

Running on Empathy

By Charles Halpern

In July, in the midst of the primary campaign, President Obama spoke to a Planned Parenthood conference in the District of Columbia. After criticizing the Supreme Court's "concerted effort to steadily roll back" access to abortion, he turned his attention to the selection of judges. But he did not fall back on the old question of whether judges should be committed to a woman's right to choose abortion. He took the discussion in a new and unexpected direction.

He stated his intention to make *empathy* a primary criterion in appointing judges. "We need somebody who's got the heart, the empathy, to recognize what it is like to be a young teenage mom. The empathy to understand what it is like to be poor, or African-American, or gay, or disabled or old. And that is the criteria by which I'm going to be selecting my judges."

This was a striking statement. Rarely have qualities of heart or empathy been articulated as criteria for the selection of judges. It is not surprising that Obama would commit himself to this new criterion. He is a man who has identified "cultivating empathy" as one of the important values in his life. His strong empathetic sense made him effective as a candidate. In speaking to Northwestern University graduates, he urged them to help address the country's "empathy deficit — the ability to put ourselves into someone else's shoes; to see the world through those who are different from us — the child who's hungry, the laid-off steelworker, the immigrant woman cleaning your dorm room."

During the campaign, Obama

provided a model for empathy in action. For example, when Sarah Palin's teenage, unwed daughter's pregnancy was disclosed, Obama had an opportunity to make wry observations about the disorder in the family of the "family values" candidate. Yet he passed up the opportunity and instead pointed out that his mother had been a teenager when he was born. Through his empathetic response, he put himself in the position of the Palin daughter, and drew from his own family's experience to defuse, rather than exploit, the issue.

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Republican critics suggested that Obama would replace the rule of law with a vague standard of empathy; but the issue did not seem to have any traction and quickly disappeared from the public debate. Of course, as a former constitutional law professor and president of the Harvard Law Review, Obama will continue to apply the traditional judicial criteria — analytic skill, mastery of legal texts, commitment to the rule of law, ethical sensitivity — in addition to the criterion of empathy.

Empathy is defined as the ability of one person to identify with and understand another person's feelings or difficulties. It is a trait that permits the empathetic person to see the world from the other person's point of view, and to comprehend that person's attitudes and actions from the inside, inviting the empathetic person to respond with generosity and understanding. Empathy can be seen as an important dimension of wisdom — supporting the capacity to see complex and difficult situations from multiple perspectives.

Empathy is a valuable skill for a lawyer to possess. It can help the lawyer to make a strong connection

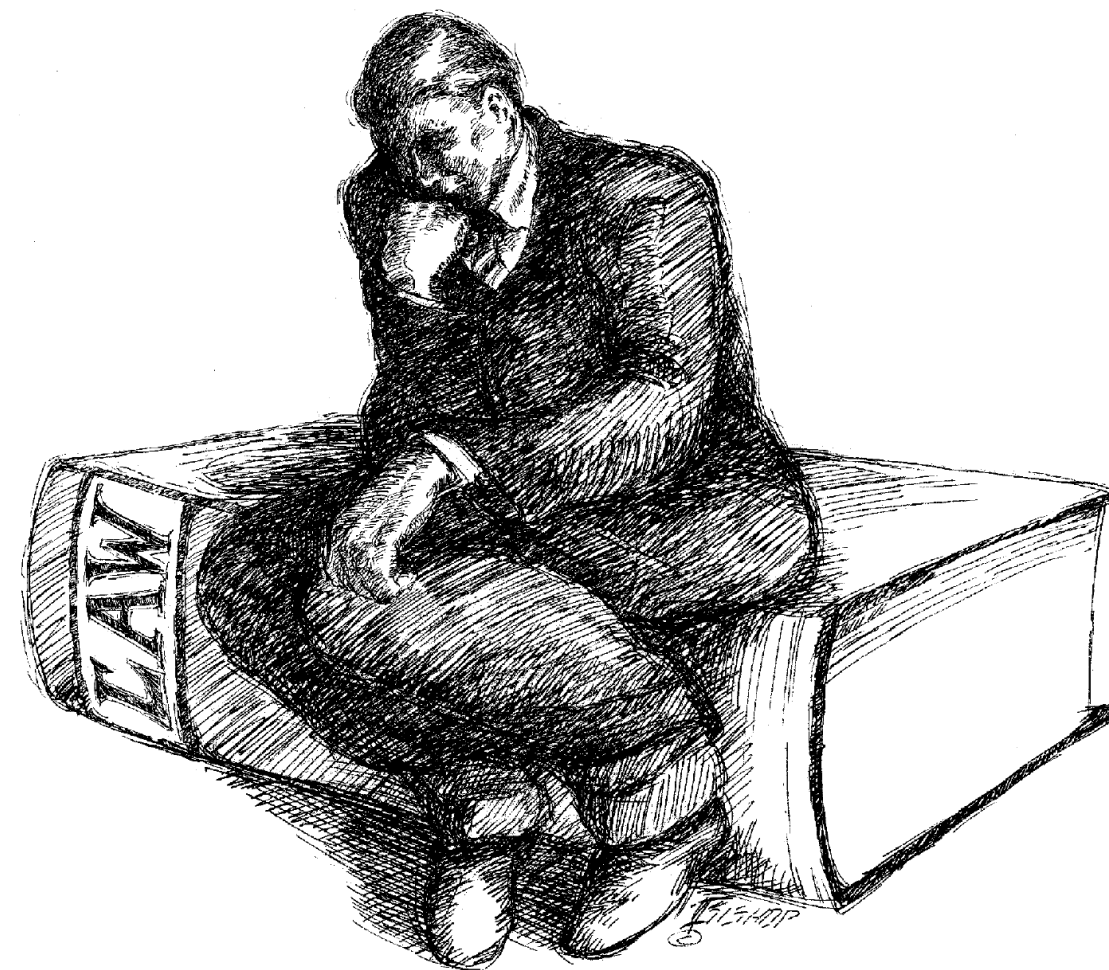
to a client and actually understand the client well enough to represent her effectively. It is surprising, then, that law schools do little to cultivate this quality. Rather, there is an aspect of the competitive, adversarial law school style that discourages empathy. And it carries forward into the legal culture, where a quality of toughness is more highly prized than the capacity to make the empathetic leap to understand the other person's perspective.

Empathy is an even more important capacity for a judge. Often confronted with contentious litigants, strong emotions and sharply defined adversarial positions, the judge with a strong empathetic understanding can see behind the arguments, and reach a deeper understanding of the problems as the litigants see them, increasing the likelihood of a wise decision. Yet, in the past, no president has identified empathy as a criterion for judicial appointments.

Criteria for judicial selection are not a hypothetical or unimportant matter. Choosing federal judges is a vital part of the president's responsibility. There are almost 60 vacancies on the federal bench waiting to be filled, and many more will arise during the course of the Obama presidency.

It will not be easy for Obama to make empathy an effective criterion in his selection of judges. Obviously, the first task confronting the president will be to choose people to manage the judicial selection process who are themselves empathetic and who place as high a value on that trait as he does himself. But how does the person in charge of judicial selection make a judgment of a candidate's empathy? It is not a quality that can be quantified, and there is rarely explicit reference to their empathy on lawyers' resumes.

The place to begin is the way the candidate has spent his career. Con-



sider Obama's career, for example — a community organizer trying to help people displaced by the collapse of the steel mills in Chicago then, after law school, entering a law firm that specialized in representing victims of discrimination. That career trajectory suggests that empathy is an important part of his makeup. On the other hand, if a lawyer has spent his whole career representing corporations — with a reputation of being hard-nosed and aggressive and no time for public service or pro bono representation — there would be reason to suspect that he lacked empathy.

The people in charge of selection could gather information from people who had worked with the candidates. Were they humane and kind in their relationships with employees, partners, adversaries and judges? Were they inter-

ested in the human consequences of legal decisions? Did they reach out in off hours to support those in need? They should also consider the way that the candidates present themselves. Are they grounded and balanced, modest and respectful? Do they listen attentively?

There are other, more traditional, criteria for judicial selection that are also subjective. In particular, judicial temperament has long been a criterion. It is impossible to quantify and difficult to assess. Nonetheless, it has been effectively used to screen out people of extreme partisanship, uncontrollable temper, impatience and racial or gender bias. Just as a growing understanding of judicial temperament has developed over time, the quality of empathy will be easier to recognize after there is some accumulated experience in applying it as a criterion in the selection process.

Obama's commitment to make empathy a criterion in his selection of judges would lead to deep changes in the selection of judges and affect the federal judiciary profoundly.

In the long term, it would affect state court selection processes, affect the training of lawyers and improve the public perception of the legal profession. Older people can remember a time when the quality most valued in a lawyer was wisdom. To re-value empathy would go far in restoring wisdom as an important quality for lawyers to cultivate.

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