BAD BOY JURISPRUDENCE

In 2009, President Barack Obama set off a "radioactive"[1] debate when he told the White House Press Corps that he would seek a judge "with 'empathy' for 'people's hopes and struggles'" to replace retiring Justice Souter.[2] Commentators on the right condemned the so-called "empathy standard" as inconsistent with the rule of law.[3] These opponents of empathic judicial reasoning reduced the concept of empathy to something resembling idiosyncratic preference and personal affection.[4] They forged an association between empathy and "judicial activism," setting empathy as adverse to impartiality.[5] And they presented conservatism as squarely on the side of impartiality, against empathy. As conservative columnist Charles Krauthammer declared at the time, "if nothing else, [conservatism] stands unequivocally against justice as empathy — and unequivocally for the principle of blind justice."[6] Legal counsel to the Judicial Confirmation Network, a powerful lobby for conservative judicial nominees,[7] warned that President Obama would "become the first president in American history to make lawlessness an explicit standard for Supreme Court justices."[8]

Some on the left ran interference, asserting that critics misunderstood what the President meant by "empathy."[9] Some legal scholars subsequently intervened, arguing that empathy is an essential judicial

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[1] Peter Baker, *In Court Nominees, Is Obama Looking for Empathy by Another Name?*, N.Y. TIMES (Apr. 25, 2010), https://www.nytimes.com/2010/04/26/us/politics/26memo.html [https://perma.cc/NR92-RRKM].

[2] Janet Hook & Christi Parsons, *Obama Says Empathy Key to Court Pick*, L.A. TIMES (May 2, 2009, at 00:00 PT) (quoting President Obama), https://www.latimes.com/archives/la-xpm-2009-may-02-na-court-souter2-story.html [https://perma.cc/BG87-N5GD].

[3] *See, e.g.*, *Thumbs-Down on Obama's Empathy Standard for SCOTUS*, JUD. CRISIS NETWORK (quoting Athan Koutsiouroumbas, Pennsylvania Judicial Network spokesperson), https://judicialnetwork.com/in-the-states/thumbs-down-on-obamas-empathy-standard-for-scotus [https://perma.cc/H7QF-UB63]; Robert Alt, *Senators Must Contest Sotomayor's View that Empathy, Ethnicity Can Overrule Law*, HERITAGE FOUND. (June 1, 2009), https://www.heritage.org/political-process/commentary/senators-must-contest-sotomayors-view-empathy-ethnicity-can-overrule [https://perma.cc/H69L-MA2W].

[4] *See* Alt, *supra* note 3.

[5] *See Thumbs-Down on Obama's Empathy Standard for SCOTUS*, *supra* note 3.

[6] Charles Krauthammer, Opinion, *Make Supreme Court Nominee Sotomayor Defend Her Judicial Philosophy*, SEATTLE TIMES (May 29, 2009, at 20:31 ET), https://www.seattletimes.com/opinion/make-supreme-court-nominee-sotomayor-defend-her-judicial-philosophy [https://perma.cc/4HX9-4NH4].

[7] Laila Robbins, *Conservative Group Behind Kavanaugh Confirmation Has Spent Years Reshaping State and Federal Benches*, BRENNAN CTR. FOR JUST. (Sep. 12, 2018), https://www.brennancenter.org/our-work/analysis-opinion/conservative-group-behind-kavanaugh-confirmation-has-spent-years [https://perma.cc/MU98-MVLD].

[8] Wendy E. Long, Opinion, *LONG: Opening of a Sorry Chapter*, WASH. TIMES (May 4, 2009), https://www.washingtontimes.com/news/2009/may/4/opening-of-a-sorry-chapter [https://perma.cc/84F5-39S8].

[9] *See* Baker, *supra* note 1 (quoting Professor Pamela S. Karlan).

attribute.[10] A small handful maintained that all judges inevitably exercise empathy.[11] But, at the height of the debate, the leading luminaries of the liberal legal and political movement largely threw up their hands in surrender.[12] Then-Judge Sotomayor distanced herself from empathy during her confirmation process, leaning into the empathy–impartiality dichotomy in asserting: "We apply law to facts. We don't apply feelings to facts."[13] And President Obama deftly avoided the term in his public statements about Justice Stevens's retirement and during Justice Kagan's subsequent confirmation process.[14] That cleared the way for a largely unchallenged conservative characterization of empathy as a cognitive bias afflicting ideologically liberal jurists, mostly on behalf of marginalized groups or individuals.[15] The idea of empathic judicial reasoning, which had for decades been generally uncontroversial, overnight became "positively toxic" and was merged seamlessly into longstanding critiques of liberal jurisprudence as "activist."[16]

For all the heat that the empathy debate generated, it mostly failed to shed light on how empathy shows up in judicial reasoning. Worse, it "turn[ed] 'empathy' into a dirty word," stifling discussion of how the conscious exercise of empathy can mediate baser cognitive biases.[17]

That is a shame. A conservative legal movement that foreswears empathy denies its jurists empathy as a tool to combat unavoidable cognitive biases such as in-group preference and out-group prejudice.[18] To the extent that these jurists conceive of the exercise of empathy as infusing their reasoning with impermissible resort to affective, emotional instinct, an irony emerges: The "anti-empathic turn"[19] divests

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[10] *E.g.*, Rebecca K. Lee, *Judging Judges: Empathy as the Litmus Test for Impartiality*, 82 U. CIN. L. REV. 145, 170 (2013); Darrell A.H. Miller, Essay, Iqbal *and Empathy*, 78 UMKC L. REV. 999, 1001 (2010).

[11] *See, e.g.*, Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 CARDOZO L. REV. DE NOVO 133, 145; Miller, *supra* note 10, at 1013.

[12] *See* John Paul Rollert, Essay, *Reversed on Appeal: The Uncertain Future of President Obama's "Empathy Standard*," 120 YALE L.J. ONLINE 89 (2010), https://www.yalelawjournal.org/forum/reversed-on-appeal-the-uncertain-future-of-president-obamas-qempathy-standardq [https://perma.cc/X9NW-T7QB].

[13] Josh Gerstein, *Sotomayor Contradicts Obama*, POLITICO (July 14, 2009, at 19:43 ET), https://www.politico.com/story/2009/07/sotomayor-contradicts-obama-024909 [https://perma.cc/7CPZ-TUFS].

[14] *See* Mary Anne Franks, Response & Perspective, *Lies, Damned Lies, and Judicial Empathy*, 51 WASHBURN L.J. 61, 67–68 (2011) (quoting Robert Barnes, *Justice Stevens to Step Down*, WASH. POST (Apr. 9, 2010), https://www.washingtonpost.com/archive/national/2010/04/10/justice-stevens-to-step-down/bbabea83-348a-468b-9bd3-7abbaodfd681 [https://perma.cc/UH9A-C65Y]).

[15] Robin West, *The Anti-Empathic Turn*, *in* PASSIONS AND EMOTIONS: NOMOS LIII 243, 246–47 (James E. Fleming ed., 2013).

[16] *See id.* at 246; *cf.* Richard M. Re, *The Supreme Court, 2024 Term — Foreword: To a Conservative Warren Court*, 139 HARV. L. REV. 1, 14 (2025) (discussing the shift toward formalism to avoid "runaway judicial activism").

[17] *See* Franks, *supra* note 14, at 68.

[18] *See* Lee, *supra* note 10, at 155, 166.

[19] *See* West, *supra* note 15, at 247.

conservative judges of a powerful tool in *tamping down* cognitive biases and affective instincts.[20]

Members of the conservative legal movement may bristle at the idea of empathy, believing it to be antithetical to cold, impartial reason, but they should reconsider. When a jurist declines to exercise empathy consciously, he loses a crucial defense against reasoning in ways that are biased by his baser psychological instincts. Those instincts include natural, inevitable — and, indeed, empathic — judgments about parties and causes.[21] This is because judges, like all people, are vulnerable to social-psychological impulses like intergroup empathy bias,[22] in-group favoritism, and out-group prejudice.[23] And indeed those impulses, which together one might call in-group/out-group reasoning, are manifest in conservative jurisprudence, including at the Supreme Court. This Note illustrates how in-group/out-group reasoning might shape conservative Justices' decisionmaking and jurisprudence. In so doing, it rebuts the charge that conservative jurisprudence[24] embodies a

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[20] *See* Lee, *supra* note 10, at 154.

[21] *See id.*

[22] For a discussion of intergroup empathy bias, see generally Eric J. Vanman, *The Role of Empathy in Intergroup Relations*, 11 CURRENT OP. IN PSYCH. 59 (2016).

[23] *See* Lee, *supra* note 10, at 155. People instinctively exercise empathy but typically do so more easily "with others like themselves." *See id.* Consciously choosing to "[s]tep[] into another's world" allows jurists to "pursue knowledge removed from or outside of oneself . . . in order to adjudicate impartially and with equal attention to all parties." *Id.* For a scientific discussion of the relationship between empathy and in-group/out-group reasoning, see Pascal Molenberghs, *The Neuroscience of In-Group Bias*, 37 NEUROSCIENCE & BIOBEHAVIORAL REVS. 1530, 1533–34 (2013).

[24] This Note's focus is the conservative legal movement — "the loose coalition of lawyers, judges, and thinkers that organized around the nascent Federalist Society in the early 1980s" and its successors on the Court. Ed Whelan, *Trump and the Conservative Legal Movement*, NAT'L REV. (July 25, 2024, at 13:19 ET), https://www.nationalreview.com/magazine/2024/09/trump-and-the-conservative-legal-movement [https://perma.cc/7CTX-85BJ]. Conservative jurisprudence means something slightly broader. At bottom, one might assume that judges and Justices from the Federalist Society milieu would automatically qualify, but that definition alone is both overinclusive and underinclusive. Conservative jurisprudence predates the forms of originalism and textualism championed and deployed by leading members of the Federalist Society, *see, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 112 (1962) (advocating judicial restraint); ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 51, 174–75 (1970) (expressing skepticism about Warren Court–era judicial subjectivity and preference for democratic resolution of contested political issues), and there are modern self-identified conservatives advancing jurisprudential views that critique originalist positivism from first principles, *see generally* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022). Moreover, not all judges affiliated with the Federalist Society have a jurisprudence that can be consistently described as conservative. For example, Seventh Circuit Judge Posner, an active affiliate of the Federalist Society, took ideologically liberal positions "[i]n cases about prison conditions, voting rights, immigration hearings, government disability benefits, and more." Corbin K. Barthold, *The Mystery of Richard Posner*, LAW & LIBERTY (Jan. 16, 2023), https://lawliberty.org/feature/the-mystery-of-richard-posner [https://perma.cc/REK8-6BZA]. With this background in mind, this Note asserts that any jurist whose jurisprudence can, on balance, be reasonably described as "originalist," "textualist," or "formalist" can be classified as a judicial conservative. This definition should not be taken to deny the existence of internal debates within the conservative legal movement writ large.

neutral impartiality that eschews cognitive bias–driven and empathic reasoning. And it suggests that empathy, used productively, can actually function as a tool to rein in those instincts.

The broad contention is this: Empathic reasoning — both intentional and instinctive — pervades judicial reasoning across ideology. In the context of the conservative legal movement to which the current Court's six conservative Justices belong,[25] baked-in empathic bias in the form of in-group/out-group reasoning manifests in rhetorical and doctrinal innovations that categorize parties and people into the good and the bad — which is partly to say those for whom the Justices have natural in-group empathy, and those for whom they do not — and then distribute benefits and burdens on that basis. This is a jurisprudence resting on a foundation of empathic judgments about the "good boys" and "bad boys" of society, aimed at protecting the "good" in-group and controlling the "bad" out-group by extending the law's protection only to the former and exacting punishment upon the latter. This is bad boy jurisprudence.[26]

I. EMPATHIC JUDGING AND ITS DISCONTENTS

To assert that empathy is a legitimate (or required) judicial quality inevitably provokes cross-spectrum reactions. On one hand, empathy defenders assert that "[p]eople without . . . empathy are not objective decision-makers. They are sociopaths . . . ."[27] Judges, as of this Note's publication, are people.[28] Presumably loath to be governed in part by "sociopaths," strong judicial-empathy proponents assert that "[w]e must . . . expressly require empathy as a qualification for the work of judging."[29] The anti-empathy conservative retorts that "a jurisprudence

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See J. Harvie Wilkinson, *Is There a Distinctive Conservative Jurisprudence?*, AM. ENTER. INST. (Mar. 5, 2001), https://www.aei.org/research-products/speech/is-there-a-distinctive-conservative-jurisprudence [https://perma.cc/C2FH-Y96D].

[25] *See* Karen M. Tani, *The Supreme Court, 2023 Term — Foreword: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 1, 47–48 (2024).

[26] Colloquially, "bad boy" brings to mind someone who breaks rules or flouts social norms. *See Bad Boy*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/bad%20boy [https://perma.cc/J53V-VXSR]. This Note, however, uses the term in a broader sense: It is a characterization meant to capture a fusion of out-group derision and prejudice, one that marks an individual as both morally suspect and undeserving of full protection or consideration under the law. "Good boy" encompasses the inverse: a sympathetic, relatable actor understood as deserving of the law's protection.

[27] David Brooks, Opinion, *The Empathy Issue*, N.Y. TIMES (May 28, 2009), https://www.nytimes.com/2009/05/29/opinion/29brooks.html [https://perma.cc/9CJP-G9LT].

[28] *Cf.* Christopher Michael Malikschmitt, *The Real Future of AI in Law: AI Judges*, A.B.A. (Oct. 18, 2023), https://www.americanbar.org/groups/law_practice/resources/law-technology-today/2023/the-real-future-of-ai-in-law-ai-judges [https://perma.cc/PEF4-PB8M] (examining the possibility and consequences of AI judges).

[29] Lee, *supra* note 10, at 147–48.

of empathy completely undermines the rule of law" by giving judges license to "erode the plainest legal text."[30]

This discourse essentially represents the battle lines over empathic judicial reasoning. The actors exist in an overlapping, multiset Venn diagram: They decry empathy in judging, embrace it, acknowledge its inevitability, seek to constrain it, seek to encourage it, or engage in some combination of the above.[31] President Obama's nod to empathy in the lead-up to his nomination of Justice Sotomayor — and to a lesser extent, Secretary Hillary Clinton's presidential-debate assertion that she would look for "Supreme Court justices who understand the way the world really works, who have real life experience"[32] — generated significant scholarship and popular discourse over the proper role (if any) for empathy in judicial decisionmaking.[33] Yet the question remains open.

The problem is partly definitional: Scholars and commentators use "empathy" to mean various affective or cognitive processes, including in the particular context of judging. Scholars who are sanguine about empathy's role in judicial decisionmaking often describe it in terms of a conscious exercise[34] — a "cognitive capacity or training to imagine oneself in the position of another,"[35] to be deployed to effectuate more nuanced reasoning. For those scholars, "empathy should be thought of as an effort to understand, as much as possible, the perspectives of others, especially others who are different from the jurist in some way that is relevant to the dispute."[36] On this view, "[t]he function of empathy is to help one understand and relate to another person."[37]

Those who disavow empathic judging tend to use the word in ways that suggest that what they have in mind is not necessarily an intentional perspective-taking exercise but instead "sympathy, care, or compassion."[38] That is why Professor Greg Weiner, asking "[w]here . . . the empathy [is] for" those "uncomfortable sharing bathrooms according to identity rather than anatomy," spoke in terms of what forms of distress

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[30] John O. McGinnis, *A Jurisprudence of Empathy Undermines the Rule of Law: Sotomayor Edition*, LAW & LIBERTY (June 20, 2016), https://lawliberty.org/a-jurisprudence-of-empathy-undermines-the-rule-of-law-sotomayor-edition [https://perma.cc/GX6T-AKMR].

[31] *See, e.g.*, Brooks, *supra* note 27 (acknowledging empathy is inevitable and even valuable but arguing its use must be constrained by tradition and self-restraint).

[32] *Full Transcript: Second 2016 Presidential Debate*, POLITICO (Oct. 10, 2016, at 01:16 ET), https://www.politico.com/story/2016/10/2016-presidential-debate-transcript-229519 [https://perma.cc/X9VN-X436]; *see also* Greg Weiner, *Previewing the Jurisprudence of Empathy*, LAW & LIBERTY (Nov. 3, 2016), https://lawliberty.org/the-jurisprudence-of-empathy [https://perma.cc/C53A-JGJH] (describing "Hillary Clinton's jurisprudence of empathy").

[33] *See supra* notes 3–6, 8–16 and accompanying text; Weiner, *supra* note 32.

[34] *See* Bandes, *supra* note 11, at 136 ("Empathy is a capacity, not an emotion.").

[35] Miller, *supra* note 10, at 1008.

[36] Lee, *supra* note 10, at 148.

[37] Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1580 (1987) (quoting DREW WESTEN, SELF & SOCIETY 94 (1985)).

[38] *Cf. id.* at 1581 (describing this understanding of empathy as one among several possible definitions).

"merit[] compassion."[39] It also comports with Professor John McGinnis's observation, framed in terms of empathic desert, that "minorities striving for success who may gain admission to elite colleges because of [affirmative action] programs deserve our empathy," and his follow-up question: "[W]hy don't those who are denied a place because of their race deserve our empathy as well?"[40]

The concept of empathy thus gives commentators shared language but no shared meaning. Professor Mary Anne Franks has captured how the concept of empathy became twisted up in partisan jousting over the nomination of Justice Souter's replacement: President Obama commented that he "view[ed] th[e] quality of empathy, of understanding and identifying with people's hopes and struggles," as an important characteristic for a jurist.[41] He "of course did not say . . . that judges should 'go on feeling' or 'side with the little guy.'"[42] And yet, in "translat[ing]" President Obama's words for the media, conservatives "claimed that when President Obama uses it, empathy is '[u]sually . . . a code word for an activist judge.'"[43] They claimed that when President Obama *said* that he valued judges with an appreciation for law's impact on the ground, "what he . . . *meant* was that he would select judges based not on merit but 'on the basis of their personal politics, their personal feelings, their personal preferences.'"[44] Then-Senator Jeff Sessions embraced the empathy-as-mere-compassion (or preference) view when he balked: "So what if the [judge] doesn't like your haircut, or for some reason doesn't like you, is he now free to rule one way or the other based on likes, predilections, politics, personal values?"[45]

Armed with a conception of empathy as idiosyncratic preference, conservative opponents of this so-called "jurisprudence of empathy" set empathy and impartiality as opposing forces.[46] That's the view Senator Sessions espoused when he asserted that empathy in a judicial nominee "is disqualifying."[47] On his view, an empathic "approach to judging

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[39] Weiner, *supra* note 32.

[40] John O. McGinnis, *The Emptiness of Empathetic Judging*, LAW & LIBERTY (Nov. 21, 2014), https://lawliberty.org/the-emptiness-of-empathetic-judging [https://perma.cc/X96U-FNJK].

[41] Franks, *supra* note 14, at 65–66 (quoting *Obama's Remarks on the Resignation of Justice Souter*, N.Y. TIMES (May 1, 2009), https://www.nytimes.com/2009/05/01/us/politics/01souter.text.html [https://perma.cc/H2XP-AATR]).

[42] *Id.* at 66.

[43] *Id.* (alteration in original) (quoting *"This Week" Transcript: Sens. Leahy and Hatch*, ABC NEWS (May 3, 2009, at 09:43 ET) (statement of Senator Orrin Hatch), https://abcnews.go.com/ThisWeek/story?id=7491153 [https://perma.cc/JV8F-QYPJ]).

[44] *Id.* (emphasis added) (quoting Rollert, *supra* note 12).

[45] *Id.* (quoting *Sessions Says He's Looking for Judicial Restraint*, NAT'L J. (May 7, 2009), http://www.nationaljournal.com/njonline/sessions-says-he-s-looking-for-judicial-restraint-20090507 [https://perma.cc/BLJ8-XR2Q]).

[46] *Id.* at 61–62.

[47] Miller, *supra* note 10, at 1000 (quoting *Sotomayor Pledges "Fidelity to the Law" as Hearings Begin*, PBS NEWS HOUR (July 13, 2009, at 00:00 ET), https://www.pbs.org/newshour/show/sotomayor-pledges-fidelity-to-the-law-as-hearings-begin [https://perma.cc/5BEX-5KAR]).

means that the umpire calling the game is not neutral, but instead feels empowered to favor one team over another. . . . [W]hatever it is, it's not law."[48] Likewise, Senator Orrin Hatch proclaimed empathy to be "a 'code' for liberal activism, in contrast to a judge who is impartially 'fair to the rich, the poor, the weak, the strong' alike."[49] McGinnis picked up on this asserted dichotomy when he called empathic judicial reasoning "a clear and present danger to the rule of law."[50]

President Obama's call for "empathy" thus provoked conservative critiques of empathy as incompatible with the rule of law. The result has been a powerful, manufactured "opposition between empathy and impartiality."[51] One could forgive a conservative jurist forged in this environment for believing that impartiality requires an aversion to any form of empathic reasoning — that they may be either empathic or neutral but not both — and that they have the ability to choose.[52]

That jurist would be mistaken. Reasoning across in-group and out-group identification is a natural psychological instinct.[53] We instinctively categorize ourselves into in-groups with whom we identify and feel a sense of belonging.[54] The unfortunate flip side is that we also amplify out-group difference, producing intergroup empathy bias: We "more readily distrust, fear, and discriminate against out-group members and . . . instinctively favor or side with members of social groups with which [we] identify."[55] We prefer members of our own in-groups — people to whom we relate most — and "discriminate against . . . members of other [out-]groups" — people to whom we relate less — in "social decision-making" and when making difficult allocative decisions.[56]

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[48] *Id.* (quoting *Sotomayor Pledges "Fidelity to the Law" as Hearings Begin*, *supra* note 47).

[49] Charlie Savage, *Scouring Obama's Past for Clues on Judiciary*, N.Y. TIMES (May 9, 2009), https://www.nytimes.com/2009/05/10/us/politics/10court.html [https://perma.cc/SE9X-QZTR]; *see also* Franks, *supra* note 14, at 66 (quoting *"This Week" Transcript: Sens. Leahy and Hatch*, *supra* note 43; Rollert, *supra* note 12).

[50] McGinnis, *supra* note 30.

[51] *See* Franks, *supra* note 14, at 62 ("The supposed opposition between empathy and impartiality only succeeds by being mapped on to the supposed divide between progressives and conservatives.").

[52] *See, e.g.*, Carolyn Shapiro, *The Language of Neutrality in Supreme Court Confirmation Hearings*, 122 DICK. L. REV. 585, 612 (2018) ("[Supreme Court] nominees often made commitments to appropriate neutrality . . . . As a result, the impression that emerges is that there are logically deducible correct answers and little-to-no room for discretion. . . . Justice Gorsuch embraced this formalistic description of the job with particular fervor.").

[53] *See* Molenberghs, *supra* note 23, at 1531–32 (collecting studies establishing in-group bias through a variety of scientific methodologies).

[54] Melike M. Fourie, Sivenesi Subramoney & Pumla Gobodo-Madikizela, *A Less Attractive Feature of Empathy: Intergroup Empathy Bias*, *in* EMPATHY: AN EVIDENCE-BASED INTERDISCIPLINARY PERSPECTIVE 45, 47 (Makiko Kondo ed., 2017).

[55] *Id.*

[56] David Buttelmann & Robert Böhm, *The Ontogeny of the Motivation that Underlies In-Group Bias*, 25 PSYCH. SCI. 921, 921 (2014); *see also* Erika Weisz & Jamil Zaki, *Empathy-Building Interventions: A Review of Existing Work and Suggestions for Future Directions*, *in* THE OXFORD HANDBOOK OF COMPASSION SCIENCE 205, 211 (Emma M. Seppälä et al. eds., 2017) (inter-group bias "carries over to empathic behavior").

Fortunately, actively drawing on the capacity for empathy can help to tame natural in-group favoritism and out-group prejudice.[57] Engaging empathy as a conscious exercise reduces intergroup empathy bias and leads to less partial decisionmaking.[58] That means that the preoccupation with avoiding the *exercise* of empathy — believing such avoidance amounts to "call[ing] the balls and strikes based on where the pitch is placed"[59] — does not leave conservative jurists immune from empathic reasoning; it leaves them vulnerable to it. Judges who swear off empathy as a conscious exercise will be more likely to "gravitate, unconsciously or nearly automatically, toward the claims of parties more familiar to them and more similar to the way they perceive the world."[60] When judges decline consciously to engage empathy, they lose a key defense against their preconceived sympathies, affective instincts, and priors. That includes the powerful influence of in-group/out-group reasoning. As conservative commentator David Brooks put it:

> Supreme Court justices, like all of us, are emotional intuitionists. They begin their decision-making processes with certain models in their heads. These are models of how the world works and should work, which have been idiosyncratically ingrained by genes, culture, education, parents and events. These models shape the way judges perceive the world.[61]

Conservative jurists' attempt to outrun empathic reasoning cannot insulate them from reasoning affectively — sometimes "unconsciously or nearly automatically"[62] — based on those internal models. Those intuitions, imbued with in-group sympathies and out-group prejudices,[63] inform their reasoning about who deserves the law's protection and who has forfeited it. The output of an aversion to the practice of empathy is a conservative jurisprudence that not only formulates the relevant questions as who the bad boy is and what is to be done about him but also answers those questions by reference to empathy-inflected, in-group/out-group reasoning.

II. BAD BOY JURISPRUDENCE

The theory of bad boy jurisprudence proposes that in-group/out-group reasoning distinctly pervades the conservative Justices' approach to answering the question of whom the law should protect and whom it should constrain, and that conservative jurisprudence reflects this

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[57] *See, e.g.*, Jellie Sierksma, Jochem Thijs & Maykel Verkuyten, *In-Group Bias in Children's Intention to Help Can Be Overpowered by Inducing Empathy*, 33 BRIT. J. DEVELOPMENTAL PSYCH. 45, 50 (2015) (finding this effect in children).

[58] *See id.*

[59] *Sessions Says He's Looking for Judicial Restraint*, *supra* note 45.

[60] Lee, *supra* note 10, at 148.

[61] Brooks, *supra* note 27.

[62] Lee, *supra* note 10, at 148.

[63] *See id.* at 155.

through doctrinal and rhetorical outputs.[64] Bad boy jurisprudence is about the overlay of in-group/out-group reasoning, unchecked by the exercise of empathy as a tool to constrain such impulses, upon considerations of whom the law should and should not protect.

This Part elaborates a theory of bad boy jurisprudence at work. Its first two sections address doctrinal innovations. First, bad boy jurisprudence can help to explain apparent doctrinal inconsistencies. In *United States v. Rahimi*,[65] the Court leaned heavily on good-versus-bad-boy rhetoric to justify wrangling its precedent to ensure that its Second Amendment doctrine would constrain bad boys and protect good boys. Second, given the malleability of in- and out-groups, Justices' reasoning about their own experiences and interests might shape relevant in-groups and out-groups and direct legal conclusions accordingly. In *United States v. Jones*,[66] Chief Justice Roberts questioned the government about the consequences of a proposed Fourth Amendment rule on himself and the other Justices, ultimately joining an opinion extending Fourth Amendment protections where his own interests (and those of his in-group members) were implicated. This stands in contrast with the conservatives' general (though not uniform) refusal to extend like protections to out-group members targeted by state action. This Part next considers how bad boy jurisprudence might mediate doctrinal innovation in legal contexts that pose a tension with the in-group/out-group reasoning underlying it: contexts of transsubstantivity, including criminal procedure and Article III standing. This Part finally considers how the rhetoric of bad boy jurisprudence — in particular, out-group identification and reproach — operates in certain criminal law cases. The conservative Justices routinely embrace good-versus-bad-boy narratives to justify not only condemning bad boys who victimized others but also refusing to extend the law's protection to bad boys who were themselves victimized.

A. Bad Boy Jurisprudence's Doctrinal Outputs: The Bruen-Rahimi *Distinction*

The conservatives' treatment of two Second Amendment challenges to gun control regulations offers insight into how bad boy jurisprudence might mediate seeming inconsistencies in conservative jurisprudence. Bad boy jurisprudence as a means of identifying bad boys, establishing them as out-group members, and finding ways to bring the law to bear

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[64] For a famously succinct characterization of conservatism along these lines, see Comment, Frank Wilhoit (Mar. 22, 2018, at 00:09 ET), *on* Henry Farrell, *The Travesty of Liberalism*, CROOKED TIMBER (Mar. 21, 2018), https://crookedtimber.org/2018/03/21/liberals-against-progressives [https://perma.cc/XCR7-CYGP] ("Conservatism consists of exactly one proposition, to wit: There must be in-groups whom the law protect[s] but does not bind, alongside out-groups whom the law binds but does not protect.").

[65] 144 S. Ct. 1889 (2024).

[66] 565 U.S. 400 (2012).

on them (and doing the opposite for good boys) may help explain the conservatives' backpedaling between *New York State Rifle & Pistol Ass'n v. Bruen*[67] and *United States v. Rahimi*.

In *Bruen*, the conservative Justices struck down a New York law requiring concealed-carry license applicants to show "proper cause" in their applications.[68] Justice Thomas's majority opinion used the term "law-abiding" fourteen times[69] and ultimately concluded that the "proper-cause requirement" contravened the Fourteenth Amendment because "it prevent[ed] law-abiding citizens . . . from exercising their right to keep and bear arms."[70] The proper-cause requirement infringed on the Justices' in-group of "law-abiding, responsible"[71] good boys, whose protection is law's function. It thus could not stand.

Bruen announced a new test for adjudicating Second Amendment claims: When a regulation falls within the ambit of the Second Amendment, it is presumptively unconstitutional;[72] "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation."[73]

Enter *Rahimi*, involving a federal statute prohibiting firearm possession by an individual subject to a domestic violence restraining order.[74] As Justice Thomas pointed out in a solo dissent, this prohibition lacked a specific historical analogue.[75] On the logic of *Bruen*, that should have doomed the regulation: Restrictions on gun ownership on the basis of a domestic violence protection order are not "consistent with this Nation's historical tradition" and thus do not "fall[] outside the Second Amendment's 'unqualified command.'"[76]

But Rahimi was a very bad boy. We know this because Chief Justice Roberts helpfully recounted, in nearly 600 words of vivid detail at the top of his majority opinion, the events that led to Rahimi's placement under a protective order and the discovery of weapons at his home.[77] The government — which bore the burden of proving that the regulation was "consistent with the Nation's historical tradition of firearm regulation"[78] — could "not identify even a single regulation with

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67 142 S. Ct. 2111 (2022).

68 *See id.* at 2123 (quoting N.Y. PENAL LAW § 400.00(2)(f) (McKinney 2022)); *id.* at 2156.

69 *See id.* at 2122 (twice), 2125, 2133 (twice), 2134, 2135 n.8, 2138, 2150, 2156 (twice); *id.* at 2131, 2138 n.9 (twice) (quoting District of Columbia v. Heller, 554 U.S. 570, 635 (2008)).

70 *Id.* at 2156.

71 *See id.* at 2131, 2138 n.9 (quoting *Heller*, 554 U.S. at 635); *id.* at 2156.

72 *Id.* at 2129–30.

73 *Id.* at 2130.

74 United States v. Rahimi, 144 S. Ct. 1889, 1894 (2024) (quoting 18 U.S.C. § 922(g)(8)(C)(i)).

75 *See id.* at 1930 (Thomas, J., dissenting); *see also* Bonnie Carlson, *Generalizing History and the Court's Opportunity in* Rahimi, U. PA. J. CONST. L. ONLINE, Apr. 2024, at 1, 8 (making this same point).

76 *See Bruen*, 142 S. Ct. at 2126 (quoting Konigsberg v. State Bar, 366 U.S. 36, 50 n.10 (1961)); *Rahimi*, 144 S. Ct. at 1930 (Thomas, J., dissenting).

77 *See Rahimi*, 144 S. Ct. at 1894–95 (majority opinion).

78 *Id.* at 1933 (Thomas, J., dissenting) (quoting *Bruen*, 142 S. Ct. at 2130).

an analogous burden and justification."[79] Even so, Chief Justice Roberts found a way to exclude Rahimi from the Second Amendment's protection.[80]

While some commentators have argued that *Rahimi* reinforced the *Bruen* framework,[81] that position is hard to square with the tenuousness of the Court's purported historical analogues,[82] the observation that the *Rahimi* test in fact "differs [from *Bruen*] both in its wording and application,"[83] and the mere fact that *Bruen*'s author found himself alone in dissent just two years later.[84] But, on the model of bad boy jurisprudence, the inconsistency between *Bruen* and *Rahimi* is easily explained: The Second Amendment should protect the law-abiding in-group of good boys and exclude from protection the unsavory out-group of bad boys.

The *Bruen-Rahimi* interplay also illustrates how viewing the law as a tool to protect good boys and constrain bad boys necessarily shapes how jurists reason about structural problems. Commentator Peter Shamshiri has made this point, in these terms:

> [T]he idea that you might be able to mitigate gun violence by slowing the proliferation of weapons in society is very foreign and distasteful to [the conservative Justices], but the idea that you could just deny gun permits to the bad boys, that's perfectly natural and it fits very squarely within their worldview.[85]

The structural consequences of bad boy jurisprudence are evident in the Roberts Court's Second Amendment jurisprudence.

B. Malleable In-Groups and Bad Boy Jurisprudence in the Fourth Amendment Context

All else equal, the criminal defendants who come before the Court are likely to fall outside the Justices' natural in-groups. To start, criminal defendants are the quintessential subjects of state coercion, while the Justices exercise the nation's highest judicial power for life. Traditional fact patterns in Fourth Amendment cases might involve suspects

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[79] *Id.* (footnote omitted).

[80] *See id.* at 1903 (majority opinion).

[81] *E.g.*, Mark W. Smith, *Much Ado About Nothing:* Rahimi *Reinforces* Bruen *and* Heller, HARV. J.L. & PUB. POL'Y: PER CURIAM, Summer 2024, No. 26, at 1–2.

[82] *See Rahimi*, 144 S. Ct. at 1943–44 (Thomas, J., dissenting).

[83] *The Supreme Court, 2023 Term — Leading Case:* United States v. Rahimi, 138 HARV. L. REV. 325, 331 (2024) (footnote omitted).

[84] *See Rahimi*, 144 S. Ct. at 1945 (Thomas, J., dissenting) (concluding that "the Government's position is untenable" in light of *Bruen*).

[85] 5-4: *New York State Rifle and Pistol Association v. Bruen* (Spotify, Aug. 16, 2022) (statement of Peter Shamshiri).

on the run,[86] Black men carrying concealed weapons,[87] "youthful occupants" of a car in a "high drug area,"[88] bus passengers under questioning by the police,[89] or individuals suspected of serious crimes such as drug trafficking[90] — people to whom the Justices must tend not to relate, which is to say their natural out-group members.[91] Conservative Justices have generally (though not uniformly[92]) voted to deny legal protection to those parties.[93]

But in- and out-groups are, to a degree, context dependent and malleable.[94] A relatable fact pattern that directly implicates the Justices' personal interests — consider a defendant in a position in which the Justices could imagine themselves — could transform an out-group defendant into an in-group member for the purpose of deciding which legal rule will bind bad boys and protect good boys. Bad boy jurisprudence's core tenet that conservative Justices reason according to in-group and out-group identification, then, suggests that we should expect prodefendant outcomes in cases where the defendant's and Justices' interests are sufficiently aligned — where the defendant is sufficiently relatable that he takes on temporary in-group status. In other words, if the

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[86] *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119, 121 (2000); California v. Hodari D., 499 U.S. 621, 622–23 (1991).

[87] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 7 (1968); Russell L. Jones, Terry v. Ohio*: Its Failure, Immoral Progeny, and Racial Profiling*, 54 IDAHO L. REV. 511, 517–18 (2018) (noting that both men searched in *Terry* were Black).

[88] Whren v. United States, 517 U.S. 806, 808 (1996).

[89] *See, e.g.*, United States v. Drayton, 536 U.S. 194, 197–98 (2002).

[90] *See, e.g.*, Arizona v. Gant, 556 U.S. 332, 335–36 (2009).

[91] *See* Carolyn Krause, *Current Supreme Court Justices' Backgrounds Are "Similar and Narrow," UT Law Professor Says*, OAK RIDGER (Jan. 7, 2025, at 04:07 ET), https://www.oakridger.com/story/news/local/2025/01/07/similar-and-narrow-backgrounds-of-supreme-court-justices-discussed/77237884007 [https://perma.cc/T94J-ECVL] ("[T]he current justices on the Supreme Court . . . have similar backgrounds and . . . lack broadly based experiences.").

[92] *See, e.g.*, Bond v. United States, 529 U.S. 334, 336 (2000) (holding, in an opinion written by Chief Justice Rehnquist and joined by all but Justices Breyer and Scalia, that squeezing a bus passenger's bag to search for drugs violated the Fourth Amendment).

[93] In *Illinois v. Wardlow*, 528 U.S. 119 (2000), five conservative Justices held that flight from a high-crime area can contribute to an officer's reasonable suspicion justifying a stop. *Id.* at 124–25. The Court's four more-liberal Justices dissented in part. *Id.* at 126–27 (Stevens, J., concurring in part and dissenting in part). In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court's conservatives voted to permit police to stop individuals and frisk them for weapons under certain circumstances. *See id.* at 30–31. The Court in *Whren v. United States*, 517 U.S. 806 (1996), unanimously held that any traffic offense provides a legitimate legal basis for a police stop. *Id.* at 818–19. In *United States v. Drayton*, 536 U.S. 194 (2002), the conservatives concluded that police need not advise bus passengers of their right to refuse consent to searches. *See id.* at 206. In *Arizona v. Gant*, 556 U.S. 332 (2009), Justices Scalia and Thomas joined a majority opinion allowing searches of vehicles incident to arrest in some circumstances. *See id.* at 335. Chief Justice Roberts and Justices Alito and Kennedy endorsed even greater latitude to search cars incident to arrest. *See id.* at 355–56 (Alito, J., dissenting).

[94] *See* Mark Levine et al., *Identity and Emergency Intervention: How Social Group Membership and Inclusiveness of Group Boundaries Shape Helping Behavior*, 31 PERSONALITY & SOC. PSYCH. BULL. 443, 451 (2005) (explaining that shifting membership of in- and out-groups mediates pro- and antisocial behavior).

Justices connect to an otherwise out-group defendant by adopting, implicitly or explicitly, a "this-could-happen-to-me" frame on the state action, the defendant should win.

On that telling, bad boy jurisprudence helps make sense of the prodefendant outcome in *United States v. Jones*, where Chief Justice Roberts reasoned at oral argument about an intrusive law enforcement practice explicitly by reference to its potential effect on himself and the people most like him.[95] *Jones* involved a challenge to the constitutionality of the government's use of a GPS device attached to a car to monitor its movement on public roads.[96] During an exchange with Deputy Solicitor General Michael Dreeben, Chief Justice Roberts pressed on the government's assertion that the tracking did not constitute a Fourth Amendment search, asking: "You think there would also not be a search if you put a GPS device on all of our cars, [and] monitored our movements for a month?"[97] When Deputy Solicitor General Dreeben began to respond that "the Justices of this Court when driving on public roadways have no greater expectation of [privacy]" than ordinary citizens, Chief Justice Roberts interrupted: "So, your answer is yes, you could tomorrow decide that you put a GPS device on every one of our cars, follow us for a month; no problem under the Constitution?"[98] The Court ultimately held that such tracking constituted a search implicating Fourth Amendment protection.[99]

The Justices know that mass surveillance and other technology-based intrusions put their own interests at risk, just like those of the criminal defendants before them. On the terms of bad boy jurisprudence, interest convergence of this sort may turn criminal defendants into in-group members — at least for purposes of the Justices' reasoning about how to leverage the law to bind out-group bad boys and protect in-group good boys.

Bad boy jurisprudence may also shed some, albeit inconclusive, light on *Carpenter v. United States*,[100] which, like *Jones*, addressed an emerging surveillance tool. In *Carpenter*, the Justices considered the Fourth Amendment's applicability to cell-site location information (CSLI).[101] At oral argument, Justice Sotomayor raised the Justices' own interests in data privacy, noting: "I am not beyond the belief that someday a

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[95] Transcript of Oral Argument at 9–10, United States v. Jones, 565 U.S. 400 (2012) (No. 10-1259), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/10-1259.pdf [https://perma.cc/8JDR-LNCV].

[96] 565 U.S. at 402.

[97] Transcript of Oral Argument, *supra* note 95, at 9.

[98] *Id.* at 10.

[99] *Jones*, 565 U.S. at 404.

[100] 138 S. Ct. 2206 (2018).

[101] *Id.* at 2211.

provider could turn on my cell phone and listen to my conversations."[102] Justice Kennedy made a similarly self-referential point about privacy expectations, asserting that there is a "normal expectation that businesses have your cell phone data. I think everybody, almost everybody, knows that. If I know it, everybody does."[103] He continued: "But I . . . don't think there's an expectation that people are following you for 127 days."[104] Yet Justice Kennedy, like Justices Thomas, Alito, and Gorsuch, dissented from the Court's recognition of a privacy interest in CSLI.[105]

Chief Justice Roberts, writing for the Court, seemed still touched by his shared stake in the extent of Fourth Amendment protections in the age of ubiquitous technology capable of large-scale tracking.[106] In holding that the government's acquisition of CSLI was a Fourth Amendment search,[107] Chief Justice Roberts called mobile phones practically "a 'feature of human anatomy'"[108] and "indispensable to participation in modern society."[109] But what might bad boy jurisprudence say to the other four conservatives in dissent?

Perhaps these Justices considered the risk that they would be suspected of a crime such that their CSLI would be searched lower than the risk of government surveillance of the kind at issue in *Jones*. Or maybe broader convictions stemming from originalism and the positive law model of the Fourth Amendment controlled, leaving no room for in-group sympathies to move the needle. After all, even the dissenting Justices acknowledged their shared interests with the defendants and with participants in modern society at large. Justice Gorsuch offered: "Today we use the Internet to do most everything. Smartphones make it easy to keep a calendar, correspond with friends, make calls, conduct banking, and even watch the game . . . . Even our most private documents . . . now reside on third party servers."[110] And Justice Alito opened his dissent: "I share the Court's concern about the effect of new technology on personal privacy . . . ."[111] But the conservative Justices' shared privacy interests with criminal defendants evidently could not overcome the difficult issues *Carpenter* raised about the originalist

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[102] Transcript of Oral Argument at 14, *Carpenter*, 138 S. Ct. 2206 (No. 16-402), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-402_6khn.pdf [https://perma.cc/6J85-56GD].

[103] *Id.* at 27.

[104] *Id.*

[105] *Carpenter*, 138 S. Ct. at 2224 (Kennedy, J., dissenting); *id.* at 2262 (Gorsuch, J., dissenting).

[106] *See id.* at 2211–12 (majority opinion).

[107] *Id.* at 2217.

[108] *Id.* at 2218 (quoting Riley v. California, 573 U.S. 373, 385 (2014)).

[109] *Id.* at 2220.

[110] *Id.* at 2262 (Gorsuch, J., dissenting).

[111] *Id.* at 2246–47 (Alito, J., dissenting).

conception of Fourth Amendment protections,[112] third-party possession, positive law baselines, and the search/subpoena distinction.[113]

Bad boy jurisprudence thus cannot offer a perfect explanation for the vagaries of Fourth Amendment doctrine.[114] But, as *Jones* suggests, it may help to explain some of what is operating on the Justices' reasoning in Fourth Amendment cases. Fourth Amendment jurisprudence, with its overarching (un)reasonableness standard, may structurally prompt jurists to reason by reference to their own privacy expectations or expectations for treatment by law enforcement. If the Justices' in-group/out-group biases are shaping their determination of which legal rule will bind bad boys and protect good boys, their identification with a criminal defendant as an in-group member would counsel a pro-defendant outcome. That theory is consistent with Chief Justice Roberts' inquiry at the *Jones* oral argument. And it would explain not only the Justices' more discerning Fourth Amendment instincts in the high-tech, mass-surveillance context but also their line-drawing exercises in the more traditional Fourth Amendment environment of automobiles, explored next.

C. Bad Boy Jurisprudence in Transsubstantive Legal Regimes

Transsubstantive doctrinal contexts, where the governing legal context or doctrine is one whose "form and manner of application do not vary depending upon the antecedent legal regime that the dispute implicates,"[115] present a special case for bad boy jurisprudence. A Justice who wants to bind out-group bad boys and protect in-group good boys will be constrained in doing so where the law is transsubstantive because the underlying legal context of the parties matters less than the application of the overarching rule. An illustrative context is Fourth Amendment law, which — on its face — makes no rule distinctions based on the underlying substantive crime at issue.[116] Criminal procedure is thus one context ripe for exploring what it might look like for formal transsubstantivity and the in-group/out-group–motivated reasoning of bad boy jurisprudence to coexist. The inquiry: How might Justices go about articulating a formally transsubstantive legal rule that in practice protects and burdens different parties on the basis of in-group/out-group–inflected judgments about who deserves the law's protection? In essence, bad boy jurisprudence posits that conservative Justices can — whether through creative doctrinal innovations or bald

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[112] *See id.* at 2247.

[113] *See id.* at 2255.

[114] *See* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 479 (2011).

[115] David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1193.

[116] *See* William J. Stuntz, Commentary, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 847 (2001).

inconsistencies — end-run transsubstantivity to bind out-group bad boys and protect in-group good boys.

Consider Justice Scalia's concurring opinion in *Arizona v. Gant*.[117] Gant, who was arrested for driving on a suspended license, was handcuffed and locked in the back of a patrol car.[118] Officers subsequently searched his car and found cocaine in the pocket of a jacket in the back seat.[119] Justice Stevens, for the majority, concluded that the search-incident-to-arrest exception to the Fourth Amendment warrant requirement could not justify this search of Gant's jacket, at least where "Gant could not have accessed his car to retrieve weapons or evidence at the time of the search."[120] Without explanation,[121] Justice Stevens also borrowed from Justice Scalia's separate writing in a prior case — *Thornton v. United States*[122] — to "conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle."[123] Concurring, Justice Scalia doubled down on that alternative: "[A] vehicle search incident to arrest is *ipso facto* 'reasonable' *only* when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred."[124] Justice Scalia would thus permit a search incident to arrest any time an officer had probable cause to believe evidence of the crime of arrest might be found in the vehicle, regardless of whether the arrestee was in reaching distance of the car.[125] As applied, that rule would insulate Gant, who was arrested for driving on a suspended license, but would leave unprotected individuals arrested on suspicion of drug or gun possession, for example.[126]

In this case, Justice Scalia's doctrinal options were constrained by the transsubstantive nature of criminal procedure. The Fourth Amendment, at least formally, "treats one crime just like another."[127] Consistency with the principle of transsubstantivity thus set outer limits on Justice Scalia's options for crafting his search-incident-to-arrest rule for vehicles.

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117 556 U.S. 332 (2009).

118 *Id.* at 335.

119 *Id.*

120 *Id.*; *see id.* at 344.

121 *See id.* at 364 (Alito, J., dissenting).

122 541 U.S. 615 (2004).

123 *Gant*, 556 U.S. at 335.

124 *Id.* at 353 (Scalia, J., concurring) (second emphasis added).

125 *See id.*; Angad Singh, Comment, *Stepping Out of the Vehicle: The Potential of* Arizona v. Gant *to End Automatic Searches Incident to Arrest Beyond the Vehicular Context*, 59 AM. U. L. REV. 1759, 1769 (2010) (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment)).

126 *See Gant*, 556 U.S. at 353 (Scalia, J., concurring); *Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment).

127 Stuntz, *supra* note 116, at 847 (footnote omitted).

Within those outer bounds, considerations of in-group versus out-group effect may have informed where Justice Scalia drew the line in *Thornton* and *Gant*. Justice Scalia was a driver — susceptible, as all drivers are, to citation or arrest for regulatory infractions or traffic violations. (In 2011, the Justice was ticketed after causing a four-car accident when he rear-ended another driver on the George Washington Parkway.[128]) On the in-group/out-group–informed view embodied by bad boy jurisprudence, Justice Scalia would key the search-incident-to-arrest rule to preventing searches of his in-group (traffic or regulatory violators) while permitting searches of his out-group (those suspected of the wrong kind of crime).

Again, it is impossible to know what drove Justice Scalia's rule development — especially given his famously idiosyncratic criminal procedure portfolio.[129] But bad boy jurisprudence offers at least one explanation. If a judge wanted to craft a rule prohibiting searches for the kinds of violations that he (and the in-group of drivers to whom he relates) might commit, while allowing searches for the kinds of infractions that the out-group to whom he does not relate might commit — without straying from criminal procedure's core principle of transsubstantivity — he would do precisely what Justice Scalia did in *Thornton* and *Gant*: Draw the line based on whether the crime of arrest is the type of crime for which evidence might be found in the car.[130]

Thus even transsubstantive procedural rules can be wielded to effectuate a Justice's underlying judgments about who is deserving and undeserving of legal redress — judgments that, on the theory of bad boy jurisprudence, are suffused with in-group/out-group reasoning and intergroup empathy biases that cause the Justices "instinctively [to] favor or side with members of social groups with which they identify."[131]

Article III standing presents another context in which to assess how conservative Justices might go about devising formally transsubstantive legal rules that afford greater protection to in-group litigants and impose disparate burdens on out-group litigants.[132] A bad boy jurisprudence of standing predicts that transsubstantive justiciability rules would nevertheless regulate access to federal courts partly on the basis of in-group/out-group–inflected judgments about who deserves the law's protection.

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128 Michael A. Memoli, *Supreme Court Judge Scalia Ticketed in Traffic Accident*, L.A. TIMES (Mar. 30, 2011, at 00:00 PT), https://www.latimes.com/world/la-xpm-2011-mar-30-la-pn-scalia-traffic-ticket-20110330-story.html [https://perma.cc/GXX2-4FBY].

129 *See* David Stras et al., *Justice Scalia and the Criminal Law*, 86 U. CIN. L. REV. 743, 743 (2018).

130 I thank Professor Richard Re for the insight underlying this point.

131 *See* Fourie, Subramoney & Gobodo-Madikizela, *supra* note 54, at 47.

132 *See* Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1062 (2015) ("[T]he Court began in the 1970s to characterize standing as turning almost entirely on a single, transsubstantive, tripartite test . . . .").

As it turns out, developments in standing doctrine comport with that hypothesis. Two cases that involve conservative Justices' treatment of claims for injunctive relief by out-group plaintiffs — a Black man battered by Los Angeles police in *City of Los Angeles v. Lyons*[133] and individuals suspected of being undocumented immigrants in *Noem v. Vasquez Perdomo*[134] — are illustrative.

Lyons arose after two Los Angeles Police Department (LAPD) officers brutalized twenty-four-year-old Adolph Lyons and placed him in a chokehold until he blacked out.[135] Lyons brought a § 1983 suit for damages and to enjoin the LAPD from using chokeholds as part of its department-approved policy.[136] LAPD officers had employed these chokeholds nearly a thousand times between 1975 and 1980.[137] Between 1975 and *Lyons'* final disposition in 1983, LAPD officers killed sixteen people — including twelve Black men — with chokehold restraints.[138] The Court split 5–4 by ideology, with the conservative Justices concluding that Lyons lacked standing to seek an injunction against such chokeholds in the future because he "made no showing that he is realistically threatened by a repetition of his experience."[139]

Recently, the Court returned to Los Angeles in *Vasquez Perdomo*, which saw *Lyons'* "realistic threat" standard applied to another outgroup of the conservative Justices: individuals suspected of being undocumented immigrants. In a 6–3 order, the Court's conservative Justices stayed a lower court order enjoining ICE's "roving patrols,"[140] which profiled, harassed, and detained mostly Hispanic Los Angeles residents on purported suspicion of undocumented status, even after those individuals averred their citizenship or produced valid IDs.[141] The stay permitted agents to conduct these stops based solely on apparent race or ethnicity, speaking Spanish or accented English, or presence at the types of places day-laborers are known or thought to gather.[142] Justice Kavanaugh's concurrence framed *Vasquez Perdomo* as *Lyons* 2.0: "[L]ike in *Lyons*, plaintiffs have no good basis to believe that law enforcement will unlawfully stop them in the future based on the prohibited factors . . . ."[143] But the effect of the stay was to bless the same

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133 461 U.S. 95 (1983); *see id.* at 114–15 (Marshall, J., dissenting).

134 No. 25A169, slip op. (U.S. Sep. 8, 2025); *id.* at 1–3 (Kavanaugh, J., concurring in the grant of the application for stay).

135 *Lyons*, 461 U.S. at 114–15 (Marshall, J., dissenting).

136 *Id.* at 98–99, 113 (majority opinion).

137 *Id.* at 116 (Marshall, J., dissenting).

138 *Id.* at 115–16.

139 *Id.* at 105, 109 (majority opinion).

140 Noem v. Vasquez Perdomo, No. 25A169, slip op. at 1 (U.S. Sep. 8, 2025); Vasquez Perdomo v. Noem, 790 F. Supp. 3d 850, 864 (C.D. Cal. 2025).

141 *See Noem*, 790 F. Supp. 3d at 863–64, 866–67, 869, 894–95.

142 *See id.* at 898; *Noem*, slip op. at 1.

143 *Noem*, slip op. at 4 (Kavanaugh, J., concurring in the grant of the application for stay) (emphasis omitted).

discriminatory policy that made it eminently probable that the plaintiffs would in fact be targeted again. As Justice Sotomayor pointed out in dissent, "the plaintiffs, by doing nothing more than going to work every day, are likely to be seized by agents who are targeting their specific workplaces in accordance with the Government's practice."[144]

Compare the conservatives' restrictive approach to standing in cases involving Black men subjected to police violence and suspected undocumented immigrants with their willingness to bootstrap standing in cases involving corporate and moneyed plaintiffs who — like the Justices — enjoy wealth, power, and elite status. In *Diamond Alternative Energy, LLC v. EPA*,[145] Justice Kavanaugh for the Court concluded that fuel producers not directly impacted by California's regulation of electric vehicles had standing to challenge those regulations based on the downstream economic injuries they sustained as a result.[146] In dissent, Justice Jackson alleged motivated reasoning by her conservative colleagues to support moneyed interests.[147] On Justice Jackson's read, the majority's standing analysis "invites questions about inconsistent decisionmaking and whether this Court is holding business litigants to the same standards as everyone else."[148] The *Diamond* majority bootstrapped the fuel producers' redressability argument, obscuring their lack of evidence and instead relying on "'commonsense' intuitions about automaker and consumer behavior."[149] The question in Justice Jackson's mind is one raised by the theory of bad boy jurisprudence: How do the Justices' sympathies — including their reasoning across in- and out-groups — bear on their infusion of "common sense" into the standing calculus?[150] Inconsistent application of the law, including through reliance on "commonsense" inferences, "tends to redound to the benefit of particular litigants,"[151] making such inferences in the standing context another entry point for in- and out-group-reasoning–informed probabilistic judgments.

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144 *Id.* at 15 (Sotomayor, J., dissenting).

145 145 S. Ct. 2121 (2025).

146 *See id.* at 2137, 2142.

147 *See id.* at 2148–49 (Jackson, J., dissenting); *see also* Jay Willis, *The Supreme Court's Conservatives Will Always Put Corporate Power First*, BALLS & STRIKES (Feb. 24, 2023), https://ballsandstrikes.org/scotus/the-supreme-courts-conservatives-will-always-put-corporate-power-first [https://perma.cc/N63G-T8VW] ("[T]he six Republicans who sit on the Court right now are the six most pro-business justices in a century . . . .").

148 *Diamond Alt. Energy*, 145 S. Ct. at 2149 (Jackson, J., dissenting).

149 *See id.* at 2150.

150 *See id.* at 2151 ("Here, the Court's 'commonsense' inferences readily align with the fuel industry's assertions of economic injury, even in the face of conflicting evidence. But for less wealthy individual plaintiffs, establishing redressability to the Court's satisfaction is often harder to come by.").

151 *Id.* at 2152.

D. Establishing Out-Groups: The Rhetoric of Bad Boy Jurisprudence

Bad boy jurisprudence needs bad boys, and a core element of bad boy jurisprudence is the use of framing, narrative, and rhetoric to brand the bad boy(s) in a given story. This is what conservative Justices do when they begin their opinions in rights-denying criminal cases with recitations of the grisly facts underlying the crime alleged, "even when those details of the crime are irrelevant to the legal issue."[152] Commentator Nicholas Goldrosen has called this rhetorical move — foregrounding a rights-denying opinion with "a description of the underlying crime with gory details far more familiar to a true crime podcast" — "the key characteristic of a criminal law opinion from the Court's conservative wing."[153] A handful of examples from Goldrosen's analysis are illustrative:

> Conservative justices have been doing this for a long time. [Justice] Thomas presented a . . . graphic fact pattern in *United States v. Tsarnaev*,[154] as did Justice Neil Gorsuch in *Bucklew v. Precythe*.[155] . . . In *Bucklew*, Gorsuch describes the defendant, "bearing a pistol in each hand," shooting his neighbor and pistol-whipping his wife. In *Edwards v. Vannoy*,[156] decided in 2021, Justice Brett Kavanaugh recounted the defendant's string of kidnapping, robbery, and rape, and notes that the defendant confessed on tape — the hour-long video of which, he helpfully informed readers, is available to view on the Court's website.[157]

Why expend pages of the U.S. Reports airing these evocative but legally irrelevant details? Some construe these gripping narratives as an outgrowth of the conservative Justices' "own empathy for crime victims."[158] But that leaves us without explanation for the Justices' use of this tactic in cases without an identifiable victim, or cases where the victim of the challenged government action is himself targeted by the Justices in this way. In those cases, bad boy jurisprudence — not empathy for crime victims, who don't appear in the underlying facts — helps make sense of the Justices' rhetorical strategy.

Consider *Egbert v. Boule*.[159] Robert Boule alleged that a Border Patrol agent violated his Fourth Amendment rights by shoving him against a vehicle and throwing him to the ground.[160] Before reaching

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152 Michael C. Dorf, *Empathy and Justice*, DORF ON L. (May 22, 2009), https://www.dorfonlaw.org/2009/05/empathy-and-justice.html [https://perma.cc/ES2Y-6BDM].

153 Nicholas Goldrosen, *Why Conservative Supreme Court Opinions Read like True Crime Podcasts*, BALLS & STRIKES (June 15, 2022), https://ballsandstrikes.org/legal-culture/shinn-v-ramirez-true-crime-podcasts [https://perma.cc/8JNL-VR2K].

154 142 S. Ct. 1024 (2022).

155 139 S. Ct. 1112 (2019).

156 141 S. Ct. 1547 (2021).

157 Goldrosen, *supra* note 153 (quoting *Bucklew*, 139 S. Ct. at 1119).

158 Dorf, *supra* note 152. Such an exercise of empathy could still be mediated by in-group/out-group reasoning if the Justices identify with actual or potential crime victims and against perpetrators.

159 142 S. Ct. 1793 (2022).

160 *Id.* at 1811–12 (Sotomayor, J., concurring in the judgment in part and dissenting in part).

Boule's excessive force claim, though, Justice Thomas (for the five-conservative-Justice majority) regaled readers with details (including photographs) of Boule's inn on the United States–Canada border.[161] Boule had an agreement with United States Border Patrol under which he informed law enforcement when he was planning to lodge or transport suspected smugglers.[162] Justice Thomas not only described with attitude the "aptly named 'Smuggler's Inn'" and the specific types of drugs seized therefrom but also chastised Boule, "[e]ver the entrepreneur," for "declin[ing] to offer his erstwhile customers a refund."[163] Justice Thomas thereby characterized this traditional paid confidential-informant relationship as an opportunistic business venture on Boule's part, painting Boule not only as generally seedy but also as exploitative.[164] Empathy for crime victims can't explain the conservative Justices' rhetorical strategy in cases like *Egbert*. Instead, Boule is — like many criminal defendants — an out-group member through and through.[165] He is, on the majority's frame, a bad boy. And the logical next step of bad boy jurisprudence — denying legal protection to unsympathetic bad boys — requires that the stage be set this way. Through the narrative he draws up in *Egbert*, "[Justice] Thomas is telling you, 'This is a bad boy.'"[166]

In varied contexts, conservative Justices engage the rhetoric of bad boy jurisprudence when they demean litigants, painting them as unsympathetic and setting the stage for their condemnation or their exclusion from the law's protection. Take Justice Thomas's concurrence in *United States v. Husayn* (*Zubaydah*),[167] which held that the state secrets privilege barred a man tortured at a publicly known CIA "black site" in Poland[168] from accessing documents related to that torture.[169] Justice Thomas employed scare quotes to describe Abu Zubaydah — who is straightforwardly a survivor of torture at the hands of the CIA[170] — as

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161 *Id.* at 1800–01 (majority opinion).

162 *Id.* at 1801.

163 *Id.* at 1800–01.

164 *See* 5-4: *Egbert v. Boule* (Spotify, June 21, 2022).

165 *See* Dorf, *supra* note 152 (noting "the conservatives' lack of empathy for criminal defendants" (emphasis omitted)).

166 5-4, *supra* note 164 (statement of Peter Shamshiri).

167 142 S. Ct. 959 (2022).

168 *See id.* at 966; *id.* at 986 (Gorsuch J., dissenting); *Landmark Rulings Expose Poland's Role in CIA Secret Detention and Torture*, AMNESTY INT'L (July 24, 2014), https://www.amnesty.org/en/latest/news/2014/07/landmark-rulings-expose-poland-s-role-cia-secret-detention-and-torture [https://perma.cc/LAF3-BN68].

169 *Zubaydah*, 142 S. Ct. at 964.

170 *See* Ed Pilkington, *"The Forever Prisoner": Abu Zubaydah's Drawings Expose the US's Depraved Torture Policy*, THE GUARDIAN (May 11, 2023, at 06:00 ET), https://www.theguardian.com/law/2023/may/11/abu-zubaydah-drawings-guantanamo-bay-us-torture-policy [https://perma.cc/EV2Y-MK4U] ("Abu Zubaydah is the poster child for America's torture program." (quoting Professor Mark Denbeaux)).

"an alleged 'survivor' of CIA interrogation."[171] Or consider Professor Karen Tani's observation that the treatment given by Chief Justice Roberts to Jane Cummings, the deaf-blind plaintiff who brought a disability discrimination claim in *Cummings v. Premier Rehab Keller, P.L.L.C.*,[172] left her looking like "a self-aggrandizing and emotionally frail woman running roughshod over Congress."[173]

Through the identification and admonition of out-group parties, the rhetoric of bad boy jurisprudence not only helps to justify legal decisionmaking grounded in in-group/out-group–motivated instincts but also invites the audience to share in those impulses. The conservative Justices' "vivid language . . . draws the reader's attention away from the constitutional [or other legal] principle at issue and reassures them that"[174] the Court is denying a right or remedy to,[175] or condemning to death,[176] or otherwise finding against,[177] "a Bad Man Who Deserves It."[178] Ungenerous or unsympathetic portrayals of out-group bad boys mark them as such and set the stage for their exclusion from the law's protection.

CONCLUSION

Crafting legal rules partly by reference to who deserves the law's protection and who does not is not a peculiarly conservative exercise. And it is worth noting that the foregoing typology of empathic reasoning in conservative jurisprudence — and the concept of bad boy jurisprudence on the whole — is not intended to deny that the conservative Justices *also* engage in empathic reasoning in the style of which the liberal Justices are traditionally accused. The conservative Justices undoubtedly evince sympathy and empathy for the marginalized and the less privileged at times.[179]

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171 *Zubaydah*, 142 S. Ct. at 981 (Thomas, J., concurring in part and concurring in the judgment); *see also* 5-4: *United States v. Zubaydah* (Spotify, Apr. 29, 2025) ("He calls Zubaydah an alleged 'survivor' of CIA interrogation." (statement of Michael Liroff); "He's trying to demean. Like, oh, you're calling him a survivor, but actually he's a disgusting terrorist. But on the facts, he survived torture . . . ." (statement of Rhiannon Hamam)).

172 142 S. Ct. 1562 (2022).

173 Tani, *supra* note 25, at 57–58; *see Cummings*, 142 S. Ct. at 1567.

174 Goldrosen, *supra* note 153.

175 *See, e.g.*, Egbert v. Boule, 142 S. Ct. 1793, 1800 (2022).

176 *See, e.g.*, Bucklew v. Precythe, 139 S. Ct. 1112, 1118–19 (2019).

177 *See, e.g.*, *Zubaydah*, 142 S. Ct. 959, 964 (2022).

178 Goldrosen, *supra* note 153.

179 Justice Gorsuch is a notable, consistent defender of the rights and dignity of Native American individuals and tribes. Adam Liptak, *Justice Neil Gorsuch Is a Committed Defender of Tribal Rights*, N.Y. TIMES (June 15, 2023), https://www.nytimes.com/2023/06/15/us/politics/neil-gorsuch-supreme-court-opinions.html [https://perma.cc/H7MG-AWD8]. His concurrence in *Haaland v. Brackeen*, 143 S. Ct. 1609 (2023), included this empathic meditation: "Often, Native American Tribes have come to this Court seeking justice only to leave with bowed heads and empty hands. But that is not because this Court has no justice to offer them." *Id.* at 1661 (Gorsuch, J., concurring).

This Note's aim has been to surface the less immediately recognizable manifestations of empathic reasoning in conservative Justices' decisionmaking. The concept of bad boy jurisprudence means to raise the possibility that in-group/out-group reasoning, including in the form of intergroup empathy bias, drives conservative jurisprudence in ways that derive from empathy but are not so commonly understood as such.

Bad boy jurisprudence presents one explanation for some doctrinal and rhetorical developments and trends in conservative jurisprudence: In-group/out-group reasoning permeates conservative Justices' thinking about who deserves the law's protection and who does not, how to effectuate that protection and condemnation, and how to justify those choices through rhetoric and narrative. All of this may be understood as the output of an approach that denounces empathy despite its being a powerful tool to mediate and tamp down base psychological instincts, including in-group preference and out-group prejudice. To the extent that the Court's conservatives claim a judicial approach akin to that of an umpire, calling balls and strikes where they fall,[180] they might consider how harnessing empathy may help them to do so.

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[180] *See* Abigail Simon, *President Trump Picked Brett Kavanaugh for the Supreme Court. Who Is He?*, TIME (July 9, 2018, at 21:05 ET), https://time.com/5334098/donald-trump-brett-kavanaugh-supreme-court [https://perma.cc/33ER-2EDV] (noting Justice Kavanaugh's borrowing this metaphor from Chief Justice Roberts).