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 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 discomfort seriously. But we know that school officials 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 discomfort 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. But pre-clearance? For over-the-counter ibuprofen?

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.

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Men, as in a fitness center pool. A 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 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 undergarment 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?

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.

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 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 undergarments 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.