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Sotomayor can't escape an overworked word

With Sonia Sotomayor taking her seat as the 111th justice in U.S. Supreme Court history, we can leave behind the most overworked word of the summer: "empathy."

President Obama said he wanted a justice with empathy. This led to the network talking heads opining whether empathy should have any role in judging.

Sotomayor pleased the Senate Judiciary Committee when she insisted that "[I]t's not the heart that compels decisions in cases; it's the law." This, of course, is the stock answer members of the Senate Judiciary Committee wanted to hear.

Sotomayor's comment would be considered highly sophisticated — if we were still in the 18th century. Enlightenment thought would have approved of her distinction between reason and emotion. Reason and emotion, after all, were considered opposites. The genesis of this went back to Descartes' insistence in the 17th century on the mind-body dichotomy.

But neuroscience has now proven that Descartes was wrong. Modern brain research shows that emotion does not impede reason; on the contrary, reason *requires* emotion. In order to understand how judges actually decide cases, you first have to understand a little about how the human brain works. For this reason, I would recommend your reading George Lakoff's *The Political Mind* (2008) and Marco Iacoboni's *Mirroring People* (2008).

First, let's look at some empirical evidence on why applying "the law" is not going to help Justice Sotomayor when she decides cases on the Supreme Court. By definition, the cases the court decides to review are the hard cases, those that fall between the cracks of what is "the law." Last term, 23 of the Court's 75 cases — 31 percent of its docket — were 5-4 decisions. More interestingly, 16 of those decisions had exactly the same eight justices splitting 4-4 on the same sides. That is, in all 16 cases Chief Justice John G. Roberts Jr. and Justices Antonin Scalia, Clarence Thomas, and Samuel A. Alito agreed with each other; and in each of these 16 cases Justices [John Paul Stevens](#), David H. Souter, Stephen Breyer, and Ruth B. Ginsburg disagreed.

If all you have to do is apply "the law," how could these eight justices split in exactly the



Criminal Procedure

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same way in over 20 percent of the cases on the court's docket?

Well, first you may have noticed that this 4-4 split exists between the justices who are popularly known as "conservatives" and "liberals." This clearly suggests that their decisions are driven at least to some degree by politics or ideology or policy preferences.

The justices, of course, would disagree. But this is not surprising. According to Dartmouth neuroscientist Michael Gazzaniga, 98 percent of what the brain does is outside of our conscious awareness. In other words, neuroscientists have estimated that if you wrote down everything you would need to understand a text, items that were neither in conscious awareness nor in the written text would make up 95-98 percent of the list. Thus, as Lakoff observes, "Most reason is unconscious."

So what is this material the reasoning brain is drawing on that we are not aware of? According to UCLA neurologist Marco Iacoboni, our brains filter outside stimuli through "mirror neurons." These are brain cells that try to understand stimuli by internally simulating what you are externally experiencing. If you are a spectator at a soccer game and watch another person kick a soccer ball, mirror neurons will "fire," i.e., activate, those areas of the brain actually responsible for the "kicking" action even though you are sitting completely still. Even more remarkably, these mirror neurons will fire not only if you actually witness a person kick; they will also fire if you hear a ball kicked or even if you just hear the word "kick."

The recent discovery of these "mirror neurons" has broken down the separate boxes for "perception" (watching a kick) and "action" (kicking) that was part of the old brain paradigm. Instead, we now know that the brain deals with stimuli in a more holistic way. Perception and action are actually a unified process in the brain.

Why? Because it is important for survival. When a stranger approaches, it is important for you to identify him as a friend or foe. Your brain will take into account his actions, tone of voice, and facial expressions in order to judge whether his intention is friendly or threatening. Mirror neurons help accomplish this by imitating all that you observe so that you can feel as if you were inside that person. Only then will you be able to judge what his intentions are.

In other words, you *must empathize* in order to survive. And neuroscientists believe that there is a strong link between mirror neurons and our ability to empathize. Understood on this level, empathy is not a "nice" quality we need to consciously work on; rather, as Iacoboni writes, "Empathy plays a fundamental role in our social lives." He continues, "It seems as if the brain is *built* for mirroring, and that only through mirroring — through the simulation in our brain of the felt experience of other minds — do we deeply understand what other people are feeling."

And empathy thus encourages social interaction and cooperation. As Lakoff says, "Doing things for others is natural if you feel what they feel." He argues that our brains have actually "evolved for empathy." Iacoboni takes it a step further by stating that mirror

neurons "demonstrate that we are wired for empathy."

So forget about *whether* empathy has a place in judging. That is not the issue. The real issue is *how* it manifests itself in judging.

And this brings us to a justice's role in deciding a criminal case. The real issue is whose experience is the justice mirroring? Whose pain does the justice feel? Where does the justice's empathy get directed?

It all depends on where the justice — and her brain — is looking. Back in the 1970s, the sociologist Erving Goffman developed the concept of "frames," i.e., the cognitive structures we use to create a narrative. Criminal cases provide a choice of frames. Some will view a criminal case from the perspective of the victim and see it as a story of government attempting to re-impose order after a transgression. Others, however, will view it from the perspective of the defendant and ask whether the government has the right to seriously curtail the freedom of that person. In other words, is your focus more on the rights of society or on the rights of the individual defendant?

Death penalty cases are undoubtedly the starkest examples. For example, during the 2006 Term the Supreme Court decided eight such cases. The cases came to the Court both through direct appeal and through federal habeas corpus. The issues ranged from jury instructions to competence of the defendant to be executed; from ineffective assistance of counsel to improper removal of a juror; one case even dealt with the timeliness of the filing of the habeas petition.

What did the cases have in common? Just like the 16 cases this past term, these eight cases from the 2006 Term once again had the very same eight justices splitting 4-4 in each case. That is, regardless of the issue, Roberts, Scalia, Thomas, and Alito always voted to affirm the death penalty; regardless of the issue, Stevens, Souter, Breyer, and Ginsburg always voted to reverse the death penalty.

If you look at the language in the majority and dissenting opinions of these eight decisions, it will not surprise you which justices seemed more interested in the facts of the crime, and which emphasized the background of the defendant. Each group clearly "empathized." But, depending on the frame, the empathy ran in opposite directions. And this resulted in the conflicting decisions.

Why does a justice's brain choose to focus in one direction rather than the other? That is a separate issue, and the answer is not clear. But if Sotomayor thinks her job on the Supreme Court is merely to apply "the law," she will be in for an unpleasant surprise.

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