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Empathy, gender and the Supreme Court

By Ann M. Lousin

"Empathy" is the word of the hour. President Obama says Supreme Court justices should have "empathy" for the people in the cases before the court. Critics say that "empathy" is a code word for bleeding heart, activist liberalism.

Justices Ruth Bader Ginsburg and Sandra Day O'Connor say that there should be more women on the U.S. Supreme Court, apparently because women bring an added dimension to the decision-making process, at least where the issues relate to females.

If we want to see whether "empathy" and having women justices would affect Supreme Court decisions, we should read *Safford Unified School District # 1 v. April Redding* (No. 08-479), the school strip-search case decided June 25.

First, let's look at the definition of "empathy." The Oxford English Dictionary defines it as "the power of projecting one's personality into (and so fully comprehending) the object of contemplation."

How would "empathy" play a role in a case like *Safford*? How would knowledge of how girls and women think and act affect the analysis in that situation?

After the oral arguments on April 21, Justice Ginsburg made some public comments about how her eight male colleagues had "never been 13-year-old girls." She pointed out that during oral argument, some of them had made some insensitive, ostensibly funny comments that the others laughed at. (Because I have not heard the tape, I am taking the reports as accurate.) Some commentators took her side and pointed out that the lack of sensitivity (or "empathy"?) on the part of some of the justices demonstrated why there should be more women justices.

In reading the majority opinion, I was struck by how much it read like a compromise committee report designed to deflate these criticisms.

It's as if the eight male justices said, "Look, guys, Ruth is upset because she thinks we didn't take this girl's discomfiture seriously. But we know that school officials

are part of the war on drugs and have a hard time of it with teenagers generally. Let's say that the principal, nurse, and secretary went just a little too far in investigating the girl's bra and panties for what is, after all, only ibuprofen, a perfectly legal medicine. Let's say they can strip the girl down to her underwear, but if it's only ibuprofen and she's not about to pass it around at lunch, they must stop at her bra and panties. But then, let's give them a break and say they

parents in the district don't like the district's policies, they can try to change them or, failing in that, either send their children to a private school, home school them, or move to another district. He would not hold the school officials personally liable either.

It's difficult to discern the entire narrative from the majority opinion and dissents. I say that with regret, because the author of the majority opinion, Justice David H. Souter, is a hero of mine and a judge noted

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aren't financially personally liable. We'd be sending a message to future administrators and teachers and counter the criticisms of us as men who don't understand women and girls."

Six of the justices effectively came to that conclusion. Justices John Paul Stevens and Ginsburg weren't buying the part about letting off the officials who refused to let Savana Redding call her mother April before searching her underwear and then, after finding no ibuprofen, kept her in custody for two more hours. Apparently, the principal kept her outside his office through lunch and never informed her mother of what transpired. To these two justices, the officials had not only conducted an unconstitutional search, but their behavior showed an outrageous insensitivity towards both the student and her parent.

Justice Clarence Thomas was the only one who wasn't buying the conclusion that the search was unconstitutional. He believed that the war on drugs trumped the discomfiture of the student. He said that schools should be allowed to resume their role of in loco parentis, that parents have no constitutional right to be informed that their children are being searched, and that if the

for detailing all of the facts and arguments in a case even when they run counter to the conclusion he reaches.

Here are some observations on the role empathy and gender awareness might play in the *Safford* situation.

First, the school had the policy of prohibiting all medicines, including non-prescription painkillers, on campus unless the administration gave prior consent to their being in the school.

This amazes me. I can understand a school's need to be informed if a child needed special medicines, such as anti-bee sting medicine or insulin shots. But pre-clearance? For over-the-counter *ibuprofen*?

Apparently the rule extended to life-saving drugs, such as insulin. A Type One diabetic child in middle school is old enough to give him or herself insulin shots. Giving a school the discretion to decide whether that child can bring insulin into the school would violate the Americans with Disabilities Act. Justice-designate Sonia Sotomayor, who has been a Type One diabetic since the age of eight, and whose life depends on insulin shots, would have some strong words about that policy. Surely others should "empathize" with a diabetic child.

Here's another definition from the OED: "*Menarche*" is "the first menstrual period; the age at which this occurs." Most girls experience menarche before age 14. Many of them suffer cramps or migraine headaches. "Migraine" is a type of vascular headache. The female pattern usually begins with menarche and often ends with menopause. Most females combat migraines with a combination of prescription and over-the-counter painkillers. For an official to assume the discretionary power to decide whether a girl suffering from cramps or migraines can bring pain killers to school is beyond my comprehension.

I do not think that *only* women can understand or "empathize" with that situation. Male justices and male school officials should understand that.

Second, most females, especially girls, may be more sensitive about displays of their bodies than most males are.

This was a point Ginsburg made, noting that she was the only one on the court who could remember what being a 13-year-old girl was like. Reportedly, one of her colleagues commented during oral argument that if kids strip to their underwear when getting into gym clothes, why was it different when the nurse forced Savana to strip to her underwear? In my experience, both in school and in fitness centers, most females change into gym clothes in private and do not normally disrobe in front of groups of women.

Men tell me that boys and men are less inhibited. They also say that males sometimes swim naked, both in school swimming classes and in all-male swimming pools. Some men members of Chicago clubs objected to admitting women because they, the men, would no longer be able to swim naked in the club's pool. Trust me, girls do not swim naked in school swimming classes, and I have never seen a female swim naked in a fitness center pool.

Surely, this gender distinction, insofar as it exists, is apparent to everyone. Men, as well as women, could understand it. For the record, I would oppose a search of a 13-year-

old boy's shorts, too. I can *empathize* with that boy. The opportunity for voyeurism and using searches as a means of intimidation is obvious. In his autobiography, former Governor Dan Walker detailed these practices in his description of his time in a federal prison

Third, isn't there is a right of parents to be informed when searches are about to occur?

If, as Souter noted, there was no immediate danger of ibuprofen being distributed while Savana was in school custody, why not call her mother? What was wrong with the mother's being present during the underwear search? The justices compared the rights of students to the rights of suspects arrested by the police. Don't those arrested have a right to call a family member or lawyer? Why not a student about to be searched?

April Redding's rights received little attention from the Supreme Court, but I think they warrant mention. Pace Justice Thomas, don't parents have some right to be notified? I guarantee that if any school official had strip-searched me without calling my mother first, Opal Lousin would have uttered some strong words to that official. I'll bet that Rose Alito, Celia Bader, Anne Breyer, Gladys Kennedy, Rosemary Roberts, Catherine Scalia, Elizabeth Stevens, Helen Souter, and Leola Thomas would have, too.

Fourth, by holding the individual school officials not liable personally "because the law was unclear" when they acted, the court is setting the stage for future fights. The opinions noted that Arizona state law may allow April and Savana to sue the district itself. If the district is sued, it will claim that the school officials did not follow the district's rules, that they were acting on their own. The assistant principal, nurse, and administrative assistant will maintain that they were only following the school's policies. That is a set-up for a court fight between the district and its employees.

Why would an assistant principal choose to believe a boy who apparently regularly informs them of which students he thinks

are carrying contraband (ibuprofen) and a girl who says that the ibuprofen, etc., in her day-planner were not hers, but belonged to her pal Savana? Anyone who has been a child knows that kids who are caught misbehaving often try to escape punishment by saying that another kid did it. The testimony of such kids is about as reliable as that of a "street informant." Apparently neither the boy with the "report" nor the girl who was caught with the ibuprofen, etc., was searched or in any way disciplined. In fact, it appears that after finding Savana was "clean," the principal and nurse did not even apologize to her.

Moreover, the court will soon hear from defendants in other section 1983 actions that the "law was unclear" when they acted. This will open a new avenue for determining liability. By trying to compromise — the search went just a bit too far when all that was involved was ibuprofen, but the school officials didn't know better — the court may have cleared up one issue (when is search of underwear valid?) but given us another set of unresolved issues.

To be fair, we should all be able to understand the situation of the school officials, too. As the justices noted, there is a drug problem in schools although ibuprofen does not seem to be at the core of it. Arizona and some other states make it a crime for a child to carry a prescription drug without a prescription. Kids will try to get other kids in trouble, for many different reasons, including revenge. Therefore, we can understand the dilemma of school officials who suspect that a "contraband drug will be distributed at lunchtime" and know that their superiors expect them to prevent that. Moreover, those officials have probably received little or no guidance from the school district on what they may legally do.

We can understand both the Reddings' and the school officials' situation. We can project ourselves into their situation and comprehend it. That is empathy.