Law and Practical Reason

The intention of this series is that it should encompass monographs and collections of essays that address the fundamental issues in legal philosophy. The foci are conceptual and normative in character, not empirical. Studies addressing the idea of law as a species of practical reason are especially welcome. Recognising that there is no occasion sharply to distinguish analytic and systematic work in the field from historico-critical research, the editors also welcome studies in the history of legal philosophy. Contributions to the series, inevitably crossing disciplinary lines, will be of interest to students and professionals in moral, political, and legal philosophy.

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On Empathy as a Necessary, but Not Sufficient, Foundation for Justice (A Response to Slote)

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In ‘EMPATHY, LAW and Justice’, Michael Slote makes a compelling case for the importance of empathy in law, just as he argued convincingly in his recent book, The Ethics of Care and Empathy, that empathy is necessary for personal morality. He claims, however, to have established that ‘empathy and empathic concern for others can function as the basis, the entire basis [my emphasis], for a plausible understanding of legal and social justice’, and, of this, I am not (yet) convinced.¹

Before presenting my reasons for scepticism about the claim that empathy alone can provide a sufficient basis for an adequate understanding of justice, I want to say how refreshing this chapter is after the firestorm sparked by US President Obama’s invoking of empathy in a press conference held on 1 May 2009. In announcing Justice David Souter’s intention to resign from the US Supreme Court and sketching the qualifications he would look for in Souter’s replacement, Obama said, among other things:

I will seek someone who understands that justice isn’t about some abstract legal theory or footnote in a casebook. It is also about how our laws affect the daily realities of people’s lives – whether they can make a living and care for their families; whether they feel safe in their homes and welcome in their own nation. I view that quality of empathy, of understanding and identifying with people’s hopes and struggles, as an essential ingredient for arriving at just decisions and outcomes.²

Obama’s subsequent nomination of Judge Sonia Sotomayor to replace Souter fanned the flames of what some in the press had already labelled the ‘empathy

¹ In a book published after the conference at which this paper was presented, Slote (2010: further defends the view that justice can be understood in sentimental terms, concluding that ‘[u]nder ideals of justice,... can be anchored in the normative idea that actions, laws, customs, and institutions are morally objectionable if and only if they exhibit a lack of full-blown empathic concern for others’ (on the part of individuals or groups): Slote (2010: 159). I do not discuss these further developments in this commentary, but recommend to readers interested in empathy and the law Moral Sentimentation, especially ch. 9 on ‘Justice’.

² Available at www.nytimes.com/2009/05/01/us/politics/01sotomayor.html.
other in pain, on Sleté’s view, is clear from the next sentence: ‘However, we can also [my emphasis] feel sorry for, bad for, the person who is in pain’ and this ‘amounts . . . , to sympathy for them, and it can happen even if we aren’t feeling their pain.’ 2 I take his definition of empathy to be similar to that employed by Martha Nussbaum, who holds that empathy is an ‘imaginative reconstruction of another person’s experience, without any particular evaluation of that experience’.

On Sleté’s view, empathy, unlike sympathy, ‘involves a kind of oneness or identification with others’. It should be noted, though, that empathy also requires a certain degree of detachment. As John Deigh points out, ‘it is distinctive of empathy that it entails imaginative participation in the other’s life without forgetting oneself.’ 3 I assume Sleté agrees with this, though I doubt that he would go as far as Nussbaum, who asserts that, typically, ‘empathy is like the mental preparation of a skilled [Method] actor: it involves a participatory enactment of the situation of the sufferer, but is always combined with the awareness that one is not oneself the sufferer.’ 4 Empathy requires, on Nussbaum’s view, ‘a kind of “twofold attention”, in which one both imagines what it is like to be in the sufferer’s place and, at the same time, retains securely the awareness that one is not in that place.’ 5 I do not know if good Method actors actually feel their characters’ pain, but Nussbaum’s view of empathy sounds here more like the view that it is merely cognitive awareness, since it is difficult to know how a secure awareness of the fact that one is not in the position of [my emphasis] the sufferer is compatible with actually feeling the sufferer’s pain.

In any case, it seems that, on Sleté’s account of empathy, X’s empathising with Y’s pain involves three stages: 6

(i) X feels pain as a result of Y’s awareness that Y is feeling pain.

That more than mere awareness that Y is feeling pain is required for empathy is clear, since X could be aware that Y is in pain even if X has never experienced pain (provided X knows how to read Y’s pain-related behaviour and how to use the word ‘pain’ appropriately), just as X could be aware that Y is seeing green (as opposed to red) even if X is colour-blind. But in this case, it would be odd to say that X empathises with (rather than, say, merely comprehends) Y’s pain.

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3 Sleté (2012: 281).
4 Sleté (2007: 13).
6 Nussbaum elaborates that ‘empathy is simply an imaginative reconstruction of another person’s experience, whether that experience is happy or sad, pleasant or painful or neutral, and whether the imaginer thinks the other person’s situation good, bad, or indifferent’ (2001: 302).
7 Sleté (2012: 281).
10 Ibid 328.
11 These stages need not be temporally distinct, and could perhaps more accurately be labelled ‘components.’
Additional difficulties for an account of justice based solely on empathy arise upon examination of what Slote observes to be the 'interesting correlation between the arousal of empathy and what we commonly think about the strength of our moral obligations'. Others suffering in close proximity to us arouse greater empathy than those suffering at a (geographic or temporal) distance. This correlates with our intuition that it is morally worse not to save a child drowning right in front of us than it is not to save a child starving in some distant place. Even if we agree with Slote that, in this case, empathy correlates positively with moral obligation, in other cases, the arousal of empathy is not a reliable guide to moral obligation - or to what justice requires. We have a tendency to empathise more readily and more strongly with those who are similar to us - even when, as in the case of ethnicity, for example, the similarity is not morally or legally relevant. A judge who experienced - and then made decisions based on - greater empathy for members of their own ethnic group than for other similarly-situated persons of different ethnicities would not be acting justly. Sometimes, greater empathy for certain others us morally astray. I do not consider this to be a reason to reject empathy as something that should inform our views about justice. But it does indicate that empathy, by itself, is not enough.

The development of empathy can be thwarted, for example, by pernicious social constraints such as prejudice and hatred. Undeveloped or untutored empathy can lead to bad moral judgement, and even mature empathy - that of someone who has completed, for example, Martin Hoffman's process of moral education - can be dangerously selective. We need an independent standard to determine when empathy is sufficiently developed (for purposes of morality or law) and this cannot be the simple, overall maturity of the individual(s) in question.

Slote concedes that we need moral education in order to achieve 'a fully developed capacity for empathy with others'. But this suggests that empathy must be modified, tempered, or disciplined with reason or some other moral measure. This is clear not only in cases where empathy for a particular group is insufficiently developed, but also in cases where (fully developed) empathy for different people (or groups) pulls us in different directions.

Slote is unquestionably correct in his observation that 'we are more empathically concerned with pain or danger we perceive than with pain or danger we merely know about', but it does not follow that this greater empathetic concern for actually perceived danger implies a greater degree of moral (or legal) obligation to

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15 I am accepting Slote's claim for the sake of argument, and it is not obvious that we do have a greater moral obligation to the drowning child. And, even if we do, the fact that we feel greater empathy for the drowning child does not explain why we have a greater moral obligation to save her, as John Deigh points out in his comments 2012:300-01.
17 Our worries whether empathy for a particular group can be outdeveloped as Sotomayor's critics assumed her empathy for Latinas was.
prevent (or ameliorate or redress or otherwise address) it.\textsuperscript{23} If present degree of empathic concern is what warrants degree of moral obligation, there would seem to be no moral imperative to expand our imaginations (and our purview) to be better able to perceive and thus feel empathic concern for potential victims of previously unseen dangers.

And yet, as Critical Race Theorists and others have argued, justice requires us to expand our imaginations and to try to put ourselves in the position of those unlike ourselves. As I have argued,\textsuperscript{20} first-person narratives of victimisation and oppression can facilitate greater empathic concern than a perusal of arguments and statistics alone can and, thus, play a critical role in furthering our understanding of what justice requires. Seeking out and reading such narratives is especially important for those of us in dominant groups, since our lives do not, typically, require us to educate ourselves about the experiences of those in marginalised groups. Members of marginalised groups, in contrast, more readily acquire awareness of the dominant group’s experiences since those are taken to be the norm for the culture (and are conveyed through education and reflected and reinforced by the mainstream media).\textsuperscript{27}

Reason alone does not give us enough imaginative access to others’ experiences to enable us to determine, on the basis of it alone, what justice requires. If rationalism is the view that reason is all that is required for justice, and if sentimentalism is simply the view that rationalism is false, then I am in agreement with Slote that sentimentalism is correct. However, if sentimentalism is the view that empathy provides a necessary and sufficient basis for justice, then, although Slote has not persuaded me that sentimentalism is correct, he has certainly ‘whet[ted] [my] appetite for hearing or seeing more’.\textsuperscript{28}

\textsuperscript{23} The ‘flinch’ test Slote suggests (2012: 289) is notoriously unreliable. I flinched when watching my infant son get necessary immunisations, while I was and am capable of reading about countless distant children dying of famine or disease without flinching (which is not to say that I am not concerned about them).

\textsuperscript{20} Brison 2002.

\textsuperscript{27} I suspect this more fully developed imaginative repertoire on the part of marginalised minorities is what Justice Sotomayor had in mind when making the comment, for which she was skewed by her critics, that she would ‘hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male [judge] who hasn’t lived that life’. Sotomayor’s comment was taken from a speech she gave in 2001 to a group of Latino lawyers and law students. I was trying to inspire them to believe that their life experiences would enrich the legal system, Sotomayor said during her confirmation hearings. ‘The words I spoke created a misunderstanding. I want to state upfront, unequivocally, I do not believe that any racial or ethnic group has an advantage in sound judging.’ She pointed out that she made the comment in contrast to former Supreme Court Justice Sandra Day O’Connor who was known for saying that she did not view herself as a female jurist and said that a wise old man and a wise old woman would reach the same result as judges. Later, Sotomayor said, ‘I was trying to play on [O’Connor]’s words—my play [el] that. That was bad. It left an impression that life experiences commanded a result in cases, but that is not what I do as a judge’. (Available at www.features. cmsmonitor.com/politics/2009/07/14/sotomayor-wise-latina-as-bad-choice-of-words/).

\textsuperscript{28} Slote 2012: 292.