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# Empathy Leads to Death: Why Empathy is an Adversary of Capital Defendants

Erik Aucion

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**EMPATHY LEADS TO DEATH:  
WHY EMPATHY IS AN ADVERSARY OF  
CAPITAL DEFENDANTS**

**Erik Aucoin\***

*Foreword by Ellen Kreitzberg\*\**

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#### FOREWORD

Bryan Stevenson<sup>1</sup> reminds us that as we consider the use of the death penalty, the question we should be asking ourselves is not whether or not the defendant deserves to die—but rather whether we deserve to kill.<sup>2</sup> Stevenson challenges us to examine whether or not the state is able to implement a system of capital punishment that is neither arbitrary nor capricious.<sup>3</sup>

The modern era of the death penalty dates from the mid 1970’s. In 1972 the Supreme Court found the Georgia death penalty statute unconstitutional under the “cruel and unusual” clause of the Eighth Amendment.<sup>4</sup> The result of this decision was to invalidate all existing death penalty statutes around the country. States quickly went to work to revise their death penalty statutes and to prosecute new cases in which they sought a sentence of death. In four years, five of these cases made it to the Supreme Court. The Court needed to determine whether these statutes adequately addressed the concerns raised in *Furman*.<sup>5</sup> Each statute took a slightly different approach in its death penalty scheme. The Court upheld three of the statutes and struck down only those that

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1. Bryan Stevenson is the Executive Director of the Equal Justice Initiative (EJI) and a civil rights attorney and anti-death penalty advocate.

2. Bryan Stevenson, *We Need to Talk About an Injustice*, YOUTUBE (Mar. 5, 2012), (at 7:52) <https://www.youtube.com/watch?v=c2tOp7OxyQ8> (originally recorded at the March 2012 TED Conference in Long Beach, CA).

3. Stephen B. Bright, *Counsel for the Poor: The Death Penalty not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); see also Ellen Kreitzberg, *Death Without Justice*, 35 SANTA CLARA L. REV. 485 (1995).

4. *Furman v. Georgia*, 408 U.S. 238, 239 (1972).

5. *Gregg v. Georgia*, 428 U.S. 153 (1976) (upheld); *Proffitt v. Florida*, 428 U.S. 242 (1976) (upheld); *Jurek v. Texas*, 428 U.S. 262 (1976) (upheld); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (invalidated); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (invalidated).

imposed a mandatory sentence of death.<sup>6</sup> These five decisions established guidelines for what a constitutional death penalty statute should include.<sup>7</sup>

Following the 1976 decisions, the Supreme Court spent the next few decades reviewing challenges to the arbitrariness of the death penalty. These included challenges to the standards for the effective assistance of counsel,<sup>8</sup> the admissibility of aggravating evidence<sup>9</sup> and of mitigating evidence,<sup>10</sup> and the impact of race and racial attitudes on the imposition of the death penalty.<sup>11</sup>

Even with these numerous challenges, the Court consistently upheld the constitutionality of the death penalty even, in some cases, in the face of extensive empirical data and evidence that demonstrated unfairness in its application.<sup>12</sup> Nonetheless, the Court imposed few if any constraints on the states in the operations of their death penalty statutes. There was, however, one issue around which the Court did consistently reverse sentences of death; cases that demonstrated any limitation or restriction on the jury's ability to hear or consider mitigating evidence.<sup>13</sup> After striking down the mandatory death penalty statutes in 1976, the Court reaffirmed that any sentence of death must include a particularized consideration of the character and background

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6. *Woodson*, 428 U.S. 280 (invalidated); *Roberts*, 428 U.S. 325 (invalidated) (In both cases, the Court struck down the death penalty statutes that made the imposition of the death penalty mandatory upon a finding of first-degree murder.).

7. See, e.g., *Gregg*, 428 U.S. at 206–07 (explaining the Court's rationale for finding Georgia's new sentencing procedures constitutional pursuant to the concerns articulated in *Furman*).

8. *Strickland v. Washington*, 466 U.S. 668 (1984).

9. *Zant v. Stephens*, 462 U.S. 862 (1983).

10. *Lockett v. Ohio*, 438 U.S. 586 (1978).

11. *McCleskey v. Kemp*, 481 U.S. 279 (1987); see also Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1 (2005).

12. In *McCleskey*, David Baldus presented to the court two studies, one that examined the application of the death penalty on a state-wide basis in Georgia between 1973-1979 and a second that examined the application of the death penalty in Fulton County Georgia where *McCleskey* was sentenced to death during that same period. 481 U.S. at 286–87.

13. Mitigating evidence is presented during a penalty trial by the defense and provides the jury with reasons why the defendant should not be sentenced to death. *Lockett*, 438 U.S. 586, 606–07; *Eddings v. Oklahoma*, 455 U.S. 104, 115–17 (1982) (a plurality of the Court found that the trial and appellate courts erroneously failed to consider the trouble and abusive childhood of the defendant as mitigation); *Skipper v. South Carolina*, 476 U.S. 1, 8–9 (1986) (a unanimous Court reversed the death sentence where the trial court excluded evidence of the defendant's good behavior in jail); *Hitchcock v. Dugger*, 481 U.S. 393, 398–99 (1987) (the Court reversed where the jury was told to consider only statutory mitigating evidence which precluded them from considering factors such as the defendants deprived background); *Mills v. Maryland*, 486 U.S. 367, 384 (1988) (the Court struck down a sentencing scheme that required juror unanimity before it could consider a factor as mitigating evidence).

of each defendant.<sup>14</sup> A sentence of death could not be imposed simply based upon the facts and circumstances of the crime. This constitutional standard requires not only that the trial court admit all possible mitigating evidence but that each juror selected for the case agrees that he or she is able to consider the evidence.<sup>15</sup>

This brings us to the importance of empathy in jury deliberations. If a juror is unable to feel any empathy for a defendant, is that juror able to give the kind of individualized consideration of the character and the background of that defendant that is required under the Eighth Amendment? Stevenson's question of whether "we deserve to kill" also seems to ask whether jurors who are selected for a death penalty case "deserve" to deliberate and issue of verdict of death.<sup>16</sup> Can each juror empathize with the defendant? In other words, can they follow the adage that "before you judge a man, walk a mile in his shoes" [or moccasins or boots].<sup>17</sup> And if they cannot, do these jurors deserve to kill?

This article explores the history, meaning, and depth of empathy—a concept often invoked, only occasionally understood, and rarely truly practiced. After exploring the ideas of empathy, we must go back to the question, "Do we deserve to kill?"

#### INTRODUCTION

Nick<sup>18</sup> and Scott<sup>19</sup> were, by all appearances at least, superficially similar. They both lived in the San Francisco Bay Area.<sup>20</sup> Neither were particularly wealthy or accomplished in their career.<sup>21</sup> And ultimately, both were convicted of double murders of which their wives were

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14. *Woodson*, 428 U.S. at 293, 302–03.

15. *Morgan v. Illinois*, 504 U.S. 719, 738–39 (1992) (a juror should be excused for cause if the juror does not acknowledge his or her ability to consider the mitigating evidence that the defense intends to present during the penalty phase of the trial).

16. See Stevenson *supra* note 2.

17. The exact origin of this quote cannot be identified. But in the book, *To Kill a Mockingbird*, Atticus Finch instructs his daughter as follows: "You never really understand a person until you consider things from his point of view, until you climb inside of his skin and walk around in it." HARPER LEE, *TO KILL A MOCKINGBIRD* 36 (1960).

18. Nick Lee Terry. Thomas Farragher, *Double-Murder Suspect Nabbed Oklahoma Relatives Turn Him In*, SAN JOSE MERCURY NEWS, June 4, 1990, at B1.

19. Scott Peterson. CNN Library, *Scott Peterson Trial Fast Facts*, CNN (Apr. 30, 2017, 8:39 PM), <http://www.cnn.com/2013/10/15/us/scott-peterson-trial-fast-facts/index.html> [hereinafter *Scott Peterson Trial Fast Facts*].

20. Staff Report, *Jurors Split on Death Penalty*, THE MERCURY NEWS, Nov. 6, 1991, at B5 [hereinafter *Jurors Split on Death Penalty*]; Louis Sahagun, *Jurors Deliberate Peterson's Fate*, LA TIMES (Dec. 10 2004), <http://articles.latimes.com/2004/dec/10/local/me-peterson10> [hereinafter Sahagun, *Jurors Deliberate*].

21. See *id.*

victims.<sup>22</sup> One way in which they were dissimilar was the sentences they received for their crimes: Nick received a sentence of life in prison,<sup>23</sup> and Scott received a sentence of death.<sup>24</sup>

The distinguishing factor between the two is not immediately recognizable. It was not the severity of their respective crimes, as both were convicted of brutal double murders.<sup>25</sup> Nor was it their social status, race, gender, or criminal history; they were both middle class, white men of similar ages with no criminal history.<sup>26</sup> Geographic differences also do not appear to be a factor as the men were convicted in the neighboring counties of Santa Clara and San Mateo,<sup>27</sup> neither of which is known for rampant utilization of the death penalty. If anything, more factors were present that might lead one to believe that the sentences would have been applied oppositely to the defendants. For instance, multiple witnesses saw Nick, the defendant sentenced to life, shoot his wife in the head.<sup>28</sup> However, there were neither witnesses nor any significant physical evidence linking Scott to the murder of his wife.<sup>29</sup> Additionally, following the murder, Nick kidnapped a pair of women at gunpoint, shot at police, and attempted to cross the border into Mexico.<sup>30</sup> Scott had not attempted an escape when police apprehended him.<sup>31</sup>

The one clearly distinguishable factor that explains the sentencing differences was the jury's opportunity and ability to empathize with the defendants and victims. During the penalty phase of Nick's trial the defense put his mother on the stand, who cried and displayed a photo of Nick as a child riding a pony.<sup>32</sup> Nick was convicted in 1991,<sup>33</sup> just

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22. Nick Lee Terry was convicted of killing his recently divorced wife and her new boyfriend. *Jurors Split on Death Penalty*, *supra* note 20. Scott Peterson was convicted of killing his wife and her fetus. Sahagun, *Jurors Deliberate*, *supra* note 20.

23. *Jurors Split on Death Penalty*, *supra* note 20. Following the jury hanging on the death penalty the Santa Clara DA's office opted to not retry the penalty phase. *Id.*

24. *Scott Peterson Trial Fast Facts*, *supra* note 19.

25. *Id.*; *Jurors Split on Death Penalty*, *supra* note 20.

26. See Farragher, *supra* note 18; Sahagun, *Jurors Deliberate*, *supra* note 20.

27. See *Jurors Split on Death Penalty*, *supra* note 20; Mark Arax & Don Wright, *Peterson Trial Is Moved to San Mateo County*, LA TIMES (Jan. 21, 2004), <http://articles.latimes.com/2004/jan/21/local/me-laci21>.

28. Farragher, *supra* note 18.

29. See Michelle Guido, *Friend: Gunman 'Snapped,'* THE MERCURY NEWS (May 26, 1990), at; GREG BERATLIS, ET AL., WE, THE JURY: DECIDING THE SCOTT PETERSON CASE (1st ed. 2007).

30. Farragher, *supra* note 18.

31. Monte Morin & Dan Morain, *Scott Peterson Arrested in Wife's Slaying*, LA TIMES (Apr. 19, 2003), <http://articles.latimes.com/2003/apr/19/local/me-laci19>.

32. *Jurors Split on Death Penalty*, *supra* note 20.

33. *Id.*

months after *Payne v. Tennessee*,<sup>34</sup> but the judge in the case declined to apply *Payne* or to allow Victim Impact Evidence.<sup>35</sup> In the penalty phase of Scott's trial, the defense also tried to employ Empathy by having thirty-eight of Scott's friends and family members offer mitigating evidence, including his "frail mother, Jackie, who . . . tearfully pleaded for her son's life, saying he could still do good from prison."<sup>36</sup> What the defense in Scott's case also had to contend with was the prosecution pulling at the very same Empathic feelings by calling Scott's mother-in-law to the stand who screamed at him from the stand and wept while recounting her first Mother's Day without her daughter.<sup>37</sup>

Empathy is inexorably connected and exceptionally impactful to the penalty phase of capital trials today. During the penalty phase, jurors are relieved of the necessity to determine guilt and rather are asked to solely focus on the appropriateness of the punishment.<sup>38</sup> When relying on Victim Impact Evidence<sup>39</sup> and Mitigation Evidence,<sup>40</sup> jurors are frequently encouraged by counsel to Empathically "walk a mile in the shoes" of both the defendants and victims. Empathy is not only *a* determining factor in the penalty, in many cases (like Nick's) it may be *the* determining factor.

Part I of this article will review society's understanding of Empathy and its phases.<sup>41</sup> Part II will discuss how major impediments to Empathy, such as age, gender, religion, and race, can impact the death penalty.<sup>42</sup> Part III will examine "the dark side of Empathy,"<sup>43</sup> including its link to

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34. *Payne v. Tennessee*, 501 U.S. 808 (1991).

35. Personal Communication with Karyn Sinunu-Towery, former Assistant District Attorney, Santa Clara County District, in Santa Clara, Cal. (Dec. 6, 2016).

36. See Sahagun, *Jurors Deliberate*, *supra* note 20.

37. See Louis Sahagun, *Penalty Phase for Peterson Underway*, LA TIMES (Nov. 30, 2004), [http://www.latimes.com/la-113004laci\\_lat-story.html](http://www.latimes.com/la-113004laci_lat-story.html) [hereinafter Sahagun, *Penalty Phase*]. This included Scott's mother in law who from the witness stand yelled at Scott that, "Divorce is an option, not murder." *Id.*

38. LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT § 7.02 (3d ed. 2012).

39. Victim Impact Evidence includes statements from family members of a victim detailing how the murder affected the family and community. *Payne*, 501 U.S. 808.

40. Mitigating evidence is presented during the Penalty phase of a capital trial, and may include mental illness, young age, childhood abuse, remorse, or a minor role in the homicide in an effort to reduce the culpability of a defendant and encourage a jury to select a life sentence rather than death. *Definition of Mitigating Evidence*, US LEGAL: LEGAL DEFINITIONS (Jan. 20, 2017), <https://definitions.uslegal.com/m/mitigating-evidence/>.

41. See *infra* Part I.

42. See *infra* Part II.

43. Paul Bloom, *The Dark Side of Empathy*, THE ATLANTIC (Sep. 25, 2015), <https://www.theatlantic.com/science/archive/2015/09/the-violence-of-empathy/407155/>.

rage and violence.<sup>44</sup> Finally, Part IV discusses the ways in which these impediments to Empathy, coupled with dark Empathic impulses drawn out from jurors, lead to a “wanton,” “freakish,” and unconstitutional application of the Death Penalty.<sup>45</sup>

#### SOUNDTRACK

While reading this article, the author recommends listening to the following soundtrack. These songs have been selected due to their connection with the material. The footnotes following each song recommend which part of the article the song should be paired with.

1. AJJ, CANDLE IN THE WIND (BEN’S SONG) (Plan-it-X Records 2008).<sup>46</sup>  
“Love is all we need. Except love isn’t all we need. We need compassion. And we need Empathy. And we need love (a little bit). And we need some money.”
2. THE VELVET TEEN, 333 (Slowdance Records 2006)<sup>47</sup>  
“You are the person you’ve been always, you were just too young to know yourself back then. And if you think that you can change, well then I hope you’re right. Not even god can change your nature, but you can hold back, right?”
3. NICK CAVE & THE BAD SEEDS, THE MERCY SEAT (Mute 1998)<sup>48</sup>; *See also* JOHNNY CASH’S COVER OF THE MERCY SEAT (American Recordings 2000).  
“And in a way I’m yearning to be done with all this measuring of proof. An eye for an eye and a tooth for a tooth. And anyway I told the truth. And I’m not afraid to die.”
4. AMERICAN FOOTBALL, STAY HOME (Polyvinyl Records 1999).<sup>49</sup>  
“Don’t leave home again if Empathy takes energy, cause everyone feels just like you.”
5. AKRON/FAMILY, EVERYONE IS GUILTY (Dead Oceans 2009).<sup>50</sup>  
“Everyone, everyone, everyone. Everyone, everyone, everyone. Everyone, everyone, everyone. Everyone, everyone, everyone. Everyone, everyone.”

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44. *See infra* Part III.

45. *See infra* Part IV; *See also* *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

46. *See infra* Part I.

47. *See infra* Part II.C.

48. *See infra* Part II.D.

49. *See infra* Part III.A.

50. *See infra* Part IV.

6. THE PAPER CHASE, A LITTLE PLACE CALLED TRUST (Beatville Records 2002).<sup>51</sup>  
 “You deserve whatever you get, because you are not the innocent . . . What do you take me for? You don’t want freedom; you want trick photography. The jury laughs at you, love.”
7. SUFJAN STEVENS, JOHN WAYNE GACY JR. (Asthmatic Kitty Records 2005).<sup>52</sup>  
 “And in my best behavior I am really just like him. Look beneath the floor boards for the secrets I have hid.”
8. ALOHA, FLIGHT RISK (Polyvinyl Records 2016).<sup>53</sup>  
 “Without Empathy the fools won’t bother me and all that’s left to see now are the feathers at the bottom of the box.”
9. ELLIOT, CALM AMERICANS, (Revelation Records 2000).<sup>54</sup>  
 “It’s all been Americanized that’s all. You symbolize the message that we’re all ok with.”
10. PLANES MISTAKEN FOR STARS, CROOKED MILE (Abacus Records 2006).<sup>55</sup>  
 “We tip to the measuring line, to be fit for a box of pine.”

#### I. WHAT IS EMPATHY?

“Yet, taught by time, my heart has learned to glow for other’s good,  
 and melt at other’s woe.”<sup>56</sup>

Empathy is illogical at its core. Genuine Empathy means understanding and feeling an emotion based on witnessing another who is, or should be, experiencing that emotion.<sup>57</sup> The empathizer need not be subject to stimuli which would naturally lead to that emotional response.<sup>58</sup> In fact, research has shown that people use mutually exclusive neuropathways to either empathize or logically analyze a

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51. See *infra* Part IV.A.

52. See *infra* Part IV.A.3.

53. See *infra* Part IV.B.

54. See *infra* Part IV.B.2.

55. See *infra* Conclusion.

56. HOMER, THE ODYSSEY line 269 (A.S. Kline trans., Poetry in Translation 2016), <http://www.poetryintranslation.com/PITBR/Greek/Odyssey23.php>.

57. See, e.g., Steve Taylor Ph.D., *Empathy The Ability that Makes us Truly Human*, PSYCHOL. TODAY (Mar. 24, 2012), <https://www.psychologytoday.com/blog/out-the-darkness/201203/Empathy-the-ability-makes-us-truly-human>; Claudia Gold, M.D., *True Empathy: A Physical Sensation*, PSYCHOL. TODAY (Sep. 1, 2011), <https://www.psychologytoday.com/blog/child-in-mind/201109/true-Empathy-physical-sensation>.

58. *Id.*

situation.<sup>59</sup> In other words, one cannot be simultaneously empathetic and logical.<sup>60</sup> Despite the illogical nature of Empathy, it is hard to argue that Empathy has not led to great good. Empathy can lead to deeper connections with, and better understandings of, others. As Mahatma Gandhi said, “three-fourths of the miseries and misunderstandings in the world will disappear if we step into the shoes of our adversaries and understand their standpoint.”<sup>61</sup>

In his first major work, *Down and Out in Paris and London*, George Orwell tells the story of his Empathic experiment. Orwell left his privileged life to live among the tramps of East London. The final passage of the book reflects his resulting new Empathic perspective:

I can point to one or two things I have definitely learned by being hard up. I shall never again think that all tramps are drunken scoundrels, nor expect a beggar to be grateful when I give him a penny, nor be surprised if men out of work lack energy . . . That is a beginning.<sup>62</sup>

#### *A. A Deep Rooted, Though Not Uniquely, Human Emotion*

Emotions intersect human life in a multitude of ways. Clare Huntington, Associate Dean for Research, and Professor of Law at Fordham University School of Law, described emotion as being “interwoven into every aspect of our lives—the trading floor, the classroom, the playing field, the street, the courthouse, the kitchen table.”<sup>63</sup> This cacophony of emotion has varied degrees of impact on individuals based on their ability to recognize, cognitively understand, and be influenced by the emotions of others.

Empathy has enjoyed something of a day in the sun over the last decade with countless books, articles, and Ted Talks,<sup>64</sup> which have referred to it as an “essential skill.”<sup>65</sup> Empathy training for managers is

59. Anthony I. Jack, et al., *fMRI Reveals Reciprocal Inhibition Between Social and Physical Cognitive Domains*, NEUROIMAGE (2012).

60. *Id.*

61. M. K. GANDHI, ALL MEN ARE BROTHERS 88 (Krishna Kripalani ed., UNESCO/World Without War Publications, Paris 1969).

62. GEORGE ORWELL, DOWN AND OUT IN PARIS AND LONDON (Victor Gollancz 1933).

63. Clare Huntington, *Embracing the Affective Family*, 33 HARV.J.L. & GENDER 321, 321–23 (2010).

64. *Empathy*, TED, <https://www.ted.com/topics/empathy> (last visited December 14, 2016).

65. KARLA MCLAREN, THE ART OF EMPATHY: A COMPLETE GUIDE TO LIFE’S MOST ESSENTIAL SKILL (2013); BRUCE PERRY & MAIA SZALAVITZ, BORN FOR LOVE: WHY EMPATHY IS ESSENTIAL—AND ENDANGERED (2010); The author notes the use of the term “skill,” and recognizes that many refer to it as such, but the author has taken the position that while accessing it may require a degree of skill that can be learned, Empathy is, at its core an

currently a common corporate practice.<sup>66</sup> There are businesses that exist solely to measure, track, and improve the Empathy of corporations.<sup>67</sup> In 2015, Harvard Business Review published the latest index of the most and least empathetic companies.<sup>68</sup>

Despite this recent focus, the history of Empathy can be traced to the beginnings of human existence. Primatologist Frans B. M. de Waal, Ph.D., published a paper in conjunction with researchers at the University of California, Berkley, which found that Empathic and conciliatory responses in primates and other mammals suggests an “appreciation of the other’s situation and shows a degree of perspective-taking” that is not unique to humans but rather a product of our evolutionary history.<sup>69</sup> Waal further posits that Empathy evolved “during the 180 million years of mammalian evolution” in part because “females who responded to their offspring’s needs out-reproduced those who were cold and distant.”<sup>70</sup> Charles Darwin wrote that “the sign of another person enduring hunger, cold, fatigue revives in us some recollection of these states, which are painful even in the idea. And we are thus impelled to relieve the suffering of another in order that our own painful feelings may be at the same time relieved.”<sup>71</sup>

A simple illustration of illogical Empathy is the “contagious yawn” phenomenon. Researchers using neuroimaging found that results indicate that the act of “catching” a yawn upon witnessing another utilizes and activates the portions of the brain most commonly associated with Empathic connections.<sup>72</sup> Another recent study indicates that

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emotion.

66. Joann Lublin, *Companies Try a New Strategy: Empathy Training*, WALL STREET JOURNAL (Jun. 21, 2016, 6:16 PM), <https://www.wsj.com/articles/companies-try-a-new-strategy-empathy-1466501403>.

67. THE EMPATHY BUSINESS, <http://theEmpathybusiness.co.uk/> (last visited December 14, 2016).

68. Belinda Parmar, *The Most (and Least) Empathetic Companies*, HARV. BUS. REV. (Nov. 27, 2015), <https://hbr.org/2015/11/2015-empathy-index>. This index was based on analysis of “internal culture, CEO performance, ethics, and social media presence of 160 companies on major financial indexes.” The index showed Microsoft and Facebook topping it and JD Sports Fashion and Abercrombie & Fitch bottoming it. The index utilized a combination of CEOs’ approval ratings; gender ratio of board members; frequency of complaints; social network performance; and the impact of controversy such as ethical lapses, scandals, and fines—among other metrics in determining scores.

69. Frans de Waal, *The Evolution of Empathy*, GREATER GOOD MAGAZINE (Sep. 1, 2005), [https://greatergood.berkeley.edu/article/item/the\\_evolution\\_of\\_empathy](https://greatergood.berkeley.edu/article/item/the_evolution_of_empathy).

70. *Id.*

71. CHARLES DARWIN, *THE DESCENT OF MAN, AND SELECTION IN RELATION TO SEX* 492 (1871).

72. Liz Seward, *Contagious Yawn ‘Sign of Empathy’*, BBC NEWS, (Sep. 10, 2007, 8:01 PM); *contra* Marie Ellis, *New Study Suggests Contagious Yawning is Not Linked to Empathy*, MEDICAL NEWS TODAY (Mar. 15, 2014), <https://www.medicalnewstoday.com/articles/>

individuals with psychopathic tendencies, defined as Empathy deficiencies, display a corresponding immunity to the contagious yawn.<sup>73</sup>

This emotional contagion is not unique to humans. In 2014 scientists studying bonobos also found that the primates exhibit the “contagious yawn” phenomenon in much the same way as humans.<sup>74</sup> Other research has found similar empathetic behavior in chimpanzees,<sup>75</sup> elephants,<sup>76</sup> dogs,<sup>77</sup> wolves,<sup>78</sup> and rodents.<sup>79</sup>

### *B. Related to, but Distinguishable from, Sympathy*

“Sympathy is easy. It’s always given from a position of power . . .  
But when you have Empathy, you empathize with the person. You  
put yourself on equal footing. Sympathy is easy. Empathy is  
hard.”<sup>80</sup>

The words “Empathy” and “sympathy” are frequently used interchangeably to describe similar emotional reactions, which has led to confusion as to what distinguishes the two terms.<sup>81</sup> Both are intimately tied to the emotions at play in our closest relationships, and both can lead to the desire to reduce or eliminate another’s suffering. Despite these similarities, Empathy and sympathy are distinct emotional responses.<sup>82</sup>

274016.php. Duke Center for Human Genome Variation researchers found that primary predictor of contagious yawning to be age. But did these researchers ignore research (discussed below) indicating Empathy diminishes with age?

73. Brian K. Rundle, et al., *Contagious Yawning and Psychopathy*, 86 PERSONALITY AND INDIVIDUAL DIFFERENCES (November 2015).

74. Elisabetta Palagi, et al., *Yawn Contagion in Humans and Bonobos: Emotional Affinity Matters More Than Species*, PEERJ (Aug. 12, 2014), <https://peerj.com/articles/519/>. (bonobos are the closest evolutionary cousin to humans and were formerly called pygmy chimpanzees).

75. Matthew W. Campbell & Frans B. M. de Waal, *Ingroup-Outgroup Bias in Contagious Yawning by Chimpanzees Supports Link to Empathy*, PLOS (April 6, 2011), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0018283>.

76. See Virginia Morell, *It’s Time to Accept That Elephants, Like Us, Are Empathetic Beings*, NAT’L GEOGRAPHIC (Feb. 23, 2014), <https://news.nationalgeographic.com/news/2014/02/140221-elephants-poaching-empathy-grief-extinction-science/>.

77. See Ramiro M. Joly-Mascheroni, et al., *Dogs Catch Human Yawns*, 4(5) BIOLOGY LETTERS, October 23, 2008, at 446.

78. See Helen Thompson, *Yawning Spreads Like a Plague in Wolves*, SMITHSONIAN.COM (August 27, 2014), <https://www.smithsonianmag.com/science-nature/yawning-spread-plague-wolves-180952484/>.

79. See James Burkett, et al., *Oxytocin-Dependent Consolation Behavior in Rodents*. 351(6271) SCI. 375, 375–78 (2016).

80. Dennis Lehane, *Commencement 2004*, YOUTUBE (Mar. 20, 2009), <https://www.youtube.com/watch?v=ZJJ5z78GE5A>.

81. *Empathy vs. Sympathy*, DICTIONARY.COM (last visited Feb. 9, 2016), <http://www.dictionary.com/e/empathy-vs-sympathy/> [hereinafter *Empathy vs. Sympathy*].

82. *Id.*

“Sympathy” entered the English vocabulary in the mid-sixteenth century and was defined as an “agreement or harmony in qualities between things or people.”<sup>83</sup> A little over three hundred years later, in the late nineteenth century, “Empathy” entered the English vocabulary.<sup>84</sup> Initially, “Empathy” was used specifically in the practice of psychology and defined as “the physiological manifestation of feelings.”<sup>85</sup> Over the years, the definition of sympathy has narrowed while the definition of Empathy has expanded.<sup>86</sup> Today sympathy is defined as “commiseration, pity, or feelings of sorrow” for another’s misfortune, while Empathy is “used to refer to the capacity or ability to imagine oneself in the situation of another, thereby vicariously experiencing the emotions of . . . that person.”<sup>87</sup>

Put simply, “Empathy” is recognition and *experience or feeling of* the emotions of another while “sympathy” is an emotional feeling of concern, sorrow and/or compassion for another.<sup>88</sup> The key difference is that sympathy is not experiencing another’s emotion.<sup>89</sup> Sympathy does not require an understanding of the sufferer’s emotional state and can rest on an inability to understand another’s emotional state (“I can’t imagine what she’s feeling”) while Empathy is the recognition and, at times, involuntary, recreation to another’s emotion. While it is possible to consciously reduce sympathy felt for another, it is harder to reduce Empathy once it is initiated. However, there are several factors, discussed below, which may block or prevent Empathic responses such as when “observers judge someone they perceive to be of lower status than them, dissimilar to them, or fitting negative race and class-based stereotypes.”<sup>90</sup>

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83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Empathy vs. Sympathy*, *supra* note 81.

88. NANCY EISENBERG & PAUL H. MUSSEN, THE ROOTS OF PROSOCIAL BEHAVIOR IN CHILDREN (1989).

89. *Id.*

90. Andrew E. Taslitz, *Trying Not to Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?*, 45 TEX. TECH. L. REV. 315, 353 (2012).

### C. *The Phases of Empathy*

“I fashion the expression of my face, as accurately as possible, in accordance with the expression of his, and then wait to see what thoughts or sentiments arise in my mind or heart, as if to match or correspond with the expression.”<sup>91</sup>

Social scientists recognize three primary phases of Empathy: cognitive, physical, and emotional.<sup>92</sup> These phases of Empathy can occur (or at least appear to occur) either simultaneously or sequentially.<sup>93</sup>

#### 1. *Cognitive Empathy*

The necessary first stage of Empathy is the ability to cognitively recognize the suffering of another.<sup>94</sup> Philosophers have argued that there exists a moral obligation to recognize and cognitively understand the suffering of others.<sup>95</sup> When Empathy fails to move past the stage of cognitive recognition, only feeling *for* rather than *with* another, it has been described as perspective taking.<sup>96</sup>

Cognitive recognition and understanding is required before one can move to the physical or emotional phases of Empathy.<sup>97</sup> The more in common one has with another, or the situation that another is in, the easier it is to recognize or imagine the emotion being felt.<sup>98</sup>

Thus, the author posits, that even if an empathizer cannot move past the cognitive phase of Empathy he can utilize it to accurately recognize and understand another’s emotional state and to—perhaps dispassionately—act to alleviate the stress or suffering of another. This is essentially deliberate Empathy rather than unconscious Empathy. Empathy that remains in the cognitive phase may also lead to decidedly darker outcomes as well.<sup>99</sup>

#### 2. *Physical Empathy*

The second phase of Empathy is a physical reaction to witnessing or learning of the pain and or suffering of another.<sup>100</sup> These reactions can

91. EDGAR ALLAN POE, THE PURLOINED LETTER, *in* THE GIFT: A CHRISTMAS, NEW YEAR, AND BIRTHDAY PRESENT (1844).

92. *See generally* CANDACE CLARK, MISERY AND COMPANY: SYMPATHY IN EVERYDAY LIFE, (U. of Chi. Press 1998).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *See generally* Clark, *supra* note 92.

99. Bloom, *supra* note 43.

100. Clark, *supra* note 92.

include weeping, shivering, rapid heartbeat, nausea, sour stomach, or pain.<sup>101</sup> Some have theorized that, just as cognitive recognition is required for other forms of Empathy to manifest, physical Empathy is likewise necessary for movement to the final phase, emotional Empathy.<sup>102</sup>

### 3. Emotional Empathy

The phase of Empathy most often referred to with the generic term “Empathy” is the final emotional response to witnessing or learning of the pain or suffering of another and mirroring or recreating the same or similar emotion within the witness.<sup>103</sup> This is essentially unconscious rather than deliberate Empathy.

This emotional reaction of truly feeling or experiencing the emotion of another has been referred to as “compassionate”<sup>104</sup> or “affective” Empathy.<sup>105</sup> It is the ability to recognize, experience and involuntarily respond to the feelings of another.<sup>106</sup> Like cognitive Empathy, emotional Empathy can also lead to dark outcomes. The failure or inability to act on this involuntary Empathic response can trigger “Empathic distress” which can include depression, rage, or even violent or suicidal thoughts.<sup>107</sup>

## II. THE IMPACT OF RACE, GENDER, AGE, AND RELIGION ON EMPATHY

“You can only understand people if you feel them in yourself.”<sup>108</sup>

Social science recognizes that surface level similarities increase the likelihood that one will be motivated to and capable of accurately empathizing with another.<sup>109</sup> “Oneness” plays an important part in our ability to empathize.<sup>110</sup> Studies in which men were dosed with oxytocin (a hormone thought to be linked with Empathy) found that the subjects behaved with more Empathy towards those on their “team,” but

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101. *Id.*

102. *Id.*

103. *Id.*

104. Mark B. Borg Jr., et al., *A New Understanding of Compassionate Empathy*, PSYCHOL. TODAY (Aug. 29, 2014), <https://www.psychologytoday.com/blog/irrelationship/201408/new-understanding-compassionate-empathy>.

87. Simone G. Shamay-Tsoory, et al., *Two Systems for Empathy*, 132(3) BRAIN 617, 617–27; Troy Campbell, *Too Much Experience: A Desensitization Bias in Emotional Perspective Taking*, 106(2) J. PERSONALITY AND SOC. PSYCHOL., 117, 117–71 (2014).

106. *See id.*

107. *See* Bloom, *supra* note 43.

108. JOHN STEINBECK, EAST OF EDEN 444 (Centennial ed., Penguin Books 2002).

109. STEVE PAVLINA, PERSONAL DEVELOPMENT FOR SMART PEOPLE (2008).

110. Mark Vernon, *You have to be kind to be cruel*, NEWSTATSMAN (Sep. 6, 2010), <https://www.newstatesman.com/society/2010/09/empathy-lee-moral-study-others>.

displayed significantly less Empathy to those on other “teams.”<sup>111</sup> Four major factors that impact this ability to identify others as being on one’s team and thus influence the level to which one may empathize with others are: race,<sup>112</sup> gender,<sup>113</sup> age,<sup>114</sup> and religion.<sup>115</sup>

#### A. Race

“In all people I see myself—none more, and not one a barleycorn less, And the good or bad I say of myself, I say of them.”<sup>116</sup>

The first factor that effects a person’s ability to empathize is race. Studies have shown that “[e]mpathic neural response is heightened for members of the same race, but not those of other races.”<sup>117</sup> To test empathetic responses, researchers observed brain activity of volunteers as they witnessed others being poked either with a cotton swab or a needle.<sup>118</sup> When witnessing another being poked with needles, researchers observed brain activity in portions of the brains that typically activate when personally experiencing pain.<sup>119</sup> In other words, these researches observed a true empathetic response of actually feeling pain when witnessing others experiencing pain. The most noteworthy finding of this study was that white witnesses displayed significantly lower activation of these portions of the brain when they witnessed painful poking inflicted upon non-whites.<sup>120</sup> Studies which included blacks<sup>121</sup> and studies which included Asians showed comparable results, with all groups displaying more Empathy for individuals of their own race.<sup>122</sup>

111. *Id.*

112. *See infra* Part II.A.

113. *See infra* Part II.B.

114. *See infra* Part II.C.

115. *See infra* Part II.D.

116. Walt Whitman, *Song of Myself*, U. TORONTO LIBR., <https://rpo.library.utoronto.ca/poems/song-myself> (last visited December 14, 2016). This quote is interesting in context of Whitman’s racial attitudes. He opposed slavery, but also viewed blacks as less evolved and opposed their voting rights. *See* William Douglas O’Connor, *The Good Gray Poet*, WHITMAN ARCHIVES, <http://whitmanarchive.org/criticism/disciples/tei/anc.00170.html> (last visited December 14, 2016).

117. Joan Y. Chiao & Vani A. Mathur, *Intergroup Empathy: How Does Race Affect Empathic Neural Responses?*, 20(11) *CURRENT BIOLOGY* 478, 478–80 (2010) [hereinafter Mathur, *Intergroup Empathy*].

118. *See* Xiaojing Xu, et al., *Do You Feel My Pain? Racial Group Membership Modulates Empathic Neural Responses*, 29(26) *J. NEUROSCI.* (Jul. 1, 2009).

119. *Id.*

120. *Id.*

121. Vani A. Mathur, et al., *Neural Basis of Extraordinary Empathy and Altruistic Motivation*, 51 *NEUROIMAGE* 1473 (2010) [hereinafter Mathur, *Neural Basis of Extraordinary Empathy*].

122. David L. Neumann, et al., *Empathy Towards Individuals of the Same and Different Ethnicity When Depicted in Negative and Positive Contexts*, 55(1) *PERSONALITY &*

Studies also suggest that blacks tend to feel greater Empathy for other blacks than whites feel for other whites.<sup>123</sup> The neural responses of blacks in these studies represent *extraordinary* Empathy, but only for other blacks.<sup>124</sup> This heightened empathetic response corresponded with the level to which the black subjects of the study identified with being black.<sup>125</sup> The researchers conducting the study believe these results suggest that one can enhance Empathy and altruistic motivation by finding commonalities with other individuals and groups.<sup>126</sup>

### B. Gender

“There is absolutely no single aspect of one’s personality that is more important to develop than Empathy, which is not a skill at which men typically are asked to excel. I believe Empathy is not only the core of art, literature and music, but should also be at the core of society, from ethics to economics.”<sup>127</sup>

Women are consistently found to be capable of displaying more complex and differentiated articulation of emotions and emotional experiences than men.<sup>128</sup> Studies have also shown that females are more Empathic than their male counterparts, even when the person they empathize with is male.<sup>129</sup> Women are even capable of specialized Empathy such as cross-racial Empathy<sup>130</sup> and are more likely to express Empathy freely, while men have been found to be more discriminate in their expression of Empathy.<sup>131</sup> Women are also more likely to exhibit Empathy towards their adversaries than men.<sup>132</sup> Studies have also

INDIVIDUAL DIFFERENCES 8, 8–13 (2013).

123. Mathur, *Intergroup Empathy*, *supra* note 117; These impediments in cross-racial Empathy heighten the importance of the prohibition on using peremptory challenges during *voir dire* to exclude potential jurors based on race, or ethnicity. In the same manner, it is equally important that, when appropriate, defense counsel make Batson challenges/objections. *See* *Batson v. Kentucky*, 476 U.S. 79 (1986).

124. Mathur, *Neural Basis of Extraordinary Empathy*, *supra* note 121.

125. *Id.*

126. *Id.*

127. Chris Ware. Chris Randel, *Building A Memory*, Hazlit (October 10, 2012) <https://hazlitt.net/comics/building-memory>.

128. *See, e.g.*, Lisa F. Barrett, et al., *Sex Differences in Emotional Awareness*, 26(9) PERSONALITY SOC. PSYCHOL. BULLETIN 1027, 1027–35 (2000).

129. The increased capacity for Empathy in females also heightens the importance of the prohibition on using peremptory challenges to exclude potential jurors based on sex. *Batson*, 476 U.S. 79.

130. Yu-Wei Wang, et al., *The Scale of Ethnocultural Empathy*, 2 J. COUNSELLING PSYCHOL. 221, 221–34 (2003).

131. Leonardo Christov-Moore, et al., *Empathy: Gender Effects in Brain and Behavior*, NEUROSCI. BIOBEHAV. REV. (2014); Martin Schulte-Rüther, et al., *Gender Differences in Brain Networks Supporting Empathy*, 42(1) NEUROIMAGE, 393–403 (2008).

132. *Id.*

indicated that women not only experience more Empathy than men, but also outwardly express Empathy to a greater extent as well.<sup>133</sup>

Women's increased Empathy appears to come with a price, however. Oakland University professor Barbara Oakley wrote in *Cold-Blooded Kindness: Neuroquirks of a codependent killer, or just give me a shot at loving you, Dear, and other reflections on helping that hurts*, that "it's surprising how many diseases and syndromes commonly seen in women seem to be related to women's generally stronger Empathy for and focus on others" including depression, anorexia, and other forms of Empathy induced guilt and stress.<sup>134</sup>

It has been suggested that men's neural circuitry contributes to mental separation of one's perspective from another's.<sup>135</sup> The basis for these gender differences in Empathy may also be related to testosterone levels. Recent studies, which again found that females are more empathetic than men, found that administration of testosterone lessens various expressions of Empathy in women.<sup>136</sup> Prenatal testosterone levels also may influence Empathy later in the child's life.<sup>137</sup>

Another gender differentiation in Empathy relates to ADHD. The dopamine D4 receptor gene variant that is associated with ADHD also displays a gendered association with Empathy. Women with a specific gene variant scored higher in cognitive Empathy than women without the same gene variant, while men with the same variant scored lower than men without it.<sup>138</sup> Thus, women with ADHD may be more empathetic than other women, while men with ADHD may be less empathetic than other men. Additionally, individuals utilizing stimulants to combat the effects of ADHD receive *enhanced transmission of dopamine*, which allows them to focus on and readily access brain functions associated with Empathy. Thus, medication may either create

133. Mia Silfver & Klaus Helkama, *Empathy, Guilt, and Gender: a Comparison of Two Measures of Guilt*, SCANDINAVIAN J. PSYCHOL. (2007).

134. BARBARA OAKLEY, *COLD-BLOODED KINDNESS* (2011) (Oakley comments that the same Empathic responses which create feelings of empathetic guilt when one feels they have harmed another, also result in depression. She also notes that it is possible to predict future anorexia in female children based on their level of selflessness, or Empathy).

135. Schulte-Rüther, *supra* note 131.

136. See, e.g., Jack van Honk, et al., *Testosterone Admin. Impairs Cognitive Empathy in Women Depending on Second-to-Fourth Digit Ratio*, PROC. NAT'L ACAD. SCI. (2013) (found decreased social intelligence); Erno Jan Hermans, et al., *Testosterone Admin. Reduces Empathetic Behavior: a Facial Mimicry Study*, PSYCHONEUROENDOCRINOL. (2006) (reduced mimicry of emotional facial expressions).

137. Rebecca C. Knickmeyer, et al., *Foetal Testosterone, Soc. Relationships, and Restricted Interests in Children*, 46(2) J. CHILD PSYCHOL. & PSYCHIATRY (2005) (showed significant correlation in prenatal testosterone levels and child's Empathy related behavior).

138. Gina Pera, *ADHD's Link and Its Treatment Link to Empathy*, 1201 ALARM PRESS (2008).

or diminish Empathy by providing individuals an ability to more aptly access sophisticated brain functionality as it pertains to Empathy.<sup>139</sup>

A recent study concluded that because of stereotypes that women are “weak, passive, and in need of male protection,” the death penalty is applied infrequently to female defendants when available.<sup>140</sup> On the other hand, cases with a female victim were far more likely to result in a sentence of death.<sup>141</sup> In many cases, the presence of sexual assault explains this phenomenon, as does the perception of the vulnerability of the victim and whether the female victim was a mother or spouse.<sup>142</sup> These roles may lead to a protective, empathetic, response from jurors, which may lead to the belief that the defendant was more dangerous and thus more deserving of death than if the same crime occurred with a male victim.<sup>143</sup>

In another study, volunteers witnessed subjects being shocked.<sup>144</sup> There were significant differences in male and female responses. Witnesses observed two volunteers engaged in a game where one who played fair and the other played unfairly.<sup>145</sup> Both males and females had Empathic responses when the volunteer who was playing fair was shocked.<sup>146</sup> When the unfair player was shocked, females displayed similar empathetic responses.<sup>147</sup> Males, on the other hand, not only displayed lower empathetic responses, but also displayed activation of an additional area of the brain that is generally associated with reward.<sup>148</sup> This suggests that men not only feel less Empathy for wrongdoers, they also feel rewarded or take pleasure when witnessing justice or vengeance.<sup>149</sup>

### C. Age

Studies have indicated that Empathy remains relatively consistent

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139. *Id.*

140. Steven F. Shatz & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender, and the Death Penalty*, 27 BERKELEY J. GENDER L. & JUST. (2012).

141. Caisa Elizabeth Royer, et al., *Victim Gender and the Death Penalty*, CORNELL L. FAC. PUBLIC'NS (2014).

142. *Id.* at 433–34, 445.

143. Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343, 358 (2003).

144. Tania Singer, et al., *Empathic Neural Responses are Modulated by the Perceived Fairness of Others*, NATURE, Jan. 26, 2006, at 466–69.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

throughout adulthood.<sup>150</sup> Other studies have found however, that from a very early age, male children in general show less Empathy than female children of the same age.<sup>151</sup> This gap in Empathy increases with age creating an even larger gap in the ability to access Empathy in adulthood. Females generally become more empathetic with time, while males increasingly become less empathetic.<sup>152</sup>

#### *D. Religion*

“You don’t need religion to have morals. If you can’t determine right from wrong, then you lack Empathy, not religion.”<sup>153</sup>

In addition to the evolutionary basis for Empathy, discussed above,<sup>154</sup> teachings regarding what we now regard as Empathy can be traced back to the earliest recorded history. While it is commonly claimed to be a creation of Christianity, nearly every religion has a variation of the “Golden Rule” commonly defined as “treat others how you wish to be treated,” or alternatively, “what you wish upon others, you wish upon yourself.”<sup>155</sup>

The word Empathy is neither found in the text of the Bible nor the Koran. However, the idea of Empathy has been interwoven, and perhaps confused,<sup>156</sup> with the concepts of “intercession” and “Shafa’ah” which both mean to come between two parties or praying on behalf of another.<sup>157</sup>

Modern Christians, frequently cite Biblical references to an “eye for and eye” and “a tooth for a tooth” as justification for Capital Punishment.<sup>158</sup> Some Christians view these references as a grant of

150. Daniel Grünh, et al., *Empathy Across the Adult Lifespan: Longitudinal and Experience-Sampling Findings*, EMOTION, Dec., 2008, at 753–65.

151. Ed O’Brien, et al., *Empathic Concern and Perspective Taking*, PSYCHOL. SCI. & SOC. SCI., Oct. 14, 2016, at 23–28.

152. Eider Pascual-Sagastizabal, et al., *Empathy, Estradiol and Androgen Levels in 9-year-old Children*, PERSONALITY & INDIVIDUAL DIFFERENCES (Jun. 2013) at 936–40.

153. Anonymous.

154. See discussion *supra* Part I.A.

155. ANTONY FLEW, A DICTIONARY OF PHILOSOPHY (1979).

156. Eddie Smith, *Qualities of an Effective Intercessor*, CHARISMANEWS (Oct. 18, 2014, 3:00 PM), <https://www.charismanews.com/opinion/45777-9-qualities-of-an-effective-intercessor>.

157. See, e.g., Intercession (Mediation), NEWADVENT, <http://www.newadvent.org/cathen/08070a.htm> (last visited December 14, 2016); Jack Wellman, *What Does Intercession Mean? A Biblical Definition of Intercession*, PATHEOS (Aug. 17, 2015), <http://www.patheos.com/blogs/christiancrier/2015/08/17/what-does-intercession-mean-a-biblical-definition-of-intercession/>; MUHAMMAD HUSAYN TABATABA’, AN EXEGESIS OF THE QUR’AN, 264–93 (Sayid Saeed Akhtar Rizvi trans., 1984).

158. President Donald Trump on his favorite Bible verse “an eye for an eye, you can almost say that. That’s not a particularly nice thing. But you know . . . we have to be firm and

authority to carry out capital punishment as well as a holy justification for the creation of an Empathic Divide between themselves and those “deserving” of death.

These references may have been derived from the Babylonian Code of Hammurabi—one of the oldest known recorded sets of laws—which states that “If a man has destroyed the eye of a man of the gentleman class, they shall destroy his eye.”<sup>159</sup>

The use of “an eye for an eye and a tooth for a tooth” reference to show a biblical justification for capital punishment is more of a lie for a lie than a truth for a truth. First, it is important to note that these references are limited to the Old Testament, which often depicts a God committing acts that few modern Christians would choose to defend,<sup>160</sup> rather than the God of Love depicted in the New Testament.<sup>161</sup> Second, scholars generally interpret both the biblical and Babylonian references to “eye for eye,” to be restrictions on retaliation—limited to the equivalent of the injury suffered—and a civil code for restitution, rather than authority for vengeance or capital punishment.<sup>162</sup> And third, these passages are directly abrogated by the very individual that Christians take their name from: Jesus. Jesus says:

You have heard that it was said, [e]ye for eye, and tooth for tooth. But I tell you, [d]o not resist an evil person. If someone strikes you on the right cheek, turn to him the other also. And if someone wants to sue you<sup>163</sup> and take your tunic, let him have your cloak as well. If

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have to be very strong.” *Trump on WHAM*, SOUNDCLOUD, <https://soundcloud.com/buzzfeedandrew/trump-on-wham> (last visited December 14, 2016); Anyone who injures their neighbor is to be injured in the same manner: fracture for fracture, eye for eye, tooth for tooth. The one who has inflicted the injury must suffer the same injury. Whoever kills an animal must make restitution, but whoever kills a human being is to be put to death.” *Leviticus* 24:19–21; “[E]ye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise”. *Exodus* 21:24–25.

159. HAMMURABI'S CODE: AN EYE FOR AN EYE, ANCIENT CIVILIZATIONS ONLINE TEXTBOOK, available at <http://www.ushistory.org/civ/4c.asp>.

160. See, e.g., *Genesis* 22:1–2 (God asking a man to kill his only son to test his fear of God); *Job*:1 (God inflicting a series of horrors upon a righteous man because of a bet with the devil, including illness, poverty, and the death of his family); *Genesis* 38:9–10 (God killing a man for not ejaculating in his sister-in-law); *2 Kings* 2:24 (God sending bears to rip apart forty-two children); *Joshua* 6:20–37 (God knocking down the walls of a city so that his people could kill all the “men and women, young and old, cattle, sheep and donkeys” and take the city); *Exodus* 12:29 (the genocide of Egyptian children); *Genesis* 19 (God’s complete destruction of two cities); and *Genesis* 7:21 (God’s destruction of nearly all life on Earth).

161. *John* 3:16 (“For God so loved the world that he gave his one and only Son, that whoever believes in him shall not perish but have eternal life.”).

162. *Hammurabi’s Code: An Eye for an Eye*, USHISTORY.ORG, <http://www.ushistory.org/civ/4c.asp> (last visited Apr. 10, 2017).

163. The idea that these laws refer to a civil code of restitution is further established by the lawsuit reference.

someone forces you to go one mile, go with him two miles. Give to the one who asks you, and do not turn away from the one who wants to borrow from you.<sup>164</sup>

This eye-for-an-eye point of view even runs contrary to one of the earliest stories featuring this vengeful, Old Testament version of God. God did not take from Cain what Cain took from Abel (his life). Rather, for his fratricide, Cain was marked and exiled. God even forbade others from killing him for his crime.<sup>165</sup> Cain was allowed to leave with several of his brothers, get married, father children, establish a city and likely, live a long life, and experience a mundane death.<sup>166</sup>

Despite the clear repudiation of an eye for an eye and the numerous examples in the New Testament that can be inferred to depict Jesus's Empathy for the poor and hungry,<sup>167</sup> multiple studies have consistently displayed a significant contrary link between religiosity and Empathy. Those who consider themselves to be "highly religious" are less empathetic than others in experiments related to generosity, compassion and protective feelings toward individuals being taken advantage of.<sup>168</sup> The authors of the study theorized that those who were more religious "may ground their generosity less in emotion, and more in other factors such as doctrine, a communal identity, or reputational concerns."<sup>169</sup>

This lack of Empathy is particularly prevalent in those who grew up in religious households, particularly in Christian and Muslim households.<sup>170</sup> This study also found a correlation with this lack of Empathy, the religiosity of the household, and the punitive tendencies of the household.<sup>171</sup> It is reasonable to infer that the increased punitive nature of religious households may be what leads to the Empathy-deficiency of those raised within.

Attempting to defend his opposition to Marriage Equality, one Christian writer explained that Christian Empathy is freely offered to "the murderers, the adulterers, and so forth because we realize that, before God, we are included in their number."<sup>172</sup> In other words, all sin

164. *Matthew* 5:38–42.

165. *Genesis* 4:13–15.

166. The Bible records the death of Adam, *Genesis* 5:5, and his later son Seth, *Genesis* 5:8, but does not reference Cain's death.

167. *Luke* 6:20–21.

168. Yasmin Anwar, *Highly Religious People are Less Motivated by Compassion Than are Non-Believers*, BERKELEY NEWS, (Apr. 30, 2012), <http://news.berkeley.edu/2012/04/30/religionandgenerosity/>.

169. *Id.*

170. Jean Decety, et al., *The Negative Association Between Religiousness and Children's Altruism Across the World*, CURRENT BIOLOGY, Nov. 5, 2015, at 251–55.

171. *Id.*

172. Matthew Cochran, *How Empathy Is Killing Us*, THE FEDERALIST (Nov. 4, 2015),

is equivalent; therefore, Christians empathize with all sinners. The problem with this perspective is that it is simplistic and naive to believe that someone whose sin is trivial, for instance wearing clothes woven of two different fabrics,<sup>173</sup> can equally access and display Empathy for someone who commits murder. The writer goes on to say that Christian “compassion is not our own invention that springs from our own feelings, but a specific gift from God,” and that we “cannot, through our own Empathy, make God more compassionate by calling evil good and good evil.”<sup>174</sup> The writer goes on to criticize non-theologically based Empathy as “barbaric” or “feral” and claims that it *destroys* Christian morality and sensibilities.<sup>175</sup>

Perhaps this Empathy deficiency results from the focus on pseudo-empathizing with a sinless prophet, or because mercy and intercession are depicted primarily as coming from a God. Or perhaps it is because of the certainty that a prerequisite to be a member of most religions is the absolute belief that the members of that faith alone know the “*ultimate truth*” of life. In fact, some Christian thinkers have explicitly rejected Empathy as being an inferior basis for morality in favor of the “cold, hard, objective morality” of their faith.<sup>176</sup>

The racial, gender, age, and religion-based impediments to Empathy may, in and of themselves, lead to irrational and capricious results at trial. When coupled with the dark impulses also associated with Empathy, discussed below, the results may move from capricious to unconstitutionally “wanton and freakish.”<sup>177</sup>

### III. “THE DARK SIDE OF EMPATHY”

“Ironically, torture requires Empathy, too, in the sense that one cannot deliberately inflict pain without realizing what is painful.”<sup>178</sup>

Yale Professor and Psychologist, Paul Bloom, has written extensively on Empathy and has argued that society would be “fairer and more moral once we put Empathy aside.”<sup>179</sup> Bloom views Empathy as a

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<http://thefederalist.com/2015/11/04/how-empathy-is-killing-us/>.

173. *Deuteronomy* 22:11.

174. Cochran, *supra* note 166.

175. *Id.*

176. Pennie Lee, *Why Basing Morality on Empathy Does Not Work*, BIBLICALLANDMARKS.COM (Sep. 5, 2015) (it is worth noting that this publication reflects a highly conservative Christian perspective on the subject).

177. *Gregg*, 428 U.S. at 207.

178. FRANS DE WAAL, *THE BONOBO AND THE ATHEIST: IN SEARCH OF HUMANISM AMONG THE PRIMATES* (2013).

179. Paul Bloom, *Against Empathy*, BOSTON REV. (Sep. 10, 2014), <http://bostonreview.net/forum/paul-bloom-against-empathy>.

bad moral guide, something which continues to blind us to long-term consequences.<sup>180</sup> Much of Bloom's argument centers on the biased way prone to feel Empathy for attractive people and for those who look like us or share our ethnic or national background."<sup>181</sup> He also focuses on the narrow scope of Empathy—the manner in which “it connects us to particular individuals . . . but is insensitive to numerical differences and statistical data”.<sup>182</sup> In other words, it is easier to care about and act to alleviate the suffering of a single person who we empathize with, rather than with the suffering of 100 people we don't know.<sup>183</sup>

Bloom points to “the identifiable victim effect” as a particularly prejudicial necessity of Empathy.<sup>184</sup> He argues convincingly that Empathy keeps us from appreciating that the death of 100 people we do not know is more significant than the death of a single brown-haired child whose beauty pageant photos play on an endless loop on CNN for weeks.<sup>185</sup> To drive home his point, Bloom quotes the economist Thomas Schelling:

Let a six-year-old girl with brown hair need thousands of dollars for an operation that will prolong her life until Christmas, and the post office will be swamped with nickels and dimes to save her. But let it be reported that without a sales tax the hospital facilities of Massachusetts will deteriorate and cause a barely perceptible increase in preventable deaths—not many will drop a tear or reach for their checkbooks.<sup>186</sup>

Three major aspects of this dark side of Empathy are: Empathic Distress, the depression and stress often felt as a result of *feeling with* another; Empathic violence, the impulse to direct violence toward those viewed as causing the distress of someone one Empathizes with; and Empathic Psychopathy a theory which, contrary to common beliefs about psychopathy, is that psychopaths access and utilize Empathy in a unique manner.

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180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. Paul Bloom, *The Baby in the Well*, THE NEW YORKER (May 20, 2013), <https://www.newyorker.com/magazine/2013/05/20/the-baby-in-the-well>.

185. *Id.*

186. *Id.*

### A. Empathic Distress

“I still can’t get over the frustration, the guilt and Empathy I have for everyone. There’s good in all of us and I think I simply love people too much, so much that it makes me feel too fucking sad . . . Peace, Love, Empathy.”<sup>187</sup>

Empathic distress is “an emotional state characterized by the inability to tolerate the perceived pain or suffering of another.”<sup>188</sup> Inability to relieve the deeply empathetically felt suffering of others can lead to this distress, which is more prevalent in Highly Sensitive People. When not dealt with, this may lead to depression, physical pain, unwanted behavior, or in some circumstances may be transformed into Empathic anger or rage.<sup>189</sup>

### B. Empathic Violence

“It’s the lack of Empathy that makes it very easy for us to plunge into wars.”<sup>190</sup>

Another consequence that Professor Bloom highlights in his argument against Empathy are the horrors justified by perpetrators’ Empathic rage including the lynchings of the American South, which followed “stories of white women who were assaulted by blacks,” and the pre-Holocaust attacks on Jews, which followed tales of Jewish people preying on German children.<sup>191</sup>

Governments also commonly utilize Empathic rage to justify war. Examples of this are the 2003 Iraq war (where government officials and reporters inundated the public with stories of the horrors committed by the Hussein regime), as well as the ongoing conflict in Gaza (where Israel used news of the murder of three teenagers, and Hamas used news of murdered Palestinians to boost support for their respective attacks on each other).<sup>192</sup> Even President Barack Obama, a man with a well-known affinity for Empathy,<sup>193</sup> used Empathy to justify violence when he spoke

187. KURT COBAIN’S SUICIDE NOTE, [https://kurtcobainssuicidenote.com/kurt\\_cobains\\_suicide\\_note.html](https://kurtcobainssuicidenote.com/kurt_cobains_suicide_note.html) (last visited Apr. 10, 2017).

188. Seana McGee & Maurice Taylor, *Empathic to a Fault?*, SPIRITUALITY & HEALTH (Mar. 25, 2012), <https://spiritualityhealth.com/articles/2012/03/25/empathic-fault>.

189. MARTIN L. HOFFMAN, *Empathy and justice motivation*, MOTIVATION & EMOTION, Jun., 1990, at 151–72.

190. *Readout of the President’s Audience with His Holiness Pope Francis*, THE WHITE HOUSE (Mar. 27, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/03/27/readout-president-s-audience-his-holiness-pope-francis>.

191. Bloom, *supra* note 43.

192. *Id.*

193. President Barack Obama, Commencement Address at Xavier University: Commencement and Katrina & Gulf Recovery (Aug. 11, 2006). “It’s the lack of Empathy that

of the atrocities committed by Assad in order to generate support for airstrikes in Syria.<sup>194</sup> The reaction to these horrors is often Empathic anger or rage which “can cloud our judgment, biasing us in favor of war.”<sup>195</sup> Empathy for the suffering of the victims of these regimes helps to make clear the “benefits” of war (vengeance, unseating corrupt leaders, etc.), Empathy does not help make clear the financial and consequential costs of war.<sup>196</sup> Critics have argued that the connection Bloom draws between Empathy and war is an inappropriate conflation of moralism and Empathy; however, these critics fail to acknowledge the scientific link between Empathy and violence.<sup>197</sup>

There is a wealth of scientific evidence that supports Professor Bloom’s position by showing that Empathy felt for a distressed person can also inspire aggressive behavior or “Empathic rage,” which can play upon both helping and punishing desires.<sup>198</sup> Psychologists have found that Empathy can also lead to rage displayed by a desire to engage in cruel and vengeful behavior on a victim’s behalf,<sup>199</sup> which is essentially the goal of utilizing Victim Impact Evidence. Findings of a recent study show that strong feelings of Empathy for a victim result in correspondingly strong feelings of violence and desire to make perpetrators feel pain.<sup>200</sup> Participants in the study were motivated by feelings of Empathy for victims to willingly inflict pain on perpetrators.<sup>201</sup> Participants were even motivated to inflict this retributive pain on innocent others, in an effort to empathetically “help” the individuals in distress.<sup>202</sup>

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makes it very easy for us to plunge into wars. It’s the lack of Empathy that allows us to ignore the homeless on the streets.” *Id.*

194. Bloom, *supra* note 43.

195. *Id.*

196. *Id.*

197. See, e.g., Albert Burneko, *Thinkfluence Man Pretends To Think Empathy Is Bad*, THE CONCOURSE (Mar. 23, 2016, 1:13 PM), <https://theconcourse.deadspin.com/thinkfluence-man-pretends-to-think-empathy-is-bad-1766435507>; Denise Cummins Ph.D., *Why Paul Bloom Is Wrong About Empathy and Morality*, PSYCHOLOGY TODAY (Oct. 20, 2013), <https://www.psychologytoday.com/blog/good-thinking/201310/why-paul-bloom-is-wrong-about-empathy-and-morality>.

198. Bloom, *supra* note 43.

199. Guy D. Vitaglione & Mark A. Barnett, *Assessing a New Dimension of Empathy*, MOTIVATION & EMOTION, Dec., 2003, at 301–25.

200. Anneke Buffone & Michael Poulin, *Empathy, Target Distress, and Neurohormone Genes Interact to Predict Aggression for Others—Even Without Provocation*, PERSONALITY & SOC. PSYCHOL. BULLETIN, Sep. 10, 2014, at 1406–22. This study showed that participants who read a distressing story about another student were much more likely to be willing to inflict pain (in this case via hot sauce) on a second person to help someone they felt Empathy for, even when the second person had done nothing wrong. *Id.*

201. *Id.*

202. *Id.*

This Empathic aggression on behalf of an innocent victim comes into play when a capital juror empathizes with a victim, resulting in aggression felt and directed toward the person responsible for the victim's suffering.<sup>203</sup> The Empathic juror may feel "vicariously attacked" and angry at the perpetrator, which therefore can lead to a vote for death.<sup>204</sup>

Professor Bloom's studies showed the same results: "the more Empathic people are, the more they want a harsher punishment."<sup>205</sup> He notes that it is no coincidence that "so many statutes are named for dead girls,"<sup>206</sup> they are just an example of one of the ways politicians exploit the "dark side of Empathy."<sup>207</sup> Bloom argues that America's continued support for the death penalty is due to the empathetic fear and anger stoked by the media and lawmaker's detailed depiction of victims' suffering.<sup>208</sup>

### C. Empathic Psychopathy

"[T]hen I heard the furious vibrations of the chain. The noise lasted for several minutes, during which, that I might hearken to it with the more satisfaction, I ceased my labours and sat down upon the bones."<sup>209</sup>

Historically, Psychopathy has been characterized by manipulative behavior, a lack of fear, remorse, or a lack of Empathy. Today, the Diagnostic and Statistical Manual of Mental Disorders addresses the terms psychopathy and sociopathy as "Antisocial Personality Disorders"<sup>210</sup> with the differentiation in the two being that psychopathy is genetically based while sociopathy is caused by environmental stimuli.<sup>211</sup> The lack of Empathy of psychopaths has been widely commented on and often depicted as the unique characteristic of

203. MARTIN L. HOFFMAN, THE CONTRIBUTION OF EMPATHY TO JUST. & MORAL JUDGMENT, EMPATHY & ITS DEVELOPMENT 197-220 (1987).

204. *Id.*

205. Bloom, *supra* note 43.

206. See H.R. 515, 114th Congress (2015) (Megan's Law); H.R. 1505, 109th Congress (2005) (Jessica Lunsford Act); H.R. 2716, 112th (2011) (Caylee's Law); See also H.R. 3004, 115th Congress (2017) (the filibustered Kate's Law); S. 1762, 114th Congress (2015) (Establishing Mandatory Minimums for Illegal Reentry Act of 2015) (relating to Kate Steinle who was allegedly killed in San Francisco on July 1, 2015 by Francisco Sanchez, an undocumented immigrant).

207. Bloom, *supra* note 43.

208. *Id.*

209. Edgar Allan Poe, *A Cask of Amontillado* (Jul. 20, 2015), <https://www.eapoe.org/works/tales/caska.htm>.

210. AM. PSYCHIATRIC ASSOC., DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 659 (5th ed., 2013).

211. *Id.*

psychopaths.<sup>212</sup> However, the perspective that psychopaths lack Empathy has been strongly rebutted by psychologists and a variety of studies.

Studies have found that psychopaths do in fact feel Empathy, but that they also have a unique innate ability to switch it off at will.<sup>213</sup> When those with psychopathic tendencies were exposed to the suffering of another, their brain activity displayed lower than normal activity associated with Empathy.<sup>214</sup> When these same individuals were explicitly asked to empathize with those they were viewing, their brains displayed normal Empathic responses.<sup>215</sup> These findings indicate that psychopaths do in fact have an ability to consciously empathize.

A study conducted on prisoners with psychopathic tendencies showed that while they may not experience remorse or sorrow as others do, they are much better at faking or mimicking emotions.<sup>216</sup> This mimicry can be inferred to be a sort of conscious Empathic response to reflecting the emotions that a “normal” person may feel in the situation. Researchers theorized that this may be because “most people don’t have to fake emotions all the time, so they don’t have any practice at it[,] [b]ut someone who does not feel these emotions will have practice at faking them, so they will probably be better at it.”<sup>217</sup> A similar study conducted on students, offenders, and others had similar findings.<sup>218</sup> This ability to consciously and effectively mimic the emotions of other has been referred to as “callous Empathy.”<sup>219</sup> This implies that psychopaths rely on this ability to use their understanding of the emotions of others (even the emotions that they have caused) for their own ends. In fact, there are findings that psychopaths may even *use* Empathy to experience and in turn take pleasure in the suffering of their victims.<sup>220</sup>

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212. See, e.g., Ali Venosa, *Psychopath Definition May Be Different Than You Thought: 7 Facts About Psychopaths*, MEDICAL DAILY (Nov. 11, 2015, 7:00 AM), <http://www.medicaldaily.com/psychopath-definition-may-be-different-you-thought-7-facts-about-psychopaths-361112>.

213. Harma Meffert, et al., *Reduced Spontaneous But Relatively Normal Deliberate Vicarious Representations in Psychopathy*, BRAIN, Jul. 23, 2013, at 250–62.

214. *Id.*

215. *Id.*

216. Angela Book, et al., *The Mask of Sanity Revisited: Psychopathic Traits and Affective Mimicry*, EVOL’RY PSYCHOL. SCI., Jun., 2015, at 91–102.

217. Cathy Majtenyi, *Psychopaths Mimic Emotions Very Accurately: Brock Study*, THE BROCKNEWS (Mar. 18, 2015), <https://brocku.ca/brock-news/2015/03/psychopaths-mimic-emotions-very-accurately-brock-study/>.

218. Book, *supra* note 209.

219. *Id.*

220. Brent E. Turvey, *The Impressions of a Man: An Objective Forensic Guideline to Profiling Violent Serial Sex Offenders*, KNOWLEDGE SOLUTIONS (Mar. 1995), <http://www.corpus-delicti.com/impress.html>.

## IV. EMPATHY'S IMPACT ON CAPITAL PUNISHMENT

“If you can learn a simple trick, Scout, you’ll get along a lot better with all kinds of folks. You never really understand a person until you consider things from his point of view, until you climb inside of his skin and walk around in it.”<sup>221</sup>

Empathy and other “extraneous emotional factor[s]” are typically absent from criminal courtrooms,<sup>222</sup> and courts regularly instruct jurors not to allow “sympathy, prejudice, or public opinion” influence their view of a case.<sup>223</sup> Emotions, like Empathy, may be privately felt but should not be used in determination of the appropriateness of death as punishment.<sup>224</sup> But, as the Supreme Court has repeatedly stated “death is different”.<sup>225</sup>

Over the years, Empathy has become increasingly intertwined in the penalty phase of capital trials.<sup>226</sup> Effective attorneys attempt to influence the outcome of the penalty phase by using Mitigation and Victim Impact Evidence to draw out and direct juror Empathy in a manner that favors their position.<sup>227</sup>

In *Morgan v. Illinois*, the Supreme Court held that “[a]ny juror to whom mitigating factors are . . . irrelevant should be disqualified for cause, for [they have] formed an opinion concerning the merits of the case without basis in the evidence developed at trial.”<sup>228</sup> In other words, a “Mitigation impaired” juror, perhaps even one who cannot, or will not, empathize with the defendant and consider the Mitigation evidence that will be offered, is not qualified and should be excused for cause. Since *Morgan*, capital defense counsel handbooks and jury selection checklists commonly instruct counsel to select jurors who are more likely to be swayed by evidence of mitigating factors such as the “mistreatment of the defendant as a child or society’s failure to respond to his cries for help” to believe that the defendant is not *absolutely* culpable, and

221. HARPER LEE, *TO KILL A MOCKINGBIRD* 48 (50th Anniv. ed., 2010).

222. *California v. Brown*, 479 U.S. 538, 543 (1987).

223. KEVIN F. O’MALLEY, ET AL., *FEDERAL JURY PRACTICE & INSTRUCTIONS: CIVIL* § 103:01 (6th ed., 2011).

224. Jody Madeira, *The Family Capital of Capital Families: Investigating Empathic Connections Between Jurors and Defendants’ Families in Death Penalty Cases*, 2011 MICH. ST. L. REV. 859, 875–76 (2011).

225. See, e.g., *Gregg*, 428 U.S. 153; *Furman v. Georgia*, 408 U.S. 238, 286–89 (1972) (Brennan, J., concurring) (“[d]eath . . . is in a class by itself”); *Ring v. Arizona*, 536 U.S. 584, 605–06 (2002) (“no doubt that ‘[d]eath is different’”).

226. See generally SUN WOLF, *PRACTICAL JURY DYNAMICS2: FROM ONE JUROR’S TRIAL PERCEPTIONS, THE GROUPS DECISION-MAKING PROCESSES* (LexisNexis 2007).

227. See, e.g., Beth Caldwell, *Appealing to Empathy*, 64 MAINE L. REV. 391 (2012); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996).

228. *Morgan v. Illinois*, 504 U.S. 719, 738–39 (1992).

therefore deserving of life.<sup>229</sup> Some of these guides explicitly suggest that capital defense counsel identify and select jurors they believe display higher degrees of Empathy during *voir dire*.<sup>230</sup>

There is evidence, discussed below, that doing so may in fact be a fatal mistake.<sup>231</sup> Contrary to assumptions and the above referenced suggestions, it may be in the defendant's best interest to minimize the utilization of ploys for Empathy and may even be in the defendant's best interest for counsel to oppose highly Empathic jurors in some cases. It comes down to a strategic choice counsel must make upon full consideration of the characteristics, circumstances, and history of the defendant, the victim and witnesses who may offer victim impact statements.

As discussed above, race, gender, age, and religion all play roles in the ability, or inability, to empathize. The presence or absence of Empathy can be critical to whether jurors impose death. This irrational emotional influence used to determine either the death-worthiness, or, more commonly, the vengeance-worthiness of victims, does not comport with the requirement laid out by the Supreme Court in *Gregg v. Georgia* that juries not "wanton[ly] and freakish[ly]" impose the death sentence in such an irrational manner.<sup>232</sup>

#### A. Mitigation

"If you look into someone's face long enough, eventually you're going to feel that you're looking at yourself."<sup>233</sup>

During the penalty phase of a capital trial, defense counsel relies heavily on mitigating evidence to show that the defendant is a human who is worthy of life, in an attempt to influence jurors to choose life rather than death.<sup>234</sup>

In the early 1980's the Supreme Court held that failure to evaluate mitigating evidence, especially "evidence of a difficult family history and of emotional disturbance," was a violation of the Eighth and

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229. See, e.g., 2 INDIANA PUB. DEFENDER COUNCIL, DEATH PENALTY DEFENSE § 4-26.

230. See, e.g., ILL. PRAC. SERIES, CRIM. PRAC. & PROC. § 25:75 (2d ed., 1996). This checklist encourages attorneys to consider "are there particular areas the attorney wishes to consider during *voir dire* which will begin the process of capturing the Empathy of the jury for the client." *Id.* (suggesting that counsel should focus recognizing juror Empathy during the selection process in order to effectively draw on that Empathy during the penalty phase).

231. See *infra* Part IV.B.

232. *Gregg*, 428 U.S. at 207.

233. PAUL AUSTER, MR. VERTIGO 37 (1994).

234. Carter, *supra* note 38, at 169.

Fourteenth Amendments.<sup>235</sup> In the early twenty-first century the Supreme Court reinforced the crucial nature of mitigating evidence as it pertains to the penalty phase of capital trials in a series of cases.<sup>236</sup> In these decisions, the Supreme Court held that defense counsel's failure to investigate mitigating evidence adequately was sufficient to establish ineffective assistance of counsel in violation of the Sixth Amendment.<sup>237</sup>

### *I. The Empathic Divide*

“Could a greater miracle take place than for us to look through each other's eye for an instant?”<sup>238</sup>

Psychologist and Professor Craig Haney, one of the foremost thought leaders on the death penalty, has written extensively on what he refers to as the “Empathic Divide” present in capital trials.<sup>239</sup> Haney has explained that “a cognitive and emotional distance between [jurors and defendant] acts as a psychological barrier, making genuine understanding and insight into the role of social history and context in shaping a capital defendant's life course difficult to acquire.”<sup>240</sup> In his research on the subject, Haney has found that jurors in capital trials create this Divide between themselves and the defendants in order to rationalize the action they are being asked to take, to determine whether another human may live or die.<sup>241</sup>

The Empathic Divide is described as the cause of public support for torture, or as proponents love to call it, “enhanced interrogation.”<sup>242</sup> A group of psychologists theorized that they could alter the perceptions and thus close the divide in regards to torture by exposing individuals to torture.<sup>243</sup> Before and after subjecting some of the individuals in the study to minimal versions of common interrogation techniques, the

235. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

236. *See Williams v. Taylor*, 529 U.S. 362 (2000) (defense counsel's failure to meet *Strickland* standard by failing to conduct investigation to discover mitigating evidence); *Wiggins v. Smith*, 539 U.S. 510 (2003) (defense counsel's failure to meet *Strickland* standard by failing to conduct investigation into defendant's social history); *Rompilla v. Beard*, 545 U.S. 374 (2005) ( defense counsel conducting only a limited investigation to find mitigating evidence feel below professional norms) into defendant's social history.

237. *Id.*

238. HENRY DAVID THOREAU, *WALDEN* 6 (2010).

239. Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury.*, 2011 MICH. ST. L. REV. 573 (2011).

240. Craig Haney, *Condemning the Other in Death Penalty Trials*, 53 DEPAUL L. REV. 1557 (2004) [hereinafter *Condemning the Other in Death Penalty Trials*].

241. *Id.*

242. *See Senate Select Comm.. Study of the Central Intelligence Agency's Detention and Interrogation Program* (declassification revisions, Dec. 3, 2014).

243. Mary-Hunter Morris McDonnell, et al., *Torture in the Eyes of the Beholder*, 44 VAND. J. OF TRANSNAT'L L. 112 (2011).

psychologists gauged the subjects' opinions on the acceptability of each method.<sup>244</sup> After being subjected to even these mild versions of interrogation techniques the subjects estimated the related versions of torture as inflicting significantly more suffering.<sup>245</sup> The researchers concluded that "except in a rarified situation, people are going to exhibit a systematic bias to under-appreciate the misery produced by the tactics they endorse."<sup>246</sup> In the capital punishment context this can impact both jurors' inability to comprehend the horror of imprisonment and execution, as well as jurors' inability to empathize based on Mitigation evidences depicting entirely alien childhoods and lives of defendants.

Most jurors have no firsthand experiences to draw upon to contextualize the life of the defendant or imagine themselves in a comparable situation.<sup>247</sup> Few can appreciate the sort of devastating childhoods and lives many capital defendants have experienced.<sup>248</sup> Instead, jurors are prone to consider only the hardships they have an understanding of.<sup>249</sup>

Further widening the divide is the inherent sense of "otherness" jurors feel with regard to defendants.<sup>250</sup> This divide exists "because the harm for which the defendant is responsible is so great and the typical capital defendant is perceived as so dissimilar to the jurors."<sup>251</sup> Therefore, jurors see none of themselves in the defendant.<sup>252</sup> This divide can prevent Empathy simply based on the perceived difference in behavior, even when other similarities between jurors and defendants exist.<sup>253</sup>

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244. *Id.* at 113 ("Torture: prolonged exposure to cold-test's small version: hand submerged in icy water; Solitary confinement-exclusion from an activity; sleep deprivation-tested under mild sleep deprivation.").

245. *Id.* at 114.

246. *See id.*; *Crossing the Line: What Constitutes Torture?*, ASSOC. FOR PSYCHOL. SCI. (Ap. 12, 2011) <http://www.psychologicalscience.org/news/releases/crossing-the-line-what-constitutes-torture.html>.

247. *Condemning the Other in Death Penalty Trials*, *supra* note 213, at 1558.

248. *See* Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 Santa Clara L. Rev. 547 (1995) [hereinafter *The Social Context of Capital Murder*]; David Lisak & Sara Beszterczey, *The Cycle of Violence: The Life History of 43 Death Row Inmates*, 8 PSYCHOL. OF MEN & MASCULINITY 118–28 (2007) (finding that 94 percent of the inmates studied had been physically abused, 59 percent sexually abused, and 83 percent had witnessed violence in adolescence).

249. *See The Social Context of Capital Murder*, *supra* note 221; *See also Condemning the Other in Death Penalty Trials*, *supra* note 213, at 1588.

250. CRAIG HANEY, DEATH BY DESIGN: CAP. PUNISHMENT AS A SOC. PSYCHOL. SYS. 203–04 (2005) [hereinafter DEATH BY DESIGN].

251. *Id.* at 203.

252. *Id.*

253. *Id.*

The likelihood of Mitigation evidence striking an empathetic chord with jurors is even less likely when this lack of experiential similarity and otherness is coupled with the demographic differences that are present between many jurors and capital defendants.<sup>254</sup>

Physical barriers that exist between jurors and defendants further exacerbate the Empathic Divide. While witnesses, including those testifying about the impact of the victim's death,<sup>255</sup> typically are positioned near the jury looking straight at them, defendants sit on the opposite side behind several physical barriers (the jury box, the defendant's table, court clerk's table, etc.). This physical barrier, coupled with the emotional barrier, can make it even more difficult for jurors to empathize with defendants.

The Empathic Divide can break down, particularly in long drawn out cases. Based on general observation and knowledge, weeks or months of being in the same room as another, seeing them interact with family and do other mundane or normal things, allows a defendant to appear more *human*. Again, Orwell gives us an eloquent description of how this sort of Empathy can play out. In his essay *A Hanging*, Orwell's Empathy blossoms the moment he sees the condemned do something familiar and mundane:

When I saw the prisoner step aside to avoid the puddle, I saw the mystery, the unspeakable wrongness, of cutting a life short when it is in full tide. This man was not dying, he was alive just as we were alive. All the organs of his body were working—bowels digesting food, skin renewing itself, nails growing, tissues forming—all toiling away in solemn foolery. His nails would still be growing when he stood on the drop, when he was falling through the air with a tenth of a second to live. His eyes saw the yellow gravel and the grey walls, and his brain still remembered, foresaw, reasoned—reasoned even about puddles. He and we were a party of men walking together, seeing, hearing, feeling, understanding the same world; and in two minutes, with a sudden snap, one of us would be gone—one mind less, one world less.<sup>256</sup>

## 2. Racial Empathy and Mitigation

It has been historically assumed that the race of a defendant would be a highly significant factor in the likelihood that a jury would return a verdict of death.<sup>257</sup> But this assumption has proven to be false.

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254. Emily Hughes, *The Empathic Divide in Capital Trials: Possibilities for Social Neuroscientific Research*, 2011 MICH. ST. L. REV. 541 (2011); See *infra* Part III.B.

255. See *infra* Part III.B.

256. GEORGE ORWELL, *A HANGING* (1931).

257. See generally Carter, *supra* note 38.

Psychologist Samuel Sommers found that “[r]esearch examining the influence of a defendant’s race on individual juror judgments has produced inconsistent results that are difficult to reconcile.”<sup>258</sup> Studies have found everything from no effect, to bias in favor of defendants of the same race, to even bias against/harsher judgment of defendants of the same race.<sup>259</sup>

Haney’s Empathic Divide concept pertains to all capital defendants, but he recognizes that the Empathic Divide is more significant “in the case of African American capital defendants” due to “an even more extreme attribution error that whites tend to commit when they interpret and judge the behavior of minority group members.”<sup>260</sup> This is based, in part, on years of media portrayal of criminal defendants (particularly defendants of color) as “others” via the use of predatory language like “roving packs,” “thugs,” and “terrorists”<sup>261</sup> as well as the use of mug shots when reporting on suspects of color.<sup>262</sup>

### 3. *Imagination and Mitigation*

“Imagination. . . in its arguably most transformative and revelatory capacity, it is the power that enables us to empathize with humans whose experiences we have never shared.”<sup>263</sup>

It may be difficult, but Empathy *can* be drawn out of highly empathetic and imaginative jurors and be helpful in mitigation. Songwriter Sufjan Stevens described the process of writing a song about

258. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 599 (2006).

259. Tara L. Mitchell, et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 636 (2005).

260. DEATH BY DESIGN, *supra* note 243.

261. See, e.g., Barbara Miler, *Roving Youths Attack Students, Police on Temple University Campus*, PENNLIVE.COM (Oct. 25, 2016), [http://www.pennlive.com/news/2016/10/roving\\_youths\\_attack\\_students.html](http://www.pennlive.com/news/2016/10/roving_youths_attack_students.html); Anthea Butler, *Shooters of Color are Called ‘Terrorists’ and ‘Thugs.’ Why are White Shooters Called ‘Mentally Ill’?*, WASH. POST (Jun. 18, 2015), [https://www.washingtonpost.com/posteverything/wp/2015/06/18/call-the-charleston-church-shooting-what-it-is-terrorism/?utm\\_term=.7968b34044d6](https://www.washingtonpost.com/posteverything/wp/2015/06/18/call-the-charleston-church-shooting-what-it-is-terrorism/?utm_term=.7968b34044d6).

262. See Leigh Donaldson, *When the Media Misrepresents Black Men, the Effects are Felt in the Real World*, THE GUARDIAN (Aug. 12, 2015) NEED A LINK; Caroline Siede, *Arrested for Same Crime, in Newspaper White Suspects Get Yearbook Photos, Black Suspects Get Mugshots*, BOINGBOING (Mar. 31, 2015), <http://boingboing.net/2015/03/31/arrested-for-same-crime-in-ne.html>. It is important to note that this pertains only to defendants, the level of Empathy jurors may feel for victims and their family, is another matter altogether. *Id.*; See also *infra* Part III.B.

263. J.K. Rowling, *Speech at Harvard University Commencement*, THE HARVARD GAZETTE (Jun. 5, 2008), <https://news.harvard.edu/gazette/story/2008/06/text-of-j-k-rowling-speech/>.

John Wayne Gacy<sup>264</sup> as a:

Concerted effort to scrupulously evoke the series of events which led to his crime, and, considering the circumstances, that was not a pleasant task . . . Was it his abusive father? Was it a head injury? A doting mother? I'm less interested in cause and effect, in terms of human iniquity. I believe we all have the capacity for murder. We are ruthless creatures. I felt insurmountable Empathy not with his behavior, but with his nature, and there was nothing I could do to get around confessing that, however horrifying it sounds.<sup>265</sup>

Shortly before his death, law professor Andrew Taslitz referred to this phenomenon when he wrote that “because of the emphasis on the offender’s heart and mind” in criminal cases, defense counsel “must be able to appeal powerfully to the human imagination and move jurors to direct their imagination” to enable juror to Empathy.<sup>266</sup>

Selecting highly empathetic or imaginative jurors is still risky when Victim Impact Evidence is being presented, because despite the possibility that they are better able to empathize with the defendant, there remains the likelihood that they will also be able to imagine the suffering of the victims and their families and thus be even more swayed by the Victim Impact Evidence.<sup>267</sup>

#### *B. Victim Impact Evidence*

“Without Empathy the fools won’t bother me and all that’s left to see now are the feathers at the bottom of the box.”<sup>268</sup>

Prosecutors also have an evidentiary tool with which they can draw upon juror Empathy to increase the likelihood a verdict of death is returned: Victim Impact Evidence.<sup>269</sup> This evidence is used to establish

264. See, e.g., TERRY SULLIVAN, & PETER T. MAIKEN, *KILLER CLOWN: THE JOHN WAYNE GACY MURDERS* (2000). Gacy murdered an unknown number of (but likely more than thirty-three) young men in Illinois during the 1970’s by strangulation. Gacy buried twenty-seven of his victims under his home. Gacy was convicted of thirty-three counts of murder and was sentenced to death on March 13, 1980 and executed by lethal injection on May 10, 1994. *Id.*

265. Matthew L. Peck, *Illinois Seems Like a Dream to Me Now: An Interview with Sufjan Stevens*, GAPERS BLOCK (Jul. 4, 2005), [http://gapersblock.com/detour/illinois\\_seems\\_like\\_a\\_dream\\_to\\_me\\_now\\_an\\_interview\\_with\\_sufjan\\_stevens/](http://gapersblock.com/detour/illinois_seems_like_a_dream_to_me_now_an_interview_with_sufjan_stevens/).

266. Andrew E. Taslitz, *Why Did Tinkerbell Get Off So Easy?: The Roles of Imagination and Social Norms in Excusing Human Weakness*, 42 TEX. TECH L. REV. 419, 440 (2009).

267. For a discussion on the potential problems and risks of having an empathetic jury, see *infra* Part IV.B.

268. ALOHA, *FLIGHT RISK*, in *LITTLE WINDOWS CUT RIGHT THROUGH* (Polyvinyl Records 2016).

269. Ray Paternoster & Jerome Deise, *A Heavy Thumb on the Scale: The Effect of Victim Impact Evidence on Capital Decision Making*, 49(1) CRIMINOLOGY: AN INTERDIS. J. 129, 129–61 (2011).

that the harm created by the defendant's actions and the victim's death spilled beyond the act in question and into the victim's family, friends, and community.<sup>270</sup>

In 1987, the Supreme Court held in *Booth v. Maryland* that Victim Impact Evidence was unconstitutional and that there existed no "justification for permitting [the death penalty] decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character."<sup>271</sup> Four years later, the Court overruled this standard in *Payne*, which held that Victim Impact Evidence used to establish a victim's "uniqueness as an individual human being" to encourage a jury to "think the loss to the community resulting from his death" was admissible.<sup>272</sup>

In a recent decision, the Supreme Court determined that Victims' family members are not permitted to testify as to how they believe a defendant should be sentenced, clarifying the limit of *Payne* and which parts of *Booth* are still binding.<sup>273</sup>

Jurors have difficulty empathizing with victims who they view as having engaged in risky, or "immoral" behavior prior to their death.<sup>274</sup> The level to which jurors are able to empathize with victims is related to whether they are capable of imagining themselves in a similar scenario.<sup>275</sup> A married, father of five, Google executive who is killed while walking his dog is far more likely to elicit Empathy than if he is killed on his yacht while shooting heroin with a prostitute he met through a "sugar-daddy" website.<sup>276</sup>

On the other hand, jurors are far more likely to empathize with victims engaged in situations they can imagine themselves in. This is particularly evident in instances of random killings as well as murders of victims who were not engaged in risky activities.<sup>277</sup> Random victims engaged in mundane everyday activities (getting gas, using a restroom, withdrawing money from an ATM) are far more likely to evoke a great deal of identification and Empathy from jurors who imagine that "there, but for the grace of God go I."<sup>278</sup>

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270. *Payne*, 501 U.S. 808.

271. *Booth v. Maryland*, 482 U.S. 496, 506 (1987).

272. *Payne*, 501 U.S. 808, 823.

273. *Bosse v. Oklahoma*, 137 S. Ct. 1 (2016).

274. Sundby, *supra* note 142.

275. *Id.*

276. Erik Ortiz, 'Call Girl Killer' Alix Tichelman Gets Six Years for Google Exec's Death, NBCNEWS.COM (May 20, 2015), <https://www.nbcnews.com/news/us-news/call-girl-killer-alix-tichelman-gets-six-years-google-execs-n361481>.

277. Sundby, *supra* note 142.

278. *Id.*

There does exist a limit to the extent prosecutors can play to the Empathy of jurors. Prosecutors cannot explicitly, or even implicitly, direct jurors to imagine themselves in the shoes of the victim.<sup>279</sup> This impermissible ‘golden rule’ argument directs “jurors to place themselves in the victim’s position, asks the jurors to imagine the victim’s pain and terror or imagine how they would feel if the victim were a relative.”<sup>280</sup>

### *1. Racial Empathy and Victim Impact Evidence*

Much has been said and written about the link between race of the victim and application of the death penalty. While there are examples of overt conscious or subconscious racism, the factors discussed above regarding the barriers to cross racial Empathy indicate that Empathy, and the fact that jurors are put in a position to empathize with victims, may play a more significant role in the application of the death penalty than conscious or even subconscious racism.

The difficulty of and the rarity in achieving cross-racial Empathy inevitably leads to an irrationally wanton and freakish application of the death penalty where neither mitigating factors nor the impact of the death has as significant of an impact as the random characteristics jurors share with victims and defendants.<sup>281</sup> As professor Bloom writes, because of the overwhelming “evidence that we are more prone to empathize with some individuals over others—with factors like race, sex, and physical attractiveness playing a powerful role—it’s hard to think of a more biased and unfair way to determine punishment.”<sup>282</sup>

### *2. The Future of Victim Impact Evidence*

“ ‘Empathy’ is the latest code word for liberal activism, for treating the Constitution as malleable clay to be kneaded and molded in whatever form justices want. It represents an expansive view of the judiciary in which courts create policy that couldn’t pass the legislative branch or, if it did, would generate voter backlash.”<sup>283</sup>

Perhaps our new Attorney General, Jefferson Sessions, will stick with his anti-Empathy stance and work to eliminate the inappropriate empathetic pull of Victim Impact Evidence as it pertains to the penalty phase of capital trials. During Justice Sotomayor’s confirmation

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279. See, e.g., *United States v. Copple*, 24 F.3d 535 (3d Cir. 1994), *People v. Mendoza* 42 Cal. 4th 686 (2007).

280. *Hutchinson v. State*, 882 So.2d 943, 954 (Fla. 2004).

281. Bloom, *supra* note 43.

282. *Id.*

283. Karl Rove, ‘Empathy’ is Code for Judicial Activism, WALL STREET JOURNAL (May 28, 2009), <https://www.wsj.com/articles/SB124347199490860831> (last visited 09/25/2017).

proceedings, then-Senator Sessions derided President Obama's comments regarding his intent to nominate Justices who were practiced in, and willing to, display Empathy and argued that Empathy is prejudicial, "akin to politics", and "has no place in the courtroom."<sup>284</sup> He explained that "Empathy for one party is always prejudice against another."<sup>285</sup>

Unfortunately, any hope that Attorney General Sessions might apply his anti-Empathy stance in a manner that would reduce the prevalence of capital sentences is likely foolish. During Justice Kagan's nomination hearing, he said that viewing capital punishment as "cruel and unusual" could "never be a fair interpretation of the cruel and unusual clause in the Constitution."<sup>286</sup> He has also stated that the Supreme Court's decision to ban the executions of minors was not a "principled approach to jurisprudence."<sup>287</sup> Ultimately, Attorney General Sessions believes "we have had far too much obstruction of the death penalty" which, in his view, must end.<sup>288</sup>

#### CONCLUSION

Empathy is a crucial and fundamental aspect of healthy human relationships. Despite Paul Bloom's perspective, much good can come from Empathy. In capital cases, Empathy can potentially help in mitigation, though if impeded by one or more of the factors above<sup>289</sup> it may have negligible impact. This underscores how important jury selection can be. Defense counsel must carefully consider all the relevant characteristics, circumstances, and history of the defendant, victim and witnesses who may offer victim impact statements and how potential jurors may empathize with each player. If the factors are stacked against the defendant, counsel will have an uphill battle to try to humanize the defendant and make connections that jurors can recognize in the defendant.

Unfortunately, even if counsel can humanize the defendant and

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284. *The Nomination of Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States*, COMM. ON THE JUDICIARY (July 13, 2009), <https://www.judiciary.senate.gov/meetings/the-nomination-of-sonia-sotomayor-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states>.

285. *Id.*

286. Jeff Sessions III, *Nomination Elena Kagan*, VOTE SMART (June 21, 2010), <https://votesmart.org/public-statement/523280/nomination-elena-kagan#.Wlwh7COZNp8>.

287. Jeff Sessions III, *Sotomayor Nomination*, VOTE SMART (June 23, 2009), <https://votesmart.org/public-statement/435711/sotomayor-nomination#.WlwhqCOZNp8>.

288. Jeff Sessions III, *Executive Session*, VOTE SMART (Jan. 23, 2012) [https://votesmart.org/public-statement/664113/executive-session#.Wlwg\\_yOZNp8](https://votesmart.org/public-statement/664113/executive-session#.Wlwg_yOZNp8).

289. *See supra* Part II.

create empathetic connections with jurors, it may still not be enough. It will nearly always be easier for empathetic jurors to make strong Empathetic connections with victims.<sup>290</sup> These connections can have deadly consequences when prosecutors use Victim Impact Evidence to draw out Empathetic anger.

Empathy is not the problem; the problem is the current system of determining when the death penalty is appropriate. The influence Empathy has on the penalty phase will continue to lead to arbitrary and capricious utilization of the death penalty based on the illogical assessment of the victim's worthiness. This concept is completely at odds with the Supreme Court's decision in *Saffle* which requires a "reasoned moral response, rather than an emotional one based on the whims or caprice of jurors."<sup>291</sup> Sympathy and mercy are more appropriate emotions which can be logically applied and do not share Empathy's link to violence, or obstruction to logical and analytical thought.

Until lawmakers and courts recognize the unconstitutionally wanton, freakish, and irrational influence victim impact statements have on the application of the death penalty, Empathy will continue to send men "to the measuring line,<sup>292</sup> to be fit for a box of pine."<sup>293</sup>

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290. *See supra* Part IV.

291. *Saffle*, 494 U.S. at 484.

292. The "measuring line" is a biblical reference that signifies something marked off for judgment or destruction. *See Isaiah* 28:17; *2 Kings* 21:13.

293. PLANES MISTAKEN FOR STARS, CROOKED MILE (Abacus Records 2006).