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THE FLIGHT FROM JUDGMENT:  
REFLECTIONS ON BENJAMIN BARTON'S *AN EMPIRICAL  
STUDY OF SUPREME COURT JUSTICE PRE-APPOINTMENT  
EXPERIENCE*

*Jennifer Hendricks\**

In their book, *Practical Wisdom: The Right Way to Do the Right Thing*, Barry Schwartz and Kenneth Sharpe highlight the task of sentencing a convicted criminal as quintessentially calling for practical wisdom.<sup>1</sup> Wisdom, they argue, is not a transcendent state to be achieved by mystical means but a skill that must be learned and improved by practice, trial, and error.<sup>2</sup> It is grounded in empathy, which is the cognitive ability “to imagine what someone else is thinking and feeling.”<sup>3</sup> A person’s capacity for wisdom can be stunted by rote adherence to inflexible rules or by carrots and sticks that replace good character with a reward system.

Professor Benjamin Barton’s new Article argues that the rarified and insular biographies of the current justices of the Supreme Court are ill-suited for developing practical wisdom.<sup>4</sup> Having jumped through every hoop and won every gold star the legal profession has to offer, the current Court is “uniquely elite and cloistered,”<sup>5</sup> sorely lacking in courtroom experience, and too prone to manufacture legal complexity in the name of technical excellence.<sup>6</sup> While Professor Barton’s focus is on a thorough and revealing empirical analysis of the current Supreme Court as compared to its predecessors, he makes a strong normative case that the elitist shift is harmful to the Court’s work.<sup>7</sup> This essay offers one example of a case in which some justices exercised but others rejected a jurisprudential approach grounded in practical wisdom. It concludes with thoughts connecting our criteria for selecting judges with our nation’s educational goals.

*J. McIntyre Machinery, Ltd. v. Nicaastro*<sup>8</sup> is the Supreme Court’s most recent failure to reach consensus on the law of personal jurisdiction. The opinions in that case reveal a divide on the Court over whether judges can be trusted to exercise judgment.

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1. BARRY SCHWARTZ & KENNETH SHARPE, *PRACTICAL WISDOM: THE RIGHT WAY TO DO THE RIGHT THING* (2010).

2. *Id.*

3. *Id.* at 23.

4. Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137, 1139 (2012).

5. *Id.* at 1171.

6. *Id.* at 1172–73.

7. *Id.* at 1138–39.

8. 131 S.Ct. 2780 (2011).

In *McIntyre*, the Court ruled 6–3 against personal jurisdiction in New Jersey over McIntyre Machinery, a British manufacturer.<sup>9</sup> Justice Kennedy wrote the plurality opinion for himself, the Chief Justice, and Justices Scalia and Thomas.<sup>10</sup> Justice Breyer concurred in the judgment and wrote a separate opinion, joined by Justice Alito.<sup>11</sup> Justice Ginsburg wrote a dissent for herself and Justices Sotomayor and Kagan.<sup>12</sup>

Justice Kennedy’s plurality sought to dethrone *International Shoe*<sup>13</sup> as the foundation of modern personal jurisdiction doctrine; the opinion declared its allegiance to the sovereignty-based theory of jurisdiction that undergirded *Pennoyer v. Neff*.<sup>14</sup> This plurality dismissed the *Shoe* approach as based on “[f]reeform notions of fundamental fairness.”<sup>15</sup> Although written by Justice Kennedy, the opinion bore the marks of Justice Scalia’s commitment to “the rule of law as a law of rules” and his hostility to entrusting constitutional judgments to the wisdom of federal judges.<sup>16</sup>

Justice Ginsburg’s dissent engaged the practical reality of international commerce, in which foreign manufacturers are likely to treat the United States as a single market, without particular regard for the borders of individual states.<sup>17</sup> Her approach recognized that practical judgment calls were an integral part of the jurisdictional analysis. In contrast, Justice Breyer appeared to share some of Justice Ginsburg’s concerns but voted to find no jurisdiction in *McIntyre* because of slippery slope concerns: If there is jurisdiction over McIntyre, Justice Breyer argued, what about “an Appalachian potter, . . . a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer,” each of which sells its products to distant customers through a distributor?<sup>18</sup> What if, in other words, lower court judges are unable to

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9. *Id.* at 2791.

10. *Id.* at 2785.

11. *Id.*

12. *Id.* *McIntyre* is one of two cases so far in which the Supreme Court has split 6-3 along gender lines. The other case was *Blueford v. Arkansas*, 132 S.Ct. 2044 (2012), which triggered a minor buzz in the blogosphere over whether the split indicated that the female justices were more empathetic toward the criminal defendant in that case. See Mark Tushnet, *The (Ir)relevance of Gender to Judicial Decisions?*, BALKINIZATION (May 24, 2012, 10:49 AM), <http://balkin.blogspot.com/2012/05/irrelevance-of-gender-to-judicial.html>; Ann Althouse, *The Supreme Court’s new double-jeopardy case divided 6-3 on gender lines: was this “some sort of gender-related ‘empathy’”?*, ALTHOUSE (May 25, 2012, 6:03 PM), <http://althouse.blogspot.com/2012/05/supreme-courts-new-double-jeopardy-case.html>.

13. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

14. 95 U.S. 714 (1877); *McIntyre*, 131 S. Ct. at 2787–89.

15. *McIntyre*, 131 S.Ct. at 2787.

16. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176–77 (1989).

17. *McIntyre*, 131 S. Ct. at 2794–95 (Ginsburg, J., dissenting).

18. *McIntyre*, 131 S.Ct. at 2793–94 (Breyer, J., concurring in the judgment).

exercise reasoned judgment in making jurisdictional decisions?

Joining in Justice Ginsburg's *McIntyre* dissent was Justice Sotomayor, whose nomination in 2009 had touched off controversy over whether practical wisdom is part of the job description for a Supreme Court justice. The national conversation about her began with empathy-gate.<sup>19</sup> In his nominating speech, President Obama praised Justice Sotomayor for bringing empathy to the task of judging.<sup>20</sup> Critics portrayed empathy as the antithesis of objective reasoning, accusing the president of believing that "judging should be shaped by 'empathy' as much or more than by reason."<sup>21</sup> But empathy is not the opposite of reason. As Schwartz and Sharpe explain, "empathy—the capacity to imagine what someone else is thinking and feeling—is critical for the perception that practical wisdom demands."<sup>22</sup> Rather than interfering with reasoned judgment, empathy makes emotion "an ally of reason."<sup>23</sup>

Also controversial was Justice Sotomayor's comment about making decisions as "a wise Latina."<sup>24</sup> This statement implies that wisdom is linked to a person's life experiences, but it was widely construed as indicating bias, in contrast to Chief Justice Roberts's pledge to judge like a baseball umpire, just calling the balls and strikes.<sup>25</sup>

The "ball and strikes" theory of judging rejects the proposition that we should hope for wisdom from our judges, preferring instead to choose the "most qualified" judges, where most qualified means having won the most gold stars in a meritocratic system that increasingly

19. Marcus Alexander Gadson, *Empathy-gate*, BLOGCRITICS (May 31, 2009, 8:42 PM), <http://blogcritics.org/politics/article/empathy-gate/>.

20. President Barack Obama, Remarks by the President in Nominating Judge Sonia Sotomayor to the United States Supreme Court (May 26, 2009), <http://www.whitehouse.gov/the-press-office/remarks-president-nominating-judge-sonia-sotomayor-united-states-supreme-court>.

21. *The "Empathy" Nominee*, WALL ST. J., May 27, 2009, at A18.

22. See SCHWARTZ & SHARPE, *surpa* note 1, at 23.

23. *Id.* at 26.

24. See Sotomayor's "Wise Latina" Comment a Staple of Her Speeches, CNN (June 5, 2009), [http://articles.cnn.com/2009-06-05/politics/sotomayor.speeches\\_1\\_sotomayor-s-confirmation-sotomayor-supporters-judge-sonia-sotomayor?s=PM:POLITICS](http://articles.cnn.com/2009-06-05/politics/sotomayor.speeches_1_sotomayor-s-confirmation-sotomayor-supporters-judge-sonia-sotomayor?s=PM:POLITICS).

25. See Roberts: "My job is to call balls and strikes and not to pitch or bat", CNN (Sept. 12, 2005), [http://articles.cnn.com/2005-09-12/politics/roberts.statement\\_1\\_judicial-role-judges-judicial-oath?s=PM:POLITICS](http://articles.cnn.com/2005-09-12/politics/roberts.statement_1_judicial-role-judges-judicial-oath?s=PM:POLITICS). Some sports fans and law bloggers argued that an umpire's job, like a judge's, requires more nuanced and contextual judgments than the Chief Justice's analogy implied. See, e.g., Howard Wasserman, *Pine Tar: Of Baseball and Law*, PRAWFSBLAWG (JULY 24, 2011, 10:31 AM), <http://prawfsblawg.blogspot.com/2011/07/pine-tar-an-older-of-baseball-and-law.html> ("Umpiring—it's a lot more than calling balls and strikes.") Reaction to the recent NFL replacement referee fiasco, however, suggests that the public sees sports refereeing as a matter of correctly observing and reporting upon objective truth, rather than balancing numerous subtle factors. See, e.g., *Replacement Ref Furor Grows*, ESPN (Sept. 25, 2012, 11:00 AM), [http://espn.go.com/nfl/story/\\_id/8422572/replacement-ref-furor-grows-seattle-seahawks-wild-win-green-bay-packers](http://espn.go.com/nfl/story/_id/8422572/replacement-ref-furor-grows-seattle-seahawks-wild-win-green-bay-packers).

defines merit according to outcomes quantified and boxes checked.<sup>26</sup> As Professor Barton points out, there is a mismatch between the skills and talents rewarded by the legal meritocracy and those that are most needed in judges.<sup>27</sup> Like much recent discussion of legal education, the meritocratic defense of the current Court confuses law school with the practice of law. Getting top grades in law school indicates proficiency—even brilliance—at a subset of the huge range of tasks involved in lawyering: the tasks that call for analytic ability and skillful use of the English language in formal settings. With the growth of clinical education, we can add to the list the capacity to engage in critical self-reflection while engaged in a professional practice. The development of the practical wisdom of lawyering can be begun in law school but must be learned through practice over the longer term. There is little reason to believe that top grades at a top school—and the cascade of advancement precipitated by that achievement—necessarily predicts the development of those other skills.

None of this means that we should not want our judges to be very smart or very well educated. I have suggested through the *McIntyre* example that Justices Ginsburg and Sotomayor both exercise practical wisdom and embrace it as a guiding principle of judging; it seems that each justice's capacity for empathy survived her elite education. On the other hand, to return to picking on Justice Breyer: He is, to be sure, a brilliant lawyer in many respects. But his empathetic skills have been open to question at least since the oral argument in *Safford Unified School District #1 v. Redding*,<sup>28</sup> in which he questioned whether strip-searching a 13-year-old girl in the principal's office was meaningfully different from requiring her to change clothes for gym class.<sup>29</sup> One of his principal achievements before joining the Supreme Court was as a chief architect of the Federal Sentencing Guidelines, which sought to replace the practical wisdom of federal judges with formulas for culpability and remorse.<sup>30</sup> And his *McIntyre* opinion, in the mundane

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26. Cf. Vi Hart, *Doodling in Math Class: Connecting Dots*, YOUTUBE <http://www.youtube.com/user/vihart> (last visited Feb. 9, 2013) (“[Educators have] come to understand that education is about money and prestige and not about becoming a better human able to do great things . . . Algebra has become a checkbox subject, and mathematics weeps alone in the top of the ivory tower prison to which she has been condemned.”).

27. Barton, *supra* note 4, at 1187.

28. 557 U.S. 364 (2009).

29. Oral Argument at 43:40, *Safford Unified School District #1 v. Redding*, 557 U.S. 367 (2009) No. 08-479, available at [http://www.oyez.org/cases/2000-2009/2008/2008\\_08\\_479#argument](http://www.oyez.org/cases/2000-2009/2008/2008_08_479#argument).

30. See Linda Greenhouse, *Guidelines on Sentencing Are Flawed, Justice Says*, N.Y. Times, Nov. 21, 1998, available at <http://www.nytimes.com/1998/11/21/us/guidelines-on-sentencing-are-flawed-justice-says.html>. The wise judge, Lois Forer, profiled by Schwartz and Sharpe eventually resigned, in part out of frustration with such clumsy, rule-bound restraints on

context of a case about personal jurisdiction over a foreign manufacturer, betrays the lack of confidence in practical wisdom that Professor Barton predicts is likely to result from the narrow range of experience that too often precedes an appointment to today's Supreme Court.

Two lessons, then, from Professor Barton's data and the supporting anecdote presented here: First, as with the Sotomayor nomination, presidents picking judges need to actively seek out not only brilliance but also wisdom, empathy, and diverse experiences. Second, educational institutions must ensure that there are enough such candidates to choose from by cultivating not only analytical skill but also the capacities for empathetic reasoning, risk-taking, and learning from experience.

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her judgment. See SCHWARTZ & SHARPE, *surpa* note 1, at 115.