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Systems and Feelings

Ken I. Kersch*

Robin West’s “The Anti-Empathetic Turn” is an unusually provocative and important reflection. Its central claim is that, in deciding cases, today’s judges are increasingly pressed – educated/trained/inclined – to think of themselves not as doing justice between the parties before them, but rather of resolving the dispute to produce rules which fit as neatly as possible into a broader regulatory system. As such, judging (once a moral exercise, centered on the parties to the lawsuit, who were truly *seen*) is now largely an occasion for the engineering and maintenance of a larger and impersonal administrative and regulatory system (in which the parties – less complicated, individualized human beings, now mere illustrations/cases-in-point/vehicles – simply *prompt*). West laments this development, and (implicitly, if not expressly) calls for a return to the increasingly lost tradition of moral, party-centered, “empathetic” judging.

In this brief commentary, I agree with West’s central claim regarding a regime change in the nature of the judicial role. But I will question her account of the decline of “empathy” – including her illustrative use of Judge J. Skelly Wright’s canonical opinion in *Williams v. Walker-Thomas Furniture Co.*¹ I will argue that the changes she acutely observes are so deeply implicated in the nature of the modern social welfare state that – even if it were possible to

* Ken I. Kersch, Associate Professor of Political Science. kersch@bc.edu. Douglas Hassett, BC ’11, provided research assistance, and helpful conversation. Dustin Sebell provided additional research assistance.

¹ *Williams v. Walker-Thomas Furniture Co.*, 350 F. 2d 445 (D.C. Cir. 1965).

reverse them and revive an earlier “lifeworld” (which is doubtful) – to do so would be extremely radical (not to mention, potentially, highly reactionary).²

What are We Talking About When We Talk About Empathy?

West is very good about surveying the array of actual and possible criticisms of the use of the term “empathy” in recent scholarship and political debate concerning its proper role in law and judging. But, despite the fact that she anticipates some of my own objections, and attempts to meet them, I remain unpersuaded by her arguments, and continue to hold those objections nevertheless.

First, I don’t understand what the term “empathy” really means in this discussion. It needs to be clarified. At one point, West defines it as “the ability to understand not just the situation but also the perspective of litigants on warring sides in the lawsuit.” (1). She adds that “one simply cannot judge another before walking in his shoes. Indeed, to suggest otherwise might be thought to be disqualifying” for a judge. (2). Indeed, in law, the *lingua franca* of analogical reasoning “by definition seemingly requires empathetic understanding” (4). If by empathy, West simply means the ability of the judge to have a rich ability to understand the nature of the situation of both litigants – imagination as a route to full information³ – then I don’t think that anyone (including those she would take to be partisans of “anti-empathetic” judging) is opposed to it. If empathy means a rich ability to inhabit the situation, no one, even today, is

² Robert C. Post, “Defending the Lifeworld: Substantive Due Process in the Taft Court Era,” *Boston University Law Review* 78 (1998): 1489-1545.

³ See Susan A. Bandes, “Empathetic Judging and the Rule of Law,” *Cardozo Law Review De Novo* (2009): 133-148; Susan A. Bandes, “Empathy, Narrative, and Victim Impact Statements,” *University of Chicago Law Review* 63 (1996): 361-412.

against it. Who would deny that better judges understand more, not less? In light of this, might West be better off claiming that, today, judges are either: 1) less interested in understanding the full facts surrounding the legal disputes they are charged with resolving, including the “personal” facts speaking to the “state of mind” of a party, which often remain legally relevant; or 2) less perceptive in apprehending those facts? Put otherwise, might she be better off framing the question as involving a reduced level of curiosity or insight amongst contemporary judges?

West cites the recent public/political debates in which the model of the empathetic judge took a major beating – including the attack on President Obama for indicating during his campaign a desire to appoint empathetic judges to the bench, the attack on Supreme Court nominee Sonya Sotomayor on the grounds (in light of earlier statements she had made) that she might herself be one of those empathetic judges, and Chief Justice John Roberts’s insistence in the opening statement of his confirmation hearing that it is the job of the judge to act as a dispassionate umpire calling balls and strikes. The charge in these political dust-ups was that empathy in judging is contrary to the rule of law. West raises the possibility that the attack on empathy in judging here by conservatives – although phrased in general terms – may have, in reality, been a critique of selective empathy. As she writes, “the target of the anti-empathy argument is not empathy per se but selective empathy” by progressives/liberals. Actually, at least so far as this political sparring is concerned, it seems to me that this is precisely right. In contemporary political discourse, empathy almost always means liberal empathy. Although West’s focus is largely on questions of private law (like the contract dispute in *Williams v. Walker-Thomas*), in constitutional law, the empathizing judge invariably feels the need for welfare rights, abortion rights, gay rights, the political and religious dissenter, the criminal defendant, etc. – the entire panoply of policy positions that identify a contemporary judge as

“liberal.”⁴ As such, an empathizing Court is a liberal Court.⁵ And a conservative Court is heartless. It seems clear to me that contemporary conservatives are attacking selective liberal empathy – something that is apparent not only in these political conflicts, but in politicized “empathy” scholarship in the legal academy.⁶

There is, incidentally, no better case of the consonance of the use of the term “empathy” as synonymous with liberalism (as conservatives understand perfectly) than West’s exemplar of the empathetic judge, Judge J. Skelly Wright.

J. Skelly Wright: Scientist

Judge Wright was a southerner from New Orleans who grew up poor, and who struggled economically during the Great Depression.⁷ As the first district judge to place a school board under an injunction ordering a desegregation plan, and, in turn, the first district judge to draw up his own desegregation plan in the face of inaction by a board, Wright was a pioneer in wielding judicial power aggressively to advance social reform.⁸ He was also a staunch defender of Warren Court activism.⁹

Wright certainly described the process of judging in a way that one suspects West would celebrate. “Courts,” Wright wrote, in a well-known article in the *Cornell Law Review*, “are

⁴ See Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002).

⁵ See, e.g., Morton J. Horowitz, *The Warren Court and the Pursuit of Justice* (New York: Hill and Wang, 1999).

⁶ See, e.g., Lynne N. Henderson, “Legality and Empathy,” *Michigan Law Review* 85 (1986-1987): 1574-1653.

⁷ John Minor Wisdom, “J. Skelly Wright,” *Loyola Law Review* 32 (Summer 1986): 303-310.

⁸ See J.W. Peltason, *Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation* (Urbana: University of Illinois Press, 1971), Ch. 8; Michael S. Bernick, “The Unusual Odyssey of J. Skelly Wright,” *Hastings Constitutional Law Quarterly* 7 (1979-1980): 971-999.

⁹ Wisdom, “J. Skelly Wright.” See also Arthur S. Miller, *A ‘Capacity for Outrage’: The Judicial Odyssey of J. Skelly Wright* (Westport, CT: Greenwood Press, 1984)(forward by William J. Brennan).

concerned with the flesh and blood of an actual case. This tends to modify, perhaps to lengthen, everyone's view. It also provides an extremely salutary proving ground for all abstractions; it is conducive, in a phrase of Holmes, to thinking things, not words, and thus to the evolution of a principle by a process that tests as it creates."¹⁰ Thomas Grey described Wright as a judge "with a stronger than usual sense of substance over form."¹¹ Michael Bernick describes him as a judge with "the ability to pierce through formalisms, and the innumerable complexities and subtleties, to see the essential truths within."¹² Arthur Miller described Wright as harboring "an abiding sense of injustice," and as "adher[ing] to a personal conception of justice." In conversations with Miller, Wright described his judicial philosophy simply: "I try to do what's right."¹³

Wright defended this approach, and distinguished it from the more abstracted "scholarly tradition" of the legal process school that challenged the Warren Court and its methods. His chief target was Alexander Bickel, the author of *The Supreme Court and the Idea of Progress*, whom Wright argued, in insisting upon the reasoned and value-neutral application of abstract rules and principles, was instructing judges to be "insensitive to the legitimate claims of the powerless," and to rule in ways that advanced the interests of the wealthy and powerful.¹⁴

¹⁰ J. Skelly Wright, "The Role of the Supreme Court in a Democratic Society – Judicial Activism or Restraint?" *Cornell Law Review* (November 1968): 1-28, 13. The process Wright describes here is a good articulation of philosophical pragmatism, in which principles are defined only through their application to fully apprehended real-world facts. See John Dewey. This raises the question of the degree to which pragmatism can be defined (or misapprehended) as a form of empathy, in a way that is distinguishable from more categorical, deductive forms of philosophical inquiry into the nature and application of principles. See also J. Skelly Wright, "Professor Bickel, the Scholarly Tradition, and the Supreme Court," *Harvard Law Review* 84 (February 1971): 769-805. I would note that Holmes himself, though clearly a pragmatist, is hardly known for his empathy – though, interestingly, liberals once misperceived him as a supreme empathizer. See, e.g., Catherine Drinker Bowen, *Yankee from Olympus: Justice Holmes and His Family* (Boston: Little, Brown and Company, 1955). See Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago: University of Chicago Press, 2002).

¹¹ Thomas C. Grey, "J. Skelly Wright," *Hastings Constitutional Law Quarterly* 7 (1979-1980): 873-877, 874.

¹² Bernick, "The Unusual Odyssey of J. Skelly Wright," 999.

¹³ Miller, *Capacity for Outrage*, 3-4, 7.

¹⁴ J. Skelly Wright, "Professor Bickel, the Scholarly Tradition, and the Supreme Court," *Harvard Law Review* 84 (February 1971): 769-805.

Bickel's charge was, in effect, that the Warren Court had pursued empathy instead of following (pursuant to its duties) the dictates of reason.¹⁵ Wright emphasized in particular the “fatally unrealistic” nature of the “neutral principles” approach to constitutional adjudication of Bickel and his compatriot Herbert Wechsler, which insisted that the Court hew strictly to the dictates of the abstract principle – which Wright argued was impossible. Bickel then added that if those dictates could not be followed in their purist form, the Court should simply decline to decide the case. Wright characterized this approach as “damned-if-you-do, damned-if-you-don’t.” This would result, Wright argued, in which “the rest of us would be left to our own devices in exercising our constitutional rights and liberties.”¹⁶

But – although he himself would strenuously deny the charge¹⁷ -- Wright was no less concerned with forging and maintaining the broader regulatory system than the types of judges West criticizes. His bottom-line, however, was not efficiency, but egalitarianism. For Wright, the job of courts was to be aggressive enforcers of community ideals. A passionate defender down the line of the Warren Court's egalitarian activism, he insisted that “Today, the most important of those ideals is political equality...,” and trumpeted that Court's service of “the egalitarian ideal.”¹⁸

West takes Wright's opinion in *Williams v. Walker-Thomas* as a quintessence of judge doing case-specific, party-centered justice. But, actually, his focus in that opinion is in framing Mrs. Williams as a representative of her economic status and education level – that is, to fit her

¹⁵ Wright, “Professor Bickel, the Scholarly Tradition, and the Supreme Court,” 772.

¹⁶ Wright, “Professor Bickel, the Scholarly Tradition, and the Supreme Court,” 777, 778, 782. Wechsler, “Neutral Principles and Constitutional Law,” *Harvard Law Review*.

¹⁷ See Wright, “Professor Bickel, the Scholarly Tradition, and the Supreme Court,” 789-795.

¹⁸ Wright, “The Role of the Supreme Court in a Democratic Society,” 23.

into the system that he is concerned with, and trying to reform. West misses this.¹⁹ Wright himself believed in systems regulation. Tellingly, in contrasting the activism of pre-New Deal conservative court to Warren Court, Wright himself wrote: “The Nine Old Men were trying to halt a revolution in the role of *government as a social instrument*, while the Warren Court is obviously furthering that effort.”²⁰ In contrasting Wright with law and economics school judging, for example, we have not a case of individualized justice versus a regulatory system, but a case of dueling systems – one focused on efficiency, and the other on egalitarianism. Of course, one can argue that, as a social value, efficiency is unfeeling and cold-blooded, and egalitarianism is warm and empathetic. Is this what West really means when she says we “a less empathetic and less caring society”? But if West’s argument is that – a lament for the lost egalitarian judge -- I think we’d do better to shift the focus off judging as a process, an onto the broader topic of empathy and political philosophy, of which both types of systems-regarding judges are simply instruments – means, that is, to different systemic ends.

In fairness, I think there is more to West’s argument than this. Unlike many other treatments of the topic, West does a good job of not falling unreflectively into liberal/left clichés. In her critique of the new model of judging she is criticizing, West expressly notes that while the nature of the approach she is condemning is perhaps most apparent in the paradigmatic law and economics judge, the same inclination is inherent in progressive/liberal legal realism, which conceptualized law as a form of public policy, and emphasized its integral/constitutive

¹⁹ See Muriel Morisey Spence, “Teaching *Williams v. Walker-Thomas Furniture Co.*,” *Temple Political and Civil Rights Law Review* 3 (1993-1994): 89-105.

²⁰ J. Skelly Wright, “The Role of the Supreme Court in a Democratic Society – Judicial Activism or Restraint?” *Cornell Law Review* 54 (November 1968): 1-28, 2.

relationship to the emergent modern administrative state.²¹ In making this point – despite the fact that she thinks that Skelly Wright’s ruling in *Williams v. Walker-Thomas* is an exception to this trend on the liberal/Realist side rather than yet another illustration of it – I think she is absolutely right.

Is Wright – who celebrated “government as a social instrument,” and the role of judges as its helpmeet -- really that different from West’s *bête noire*, the judge as “master of economics, statistics and the slide rule, rather than the master of Blackstone or black letter law.” (West, 7). Not if we look to the one of Wright’s progenitors, Herbert Croly’s, who, e.g., striking re-imagining of the symbol of justice under a progressive state:

Instead of having her eyes blindfolded, she would wear perched upon her nose a most searching and forbidding pair of spectacles, once which combined the vision of a microscope, a telescope, and a photographic camera. Instead of holding scales in her hand, she might perhaps be figured as possessing a much more homely and serviceable set of tools. She would have a hoe with which to cultivate the social garden, a watering pot with which to refresh it, a barometer with which to measure the pressure of the social air, and the indispensable typewriter and filing cabinet with which to record the behavior of society.²²

The paradigm shift within law to a focus on systems, as opposed to individuals, is of enormous significance. Historically, it is a major progressive – not conservative –

²¹ Holmes, *Path of the Law*.

²² Croly, *Progressive Democracy*, 369.

accomplishment. The process has been brilliantly detailed by the intellectual historian Thomas Haskell. What we are really talking about, I'm afraid – since West has mixed in this concept of ‘the decline of empathy’ – is the invention of the modern social sciences, which, of course, is directly related to the proposition that they would be of use to an activist, problem-solving modern regulatory state, that, of necessity, treated people less as individuals and more as aggregates. It is this that bumped off common law legalism and Blackstone.²³ To say that this paradigm change was the death-knell of empathy, of course, is to get things almost precisely backwards. Populists and progressives intended to create a state that cared. But the modern state's method was to be scientific, and individualism of the sort that West ostensibly wants to reclaim – as, prior to the birth of civil libertarianism, and the fictions that the progressive state found necessary to invent to sustain it, progressives frankly noted – clearly got in the way.²⁴

There are important ways in which this paradigm shift involved the sometimes ruthless suspension of empathy, in service of the system – for ostensibly progressive ends. I illustrate this at length in my book *Constructing Civil Liberties* (2004). In my chapter detailing the ways in which the traditional common law (and constitutional law) of labor was dismantled to make space for labor unions in the modern, progressive, interest-group liberal state, I demonstrate the nature of this anti-empathetic turn in service of the weak, powerless, and excluded (the progenitors of Ms. Williams).²⁵ I use the Supreme Court's neglected Norris LaGuardia Act decisions as one of my primary illustrations. *Senn v. Tile Layer's Union* (1937) is a case-in-

²³ Thomas L. Haskell, *The Emergence of Professional Social Science: The American Social Science Association and the Nineteenth Century Crisis of Authority* (Urbana, IL: University of Illinois Press, 1977).

²⁴ This is a central theme of my book *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (New York: Cambridge University Press, 2004).

²⁵ Kersch, *Constructing Civil Liberties*, Ch. 3.

point, and well worth downing as an antidote to misunderstanding *Williams v. Walker-Thomas* as a supposed paradigmatic instance of judicial empathy.²⁶

The *Senn* case involved the legality of picketing which destroyed the company of a (very) small businessman. Paul Senn ran his Milwaukee tile-laying company mostly out of his home, did a significant amount of the work with his own hands (though he employed a handful of journeymen and helpers, depending on the amount of work available), and barely made enough money to support his wife and four children – all the more difficult during the depths of the Great Depression. His business was initially not unionized. It became a target of the Milwaukee’s Tile Layer’s Union, whose objective was to fully unionize the city’s tile-laying industry. Notably, the objective of unionizing Senn came from outside the company – it was not sought by his employees, who were, by all accounts happy with the way things were. But a union-based collective system requires that all in the industry be folded into the system nevertheless so the unionized businesses were not undercut in the tile-laying market (re wages, hours, conditions, etc., which, to sustain the system, had be standardized).

Remarkably, however, this was not a case of a company resisting unionization. Senn agreed to unionize his small company, and to follow all the benchmark standards of the system. The snag, though, was that that system required the hermetic separation of “labor” from “management” for systemic regulatory purposes. The Tile Layer’s Union demanded that Senn totally refrain from doing any more of the tile –laying work with his own hands; that is, that he re-adjust the nature of the work he did personally, so as to become, unambiguously, “management” and not “labor.” This, Senn insisted, he simply could not afford to do. The

²⁶ *Senn v. Tile Layer’s Union*, 301 U.S. 468 (1937).

union then set upon him to drive him out of business, with picketing and other forms of direct action, which sought to tar his business with the label “unfair to labor.” Traditionally, Senn would have had common law protections against this type of injury to his business. But the Norris LaGuardia Act was aimed at eliminating those protections to promote unionization. In a bone-chilling piece of systems analysis, Justice Brandeis dismissed the notion that empathy for Senn’s plight was in any way relevant to the Court’s decision: the modern world needed to be organized according to collectivities, and, as the world was remade anew, Senn’s suffering was simply a bump in the road.

One can find empathy in abundance -- with a heavy focus on the parties to the case itself, however -- in the dissents by Justices Pierce Butler, Willis Van Devanter, James McReynolds, and George Sutherland – tribunes of the legal order that West (unwittingly?) seems, in her article, to lament. How, I wonder, does this case, and those like it (many of which I discuss in *Constructing Civil Liberties*) relate to the supposed imperative of empathy in judging of which many seem to be so fond? Should this case be paired with *Williams v. Walker-Thomas*? I think the dissents in *Senn* – with their moralism and paternalism – are actually a better case of what West purports to be describing (with her patent nostalgia for the “Blackstonian” common law legal order) than Skelly Wright’s opinion, which I see as very much in the Brandeisian tradition.

It should go without saying, of course, that no one was more influential than effectuating the “shift away from a paradigm of moral judging to scientific judging” than Louis D. Brandeis. Should he be the villain in West’s story? Or does he get a pass because his ultimate objectives are egalitarian?

Of course, as it moved on from progressivism to liberalism, things developed further. Let me propose another villain in the move away from the Blackstonian common law model

celebrated by West – the public law litigation movement, including Charles Hamilton Houston, Thurgood Marshall, and the NAACP Inc. Fund (which Skelly Wright knew well, and supported), and, more generally, the entire public law litigation movement, as brilliantly anatomized in a famous *Harvard Law Review* article by Abram Chayes.²⁷ The whole point of this form of litigation, as Chayes lucidly explained, is to abstract from the parties to the lawsuit themselves, to draft them into service as vehicles for leveraging the courts to initiate significant, system-wide changes in public policy.

The Traditional Judge

This raises for me a basic question: who is this creature that West is yearning for here, the traditional empathetic judge? Were nineteenth century American judges, in their focus on the specific cases, and application of traditional common law legal categories, really more understanding and/or empathetic? Were they more in touch with their “viscera”, emotions, and feelings than modern judges?²⁸ If, as West pleads, “one must also know something about feelings of loss: what is the *feel* of the loss of the use of a hand, or the *feel* of the loss of even just a slight possibility of years of life?” (West, 3) to be a good judge in cases like *Hawkins v. McGee*, then are the pre-New Deal judges paragons of such feelings? If not, were they at least more willing – unlike modern judges -- to bring whatever feelings they had to the table as an integral part of the

²⁷ Abram Chayes, “The Role of the Judge in Public Law Litigation,” *Harvard Law Review* 89 (May 1976): 1281.

²⁸ See Carol Sanger, “The Role and Reality of Emotions in Law,” *William and Mary Journal of Women and the Law* 8 (2001-2002): 107-113. There seems to be no absence of viscera in either the opinions of judges of an earlier era, or of contemporary conservative judges, if the expression of disgust is any measure of the presence of emotion in judging. See, e.g., *Reynolds v. United States* (1878); *Bowers v. Hardwick* (1986). Justice Scalia, for one, seems very much in touch with his inner moralist. See generally Martha C. Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (New York, Oxford University Press, 2010); William Ian Miller, *The Anatomy of Disgust* (Cambridge: Harvard University Press, 1997). See also Barrington Moore, Jr., *Moral Purity and Persecution in History* (Princeton: Princeton University Press, 2000).

process of deciding cases? If so, is this necessarily a good thing? Are Blackstone and black letter law synonymous with “empathy”? I don’t see this at all.

Who is this profoundly moral, imaginative, listening judge without paradigm, sensitive only to the individualized case, and the people before him, in all the richness of their humanity? When did he sit? He is (as Max Weber described the model, and ideal) a *kadi* – a wise man under a tree (though Martin Shapiro details how even the actual kadis didn’t really fit the picture).²⁹ He is Solomon.

The System is the Empathy: The New Deal

Let me nominate a Solomon for our time, albeit a fictional one, depicted on film. William Wellman’s remarkable (pre-Code) *Wild Boys of the Road* (1933) culminates in a courtroom scene in which an initially non-empathetic judge – with the National Recovery Administration’s Blue Eagle emblem looking down over his shoulder -- pulls back from the brink of hard, law-like decision, and rules in a case-specific, compassionate, human way.³⁰ The film is not just set during the Great Depression. It is all about the economic collapse, and the enormous human cost that entailed. The movie’s heroes are two mischievous, but warm-hearted small-town teenage boys whose parents lose their jobs to the economic cataclysm. Not wanting to be a burden to their families, who can no longer support them, the boys, in a cross-country odyssey, join an army of others in hitting the rails, hopping freights looking for work. They soon meet a girl of about the same age in a boxcar – dressed as a boy – who becomes their boon companion. Along the way, life is hard, but the three are strong: they face down rail-yard bulls,

²⁹ Max Weber, *Economy and Society* ; Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1986).

³⁰ *Wild Boys of the Road* (d. William A. Wellman) (1933).

inhabit squatter camps (and, briefly, a Chicago brothel, while bedding down temporarily with the girl's prostitute aunt) -- until, inevitably, they are driven out by police (in one scene -- but certainly not all -- the police are portrayed as empathetic to the teenagers plight -- "How do you think I feel?" snaps one, "I have kids at home myself.") But the police turn on the firehoses nonetheless, and the trio is forced to move on yet again. Along the way, one of them (Tommy) loses his leg to a freight train, and must hobble about on makeshift crutch (Tommy's life is saved by doctor who is willing to treat him for free, after the kids rouse the Doctor at his home late at night; he amputates Tommy's leg, not in a hospital but -- without anesthesia, outside, by the light of a bonfire -- in a squatter's camp).

The film's youthful protagonists end up living with hundreds of others in New York City shantytown, and set out to look for work. Remarkably, the other boy, Eddie, finds a job as an elevator operator. There's a catch, though. He must buy an Alpaca coat to work the job, and he needs to do so immediately. Desperate, Eddie hits the streets to panhandle. The girl (Sally) tap dances on the sidewalks of Manhattan for coins. And then, in what finally seems like his big break, two men offer to give Eddie more than the amount he needs if he will go across the street to a movie theatre cashier, hand her a note, and bring them the box she will give him (the men tell the credulous Eddie that the cashier is a relative of theirs, who, they can't be seen with). Of course, the note demands the cashbox, the teller screams, and the Eddie -- on the cusp of at long last finding work -- is arrested.

This is how he comes before a judge, in a New York City juvenile court. The apparently stern judge seems to regard Eddie and his friends as petty criminals. He asks for some basic facts: What are your names? Who are your parents? Where do you live? They tell him nothing. If they are going to be that way, the judge lectures them sternly, the law gives him no

choice but to lock them up. “Tell me the whole story,” the judge pleads. “Let me be your friend. I want to help you.”

Sure you do, Eddie says, with dripping skepticism. But soon he breaks down, launching into a bitter, heart-breaking lament about riding the rails and homelessness, and the spreading joblessness, and his despair, and the despair of others across the country, before dissolving in tears. The camera then pans up to the wall behind the judge, as Eddie weeps: we see the Blue Eagle emblem, bold and proud, with its inscribed motto -- “We Do Our Part.” The judge has clearly been affected (after this scene, he goes into his chambers, and gazes at an autographed photo on his desk reading “To Dad” from his own teenage son, whose image, we learn, was weighing on his heart and mind at this moving courtroom moment with Eddie). “I’m going to do my part, now I want you to do yours,” the judge tells Eddie. “I know that things are going to get better soon,” he tells them, in an apparent allusion to the New Deal. “We’ll find a spot for you. You’ll all be given a chance.” The promises to get all three of them jobs, and help them, thereby, to eventually re-unite with their families.

The liberal judge in this case is clearly the picture of empathy – which the scene underlines. But, ultimately, the boys will be saved by the system itself. They will be integrated into it, though the programs of the New Deal. All – government officials, businesses (proudly displaying the Blue Eagle logo), and ordinary people will commit to doing their part to support the system – as against the old common law order. It is the system itself which is compassionate and empathetic. In the modern world, this is how things are done.

Conclusion

Wild Boys of the Road, a moving film, is ultimately hopeful – a paean to the promise of the emerging social welfare state. But it, of course, elides some of the more tragic elements of building systems, and the perhaps paradoxical movement away from treating people as individuals in service of a more secure, more equal, future.³¹ Cases like *Senn* are needed to give us a fuller picture. This modern state was forged in a hail of economic, political, and moral crises: depressions, wars, social movements for group equality. Its aims may have been, in part, compassionate. But it involved systems-building in service of those aims, with all of the focus on statistics and aggregates the construction of any elaborate regulatory system entails. Its re-imagination of the nature of the judicial process was an important part of that process.

The old Blackstonian common law order that West looks back upon wistfully was hardly empathetic, nor were its judges more in touch with their emotions, nor those of the parties appearing before them.³² As the legal modernists who sought to replace it with more progressive, policy-focused understandings recognized, the concerns for power and equality had to be embedded as animating features of the activist modern administrative state. Far from entailing a movement from formalism to an open, experimental pragmatism (at least in any simple sense), it involved a displacement of one set of value-laden legal formalism with others.³³ In many respects a product of the Great Depression itself – Wright, in fact, was not much older

³¹ It might be useful in this regard to consider what John Stuart Mill – negatively reflecting on his father and Jeremy Bentham (of course a great enemy of the common law, and a clear proponent of the modern state) -- referred to as the “dissolving influence of analysis.” Mill, *Autobiography* (chapter on “A Crisis in My Mental History”). This is very much about the way the role of feelings in imagination and understanding, something Mill tells us he neglected in his commitment to liberal reform the point of total mental collapse – a profound mental depression.

³² See Stephen Skowronek, *Building the New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge, UK: Cambridge University Press, 1982); Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (Cambridge, UK: Cambridge University Press, 1991); Victoria Hattam, *Labor Visions and State Power: The Origins of Business Unionism in the United States* (Princeton: Princeton University Press, 1993).

³³ Kersch, *Constructing Civil Liberties*.

than the suffering teenage protagonists whose plight was portrayed in *Wild Boys of the Road* – Wright is thoroughly convinced that, in decisions in cases like *Williams v. Walker-Thomas*, he is moving beyond ideology, aggregates, and systems toward ruling simply on an individualized, case-specific basis – to doing, as he explained “what’s right.” Naturally, many law professors sharing Wright’s substantive political views and outlook, and looking back on his career, see it exactly the same way.

But Wright’s words about using government – and law – as a “social instrument” betray this misapprehension of the nature of his own endeavors. With hindsight, we should be able to see this nature a lot more clearly. If Wright is appearing more empathetic, it is because the substantive and systematic political ideology in whose crucible his views were forged, and of which he is a paradigmatic judicial exemplar, is, as a system, with its own (sometimes rigid, even blinding) categories and formalisms, more empathetic. It is not because Wright hears each case on its own, unique terms, understanding it richly and fully, intellectually, and emotionally, as a prelude to doing “what’s right,” like some latter-day kadi or Solomon – or as wise, Blackstonian common law judges once did in some dimly imagined – but possibly retrievable? – days of old.