, to a large extent, this article merely reflects my quest for understanding. In Section II, I attempt to clarify my understanding of what moral imagination is. In Section III, I make some observations about the role of empathy in the judicial decision-making process. Finally, In Section IV, I apply my newly

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developed understanding of moral imagination and judicial empathy to suggest that moral imagination can be a corrective for the danger of a misapplied judicial empathy.

II. Moral Imagination

A. A Confession of Ignorance

Honesty requires me to begin by confessing that I literally know nothing about moral imagination. And I use the word "literally" literally.

I am, of course, familiar with the term "moral imagination." Much of my research addresses the ethical issues that arise in the business environment, an area in which moral imagination is much discussed. I confess, however, to being unfamiliar with the literature on the subject. And, as essentially a lay person in this context, I find it far from obvious precisely what moral imagination is.

My difficulty stems from a lack of understanding of the effect of placing the word "moral" before the word "imagination." Adjectives are called modifiers because they modify the meaning of the noun before which they are placed. But such modification may render the meaning of the noun either more or less definite.

Consider, for example, the nouns "justice" and "responsibility." Placing adjectives such as "corrective" or "distributive" before "justice" renders the meaning of the resulting phrase more definite and specific. "Justice" refers to giving each person his or her due. "Corrective justice" means giving each person what he or she is due to correct a wrong another has inflicted upon him or her; "distributive justice" means giving each person what he or she is due when a thing of value is being distributed by a third party. Similarly, placing adjectives such as "causal," "moral," or "legal" before "responsibility" specifies the type of responsibility to which one is referring.

"Responsibility" refers to the state of being answerable or accountable for something. "Causal responsibility" means the state of being answerable or accountable for causing a result; "moral responsibility" means the state of being answerable or accountable in conscience for blameworthy conduct; and "legal responsibility" means the state of being answerable or accountable for a transgression of a legal requirement.

Now consider the effect of placing the word "social" before either of these nouns. What is "social justice"? It is not clear. We know that it means something other than merely giving each person what he or she is due, but we are not sure what. It may mean giving each what he or she is due as a member of a particular group, or to effect a more appropriate distribution of wealth, or to neutralize undeserved natural advantages, or to create a just society. What is "social responsibility"? It is equally unclear. It may mean the state of being answerable or accountable to society as a whole, or for undertaking supererogatory, beneficial actions, or for taking actions at odds with one's contractual or fiduciary obligations, or it may merely be a synonym for moral responsibility. In both cases, the adjectives "corrective," "distributive," "causal," "moral," and "legal" render the meaning of the nouns more definite, while the adjective "social" renders it less so. The former adjectives function as clarifiers, whereas the latter functions as a vaguifier, to coin a phrase.

To one such as myself who is unfamiliar with the work on moral imagination, the term "moral" functions as a "vaguifier" when placed before the word "imagination." Although I know what imagination is, I do not have a clear understanding of what "moral imagination" refers to. Is moral imagination a distinct type of imaginative capacity (e.g., similar to spatial, motor, visual, or auditory imagination), the morally proper as opposed to improper or evil use of one's

imagination, the ability to conceive of morally appropriate outcomes for difficult situations, or merely the direction of ordinary imagination toward moral questions? So, before I can hope to comment intelligently on a lecture on moral imagination in judging, I must first attain a better understanding of what moral imagination is.

Unfortunately, Professor Bandes's lecture itself is not particularly helpful in this regard. Although she begins the lecture by stating that she intends to consider the questions of "the quality of moral imagination, how it differs from empathy, and what role it ought to play in judging,"[1] for most of the lecture she seems to assume that the reader is familiar with the concept of moral imagination. Indeed, search as I might, I cannot find that Professor Bandes directly addresses moral imagination until the final paragraph of the lecture. This prompts me to search elsewhere for a basic understanding of the concept.

B. A Search for Understanding

So, what is moral imagination? A bit of digging was required to answer this question. My first effort at a literature search produced several definitions that can only be described as metaphorical in nature. Thus, I found Russel Kirk defining moral imagination, in contradistinction to idyllic and diabolic imagination, as that "which informs us concerning the dignity of human nature, which instructs us that we are more than naked apes;"[2] Vigen Guroian defining it as "a power of perception, a light that illumines the mystery that is hidden beneath

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[1]Pp. 2-3 of manuscript.

[2]Russell A. Kirk, *The Moral Imagination*, 1 Literature & Belief 37, 38 (1981).

visible reality: it is a power to help 'see' into the very nature of things;"[3] and Paul Lederach defining it as "the capacity to give birth to something new that in its very birthing changes our world and the way we see things. . . . [such that it] has a quality of transcendence. It breaks out of what appear to be narrow, shortsighted, or structurally determined dead-ends."[4] Although such definitions are emotionally uplifting, they are not particularly informative.

Restricting my search to philosophical sources produced less poetic, but still somewhat cryptic definitions. For example, Patricia Werhane, who has written extensively about moral imagination in the business ethics literature, defines moral imagination as "the ability in particular circumstances to discover and evaluate possibilities not merely determined by that circumstance [sic], or limited by its operative mental models, or merely framed by a set of rules or rule-governed concerns."[5] Although this definition may be useful to the cognoscenti, as a lay person, I confess to being somewhat baffled. I do not know what it means for a possibility to be either determined or not determined by a circumstance, what an operative mental model is, or how a possibility can be either framed or not framed by rules or rule-governed concerns.

Werhane amplifies her definition by explaining

> that moral imagination . . . begins not with the general, but with the particular, a particular person of moral or immoral character, an event, a situation, a dilemma, or a conflict. Second, moral imagination entails the ability to disengage. Third, *moral* imagination . . . deals not merely with fantasies but with possibilities or ideals that, if not practical, are at least theoretically viable and actualizable. Further, these

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[3]VIGEN GUROIAN, TENDING THE HEART OFVIRTUE: HOW CLASSIC STORIES AWAKEN A CHILD'S MORAL IMAGINATION 141 (1998).

[4]JOHN PAUL LEDERACH, THE MORAL IMAGINATION 27 (2005).

[5]PATRICIA WERHANE, MORAL IMAGINATION AND MANAGERIAL DECISION-MAKING 93 (1999).

> possibilities have a normative or prescriptive character; they concern what one *ought* to do, with right or wrong, with virtue, with positive or negative consequences, or with what common morality calls "good" or "evil." This activity is imaginative when it explores a wide range of possibilities not merely explicit in the circumstance in question, or, on the other hand, fully explicated by moral abstractions such as the categorical imperative or the principle of utility.[6]

I can tell from this that moral imagination involves consideration of the normative character of theoretically viable, but not fanciful, possibilities for action that arise from particular situations or concern particular persons. However, I am at a loss as to what it means for a possibility to be or not be "explicit in the circumstance in question" or "fully explicated by moral abstractions." Hence, I am unclear as to what makes this consideration "imaginative."

In his book, *The Moral Imagination: Implications of Cognitive Science for Ethics,* Mark Johnson provides a definition of moral imagination that is, at first, similarly mystifying. Johnson identifies moral imagination with

> self-knowledge about the imaginative structure of our moral understanding, including its values, limitations, and blind spots, . . . similar knowledge of other people, both those who share our moral tradition and those who inhabit other traditions, . . . [the ability to] imagine how various actions open to us might alter our self-identity, modify our commitments, change our relationships, and affect the lives of others, . . . explor[ing] imaginatively what it might mean, in terms of possibilities for enhanced meaning and relationships, for us to perform this or that action, . . . [and] the ability to imagine and to enact transformations in our moral understanding, our character, and our behavior.[7]

Taken together, these features describe "an *imaginative rationality* that is at once insightful, critical, exploratory, and transformative."[8]

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[6] *Id.* at 101.

[7] MARK JOHNSON, THE MORAL IMAGINATION 187 (1993).

[8] *Id.*

The problem with this definition is that being told that moral imagination consists of an insightful, critical, exploratory, transformative, imaginative rationality is helpful only if one knows what "imaginative rationality" is. I confess that I do not.

Fortunately, Johnson subsequently provides a more concise and concrete formulation of this definition by identifying moral imagination with "an ability to imaginatively discern various possibilities for acting within a given situation and to envision the potential help and harm that are likely to result from a given action."[9] If this is the essence of moral imagination, it is clearly an important tool for moral decision-making. Indeed, the ability to identify all possible courses of action and trace the beneficial or harmful consequences of each is crucial to the successful application of any consequentialist approach to ethics.

Johnson's more concrete definition of moral imagination is consistent with definitions provided by other moral philosophers. Thus, Charles Larmore defines moral imagination as "our ability to elaborate and appraise different courses of action which are only partially determined by the given content of moral rules, in order to learn what in a particular situation is indeed the morally best thing to do."[10] Similarly, Jonathan Jacobs explains that the exercise of moral imagination involves "articulating and examining alternatives, weighing them and their probable implications, considering their effects on one's other plans and interests, and considering their possible effects on the interests and feelings of others."[11] And John Kekes identifies moral

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[9] *Id.* at 202.

[10] Charles Larmore, *Moral Judgment*, 35 REV. METAPHYSICS 275, 284 (1981).

[11] Jonathan Jacobs, *Moral Imagination. Objectivity, and Practical Wisdom*, 31 INT'L PHIL. Q. 23, 25 (1991).

imagination with the "mental exploration of what it would be like to realize particular possibilities" when "one central concern of the agents engaged in [the imaginative activity] is with evaluating the possibilities they envisage as good or evil."[12]

These latter definitions are perfectly intelligible to me. They suggest that moral imagination is the application of imagination to situations in which the morally proper course of action is in question to ensure that one is considering all relevant, practicable alternatives. Understood in this way, the value of moral imagination is patent. As Kekes explains, "[n]arrow-mindedness, fantasy, and self-deception all involve the falsification of facts relevant to our appraisal of our possibilities. The corrective function of moral imagination is to avoid such falsification, and thus overcome obstacles to a realistic estimate of what we can do to make our lives better."[13]

Now I think I get it. If I am reading the literature on the subject correctly, moral imagination serves as a guard against human short-sightedness and narrow-mindedness; against our natural tendency to focus on what is immediately before us and familiar and overlook more remote or unusual possibilities and consequences. If this is indeed a correct understanding, then I am all in favor of the vigorous exercise of moral imagination, not only by judges, by anyone confronting a question concerning morally proper action.

C. What's New?

As much as I may be in favor of the exercise of moral imagination, I now find myself

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[12]John Kekes, *Moral Imagination, Freedom, and the Humanities*, 28 AM. PHIL. Q. 101, 101 (1991).

[13]*Id.* at 106.

puzzled over why there is anything controversial about it. If I am understanding it correctly, "moral imagination" is neither novel nor new. With no disrespect intended, it seems to be merely what Frederic Bastiat called "foresight" in 1850.

In that year, Frederic Bastiat published an essay entitled *That Which is Seen, and That Which is Not Seen*,[14] in which he warned of the danger of disregarding remote or unfamiliar possibilities and consequences.

> In the economic sphere an act, a habit, an institution, a law produces not only one effect, but a series of effects. Of these effects, the first alone is immediate; it appears simultaneously with its cause; *it is seen*. The other effects emerge only subsequently; *they are not seen*; we are fortunate if we *foresee* them.
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> There is only one difference between a bad economist and a good one: the bad economist confines himself to the *visible* effect; the good economist takes into account both the effect that can be seen and those effects that must be *foreseen*.
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> Yet this difference is tremendous; for it almost always happens that when the immediate consequence is favorable, the later consequences are disastrous, and vice versa. Whence it follows that the bad economist pursues a small present good that will be followed by a great evil to come, while the good economist pursues a great good to come, at the risk of a small present evil.[15]

Although addressing economic considerations, he pointed out that the tendency of human beings to disregard unseen or remote possibilities is not limited to economic reasoning.

> The same thing, of course, is true of health and morals. Often, the sweeter the first fruit of a habit, the more bitter are its later fruits: for example, debauchery, sloth, prodigality. When a man is impressed by the effect that is seen and has not yet learned to discern the effects that are not seen, he indulges in deplorable habits, not only through natural inclination, but deliberately.[16]

The cure he recommends for this tendency is the exercise of foresight.

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[14] FREDERIC BASTIAT, SELECTED ESSAYS ON POLITICAL ECONOMY (George B. de Huszar, ed., The Foundation for Economic Education, Inc. 1995) (1850).

[15] *Id.* at 1.

[16] *Id.*

> This explains man's necessarily painful evolution. Ignorance surrounds him at his cradle; therefore, he regulates his acts according to their first consequences, the only ones that, in his infancy, he can see. It is only after a long time that he learns to take account of the others. Two very different masters teach him this lesson: experience and foresight. Experience teaches efficaciously but brutally. It instructs us in all the effects of an act by making us feel them, and we cannot fail to learn eventually, from having been burned ourselves, that fire burns. I should prefer, in so far as possible, to replace this rude teacher with one more gentle: foresight.[17]

Foresight requires making sure that we consider "that which is not seen," possibilities that are remote in time and space or outside our range of experience; perhaps even those which are beyond our "operative mental models" or are not "explicit in the circumstance in question." Whether in the realm of economics, political science, ethics, or judicial decision-making, this is certainly something that I can endorse. For it is the lack of such foresight or moral imagination that is responsible for the infamous "unanticipated consequences" that doom so many of the most well-intentioned efforts to create beneficial public policy, or, in the present context, to engage in effective judicial rule-making.

III. Empathy and Judicial Reasoning

A. What is empathy?

In contrast to "moral imagination," the meaning of "empathy" is far from obscure, and Professor Bandes does an excellent job of clarifying its meaning in her lecture. A quick check of the Merriam-Webster dictionary identifies empathy with "the action of understanding, being aware of, being sensitive to, and vicariously experiencing the feelings, thoughts, and experience of another of either the past or present without having the feelings, thoughts, and experience fully communicated in an objectively explicit manner." The Oxford English Dictionary defines

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[17] *Id.* at 1-2.

empathy more concisely and more elegantly as "the power of projecting one's personality into (and so fully comprehending) the object of contemplation."

Professor Bandes refines this definition by pointing out that empathy has both a cognitive and an affective dimension. She defines cognitive empathy with "[t]he capacity to understand what others are thinking or feeling"[18] and affective or emotive empathy with the "ability to feel *with* others."[19] "Cognitive empathy functions as a tool for understanding others, but it seems to have no particular emotional valence. Empathy of this sort can be used for any purpose at all, including purposes detrimental to the person at whom it is directed."[20] In contrast, affective empathy "generally implies a desire to help and to act."[21]

In drawing this distinction, Professor Bandes warns us not to extend the affective dimension of empathy too broadly. For when we do, "[the] use of the term begins to shade into concepts like 'sympathy' and 'compassion.'" And this can be dangerous because empathy is distinct from sympathy. "Sympathy requires more than simply an understanding of what another is feeling—it requires choosing sides, and often, a desire to act in furtherance of someone's welfare."[22] But such "choosing sides" is inappropriate for judges.

By carefully distinguishing between empathy and sympathy, Professor Bandes seeks to eliminate a source of confusion over the meaning of empathy. She makes it clear that when one

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[18]Manuscript, p. 15.

[19]Manuscript, p. 16.

[20]Manuscript, p. 15.

[21]Manuscript, p. 16.

[22]*Id.*

recommends that someone exercise empathy, one is not recommending that they exercise sympathy. As she explains, "a judge can feel empathy for both the litigants before him, it can inform his understanding of the stakes for them both, it can move him to seek a just outcome for the parties before him, but unlike sympathy, empathy properly employed will not move the judge to prefer one side over the other."[23] She argues that it is a mistake to conflate empathy with sympathy.

> Empathy is often dismissed as a species of activism on behalf of the downtrodden, an interference with the judge's duty to act like an umpire. This view mistakes the nature of empathy. Empathy is the ability to stand in the shoes of another, to understand that others have concerns and feelings and values different from our own. It is a tool, a capacity, and one that does not necessarily come easily. [24]

By thus, clearly differentiating empathy and sympathy, Professor Bandes both clarifies the meaning of empathy and demonstrates that the claim that the exercise of empathy undermines a judges ability to remain impartial is misguided.

B. An Unfortunate Distraction

With this clearer understanding of the nature of empathy, we can now turn our attention to the question of whether judges need empathy to do their job well, which is a fascinating one. Unfortunately, rather than address this directly, Professor Bandes spends a considerable portion of her lecture refuting a very bad argument against judicial empathy–one that she attributes to Supreme Court Justices John Roberts and Samuel Alito.[25] If Roberts, Alito, and others really were relying on the argument Professor Bandes critiques, there would be value in showing it to

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[23]Manuscript, p. 16.

[24]Manuscript, p. 20.

[25]Manuscript, p.6-7.

be untenable. However, it is difficult to believe that Roberts, Alito, or anyone else really makes the argument Professor Bandes attacks. It appears to me that Professor Bandes is expending a significant portion of her lecture attacking a straw man.

Professor Bandes begins her section entitled "Anxiety and Indeterminacy" by quoting the remarks of several judicial nominees to the effect that they have an obligation "to the rule of law . . . to do what the law requires"[26] and to apply the law "as written" rather than pursue their personal values. She then identifies this commitment with a commitment to a "notion of judging [that] is premised on a conception of law as unsituated in time and place; transcending not only judicial perspective and ideology, but the vagaries of culture, custom and history."[27] She further identifies the commitment of the judicial nominees with a view of the judicial process that requires that "judges should leave all their personal predilections, their beliefs, their moral and emotional commitments, behind when they ascend the bench,"[28]–something that is impossible–and implies that "[l]aw is a closed system that provides determinate answers to legal questions, and provides them without reference to 'external' values."[29]

The position that Professor Bandes describes and associates with the commitment to apply the law as written is usually referred to as legal formalism. Legal formalism is indeed untenable. So much so, in fact, that no serious scholar has actually advocated it. Although legal formalism has been under sustained attack by the legal realists and the critical legal studies

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[26]Manuscript, p. 6.

[27]Manuscript, p. 7.

[28]Manuscript, p. 6.

[29]Manuscript, p. 6.

movement and its progeny for over a century, no real, live legal formalist has yet been identified.

Nevertheless, Professor Bandes does an excellent job of dismantling this position. She is entirely convincing in showing that "[j]udges interpret ambiguous, indeterminate language, they weigh conflicting principles, and there is no privileged perch from which to do so—no vantage point that rises above contestable interpretive choices and value judgments."[30] On this point, I am in complete agreement with her.

Philosophical meta-ethics may be an abstract pursuit. Law is not. Law is necessarily an applied science. As every first year student learns when he or she is taught the IRAC style of writing, every legal argument involves both an abstract rule and its application in a concrete setting. Regardless of how amorphous or ethereal the rule–for example, one stating that the people have the right to be secure against unreasonable searches and seizures,–it must be applied to particular parties in particular circumstances at particular times. The assertion that "[i]f laws are universal, timeless and discoverable, then a decision-maker's attributes, beliefs, values, situatedness in a tradition, a culture, a historical time and place, can only be impediments to rational decision-making"[31] is indeed absurd. If a judge is not situated in a tradition, a culture, a historical time and place, he or she would be incapable of *applying* any legal rule. The lack of such situatedness and understanding of the culture and values of one's society would not merely be an impediment to decision-making, it would render it impossible. The naive legal formalism that Professor Bandes describes is indeed silly.

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[30]Manuscript, p. 11. Producing arguments that destroy the naive formalist position is fun to do. I have engaged in the sport myself. *See* John Hasnas, *The Myth of the Rule of Law*, 1995 WIS. L. REV. 199 (1995).

[31]Manuscript, p. 3.

The problem is that the commitment articulated by Roberts, Alito, and other judicial nominees to do what the law requires rather than pursue their own preferences does not entail a commitment to legal formalism.

In the preceding section of her lecture, Professor Bandes acknowledged that law is a teleological enterprise–that what constitutes judicial rationality "cannot be discussed in a vacuum, apart from discussion of the goals of the justice system and the role of judges . . . in that system."[32] This is a recognition that the justice system is designed to serve a normative purpose. And this implies that accepting the role of judge requires a willingness to serve the normative purpose of the system, rather than one's own. In this sense, judges take on the role of agents, just as practicing attorneys do. But where the attorney's principal is his or her client, whose interests the attorney agrees to serve in preference to his or her own, the judge's principal is the justice system itself, and he or she agrees to serve the normative purposes of the system in preference to his or her own. This agency relationship requires judges to base their decisions on the normative purposes of the system rather than their personal moral and political commitments to the extent that this is humanly possible. But such a commitment is perfectly consistent with the recognition of legal indeterminacy. One need not believe that the law "is a closed system that provides determinate answers to legal questions, and provides them without reference to 'external' values" or is "a determinate system of rules simply awaiting discovery and application . . . [with] judges as mere conduits to that discovery" to believe that judges should decide cases so as to advance the normative purpose embodied in the law rather than their personal normative preferences.

Politicians often issue public declamations that suggest that the law is self-applying. But

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[32]Manuscript, p. 5.

it is unlikely that any nominee to the Supreme Court is making such an assertion when stating that he or she will apply the law as written. A more reasonable interpretation would be that they are promising to act as faithful agents charged with advancing the purposes of the justice system rather than their own when they are grappling with the admittedly indeterminate legal materials that comprise our law.

Attributing a naive legal formalism to the opponents of judicial empathy and then proceeding to demonstrate that legal formalism is untenable tells us nothing about the desirability of judicial empathy. In my opinion, it is an unfortunate distraction from an important and fascinating question.

C. Back to Basics

If the meaning of empathy is clear, why is the question of whether judges need empathy so complex? Part of the reason may be that "judging" is a generic concept–one that includes a variety of distinct activities. Whether judicial empathy is desirable may depend on which aspect of judging we have in mind. This suggests that we may be able to reduce confusion on this matter with a quick review of the basics of the judicial role.

In our legal system, the legal decision-making process is divided between judge and jury. This division is conventionally expressed by saying that judges decide matters of law and juries decided matters of fact. Trial judges usually do not determine the outcome of cases. That is the role of the jury. The trial judge's role is to ensure that the litigants receive a fair trial–that the litigants' cases are properly presented to the jury for decision. Hence, the trial judge must see that the legal issues are properly joined, the rules of evidence are compiled with, and the jury has a proper understanding of the law. This requires that he or she make initial judgments of law–e.g.,

has the plaintiff alleged facts that a reasonable jury could find to establish all the elements of a cause of action?,–rule on evidentiary motions and objections–e.g., does the prejudicial nature of an offered item of evidence outweigh its probative value?,–and charge the jury–e.g., if the plaintiff establishes . . ., then you should find for the plaintiff. Once these tasks are complete, the trial judge turns the matter over to the jury for decision. The exception to this division of authority comes when the trial judge presides over a bench trial in which he or she is called upon to render the decision as well.

Appellate judges similarly have no authority to intrude upon the province of the jury. They are limited to reviewing the trial judge's legal rulings to determine whether any of them were erroneous–whether the trial judge made a mistake of law that prevented a litigant from receiving a fair hearing. This requires appellate judges to identify the relevant law and determine whether the trial judge properly applied it to the facts of the case.

Keeping these basics in mind may help clarify some of the questions surrounding judicial empathy. For example, the division of decision-making authority between the judge and jury can shed light on the referee analogy employed by Justice Roberts that Professor Bandes finds so objectionable. At the trial level, the jury decides who wins and who loses. The judge merely acts to ensure that both parties receive a fair trial. In this sense, the judge is analogous to the referee in a game whose job is to enforce the rules of fair play and let the outcome be determined by the players. Further, appellate judges are limited to determining whether the trial judge performed his or her "referee" role properly. They are not free to overturn the jury's decision on the basis of their personal value judgments as to how the case should have been decided. Hence, one could say that they function as higher level referees.

There is nothing objectionable about this view of the judge as referee. It does not commit one who holds it to any particular conception of the nature of law, and certainly not to legal formalism. It is perfectly consistent with the conception of the law as a set of plastic rules whose shape is determined by the normative purpose they are designed to serve. It is merely a way of saying that to do their jobs correctly, judges must leave the ultimate decision to the jury and not let their personal values cause them to tilt the playing field to favor one side over the other. It is also perfectly consistent with judges exercising empathy whenever doing so helps them do their job of acting as a referee more effectively.

Focusing on these basics can also help us determine where empathy should play a role in the legal decision-making process. For example, jurors obviously must exercise empathy. Juries render the decision of the case. They are not concerned with the effect of their decision on unknown future parties. They are charged with doing justice to the particular parties to the litigation. To do so, they must put themselves in the litigants' place. They must weigh the interests and veracity of the parties, judge the credibility of the witnesses, and decide the quantity and quality of the pain and suffering of others. These judgments obviously require empathy. Our jury system is based on the idea that ordinary citizens are more able to identify with the parties to lawsuits than are more well-educated public officials and judges. In our legal system, the jury is the repository of empathy.

This does not imply that the jury is the *exclusive* repository of empathy, however. Juries need empathy to put themselves in the place of litigants. Trial judges need empathy to put themselves in the place of jurors when called upon to determine what a reasonable juror could conclude from the evidence or whether an item of evidence would be prejudicial. Trial judges

also need empathy to put themselves in the place of litigants when they replace the jury in bench trials. Indeed, trial judges must be a bit schizophrenic since they need the capacity to exercise empathy when called upon to decide the case in bench trials and the self-restraint not to allow their empathic understanding to usurp the role of the jury when presiding over a jury trial.

But what about appellate judges? Do they need to exercise empathy as well? Appellate judges must determine whether the trial judge properly identified and interpreted the relevant law and whether he or she properly applied it to the facts of the case. But as Professor Bandes convincingly demonstrates in her critique of legal formalism, law does not consist of a set of self-applying rules with objectively verifiable meanings. Therefore, to do their jobs effectively, appellate judges must have both an understanding of the normative purpose a law (or Constitutional provision) is designed to serve and sufficient insight into human behavior to know whether applying it to the facts of the instant case would further or retard that purpose. It seems clear that empathy can be crucially important to an appellate judge's ability to make the latter type of judgments–judgments about how the law *applies* to the facts of the case.

Robin West points out that our legal system is a common law system in which judges are often called upon to reason by analogy. "A common law judge, after all, reasoning in the way central to common law adjudication, must decide if this case, litigant, or injury is like that one, in order to reach a decision in virtually every matter that comes before him."[33] To make the necessary comparison, a judge must understand the effects the decision will have on the parties to the dispute, including the way the parties will experience the decision. Professor Bandes illustrates the problems engendered by the lack of such understanding with the examples of

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[33] *See supra* West, note ?, at 2.

Lewis Powell's inability to appreciate how homosexuals would experience decision in Bowers v. Hadwick[34] and Herbert Weschler's apparent belief that both he and Charles Houston, an African-American attorney, experienced segregation in the same way.[35] Hence, empathy–the capacity to put oneself in another's place and understand how he or she will experience something–can be crucial to an appellate judge's ability to make good decisions as to how the law should be applied.

On the other hand, empathy appears to play no role in the appellate judge's more abstract task of understanding the normative purpose of the law. To say that identifying the proper normative end of a particular law, an area of law (contract, tort, property, etc.), or law generally is extremely controversial would be an understatement. Such questions are the subjects of titanic and ongoing intellectual debate. But it is essentially a philosophical debate. It is not clear to me how the ability to put oneself in another's place can help a judge determine whether contract law is best understood as a mechanism for coupling freedom with responsibility or one for ensuring that all parties to a transaction receive a fair bargain.

D. What Is the Problem?

Our analysis of the various tasks judges are called on to perform shows that empathy is necessary for the judge to be effective in performing several of them. Then why is the question of judicial empathy so controversial? The answer may be that the advocates of judicial empathy seem to call for it to be exercised in inappropriate ways.

In the first place, the advocates of judicial empathy seem to be recommending that judges

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[34]Manuscript, p. 29-30.

[35]Manuscript, p. 35.

overstep their proper bounds. Advocates of judicial empathy typically write as though they are arguing that judges should render their decisions on the basis of empathy for the *litigants* to the lawsuit. For example, Professor Bandes asserts that empathy "is the essential means by which judges attempt to understand the motivations, intentions and goals of the litigants before them,"[36] and that "a judge can feel empathy for both the litigants before him, it can inform his understanding of the stakes for them both, it can move him to seek a just outcome for the parties before him, but unlike sympathy, empathy properly employed will not move the judge to prefer one side over the other."[37] Similarly, Robin West, whom Professor Bandes cites with approval, describes empathy as "the ability to understand not just the situation but also the perspective of litigants on warring sides of a lawsuit, " and notes that "good judging–even appellate judging–must be grounded in an empathic bond between judge and litigant."[38]

This focus on the ability to empathize with the litigants has a troubling aspect to it. Although the discussion of judicial empathy almost always arises in the context of appointments to the Supreme Court or other high level appellate benches, consider for a moment how the above statements would sound if applied in the trial context. Arguing that empathy can "move [a judge] to seek a just outcome for the parties before him" and that good judging "must be grounded in an empathic bond between judge and litigant" makes it sound like it is the judge who determines the outcome of the case. But in our legal system, this is the province of the jury. A

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[36]Manuscript, p. 14.

[37]Manuscript, p. 16.

[38]Robin L. West, *The Anti-Empathic Turn*, Georgetown Public Law Research Paper No. 11-97, forthcoming in Nomos, p. 1.

trial judge needs the ability to empathize to be sure, but it is to empathize with the jurors, not the litigants. The trial judge must be able to identify with jurors to understand how they will perceive the evidence and what will inflame their prejudices, but otherwise must be on guard not to allow his or her personal judgment about who should win the case, whether derived from an empathic bond with the litigants or not, to influence the jury's decision. The ability to empathize with litigants would be important only if the judge were presiding at a bench trial. In the ordinary case, calling upon a trial judge to empathize with the litigants sounds a lot like calling upon him or her to overstep his or her proper role.

When we change our focus to appellate judging, a similar concern is evident. Appellate judges are limited to reviewing the decisions of their lower court brethren for mistakes of law. They are not empowered to substitute their judgment about which party should prevail for that of the jury. The fear associated with calling upon appellate judges to empathize with the litigants of the case is that it will tempt them to find non-existent flaws in lower court decisions when their empathetic understanding leads them to believe that the jury reached the wrong conclusion.[39] In effect, the call for this type of judicial empathy incentivizes judges to exceed their institutional role.

Secondly, exhorting appellate judges to empathize with the litigants risks injecting empathy into the legal analysis at the wrong point. Empathy clearly has value in helping the judge determine how the rules of law should be applied to the facts of the case. Empathy is a source of information about the effect that the decision (and in a common law system, the

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[39]It is precisely this temptation that gave rise to the old bromide that hard cases make bad law.

evolving law) will have on the human beings subject to it. However, empathizing with the litigants may not be helpful, and indeed, may be destructive to the judge's efforts to find the proper normative interpretation of the rule of law itself.

Robin West has recently distinguished two paradigms of judicial reasoning–scientific judging and traditional common law judging. West associates scientific judging with the ascendant jurisprudential model of the twentieth and twenty-first century, which she describes as follows.

> Most mainstream legal scholars–including liberal, progressive and critical legal scholars–concur that adjudication should be forward-looking and general, and not limited to the particulars of the facts before it. Adjudication should be, in short, legislative in form and outlook. Given their indeterminacy, precedent and past cases in general provide little guidance in any event. Courts should seek to maximize welfare. Their work is no different than the legislator's; it's simply housed in a different building.[40]

In contrast, she describes the traditional, common law model as one in which judges are more focused on reaching just decisions in the particular case before them than in creating rules that will bind parties in the future. The hallmarks of this model of judging are "the moralism, the backward-looking particularism, and the role of moral sentiments such as sympathy and empathy."[41] These elements

> were part of the traditional paradigm of good judging in common law cases quite generally. The judge in common law cases across the board was expected to understand the situation of the litigants before him or her, and make a judgment about their situation against the backdrop of pre-existing norms, many of which–not just a few–were quite explicitly moral in content.[42]

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[40]West, *supra* note ? at 36.

[41]*Id.* at 30.

[42]*Id.*

What is the proper role of judicial empathy in these contrasting models of adjudication? According to West, in the scientific model of judging, the answer is none. She argues that the "new paradigm of judging has no need for the exercise of judicial moral sentiment, or the faculties of sympathy and empathy at the core of that human capacity."[43]

> Neither empathy nor sympathy is required by the new model, for any of the judicial tasks for which it was seemingly central, in the old model. The judge on the new model is less concerned with precedent, so there is no need to engage in the sort of empathetic imaginings that Susan Bandes and others have characterized above as essential to analogical reasoning. Nor need the judge exercise whatever moral sense (or sentiment) is required to appreciate and apply moralistic legal categories. Once the law is washed in cynical acid, the judge has no need for those moral sentiments that might register engagement with the moralistic categories that have been washed away. The judge need not empathically walk in litigants' shoes before judging them: his decision should attend, rather, to the incentives or disincentives for future conduct that his decision might create, with the goal of maximizing future net social welfare.[44]

In the traditional, common law model, however, Professor West (and Professor Bandes[45]) believe that empathy plays a crucially important role. In that model, judicial decision-making "should be informed by the judge's moral sense–and hence, in part, by moral emotions and moral sentiments, including both empathy and sympathy."[46] Because the law is indeterminate, the meaning of precedent must be supplied by sources outside the law proper–by underlying moral considerations that give the law its normative purpose. Professors West and Bandes believe that judges can access those moral considerations only by exercising their "moral sense"–by empathizing with the litigants to the dispute in order to determine which deserves the sympathy

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[43] *Id.* at 37.

[44] *Id.*

[45] Manuscript, p. 26.

[46] West, *supra* note ?, at 29.

of the court. A judge "won't know . . . whether the behavior is morally objectionable or not unless he can empathize with both parties to the transaction, and then register a stronger sympathetic response to either one or the other. That's just the nature of the beast."[47]

I am in complete sympathy with Professors West and Bandes's preference for the traditional common law model of judging over the currently ascendent scientific model. I do not believe the purpose of the legal system is necessarily to maximize "future net social welfare" or serve any other purely utilitarian end. I agree with them that the meaning of a law, an area of law, or law in general must be determined by appeal to moral principles. However, I do not agree that judges may access these principles only by exercising a moral sense that requires empathizing with the litigants in order to determine which is more deserving of sympathy.

Recognizing that judges must appeal to moral sources to render legal decisions does not imply that judges must decide cases on the basis of their emotional reactions to the litigants. It implies only that judges must engage in moral reasoning or, more accurately, that legal reasoning necessarily involves moral reasoning. The idea of moral reasoning is not oxymoronic, and moral decision-making need not involve a direct appeal to emotion.

Consider the following alternative description of the traditional common law model of appellate judging. To decide a case, the judge must determine whether the lower court had a proper understanding of the meaning of the legal provision in question and whether the court applied it to the facts of the case properly. To do this, the judge must first determine what the legal provision means. Because the law is indeterminate, he or she cannot discover the meaning of the legal provision merely by examining its language. Instead, he or she must ask what moral

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[47]West, *supra* note ? At 29.

purpose the provision is designed to serve. This requires the judge to identify the moral principle or principles that underlie the particular legal provision or the general area of law within which it resides. He or she must then determine which interpretation of the legal provision in question is most consistent with these moral principles, and hence, best advances the normative purpose of the law. With this interpretation in hand, the judge must then consider how it applies to the facts of the case. To do this, he or she must have enough understanding of the culture of his or her community and the situations, desires, and interests of the litigants and other parties affected by the case to ensure that the law's application actually advances its normative purpose. To amass this understanding, the judge will exercise his or her capacity for empathy to put himself or herself in the place of all such parties. Finally, the judge will compare his or her analysis with that of the lower court to determine whether the lower court made a reversible error of law, doing so without second guessing the factual determination of the jury.

The process of seeking out the moral principles that underlie a particular law or area of law and determining which interpretation of the relevant law is consistent with those principles does not require an appeal to emotion *unless one believes that moral utterances are merely expressions on one's emotional approval or disapproval*–i.e., unless one is a noncognitivist. Absent this assumption, however, seeking the moral grounding for a law or area of law can be an entirely cognitive and rational process. If so, then the judge's emotional ability to identify with others need not enter the analysis until he or she examines how his or her cognitively determined interpretation of the law should apply to the human beings it would affect, *a group that is not necessarily limited to the litigants.*

There is nothing objectionable per se about the call for judges to "feel empathy for both

the litigants before them,"[48] or "develop an empathic bond between judge and litigant."[49] However, even supporters of the traditional common law model of adjudication (such as myself), can suspect that such calls are designed to give empathy an inappropriately prominent role in the judge's analytical process. By limiting the call for empathy to empathy for the *litigants*, the advocates of judicial empathy suggest (perhaps unintentionally) that they are placing this process of emotional identification at the heart of the judicial analysis. It sounds as though they are collapsing the moral reasoning portion of the analysis into an emotional weighing of the relative impact of the decision on the parties–a noncognitivist analysis,–rather than a cognitive consideration of relevant moral principles.

Professor Bandes seems to suggest this when, in criticizing the scientific model of judging for eliminating the role of judicial empathy, she states, "[t]hus the question continually elided is the most important question: what sources do judges draw upon when they 'reflect on the values and ideals of the Constitution' and seek 'to understand what those ideals…require in the practical world they confront…? '"[50] Professor Bandes seems to assume that the answer to this question must be the judges' empathetic weighing of the feelings of the parties to the lawsuit. I would have thought the obvious answer was the principles of justice and other moral principles that undergird the liberal society.

I may agree with Professors West and Bandes that empathy has an important role to play in the traditional common law model of adjudication, but disagree that it plays the central role

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[48]Manuscript, p. 16.

[49]West, *supra* note ?, at 1.

[50]Manuscript p.26.

they appear to assign to it. I find nothing very controversial about asserting that empathy is necessary to the proper application of law to facts. However, if Professors West and Bandes are asserting that the empathetic weighing of the feelings of the litigants should replace the process of moral reasoning in determining the proper normative interpretation of the relevant rule of law, then they are making a controversial claim indeed.

In sum, I believe that it is clear that appellate judges need the capacity for empathy to do their jobs well. This is because they would be unable to make intelligent judgements about how the law should be applied without the ability to judge its effects on the human beings subject to it. And this requires the ability to put oneself in their place and view the decision from their perspective. In fact, I would disagree with Professor West's contention that there is no role for empathy under the scientific model of judging. Even under this model, judges will fail if they cannot appreciate the perspective of the effected parties well enough to predict the results that their decision will produce in the world.

Recognizing this important role for empathy, however, does not imply that judges should seek the normative underpinnings of the law by empathizing with the litigants and letting their "moral sense" about which side should win the case inform their judgment.[51] Empathy may be crucially important to the minor premise in a legal argument–the application,–but giving it a leading role in the formation of the major premise–the meaning of the rule of law–would be

[51]I am not certain that Professors West and Bandes are actually advocating this. However, the language they employ strongly suggests it. I add this caveat because I do not want to misinterpret their position. As I stated at the outset, I am exploring a topic that is outside of my field of expertise, and I am keenly aware of my limited knowledge of the literature on the subject. My interpretation of their position reflects my best, but not fully informed, understanding of the statements they make in the relevant articles.

problematic. To the extent that the advocates of judicial empathy cast the empathetic identification with litigants in such a role, they seem to be both 1) recommending that judges invade the province of the jury and 2) assuming that moral reasoning consists of a weighing of emotions. Understood in this way, it is unsurprising that the call for judges to exercise empathy would be controversial.

IV. Is Moral Imagination the Cure?

In the process of educating myself sufficiently to write this comment, I have come to believe that empathy plays an important, but limited role in the judicial decision-making process. Although I do not believe that empathy should play a role in determining how a rule of law is interpreted, I am convinced that it must play a role in determining how it is applied.

Law is a practical enterprise. It requires that abstract normative principles be applied to real people so as to produce the normatively appropriate results. To perform their task effectively, judges must have insight into how their decisions will affect real people situated within a definite cultural milieu. This requires an appreciation of how the decision will both impact and be perceived by the parties it affects. The ability to put oneself in another's place–to empathize with others–is obviously necessary to develop such an appreciation.

Yet, even when cabined within its proper sphere, exhorting judges to exercise empathy carries with it a danger. It is the danger of short-sightedness that both Professor Bandes and Frederic Bastiat warn us about–the natural human tendency see the world in terms of what is familiar and immediately before us. Judges can empathize only with human beings of whom they are aware and only to the extent that they can perceive and identify with such parties' short and long term interests. Empathy, if exercised only partially, can give the judge a distorted view of

the effects his or her decision will have on the world, making it less likely that he or she will apply the law in a way that advances its normative purpose.

If I understand it correctly, moral imagination can act as curative for this tendency. Toward the end of her lecture, Professor Bandes defines moral imagination as "the ability to understand one's own limitations, the limitations of perspective, the range of values at stake, and the possibilities for change inherent in the situation."[52] In the context of judicial decision-making, this suggests that judges who possess moral imagination are those who are aware that the limitations of human knowledge make it difficult to accurately predict the consequences of their decisions; that limitations on human beings' ability to take a wide perspective mean that they will tend to focus on the immediate, visible, and familiar at the expense of the more remote, hidden, and alien; that the range of values at stake in any legal dispute may be wider than those most obviously pursued by the litigants; and that it is important to consider the full range of possible outcomes that may result from their decisions. Although it may mean more, the least that this can mean is that moral imagination requires a judge to exercise what Bastiat called foresight. For it is only by considering the full range of consequences and possible outcomes that judges can reduce the possibility that their decisions are based on an inaccurate view of the impact their decisions will have on the world. And this is true regardless of the model of adjudication to which one adheres.

A. The Scientific Model of Judging

Robin West argues that there is no role for judicial empathy in the scientific model of judging. Because under this model of adjudication, the judge is attempting to devise the proper

[52]Manuscript, p. 37.

rule of law for prospective application–because the judge's "work is no different than the legislator's"[53]–"[t]he judge need not empathically walk in litigants' shoes before judging them: his decision should attend, rather, to the incentives or disincentives for future conduct that his decision might create."[54] But this must be wrong. If indeed judges should attend to the incentives and disincentives for future conduct this their decisions might create, then they must walk not only in the litigant's shoes, but in the shoes of all future parties their decisions are likely to affect.

Under this model of adjudication, the problem of empathy is especially acute. For the judge is called upon not merely to do justice to the parties to the lawsuit, but to produce a rule that will regularize human behavior so as to achieve a particular normative end–e.g., the maximization of "future net social welfare."[55] But this requires judges to have sufficient insight into human perception and motivation to gage not merely how the litigants will react to their decisions, but also how divers elements of the general population will react to them over the long term. Social science may be able to help with this (which accounts for the proliferation of programs to educate judges in economics, psychology, etc.), but judges are usually JDs trained in law, not PhDs trained in the social sciences. Further, they do not have unlimited time to study the matter, but must decide cases in a timely manner. Hence, judges are inevitably driven to base their decisions at least in part on insight gained by intellectually putting themselves in the place of the people to be governed by the rule.

One reason I am an adherent of the traditional common law model of adjudication is that

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[53]West, *supra* note ?, at 36.

[54]*Id.* at 37.

[55]West, *supra* note ?, at 37.

I believe (along with Friedrich Hayek[56]) that the goal of the scientific model is unattainable–that no one has the ability to gather sufficient information to make accurate predictions of the behavior of myriad human beings. But the adherents of the scientific model of judging have no alternative but to try. Hence, for them, moral imagination becomes of crucial importance. Under their model, the only hope judges have of avoiding the curse of unanticipated consequences that befalls legislators is to consider "that which is not seen" to the greatest extent possible. They must explicitly recognize the limitations on their knowledge and their tendency to assume that others see the world the same way they do; they must try to imagine how people with different perspectives will respond to the rule; and most importantly, they must try to imagine the second-order or downstream consequences that the new rule will introduce into a dynamic social system.

Although I believe that under this model judges are attempting the impossible, I nevertheless recognize that they will come closer to their unattainable ideal by exercising moral imagination than they will by restricting their empathetic identification to the immediate effects of their decision on the litigants or by assuming that all members of the public share the same cultural backgrounds and normative presuppositions that they do. Moral imagination or at least Bastiat's foresight is their only hope in their hopeless quest.

A judge who restricts his or her empathetic identification to the litigants in a case between an unfortunate homeowner facing foreclosure and a mortgage company that pushed risky loans may be tempted to apply the law in a manner that provides relief to the homeowner. One with moral imagination will also consider the effect doing so would have on unknown individuals who may not be able to afford a home in the future if extending legal protection to

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[56] *See* F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

current homeowners increases future mortgage costs.

A judge who restricts his or her empathetic identification to the litigants in a case between laid off workers and a plant that closed its doors without warning may be tempted to apply the law in a manner that provides relief to the workers at the expense of the company's stockholders. One with moral imagination will consider the effect doing so would have on unknown individuals in other locations who do not receive job offers if capital remains tied up in unprofitable ventures.

A judge who restricts his or her empathetic identification to the litigants in a case between a child born with birth defects and a physician with medical malpractice insurance may be tempted to apply the law in a manner that provides relief to the impaired child. One with moral imagination will also consider the effect doing so would have on as-yet-unborn children in rural communities who may not have access to pediatricians if the cost of medical malpractice insurance rises.

For those who adhere to the scientific model of adjudication, the judge is engaged in an attempt to fashion a rule that best advances the law's underlying normative purpose. To apply the rule in a way likely to produce this outcome, he or she must understand how human beings will react to and be affected by the rule. And to gain this understanding judges must rely on their intuitive ability to identify with the parties–all parties–that the rule will affect. Empathy is necessary to do this, but misapplied empathy–empathy that is restricted to the litigants or only to parties immediately affected–will lead the judge astray. Moral imagination–Bastiat's foresight–is the cure for such misapplied empathy.

B. The Traditional Common Law Model of Judging

Under the traditional common law model of judging, judges are not tasked with creating rules of prospective application. Rather, their job is to decide the particular cases from which the rules of common law evolve. Hence, their focus is on ensuring that justice has been done–that the moral principles that underlie the law were properly applied in the particular case.

As has been discussed above, this task has an abstract and an applied component. First the judge must determine what the normative purpose of the law is, then he or she must determine whether it has been properly applied in the particular case. Empathy is necessary for the second determination. The judge must understand the situation, life prospects, and interests of the parties affected by the dispute well enough to ensure that the law is applied in a way that corresponds with its normative purpose.

In this model, the role of empathy is to serve as a source of information for the judge. As Professor Bandes points out, empathy helps the judge "understand the motivations, intentions, and goals of the litigants before them."[57] The problem with this formulation, however, is that it is too narrow. To ensure that a rule of law is applied in a way that serves it normative purpose, the judge needs to understand not only motivations, intentions, and goals, but also short and long term interests, and not only of the litigants, but of all parties affected by the outcome of the case.

Although I have taken issue with Professor Bandes's definition of judicial empathy, I move back into profound agreement with her when she calls for judges to exercise moral imagination or foresight when utilizing it. This is precisely what is necessary for judges to ensure that they are considering the long term consequences of their decisions on not only the litigants, but on all affected parties. Deciding whether a "blue" law requiring businesses to be closed on

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[57]Manuscript, p. 14.

Sunday may be justly applied to a Jewish shopkeeper requires the judge to consider not just the immediate consequences for the individual litigant, but the long term consequences on the entire Jewish community.

Under the traditional common law model of adjudication, judges are not required to consider the effects of their decisions on all future parties. But they are required to consider the effects of their decisions on all parties relevant to the just resolution of the case being decided. Even in this more limited context, judges have the natural human tendency toward short-sightedness, and so, are liable to focus only on the litigants and only on the most visible and short term effects of their decisions. Giving in to this tendency would be a misapplication of judicial empathy. Because moral imagination can help judges resist this tendency, it can serve as a curative for such misapplications.

With these thoughts, I conclude my quest for a better understanding of the concepts of moral imagination and judicial empathy in the hope that the benefits of my journey are not limited to myself.