During the presidential campaign Barack Obama declared, with no inadvertence, that among the furnishings of mind he would seek in an appointment to the Supreme Court is a keen sense of empathy for the less privileged in this country. And sure enough, now that he is president, his nomination of Sonia Sotomayor reveals a man more inclined to play on the clichés of identity politics than to seek a jurist who could stand on the intellectual plane of those we admire on the Supreme Court.

Conservative commentators have been scathing in their reactions to a jurisprudence that takes its bearings not from the principles of law but from sympathy toward the litigants less wealthy or less connected to the circles that matter in the world. And yet it has somehow gone unnoticed that even the most celebrated jurists weave into their judgments an understanding, drawn from experience, of the way the world works for ordinary people. Conservatives would offer a false account of the jurists they admire if they did not recognize the richness of experience and empathy that is already amply on display in the judgments of Justices Scalia, Thomas, Roberts, and Alito.

The more critical part, however, is that the commentators have seemed to concede to jurists on the liberal side an empathy that is not only implausible but a façade that covers a corruption running deeper. Just what this corruption is may be seen in three vignettes drawn from our recent experience.

The annals of Empathy in the Law might well begin with this notable case: Judge Maryanne Trump Barry, sister of Donald Trump, was appointed to the federal bench by President Reagan and elevated to the appellate court by Bill Clinton. Just after the Supreme Court struck down the bill on partial-birth abortion in Nebraska in June 2000, Barry and her court handed down their decision that struck down the comparable law in New Jersey.

In the grisly procedure of partial-birth abortion, about three quarters of the body of the child dangles from the birth canal. The head of the child is then collapsed, either by crushing with forceps or puncturing with a sharp instrument, so that the contents of the skull can be removed. In either case, the child is removed, so to speak, intact. And no parts are left behind in the body of the woman, where they might cause infection.

Judge Barry could have relied on the judgment of the Supreme Court, announced only a few weeks earlier, striking down the comparable bill in Nebraska. Barry could have disposed of the law in New Jersey quickly, without passion or bias. Instead, Barry took the occasion to display an unseemly passion in quashing the statute. She expressed nothing less than contempt for the effort to draw a line between the child in the womb and the child at the point of birth. That distinction has been known to common sense for millennia, but the application in these cases, she thought, involved “semantic machinations, irrational line drawing, and an obvious attempt to inflame public opinion. . . . The legislature would have us accept, and the public believe, that during a partial birth abortion the fetus is in the process of being born at the time of its demise. It is not. A woman seeking an abortion is plainly not seeking to give birth.”

This was postmodernist jurisprudence with a vengeance. The mother had elected an abortion—and once she had made that fateful choice, there was no child to be killed, no birth to take place. As
Judge Barry said, the pregnant woman was “plainly not seeking to give birth.” What the judge saw in the case involved no objective facts and certainly no empathy for the child. It depended, instead, entirely on the theory she was willing to install, looking out on the world.

Consider, as well, this second moment: In 1999, an enlisted man in the Air Force named Robbins had beaten his wife and killed the child she was carrying in her womb. The military prosecutors came down hard on the assault inflicted on Mrs. Robbins. But they did not think they had the authority to prosecute separately for the killing of the baby. That was the omission, the gap in the law, that led to Congressman Lindsay Graham’s bill to protect the Unborn Victims of Violence.

Graham’s bill lingered, but things were given a certain fillip with the later case of Laci and Connor Peterson. Scott Peterson had murdered his pregnant wife and sought to dispose of the body in the Pacific. But the bodies washed up on shore, the body of Laci, along with that of the child, now ripped from the womb. Backers of the bill seized the moment to rename their bill Laci and Connor’s Act.

For obvious reasons, the bill was never welcomed by the partisans of legalized abortion. Any recognition of the child in the womb as an object of protection by the law had to raise questions about the grounds on which other children in the womb, no less human, were somehow beneath the protection of the law. The partisans of abortion were left with no credible answer in objecting to Laci and Connor’s law—but their convictions made them hold fast to their position even without a credible answer. And so Representative Zoe Lofgren of California complained that Graham’s bill “recognizes a member of the species Homo sapiens at all stages of development as a victim of crime, from conception to birth. This affords even an embryo legal rights equal to and separate from those of the woman.”

Lofgren’s corrective was an amendment that “recognizes the pregnant woman as the primary victim of a crime.” A primary victim would seem to imply a secondary victim. But Lofgren’s amendment recognized only “assaultive conduct against a pregnant woman.” It was an instance of Chico Marx’s famous dictum: “Who are you going to believe—me, or your own eyes?” An unswerving loyalty to the cause of abortion required Lofgren and her colleagues to bring down the curtain of ideology, and, with that curtain in place, they would adamantly refuse to see what anyone with eyes could plainly see: that there were two bodies washed up on shore. None of the supporters of abortion in Congress offered models of empathy for the child whose skull was being crushed or whose body was being washed up on shore.

Consider, finally, a third moment of empathy in the law: the litigation in New York over the federal bill on partial-birth abortion. The bill had been passed by a Republican Congress in 2003 and signed by President Bush, but it was contested in federal district courts in different parts of the country. The trial in New York was conducted by Judge Richard Conway Casey. Judge Casey had to follow the lead of the Supreme Court in setting aside the federal law until the Court could revisit the issue. But he took the occasion to conduct hearings into claims made by partisans of abortion and their expert witnesses on the medical advantages that were supposedly offered by this horrific procedure.

Casey concluded that the evidence was far from compelling that the procedure was necessary for the health and safety of any pregnant woman. He was compelled to strike down the federal law and set up the appeal to the Supreme Court. But he was nevertheless free to remark that “the court finds that the testimony at trial and before Congress establishes that [partial-birth abortion] is a gruesome, brutal, barbaric, and uncivilized medical procedure.”

There was no question that this procedure involved the most excruciating pain to the child at the point of birth, feet dangling and animated, having his skull punctured. Judge Casey had put the question to several doctors on the side of the plaintiffs challenging the law, including Kanwaljeet S. Anand, a professor who specialized in pediatrics and anesthesiology at the University of Arkansas: Had they ever thought of administering anesthesia to the child killed in this way? The judge was apparently taken back by the reaction: “Some of plaintiffs’ experts testified that fetal pain does not
concern them, and that some do not convey to their patients that their fetuses may undergo severe pain.”

Was this a medical judgment? Or was it the hard, sober fact that, for the doctors who had settled in long ago with the defense of abortion as a right, the child in the womb had simply ceased to matter? The pain did not register as a point of concern because the child—even the child dangling from the birth canal at the point of birth—just did not count any longer as an object of concern. And therefore, of course, as an object of empathy.

These moments of empathy in the law should make clear enough that a jurist on the left is not supplied with levels of empathy for the suffering of pain that exceed the levels of ordinary folk not elevated in their sensibilities by a liberal persuasion. But these cases contain as well a deeper point that is rarely remarked and almost never speaks its name: Before we can engage our empathy there must be a prior judgment on the persons or animals or even things whose pain or disfigurement count. We recoil from inflicting cruel pain on animals, and we may even be appalled by the disfigurement of fine furniture in acts of gratuitous destruction. But the annals of our species also reveal the most remarkable capacity to screen out, as unnoticed or unheard, the pains of those marked for liquidation or subordination.

We do not ordinarily think that people lose their standing as human beings, and as bearers of rights, when they suddenly become weak and vulnerable and dependent on the care of others. But for many who have absorbed the idea of a right to abortion, the dependence of the fetus in the mother’s womb has been taken as a sign quite sufficient that the child has no standing as a separate being, with a claim to the protection of the law. The laws on abortion mark the child now as a living thing under the unchecked power of the pregnant woman. Whether it lives or dies must depend entirely on her will, not to be reviewed or judged by any other standard.

It is this hopeless subordination of the child in the womb that works, in this inverted outlook, to extinguish its rights. When we strip away the fuzzy language of empathy, what stands revealed is a prettified version of the Rule of the Strong: The strong will rule the weak, and their power to rule confirms the rightness of that rule.

What President Obama offers in the search for empathy is not a wider sensibility, alert to the sufferings of humans wherever they can be found. Nor is it the maudlin sentiment of the soft-hearted. It is merely the will to power, hiding behind banter as facile as it is false.
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