

How are we to Judge?

The current discussion over the President's Supreme Court nominee is interesting, don't you think? We knew of course that there would be two sides in this thing. In Washington D.C. there are always two sides to everything. It seems unavoidably important for the two parties to immediately oppose whatever it is that the other side is proposing. It's rather like two siblings who come inside to the dinner table and continue, as if no one else were around, their petty feud over some imagined wound or provable injustice. And that's where the analogy falls apart. The children will grow up eventually. Congress never will.

This time the dispute centers on an innocent and heretofore unimportant word in the language of the Capitol. "Empathy". One side thinks empathy is a good quality because it enables the empathizer to feel for the plight of a variety of people. The other side views empathy as the enemy of reason and objectivity, getting in the way of impartial judgment. Both sides are deluded.

Humans make decisions based on who they are and not what they believe about the rest of humanity. People decide issues from their personal ethical base and not from some notion that they can reason apart from their emotions. We take in information, process the information, weigh it against our sense of right and wrong and then decide. This process is part and parcel of our personality. It is partially chemistry and wiring and partially the environments which we have been exposed to. Trying to escape this reality is misguided and futile. You can't decide to be objective and you can't decide to be a cultural chameleon.

Judges are people just like we are people. Judges who make it to the Supreme Court are human just like us. Their decisions come from wiring and environment just like ours do. It just so happens that their decisions will affect a few hundred million Americans and, in some cases, alter the course of history. That makes them a little more subject to examination than the rest of us, for instance, when we must decide who takes out the garbage. This necessary scrutiny combined with the proclivity of political parties to spat makes this a perfect climate for pundits to yell about the current nominee.

An African American judge has experience with the Law that includes being pulled over by the police for the offense of DWB, driving while

black. His white brother and sister judges do not and can not have had this experience. This experience will inform his legal and ethical decisions. A female judge has had the experience of a society wherein women are treated as inferior, to some degree, by male colleagues and supervisors. This is part of the female judge's condition. Males do not and can not have had that experience. This experience of the world will inform her legal and ethical decisions. The law, which is to say one's understanding of the law, is shaped and colored by what has happened to a judge in her/his life. It is as important a factor as that judge's genetic wiring at birth.

To think the law can be treated in a detached way, in a manner that ignores one's own wiring and experience is simply false. In fact the people in our world who most achieve this "objective" plane of decision making are known as sociopaths. They have detached themselves from human characteristics and operate from their personally created world of objective deliberation. They simply act. They don't feel. They fill our jails and institutions. They make excellent serial killers. They make lousy judges.

The Supreme Court is made up of eight males and one female. Each of these judges deliberates and makes rulings based on his/her own experience, based on who they are and where they came from. There is no other sensible way to be. There is no Law apart from people and there are no sane people who think that they can be truly objective. Since judges rule based on their personal makeup I think it would be a good idea if the court were more evenly balanced, particularly in gender. The days of old men running every important show are drawing to a close. White haired gents who meet at their "club" to decide momentous matters should be represented on the Court in numbers closer to their actual demographic. The U.S. Supreme Court is one of those institutions that lags significantly behind. White men over 60 years old make up about 7 1/2% of the population. They comprise roughly 77% of the Court. That sounds a tad out of line, no?

I'm not suggesting quotas since they are just a bookkeeper's way of understanding fairness. I am suggesting that the next two or three or four judges appointed to the court by this president and the next president should be women. If judges decide matters based on how their lives have shaped their understanding of the law (and they do) it just makes sense to get more diverse experience on the court. To say that old men should continue to dominate the Court makes sense to only two segments of our society. Old men and those who want to be.