

2016

When Empathy Bites Back: Cautionary Tales from Neuroscience for Capital Sentencing

Sheri Lynn Johnson

Cornell Law School

Amelia Courtney Hritz

Cornell University

Caisa Elizabeth Royer

Cornell University

John H. Blume

Cornell Law School

Recommended Citation

Sheri Lynn Johnson, Amelia Courtney Hritz, Caisa Elizabeth Royer, and John H. Blume, *When Empathy Bites Back: Cautionary Tales from Neuroscience for Capital Sentencing*, 85 Fordham L. Rev. 573 (2016).

Available at: <http://ir.lawnet.fordham.edu/flr/vol85/iss2/9>

This Symposium is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

WHEN EMPATHY BITES BACK: CAUTIONARY TALES FROM NEUROSCIENCE FOR CAPITAL SENTENCING

Sheri Lynn Johnson, Amelia Courtney Hritz,** Caisa Elizabeth Royer***
& John H. Blume*****

We must learn to regard people less in light of what they do or omit to do and more in light of what they suffer.¹

Because he was just a dumb nigger.²

INTRODUCTION

It is not easy to persuade most people to willfully choose to kill another human being.³ Because obtaining a death sentence requires persuading twelve individuals to do just that, most capital trials involve efforts by the prosecutor to dehumanize the defendant. If jurors come to see the defendant as “different,” “other,” or not “fully human,” they are more likely to determine that the defendant “deserves” the ultimate punishment, making what the U.S. Supreme Court has described as essentially a moral judgment about the value of the life of the accused.

* James and Mark Flanagan Professor of Law, Associate Dean for Public Engagement, and Assistant Director, Death Penalty Project, Cornell Law School. This Article is part of a symposium entitled *Criminal Behavior and the Brain: When Law and Neuroscience Collide* held at Fordham University School of Law. For an overview of the symposium, see Deborah W. Denno, *Foreword: Criminal Behavior and the Brain: When Law and Neuroscience Collide*, 85 FORDHAM L. REV. 399 (2016).

** Graduate student in the dual J.D./Ph.D. Developmental Psychology and Law Program, Cornell University.

*** Graduate student in the dual J.D./Ph.D. Developmental Psychology and Law Program, Cornell University.

**** Samuel F. Leibowitz Professor of Trial Techniques and Director, Death Penalty Project, Cornell Law School.

1. DIETRICH BONHOFFER, *WITNESS TO JESUS CHRIST* 262 (John de Gruchy ed., 1991).

2. A juror’s answer to why he believed capital defendant Johnny Bennett murdered the victim. Bennett’s death sentence was later overturned because the sentencing “was so infected by racial animus by the prosecutor and a juror . . . that Bennett was deprived of his constitutional right to due process.” Andrew Cohen, *A Judge Overturned a Death Sentence Because the Prosecutor Compared a Black Defendant to King Kong*, MARSHALL PROJECT (Mar. 28, 2016), <https://www.themarshallproject.org/2016/03/28/a-judge-overturned-a-death-sentence-because-the-prosecutor-compared-a-black-defendant-to-king-kong#.VJueiNz4G> [https://perma.cc/2MAU-VS7S].

3. See generally DAVID GROSSMAN, *ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY* (2003).

But why is this so?

The answer lies with the fact that jurors are much less likely to empathize with a defendant whom they perceive as being not like them. This process of dehumanization is often pursued through explicit, time-tested strategies, such as comparing the defendant to a wild, crazed animal⁴ or casting him (and it is virtually always a “he”) as a psychopathic killer.⁵ Dehumanization also can be pursued implicitly by contrasting the value of a defendant’s life with that of the victim.⁶ No matter how it is accomplished, dehumanizing a defendant helps to overcome a juror’s natural human inhibition against taking another person’s life.⁷

Conversely, lawyers for a defendant facing the ultimate punishment generally see their task as humanizing their client. Defense lawyers believe that if jurors can identify with the defendant, imagine his “walk in life,” or “see the world through his eyes,” they are less likely to choose the death penalty.⁸ Capital defense teams pursue humanization—for the most part—through investigation, development, and presentation of mitigating evidence.⁹ The Supreme Court has defined mitigating evidence very broadly: anything that might legitimately persuade a juror to choose life over death.¹⁰ Common types of mitigating evidence offered at capital trials include evidence of suffering and disadvantage experienced by the defendant, such as childhood physical and sexual abuse, low cognitive functioning, poverty, brain damage, substance abuse and addiction, trauma, and mental illness, as well as positive traits such as prior good acts, talents, and adaptability to confinement.¹¹ Such evidence, and the empathy for the defendant it is intended to create, is perceived as central to persuading jurors to spare a capital defendant’s life. Without empathy, the exercise of mercy is rare.

4. See, e.g., *Bennett v. Stirling*, No. CV 2:13-3191-RMG, 2016 WL 1070812, at *2 (D.S.C. Mar. 16, 2016) (describing how a prosecutor referred to the defendant as “King Kong on a bad day,” a “caveman,” and a “beast of burden”).

5. See, e.g., *People v. Jones*, 931 P.2d 960, 997–98 (Cal. 1997) (comparing the defendant to Adolf Hitler, Charles Manson, and the “Sacramento Vampire Killer,” Richard Chase); *Ballenger v. State*, 667 So. 2d 1242, 1269 (Miss. 1995) (comparing the defendant to Charles Manson).

6. See, e.g., *Freeman v. State*, 776 So. 2d 160, 184–85 (Ala. Crim. App. 1999) (quoting the prosecutor’s closing argument, which compared the victim (an honor student) and the victim’s mother (who worked hard to provide for her children) to the defendant (a person who “couldn’t get what he wanted”)).

7. This is not unique to capital sentencing. The same process underlies many historical forms of medical and animal experimentation. See Sherry F. Colb, *The Hidden Atrocities Behind Medical Progress*, VERDICT (Mar. 30, 2016), <https://verdict.justia.com/2016/03/30/the-hidden-atrocities-behind-medical-progress> (describing medical experiments on slaves performed without anesthesia as requiring the suppression of empathy) [<https://perma.cc/2UHW-683B>]; see also GROSSMAN, *supra* note 3.

8. See Sean D. O’Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 722–24 (2008).

9. See *id.*

10. See *Skipper v. South Carolina*, 476 U.S. 1, 6 (1986).

11. See Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1547 n.41 (1998).

When a capital defendant is sentenced to death, jurors have failed to cross what Craig Haney has referred to as “the empathic divide,” which he describes as the “inability to perceive capital defendants as enough like themselves to readily feel any of their pains, to appreciate the true nature of the struggles they have faced, or to genuinely understand how and why their lives have taken very different courses from the jurors’ own.”¹² This inability, in turn, results in jurors making what we (two capital defense lawyers and two psychologists) believe to be a fundamental attribution error by “systematically discounting the important social, historical, and situational determinants of behavior . . . and correspondingly exaggerating the causal role of dispositional or individual characteristics.”¹³

Thus, empathy lies at the core of the capital trial. The rub, however, is that, despite decades of research, empathy is not clearly understood, and its implications for capital trials are largely unexplored. The confusion is—in some part—grounded in varying definitions of empathy used by those studying it.¹⁴ There are at least eight different methods of conceptualizing empathy,¹⁵ and the concepts vary when researchers analyze different questions.¹⁶ Definitions of empathy range from a focus on the cognitive ability to understand another person’s perspective (known as “attributionally driven” empathy) to the emotional ability to feel what another person feels (known as “perceptual and sensory driven” empathy).¹⁷

Advances in neuroscience have allowed researchers to begin exploring the different components of empathy. For example, some studies suggest that cognitive and affective components of empathy reflect distinct neural mechanisms.¹⁸ Neuroscientists typically understand empathy to include an

12. Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1558 (2004).

13. Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 590.

14. See Frederique de Vignemont & Tania Singer, *The Empathic Brain: How, When and Why?*, 10 TRENDS COGNITIVE SCI. 435, 435 (2006) (“There are probably nearly as many definitions of empathy as people working on the topic.”); Jean Decety & William Ickes, *Introduction: Seeking to Understand the Minds (and Brains) of People Who Are Seeking to Understand Other People’s Minds*, in THE SOCIAL NEUROSCIENCE OF EMPATHY, at vii, vii (Jean Decety & William Ickes eds., 2009) (noting that empathy is a complicated construct that “has been used by different writers in very different ways”).

15. See C. Daniel Batson, *These Things Called Empathy: Eight Related but Distinct Phenomena*, in THE SOCIAL NEUROSCIENCE OF EMPATHY, *supra* note 14, at 3, 4–8 (discussing that there are eight different psychological states corresponding to distinct concepts of empathy, including (1) knowing another person’s internal state, (2) adopting the posture of an observed other, (3) coming to feel as another person feels, (4) projecting oneself into another’s situation, (5) imagining how another is feeling, (6) imagining how one would feel in the other’s place, (7) feeling distress at witnessing another person’s suffering, and (8) feeling for another person who is suffering).

16. See *id.* at 3 (“Application of the term *empathy* to so many distinct phenomena is, in part, a result of researchers invoking empathy to provide an answer to two quite different questions: How can one know what another person is thinking and feeling? What leads one person to respond with sensitivity and care to the suffering of another?”).

17. See Nancy Eisenberg & Natalie D. Eggum, *Empathic Responding: Sympathy and Personal Distress*, in THE SOCIAL NEUROSCIENCE OF EMPATHY, *supra* note 14, at 71.

18. See *infra* Part I.A.

affective response to another person's emotions and a cognitive ability to adapt the other person's perspective.¹⁹ The first, "affective" component involves a neural response similar to the experience of one's own emotional state. This affective response creates an emotional reaction to imagining the other person's thoughts, feelings, and perspective.²⁰ The second, "cognitive" component involves imagining the world through the eyes of another person.²¹ This is an intentional ability that uses cognitive resources to take another's perspective.²² Building on these findings, neuroscientists have explored individual differences in the experience of empathy and the impact of characteristics of the person with whom they are empathizing (the target of the empathy).

This Article examines the implications of emerging neuroscientific findings regarding empathy for capital trials.²³ We have approached this task with caution because neuroscientists' understanding of the human brain is still evolving.²⁴ As with any new field, if neuroscience is completely trusted before it is thoroughly tested, there is a risk of embracing the new phrenology.²⁵ Given the state of the research, our advice to defense lawyers is quite modest, but we believe that there are some important lessons for lawyers, judges, legislators, and other stakeholders in the capital punishment system.

Earlier research from the Capital Jury Project (CJP) has revealed that jurors primarily decide whether to impose a sentence of death based on three factors: (1) how heinous they believe the crime was, (2) how dangerous they believe the defendant to be, and (3) whether they perceive the defendant to

19. See Jean Decety & Sara D. Hodges, *The Social Neuroscience of Empathy*, in BRIDGING SOCIAL PSYCHOLOGY 103 (Paul A.M. Van Lange ed., 2006).

20. See Karyn M. Plumm & Cheryl A. Terrance, *Battered Women Who Kill: The Impact of Expert Testimony and Empathy Induction in the Courtroom*, 15 VIOLENCE AGAINST WOMEN 186, 191 (2009).

21. See *id.*

22. See Jean Decety & Philip L. Jackson, *A Social-Neuroscience Perspective on Empathy*, 15 CURRENT DIRECTIONS PSYCHOL. SCI. 54, 55 (2006).

23. Cf. Emily Hughes, *The Empathic Divide in Capital Trials: Possibilities for Social Neuroscientific Research*, 2011 MICH. ST. L. REV. 541 (noting the need for additional research to develop methods for crossing the empathic divide).

24. See Carl Zimmer, *Updated Brain Map Identifies Nearly 100 New Regions*, N.Y. TIMES (July 20, 2016), <http://www.nytimes.com/2016/07/21/science/human-connectome-brain-map.html> (reporting that neuroscientists have recently identified "nearly 100 previously unknown [brain] regions" and that "[i]t may take decades for scientists to figure out what each region is doing, and more will be discovered in coming decades") [<https://perma.cc/28ZH-2TZQ>].

25. See Simon Oxenham, *Thousands of fMRI Brain Studies in Doubt Due to Software Flaws*, NEW SCIENTIST (July 18, 2016), <https://www.newscientist.com/article/2097734-thousands-of-fmri-brain-studies-in-doubt-due-to-software-flaws/> ("It's another blow for neuroscience. The discovery of major software flaws could render thousands of fMRI brain studies inaccurate.") [<https://perma.cc/C7DE-SEJ8>]; see also Gerald Bierbaum, *SMO: Front-Loading Mitigation*, VOICE DEF. ONLINE (July 2, 2016), <http://www.voiceforthedefenseonline.com/newsletters/2016/July2016.pdf> (discussing "overclaiming" based on neuroscience) [<https://perma.cc/6AUJ-Q4DA>].

be remorseful.²⁶ The jurors' assessment of these three factors, however, is influenced by both the race of the defendant and the jurors' interpretation of mitigating evidence.²⁷ Building on this foundation, we explore the empathy research to better understand why and how the presumptively legitimate factor of mitigating evidence—and the facially impermissible factor of race—affect capital sentencing decisions.

Part I, the bulk of this Article, sets forth the relevant scientific findings concerning empathy. We begin with a brief discussion of what is known about empathy, including individual differences for the capacity to empathize, and then describe the tendency to empathize with people who feel familiar. Part I also addresses how empathy for one person can cause individuals to act with aggression toward others, noting that juror empathy for victims can therefore be harmful to capital defendants. Finally, Part I also examines the results of efforts by researchers to increase empathy in a variety of contexts.

Part II turns to the application of this research for the practice of capital punishment. We address both the obligations this knowledge imposes on trial courts and the advice it suggests to capital defense lawyers. We consider implications for jury selection, the presentation of evidence, and arguments by counsel. We conclude that the neuroscience findings we have summarized provide additional support for our prior conviction: it is not possible for a system of capital punishment to neutrally determine which defendants "deserve" death.

I. THE NEUROSCIENCE OF EMPATHY

We begin with an overview of the research on the neuroscience of empathy, including a discussion of individual differences in empathy, out-group bias (including racial bias), dehumanization, empathy-linked aggression, and what is known about how empathy for another person can be increased.

A. *The Nature of Empathy*

As noted above, there are multiple definitions of empathy that are varyingly deployed depending both upon the researcher and the question or questions being asked.²⁸ For the purposes of this Article, we define empathy as the act of understanding and adopting another's perspective, either through affective or cognitive processes.²⁹ Empathy is distinct from sympathy, which

26. See John H. Blume et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1037 (2008).

27. See *id.* at 1047 n.44.

28. See *supra* notes 15–17 and accompanying text.

29. See Tamara M. Haegerich & Bette L. Bottoms, *Empathy and Jurors' Decisions in Patricide Trials Involving Child Sexual Assault Allegations*, 24 LAW & HUM. BEHAV. 421, 422 (2000); see also Frank Krueger et al., *Oxytocin Selectively Increases Perceptions of Harm for Victims but Not the Desire to Punish Offenders of Criminal Offenses*, 8 SOC. COGNITIVE &

is the act of feeling “sorrow or concern for another.”³⁰ While sympathy involves feeling sadness for another person, empathy involves sharing another person’s emotions.³¹ That emotion could be sadness, but it also could be a different emotion, such as pain, happiness, or anger. Whether sympathy and empathy influence behavior in distinct ways is not clear, and neuroimaging cannot yet distinguish between sympathetic and affective brain responses.³² Despite this uncertainty, many researchers believe that the concept of empathy should be defined narrowly.³³ By focusing on a narrow understanding of empathy that is distinct from sympathy, researchers are able to make more precise claims about the neural mechanisms underlying empathy and its subsequent influence on behavior.³⁴

Neuroscientists³⁵ make the distinction that empathy results from two different neural processes: (1) an effortful cognitive attempt to take on another person’s perspective (i.e., understanding another’s feelings) and (2) an affective response to another person’s emotions (i.e., sharing another’s feelings).³⁶ Neuroscientists have attempted to pinpoint where both components of empathy occur in the brain using functional magnetic resonance imaging (fMRI) and have found variation in which brain regions are associated with empathy.³⁷

The cognitive component of empathy is associated with increased activity in the frontal and parietal cortices,³⁸ which include networks associated with understanding what others are thinking based on their behavior.³⁹ Studies demonstrating the affective component of empathy have shown that perception of a given behavior in another individual can automatically activate one’s own representations of that behavior.⁴⁰ Mirror neurons likely explain this process.⁴¹ The mirror neuron system is a network of brain cells

AFFECTIVE NEUROSCIENCE 494, 494 (2013) (defining empathy as “the capacity to share and understand the feelings of others”).

30. Nancy Eisenberg & Paul Miller, *Empathy, Sympathy, and Altruism: Empirical and Conceptual Links*, in EMPATHY AND ITS DEVELOPMENT 292 (Nancy Eisenberg & Janet Strayer eds., 1990).

31. See Haegerich & Bottoms, *supra* note 29, at 438.

32. See de Vignemont & Singer, *supra* note 14, at 439–40.

33. *See id.* at 435.

34. *See id.*

35. While most neuroscientists make this distinction, other researchers do not. Throughout this Article, we will note if the researcher has indicated that he or she is measuring cognitive or affective empathy. If not specified, the researcher did not distinguish between the two.

36. See Decety & Hodges, *supra* note 19, at 103; Plumm & Terrance, *supra* note 20, at 191.

37. See Decety & Hodges, *supra* note 19, at 103 (“Our task is not to identify a single neural/cognitive module for empathy; no such simple module exists.”).

38. *See id.* at 104.

39. See Henrik Walter, *Social Cognitive Neuroscience of Empathy: Concepts, Circuits, and Genes*, 4 EMOTION REV. 9, 13 (2012) (finding that networks associated with mentalizing include the ventromedial prefrontal cortex, the posteromedial cortex, the bilateral temporoparietal junction, and the bilateral superior temporal sulcus).

40. *See id.* at 11.

41. See generally Giuseppe di Pellegrino et al., *Understanding Motor Events: A Neurophysiological Study*, 91 EXPERIMENTAL BRAIN RES. 176 (1992).

that fire both during performance of a task and during observation of the task done by another.⁴² This, in turn, causes the same regions of the brain to be involved in the recognition and the expression of specific emotions.⁴³ For example, the anterior insula and the cingulate cortex are consistently activated during the experience of pain as well as the observation of pain in another.⁴⁴ This is associated with personal distress at witnessing another person's suffering.⁴⁵ Another important aspect of empathy is recognizing the target being observed as separate from oneself. This activates the temporal lobe and prefrontal cortex.⁴⁶

Researchers measure two different categories of empathy: state and trait empathy.⁴⁷ As opposed to the cognitive and affective components, state and trait empathy refer to the type of empathy that is being measured, not the mechanism by which empathy is experienced. State empathy is inspired by a specific set of circumstances and is temporary.⁴⁸ This type of empathy is created in a particular circumstance when participants are induced to feel empathy for a target. In contrast, trait empathy is an individual's natural ability to empathize with other people.⁴⁹ Trait empathy is considered to be an individual difference and is generally stable. While researchers can measure trait empathy using personality scales, they cannot (currently) manipulate it.⁵⁰

42. See Karen E. Gerdes et al., *Teaching Empathy: A Framework Rooted in Social Cognitive Neuroscience and Social Justice*, 47 J. SOC. WORK EDUC. 109, 114 (2011); see also Sarah-Jayne Blakemore & Jean Decety, *From the Perception of Action to the Understanding of Intention*, 2 NATURE REVIEWS NEUROSCIENCE 561, 566 (2001) (finding that the premotor cortex, the parietal lobe, the supplementary motor area, and the cerebellum are included in the neural network).

43. See Decety & Hodges, *supra* note 19, at 104.

44. See Philip L. Jackson et al., *How Do We Perceive the Pain of Others? A Window into the Neural Processes Involved in Empathy*, 24 NEUROIMAGE 771, 775 (2005) ("The results demonstrate that watching other individuals in pain-inducing situations triggers a specific part of a neural network known to be involved in self-pain processing.").

45. See Walter, *supra* note 39, at 12, 14 (discussing that activation in these brain regions may be due to distress rather than the affective component of empathy).

46. See generally Tania Singer et al., *Empathetic Neural Responses Are Modulated by the Perceived Fairness of Others*, 439 NATURE 466 (2006).

47. See Walter, *supra* note 39, at 9.

48. See Tania Singer et al., *Effects of Oxytocin and Prosocial Behavior on Brain Responses to Direct and Vicariously Experienced Pain*, 8 EMOTION 781, 787 (2008).

49. See *id.* Trait empathy may be a result of a genetic component to empathy. This hypothesis has been supported by twin studies. See Walter, *supra* note 39, at 14. However, without social interaction and emotional bonds with others, it is unlikely that empathy will develop even if a person has a biological predisposition for it. See Jean Decety & Philip L. Jackson, *The Functional Architecture of Human Empathy*, 3 BEHAV. & COGNITIVE NEUROSCIENCE REVIEWS 71, 72 (2004).

50. See Decety & Jackson, *supra* note 49, at 191.

Finally, there is some evidence that brain stem neuropeptides,⁵¹ such as oxytocin and vasopressin, are correlated with empathy.⁵² For instance, researchers have found that oxytocin is associated with increased empathy.⁵³ Genetic variants affecting oxytocin receptors influence a person's innate predisposition to feel empathy,⁵⁴ while the administration of oxytocin in a laboratory setting has been shown to increase empathy. Specifically, increased oxytocin has been shown to increase empathetic concern for the victim of a crime and also improve prosocial feelings, such as trust, generosity, and cooperation.⁵⁵ Nevertheless, studies in which oxytocin is administered do not yield consistent results, with some research finding no effect of oxytocin on feelings of empathy for another person who is in pain.⁵⁶ Most research has focused on oxytocin, and the link between vasopressin and empathy is unclear.⁵⁷ There is some evidence, however, that suggests that vasopressin may influence generosity toward strangers and similar social behaviors.⁵⁸

B. Individual Differences in Empathy

Even though trait empathy is somewhat unpredictable, individual differences in empathy do matter. Individuals with higher trait empathy are more likely to mimic another's facial expression, are better at decoding others' expressed emotions, and may exhibit more neural resonance when observing another's pain.⁵⁹ In addition, studies suggest that variations in trait empathy are correlated with variations in brain structure.⁶⁰

Perhaps one of the most prominent stereotypes related to empathy is that women are more empathetic than men.⁶¹ Consistent with that stereotype,

51. Neuropeptides are molecules that can influence the activity of the brain. See Andreas Meyer-Lindenberg et al., *Oxytocin and Vasopressin in the Human Brain: Social Neuropeptides for Translational Medicine*, 12 NATURE REVIEWS NEUROSCIENCE 524, 524 (2011).

52. See C. Sue Carter et al., *Neural and Evolutionary Perspectives on Empathy*, in THE SOCIAL NEUROSCIENCE OF EMPATHY, *supra* note 14, at 169, 179.

53. See Walter, *supra* note 39, at 14.

54. See *id.* at 14–15.

55. See Krueger et al., *supra* note 29, at 496–97.

56. See Singer et al., *supra* note 48, at 787.

57. See Anneke E.K. Buffone & Michael J. Poulin, *Empathy, Target Distress, and Neurohormone Genes Interact to Predict Aggression for Others—Even Without Provocation*, 40 PERSONALITY & SOC. PSYCHOL. BULL. 1406, 1407 (2014).

58. See *id.*

59. See Alicia J. Hofelich & Stephanie D. Preston, *The Meaning in Empathy: Distinguishing Conceptual Encoding from Facial Mimicry, Trait Empathy, and Attention to Emotion*, 26 COGNITION & EMOTION 119, 120 (2012).

60. See Alessio Avenanti et al., *The Pain of a Model in the Personality of an Onlooker: Influence of State-Reactivity and Personality Traits on Embodied Empathy for Pain*, 44 NEUROIMAGE 275, 276 (2009); Michael J. Banissy et al., *Inter-individual Differences in Empathy Are Reflected in Human Brain Structure*, 62 NEUROIMAGE 2034, 2038 (2012). It is not yet known whether variation in brain structure contributes to, or is a consequence of, individual differences in empathy.

61. See Martin L. Hoffmann, *Sex Differences in Empathy and Related Behaviors*, 84 PSYCHOL. BULL. 712, 712 (1977); see also REBECCA M. JORDAN-YOUNG, BRAIN STORM: THE FLAWS IN THE SCIENCE OF SEX DIFFERENCES 3–4 (2010) (noting that Simon Baron-Cohen's

researchers find that women show higher levels of affective and cognitive empathy on self-report measures.⁶² These differences decrease, however, when it is unclear what the survey is measuring, which suggests that women may report being empathetic to meet societal expectations.⁶³ A variety of behavioral studies of empathy also find that women are more empathetic than men.⁶⁴ For example, studies have found that both young girls and adult women are better at inferring what other people are thinking compared to males of the same age.⁶⁵ In addition, gender differences have been found in the mirror neuron system, with females showing stronger motor resonance to observation of motor activity.⁶⁶ Overall, however, scientists have been unable to find consistent physical differences in male and female brains despite years of effort.⁶⁷ In addition, as is true with respect to many other gender differences, neuroscience cannot yet answer whether such differences are attributable to a neurological predisposition or different socialization.⁶⁸ Women are rewarded for having traits related to empathy, such as compassion and responsiveness to the needs of others, while men traditionally are encouraged to acquire a different set of traits, such as problem solving and logic.⁶⁹ Consistent with the influence of socialization, the increased trait empathy in women usually is attributed to enhanced motivation to empathize rather than an intrinsic skill.⁷⁰ It is however, worth noting the influence of oxytocin on empathy, as described above, which suggests a possible biological basis for some differences in empathy, given that women have much higher levels of oxytocin.⁷¹

research on sex differences in “empathizers” and “systemizers” has provoked controversy as an explanation for why there are fewer female scientists and engineers compared with female teachers and nurses).

62. See Banissy et al., *supra* note 60, at 2036 (finding that women scored higher on self-report measures of empathic concern for an observed individual and personal distress at witnessing negative experiences of others). But see William Ickes et al., *Gender Differences in Empathic Accuracy: Differential Ability or Differential Motivation?*, 7 PERS. RELATIONSHIPS 95, 95 (2000) (describing studies finding that men and women believe that women had more emotional insight than men, suggesting that this may reflect an American stereotype).

63. See Yawei Cheng et al., *Gender Differences in the Mu Rhythm of the Human Mirror-Neuron System*, PLOS ONE 4 (May 2008), <http://journals.plos.org/plosone/article/asset?id=10.1371/journal.pone.0002113.PDF> [https://perma.cc/HZQ9-S8SR].

64. See Bhismadev Chakrabarti & Simon Baron-Cohen, *Empathizing: Neurocognitive Developmental Mechanisms and Individual Differences*, 156 PROGRESS BRAIN RES. 403, 408–09 (2006) (reviewing research on gender differences in empathy). Simon Baron-Cohen theorizes that “the female brain is predominantly hard-wired for empathy” based on low fetal exposure to testosterone, but research findings across samples and research teams have been largely inconsistent. JORDAN-YOUNG, *supra* note 61, at 85–87; see also Martin Schulte-Ruther et al., *Gender Differences in Brain Networks Supporting Empathy*, 42 NEUROIMAGE 393 (2008).

65. See Chakrabarti & Baron-Cohen, *supra* note 64, at 408.

66. See Cheng et al., *supra* note 63, at 1–2.

67. See JORDAN-YOUNG, *supra* note 61, at 49–52.

68. See Chakrabarti & Baron-Cohen, *supra* note 64, at 408.

69. See Hoffmann, *supra* note 61, at 712.

70. See Ickes et al., *supra* note 62, at 107–08.

71. See Walter, *supra* note 39, at 14. Women have even higher levels of oxytocin while giving birth, during breast feeding, and during early interactions with their babies. See Jennifer

In addition to gender differences, research has shown disparities in empathy correlated with age, though the results are not always consistent.⁷² In one study, older adults (aged sixty to eighty) demonstrated higher levels of affective empathy and gave higher self-report measures of cognitive empathy than any other age group.⁷³ However, despite their high self-report measures, when older adults were given a test which required them to interpret what emotion was being communicated by a pair of eyes, their scores on the test were significantly lower than any other age group.⁷⁴ These apparently contradictory results could be reconciled as reflecting the fact that older adults have more difficulty interpreting emotional cues than any other age group, as demonstrated in other studies,⁷⁵ and may suggest that cognitive empathy requires a more effortful process for older adults.⁷⁶

Individual differences in the ability or propensity to empathize may predict behavior.⁷⁷ This distinction between capacity and propensity reflects the fact that the cognitive component of empathy is not automatic but depends on attention and motivation.⁷⁸ For example, when helping others is costly, individuals will have decreased motivation to empathize.⁷⁹ When ability and propensity are distinguished, one interesting result is that individuals who are diagnosed with psychopathy (and juveniles diagnosed with a conduct disorder) have high ability to emphasize but low propensity to empathize.⁸⁰

Experience also plays a role in empathy, but it is a double-edged sword. Individuals who have experienced adversity are better able to take another person's perspective in a similar situation and, thus, are more likely to

Hahn-Holbrook et al., *Parental Precaution: Neurobiological Means and Adaptive Ends*, 35 NEUROSCIENCE & BIOBEHAVIORAL REV. 1052, 1061–62 (2011) (describing studies finding that breast feeding mothers have higher levels of circulating oxytocin and increased aggressive tendencies toward potential intruders compared to formula feeding mothers).

72. See Linda Rueckert & Nicolette Naybar, *Gender Differences in Empathy: The Role of the Right Hemisphere*, 67 BRAIN & COGNITION 162, 165 (2008); see also Zeinab Khanjani et al., *Comparison of Cognitive Empathy, Emotional Empathy, and Social Functioning in Different Age Groups*, 50 AUSTRALIAN PSYCHOLOGIST 80, 83 (2015) (noting in addition that there “is a contradictory literature about the change of empathy during ageing”).

73. See Khanjani et al., *supra* note 72.

74. See *id.* at 81–83 (describing the “Eyes Test” as an exam which “requir[es] participants to select which of four words best describes the thoughts or feelings expressed in 36 pictures of the eyes”).

75. See Sarah E. MacPherson et al., *Age, Executive Function, and Social Decision Making: A Dorsolateral Prefrontal Theory of Cognitive Aging*, 17 PSYCHOL. & AGING 598, 606 (2002) (finding an age impairment for “labeling the emotion sadness”); Louise H. Phillips et al., *Age and the Understanding of Emotions: Neuropsychological and Sociocognitive Perspectives*, 57 J. GERONTOLOGY SERIES B P526, P529 (2002) (finding “no overall age effect on identifying emotions from faces” but “significant age impairments in the ability to identify anger and sadness”).

76. See Khanjani et al., *supra* note 72, at 83 (“Emotion recognition is a gut feeling for young adults, but older adults need to dedicate more processing resources to achieve accuracy.”).

77. See Christian Keysers & Valeria Gazzola, *Dissociating the Ability and Propensity for Empathy*, 18 TRENDS COGNITIVE SCI. 163, 163 (2014).

78. See *id.* at 163–64.

79. See *id.* at 164.

80. See *id.* at 163.

experience empathic concern.⁸¹ This in turn causes a propensity to be compassionate and to partake in costly prosocial behavior.⁸² However, reduced empathy after repeated exposure to suffering can in some instances be adaptive because it may lower the personal distress associated with observing the suffering of another.⁸³ Consequently (and counterintuitively), in certain situations, individuals with multiple exposure to an empathy-triggering situation may be less likely to react empathetically.⁸⁴ For example, doctors with experience administering acupuncture are less likely than nondoctors to experience empathy when seeing body parts being pricked by needles.⁸⁵

C. Out-Group Bias and Empathy

Human beings are prone to characterize others into “in-groups” and “out-groups.”⁸⁶ Categorization may be based on race, age, and gender, as well as multiple other affiliation factors. Considering another person to be in the same category as oneself contributes to a feeling of similarity, which in turn increases empathy.⁸⁷ Moreover, thinking of others as part of a different category increases alienation, which interferes with humanization, the ability to understand the other person’s perspective and attribute human characteristics to the other person.⁸⁸

81. See Daniel Lim & David DeSteno, *Suffering and Compassion: The Links Among Adverse Life Experiences, Empathy, Compassion, and Prosocial Behavior*, 16 EMOTION 175, 180 (2016). Examples of adversity include illness, violence, bereavement, social-environmental stress, and disasters. *See id.* at 177.

82. *See id.*

83. *See supra* notes 44–45 and accompanying text.

84. See Yawei Cheng et al., *Expertise Modulates the Perception of Pain in Others*, 17 CURRENT BIOLOGY 1708, 1711–12 (2007).

85. *See id.*

86. See Ruben T. Azevedo et al., *Their Pain Is Not Our Pain: Brain and Autonomic Correlates of Empathetic Resonance with the Pain of Same and Different Race Individuals*, 34 HUM. BRAIN MAPPING 3168, 3169 (2013).

87. See Plumm & Terrance, *supra* note 20, at 191; Adam Waytz & Nicholas Epley, *Social Connection Enables Dehumanization*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 70, 71 (2012) (finding that “[b]eing part of a football team, political party, a church, or a married couple identifies who is *in* one’s social circle as well as who is *out* of one’s circle”); *see also* John F. Dovidio et al., *Empathy and Intergroup Relations*, in PROSOCIAL MOTIVES, EMOTION, AND BEHAVIOR: THE BETTER ANGELS OF OUR NATURE 393, 395 (Mario Mikulincer & Phillip Shaver eds., 2010); James D. Johnson et al., *Rodney King and O.J. Revisited: The Impact of Race and Defendant Empathy Induction on Judicial Decisions*, 32 J. APPLIED SOC. PSYCHOL. 1208, 1208–09 (2002).

88. See Waytz & Epley, *supra* note 87, at 71 (“People consider themselves to be exemplars of humanity, and as others become less similar to the self, they are evaluated as less humanlike as well.”). This is reflected in the tendency of soccer fans to be willing to engage in costly helping behavior for fans of the same team, but not for fans of the rival team. *See* Boris C. Bernhardt & Tania Singer, *The Neural Basis of Empathy*, 35 ANN. REV. NEUROSCIENCE 1, 12–13 (2012).

1. Race and the Influence of Bias

Racial categorization can occur subliminally and within milliseconds.⁸⁹ Because race is such a “powerful salient cue of group membership,” the race of an actor can greatly influence the observer’s ability to empathize.⁹⁰ Observations of neural activity reveal a disturbing fact: people respond more strongly to the pain of same-race individuals than to the pain of different-race individuals.⁹¹ Specifically, neurological mirror systems are less responsive when viewing people of another race in pain, thus causing individuals to experience decreased sharing of the emotional components of pain in people of another race.⁹² Moreover, these disparities are correlated with implicit bias levels—participants with greater implicit bias are even less affected when viewing physical suffering of other-race individuals than are participants with lower levels of implicit bias.⁹³ One factor that may be driving this result is that implicit bias may impact the ability to recognize emotions, like sadness and anger, in out-group members.⁹⁴ For example, individuals with higher levels of implicit bias are quicker to perceive anger in black faces compared to white faces.⁹⁵ Finally, studies focusing on cognition and prejudice have found a correlation between implicit bias and differences in amygdala activation.⁹⁶ Studies have also found that participants tend to present greater amygdala activity in response to black

89. See Azevedo et al., *supra* note 86, at 3169.

90. *Id.*

91. Multiple studies reveal different responses to watching hands or faces of the same race, another race, and a fictitious race (violet) being pricked by a needle or poked with a Q-tip. See Alessio Avenanti et al., *Racial Bias Reduces Empathic Sensorimotor Resonance with Other-Race Pain*, 20 CURRENT BIOLOGY 1018, 1018–19 (2010) (finding that when white and black individuals living in Italy observed the pain of same-race and fictional-race individuals, their corticospinal systems were inhibited as if they were feeling the pain, but this did not occur when they observed other-race individuals in pain); Azevedo et al., *supra* note 86, at 3179 (examining white and black participants and finding increased hemodynamic activity within the bilateral anterior insula (an area involved in processing of first- and third-person emotional experiences of pain) for same-race pain); Vani A. Mathur et al., *Racial Identification Modulates Default Network Activity for Same and Other Races*, 33 HUM. BRAIN MAPPING 1883, 1888–90 (2012) (finding increased activity within the medial prefrontal cortex (associated with the self) when viewing pictures of same-race individuals in a natural disaster); Xiaojing Xu et al., *Do You Feel My Pain?: Racial Group Membership Modulates Empathic Neural Responses*, 29 J. NEUROSCIENCE 8525, 8528 (2009) (scanning Chinese and white participants and finding reduced neural activity in the anterior cingulate cortex (associated with the emotional experience of pain) when watching different-race faces in pain).

92. See Avenanti et al., *supra* note 60, at 275–76.

93. See Avenanti et al., *supra* note 91, at 1019–20 (finding a linear relationship between implicit bias and increased empathic-related brain responses for own-race pain compared to other-race pain); Azevedo et al., *supra* note 86, at 3175–76 (same).

94. See Gijsbert Bijlstra et al., *Stereotype Associations and Emotion Recognition*, 40 PERSONALITY & SOC. PSYCHOL. BULL. 567, 571–74 (2014).

95. See Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640, 641–43 (2003).

96. See Jennifer T. Kubota et al., *The Neuroscience of Race*, 15 NATURE NEUROSCIENCE 940, 940–42 (2012); Adam M. Chekroud et al., *A Review of Neuroimaging Studies of Race-Related Prejudice: Does Amygdala Response Reflect Threat?*, FRONTIERS HUM. NEUROSCIENCE (Mar. 27, 2014), <http://journal.frontiersin.org/article/10.3389/fnhum.2014.00179/full> [https://perma.cc/H4YG-L58N].

male faces, regardless of the participants' race and gender.⁹⁷ This increased activation may reflect a threat response, which is likely caused by the stereotype that black men are dangerous.⁹⁸

These observations are corroborated by behavioral studies, which also find a connection between racial groups and empathy.⁹⁹ Most pertinent here, mock jury studies find that participants report greater empathy for same-race criminal defendants than for other-race defendants and accordingly assign harsher punishment to other-race defendants.¹⁰⁰

2. Dehumanization

Dehumanization occurs when someone denies uniquely human characteristics, for example, a mental state or secondary emotions like nostalgia or humiliation,¹⁰¹ to another human being.¹⁰² Dehumanization can lead to a general feeling of indifference to another person and his or her well-being.¹⁰³

Lasana Harris and his colleagues developed the stereotype content model to explain how dehumanization occurs.¹⁰⁴ Their model posits that people use stereotypes as automatic mental shortcuts to determine the "humanness" of another.¹⁰⁵ Harris maintains that people perceive others along two different dimensions: warmth and competence.¹⁰⁶ Someone who is perceived as high

97. See Chekroud et al., *supra* note 96, at 3.

98. *See id.* at 4.

99. See, e.g., Brian B. Drwecki et al., *Reducing Racial Disparities in Pain Treatment: The Role of Empathy and Perspective-Taking*, 152 PAIN 1001, 1003–04 (2011) (finding that white nurses and students exhibited greater empathy to white patients' pain expressions, which predicted better pain treatment to white patients).

100. See Johnson et al., *supra* note 87, at 1215–16 (finding that white students reported greater empathy for white criminal defendants than black defendants and assigned more lenient punishment to white defendants); Mona Lynch & Craig Haney, *Emotion, Authority, and Death: (Raced) Negotiations in Mock Capital Jury Deliberations*, 40 LAW & SOC. INQUIRY 377, 395–400 (2015) (finding that white male jurors were more likely to focus on empathy for white male defendants during jury deliberation and more likely to downplay the importance of empathy for black male defendants and that this increased focus on empathy lead to significantly more life sentences).

101. See Waytz & Epley, *supra* note 87, at 70.

102. See C. Daryl Cameron et al., *The Emotional Cost of Humanity: Anticipated Exhaustion Motivates Dehumanization of Stigmatized Targets*, 7 SOC. PSYCHOL. & PERSONALITY SCI. 105, 105 (2016) (discussing the "intentional stance," wherein people grant humanity to others by assuming that they have their own minds, intentions, plans, and goals); Lasana T. Harris & Susan Fiske, *Dehumanizing the Lowest of the Low: Neuroimaging Responses to Extreme Out-Groups*, 17 PSYCHOL. SCI. 847 (2006).

103. See Waytz & Epley, *supra* note 87, at 74–75 ("[D]ehumanization is often conceived as a source of antipathy toward others—a visceral disliking—when it may in fact be better understood as a general indifference or apathy to others' mental states and experience.").

104. See Harris & Fiske, *supra* note 102, at 847; see also Beatrice H. Capestan & Lasana T. Harris, *Stereotype Content*, in EMERGING TRENDS IN THE SOCIAL AND BEHAVIORAL SCIENCES: AN INTERDISCIPLINARY, SEARCHABLE, AND LINKABLE RESOURCE 1, 5–6 (Robert A. Scott & Stephen M. Kosslyn eds., 2015) (ebook).

105. See Capestan & Harris, *supra* note 104, at 2 ("But if stereotypes short-circuit regular social cognitive processes that allow us to perceive a person as human, stereotypes will involuntarily allow for some outgroups . . . to be denied their humanness.").

106. See Harris & Fiske, *supra* note 102, at 847.

in “warmth” would be believed by others to have good intentions and be friendly, trustworthy, and sincere.¹⁰⁷ Someone who is perceived as high in “competence” would be believed by others to be capable and have agency.¹⁰⁸ The theory postulates that people behave toward others according to their perceived level of warmth and competence.¹⁰⁹ If someone is perceived as high competence and high warmth, others view them with pride. Envy is associated with high competence and low warmth, and pity is associated with low competence and high warmth.¹¹⁰

If someone is perceived to be low in both warmth and competence, others will be disgusted by them.¹¹¹ Disgust is the only emotion which results in the dehumanization of the target and often occurs when the target is an out-group member.¹¹² The social cognition brain network is activated at a reduced level when participants feel disgust toward one another.¹¹³

Stereotypes, including biases against out-group members, can help explain why dehumanization occurs.¹¹⁴ When stereotypes are relied upon, the targeted individual is not given the benefit of social cognitive processing, which would ascribe thoughts, feelings, and motivations to that person. Dehumanization may also occur if the observer wishes to participate in immoral behavior (in particular, causing harm to another),¹¹⁵ cope with his or her own past wrongdoing,¹¹⁶ or avoid the emotional exhaustion associated with helping another.¹¹⁷

107. See Susan T. Fiske, *Varieties of (De)Humanization: Divided by Competition and Status*, 60 NEB. SYMP. ON MOTIVATION 53, 54 (2013).

108. See *id.*

109. See Hughes, *supra* note 23, at 548–50 (summarizing the stereotype content model in more detail).

110. See *id.*

111. See Cameron et al., *supra* note 102, at 1.

112. See *id.*; Hughes, *supra* note 23, at 549, 551.

113. See Capestan & Harris, *supra* note 104, at 7. The social cognition brain network consists of the medial prefrontal cortex (mPFC), which becomes activated when participants engage in social cognition tasks. See Lasana T. Harris & Susan T. Fiske, *Social Groups That Elicit Disgust Are Differentially Processed in mPFC*, 2 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCES 45, 45–48 (2007); see also Hughes, *supra* note 23, at 551 (discussing how the mPFC is also activated at a lower level when participants view out-group members).

114. See Capestan & Harris, *supra* note 104, at 8, 11; Waytz & Epley, *supra* note 87, at 71 (“[T]he clearest examples of dehumanization arise in intergroup settings in which ingroup members dehumanize outgroup members.”).

115. Sabina Cehajic et al., *What Do I Care?: Perceived Ingroup Responsibility and Dehumanization as Predictors of Empathy Felt for the Victim Group*, 12 GROUP PROCESSES & INTERGROUP REL. 715, 716–17 (2009). The desire to participate in immoral behavior is associated with greater tolerance of harm aimed toward an out-group due to moral exclusion, which occurs when a target is perceived to exist outside of the realm in which moral values and fairness apply. See Susan Oputow, *Moral Exclusion and Injustice: An Introduction*, 46 J. SOC. ISSUES 1, 1–2 (1990).

116. See Emanuele Castano & Roger Giner-Sorolla, *Not Quite Human: Infrathumanization in Response to Collective Responsibility for Intergroup Killing*, 90 J. PERSONALITY & SOC. PSYCHOL. 804, 816–17 (2006) (finding that people dehumanize victims to excuse actions of their in-group members); Cehajic et al., *supra* note 115, at 716–18 (finding that it is easier for spectators to disengage from pain and avoid feeling empathy for a victim if that victim is dehumanized).

117. See Cameron et al., *supra* note 102, at 2, 6 (finding anticipated emotional exhaustion of helping a homeless person mediates whether the participant assigns a mental state to the

Dehumanization has been shown to result in reduced empathy and diminished motivation to help others. For example, participants perceive helping a homeless person suffering from drug addiction (a stigmatized, out-group condition) to be more exhausting than providing aid to a homeless person suffering from uncontrollable mental illness (a less stigmatized condition).¹¹⁸ They also viewed the homeless person afflicted with mental illness to be suffering more than the drug addict. This study suggests that feelings of disgust create a mental barrier to helping someone in need because the effort to help that person is perceived as more emotionally taxing than helping someone else.

Some research has shown that people in positions of power are more likely to dehumanize out-group members, especially after being asked to make a difficult decision that could negatively impact an out-group.¹¹⁹ In this situation, dehumanization is used to justify a difficult decision for which the decision maker feels responsible. This is also true where the person is not responsible for the decision, but his or her in-group is responsible.¹²⁰ Thus, for example, if one country declares war on another, a citizen may dehumanize those living in the other country.¹²¹ Ironically, a social connection may at times enable dehumanization.¹²² Participants who were primed by researchers to feel a social connection were more likely to dehumanize out-group members.¹²³ One possible explanation for this result is that people who feel socially disconnected have a greater need to create bonds with other humans and thus are more likely to exert energy to connect with strangers or out-group members.¹²⁴

In the courtroom, the process of dehumanization may be facilitated by the purposeful engagement of stereotypes. Most transparent is the use of language linking an African American defendant to nonhuman primates.¹²⁵ Research has shown that both black and white participants associate photographs of black people with apes. Moreover, this association is often present even in participants who do not display overt racism. The media may both reflect and exacerbate such associations: newspapers are far more likely

homeless person); *cf.* Jeroen Vaes & Martina Muratore, *Defensive Dehumanization in the Medical Practice: A Cross-Sectional Study from a Health Care Worker's Perspective*, 52 BRIT. J. SOC. PSYCHOL. 180, 185–87 (2013) (showing that nurses who humanize their patients report higher levels of emotional exhaustion).

118. Cameron et al., *supra* note 102, at 5–6.

119. See Joris Lammers & Diederik A. Stapel, *Power Increases Dehumanization*, 14 GROUP PROCESSES & INTERGROUP REL. 113, 122 (2011).

120. See Castano & Giner-Sorolla, *supra* note 116.

121. See *id.* at 806.

122. See Waytz & Epley, *supra* note 87, at 74–75.

123. See *id.* To prime social connection, participants were asked to come to the study with a close friend. See *id.* at 73.

124. See *id.* at 71 (“People who feel socially disconnected likewise seek to satisfy this drive by attempting to connect with others, even attributing humanlike traits to nonhuman agents that render them suitable agents of social connection . . . [and] people who feel socially connected are less motivated to affiliate with others.”).

125. See Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 292–93 (2008).

to describe African American defendants facing the death penalty with ape-related words than they are to describe white defendants with those words.¹²⁶

The association to apes is linked to disgust. Priming participants to feel disgust causes them to associate out-group members with animals at higher rates.¹²⁷ These associations are not without consequence; when participants are primed with the word “ape,” they are more likely to believe that physical violence used against a black suspect by the police was justified.¹²⁸

D. Empathy-Linked Aggression

Prosocial behavior, including empathy-motivated altruism, is regulated by a caregiving behavioral system through which individuals are motivated to help and reduce the suffering of others.¹²⁹ The empathy-altruism hypothesis suggests that empathy leads to a desire to help someone who is in trouble.¹³⁰ This system is activated when someone witnesses the plight of a “valued” other, or someone in the same in-group. As noted earlier, this process is facilitated by oxytocin and vasopressin, both of which influence social behavior and empathy.¹³¹

Although activation of this system typically leads to prosocial behavior, empathy-induced behavior is not necessarily moral.¹³² This is because the empathy-induced altruism is a narrow target, focused on the distressed individual, and may ignore larger concerns such as fairness or impartiality.¹³³ For example, when individuals feel no empathy, they tend to distribute resources in a game fairly, but when they are induced to feel empathy for a targeted group, they give preferential treatment to that group.¹³⁴

More troubling, researchers have shown that empathy can lead to antisocial and aggressive behavior.¹³⁵ If a person is motivated to protect the target of his or her empathy, that person may be inclined to punish others who are hurting or inhibiting that target. For example, in one study, researchers found that giving oxytocin to participants increased the

126. See *id.* at 303–04 (examining the usage of fifty-four words connoting bestial or subhuman qualities in news articles).

127. See Erin E. Buckles & Paul D. Trapnell, *Disgust Facilitates Outgroup Dehumanization*, 16 GROUP PROCESSES & INTERGROUP REL. 771, 776–77 (2013).

128. See Goff et al., *supra* note 125, at 302.

129. See Jennifer L. Goetz et al., *Compassion: An Evolutionary Analysis and Empirical Review*, 136 PSYCHOL. BULL. 351, 354 (2010).

130. See C. Daniel Batson et al., *Empathic Joy and the Empathy-Altruism Hypothesis*, 61 J. PERSONALITY & SOC. PSYCHOL. 413, 413 (1991).

131. See Buffone & Poulin, *supra* note 57, at 1418–19; see also *supra* notes 51–57 and accompanying text. Neurotransmitters are activated when someone senses distress in another and motivate the actor to provide aid to the vulnerable person.

132. See C. Daniel Batson et al., *Immorality from Empathy-Induced Altruism: When Compassion and Justice Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 1042, 1043 (1995).

133. See *id.*

134. See *id.*; see also Julie A. Weir & Lawrence S. Wrightsman, *The Determinants of Mock Jurors’ Verdicts in a Rape Case*, 20 J. APPLIED SOC. PSYCHOL. 901, 913–15 (1990) (finding that empathy for victims predicted belief that the victim had been raped).

135. See Johannes Keller & Stefan Pfattheicher, *The Compassion-Hostility Paradox: The Interplay of Vigilant, Prevention-Focused Self-Regulation, Compassion, and Hostility*, 39 PERSONALITY & SOC. PSYCHOL. BULL. 1518, 1521 (2013).

participant's empathy for in-group members—but also increased aggression toward competing out-group members.¹³⁶ In another study, researchers found that participants who were in a high-empathy condition were more likely to give greater amounts of painful stimulus (hot sauce) to the empathetic target's competitors, even though the competitor did not cause any harm to the target.¹³⁷ Researchers also have found that mock jurors who have high empathy for a victim are more confident in a defendant's guilt, believe the defendant to be more responsible for the crime, and give harsher sentences.¹³⁸

Observation of this association between aggression and empathy, often referred to as the compassion-hostility paradox,¹³⁹ is consistent with the results of prior research from the Capital Jury Project (CPJ). The CPJ interviews revealed that juror empathy for murder victims influences capital sentencing: when jurors reported that they had imagined themselves in the victim's situation, they were more likely to have felt empathy for the victim and more likely to have sentenced the defendant to death.¹⁴⁰

Several factors predict empathy-linked aggression. Interestingly, more empathetic people seem more likely to experience empathy-induced aggression.¹⁴¹ For example, one study found participants who scored high on an empathy scale were more likely to punish the behavior of a drunk driver (as well as more willing to help the victim) than less empathetic participants.¹⁴² Another factor that may predict empathy-linked aggression is the intensity of the victim's distress.¹⁴³ Finally, when emotional stimuli cause heightened emotion, effortful cognitive processing is decreased.¹⁴⁴ This decrease in cognitive processing may lead to increased punitiveness, because jurors do not have the emotional capacity to empathize and relate to the perpetrator of the victim's distress.

Nevertheless, empathy does not always produce aggression. Some studies have found that empathy can reduce the desire to harm intentional

136. See Carsten K.W. De Dreu et al., *The Neuropeptide Oxytocin Regulates Parochial Altruism in Intergroup Conflict Among Humans*, 328 SCIENCE 1408, 1409–11 (2010) (testing participants' response to nonteammates during a financially based game after being given oxytocin or a placebo).

137. See Buffone & Poulin, *supra* note 57, at 1418–19.

138. See Sheila R. Deitz et al., *Measurement of Empathy Toward Rape Victims and Rapists*, 43 J. PERSONALITY & SOC. PSYCHOL. 372, 376 (1982) (using the example of an ambiguous rape trial).

139. See De Dreu et al., *supra* note 136, at 1408–11 (showing that there is a positive association between compassion and hostility).

140. See Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV 343, 359–60 (2003).

141. See Buffone & Poulin, *supra* note 57, at 1408.

142. See Guy D. Vitaglione & Mark A. Barnett, *Assessing a New Dimension of Empathy: Empathetic Anger as a Predictor of Helping and Punishing Desires*, 27 MOTIVATION & EMOTION 301, 312–13 (2003) (using a scale that measures trait-empathetic aggression); see also Buffone & Poulin, *supra* note 57, at 1417–18.

143. See Buffone & Poulin, *supra* note 57, at 1408.

144. See Jessica M. Salerno & Bette L. Bottoms, *Emotional Evidence and Jurors' Judgments: The Promise of Neuroscience for Informing Psychology and Law*, 27 BEHAV. SCI. & L. 273, 277 (2009).

wrongdoers. For example, in an experiment in which a confederate cheated on a task to earn higher compensation than the other competitors, participants were asked to choose how much hot sauce the cheating confederate would be required to consume.¹⁴⁵ When the confederate cheated, the participants gave the confederate far more hot sauce than when the confederate did not cheat. However, when participants underwent a compassion-inducing task *toward an unrelated third-party* before being asked to assign the hot sauce amounts, the participants no longer punished the confederate. The more compassion the participants felt toward the third party, the less hot sauce the participant gave to the confederate. Thus, in this scenario, priming participants with feelings of compassion resulted in less aggression toward an intentional wrongdoer.

One might speculate that these results can be reconciled by the difference between the targets of empathy; that is, when the target of empathy has been harmed by the wrongdoer, then aggression is induced, but when the target of the empathy is unrelated to the wrongdoer, empathy is increased for the wrongdoer as well. However, research also shows that doses of oxytocin increase the perception of harm suffered by a victim, yet do not simultaneously increase the desire to punish those that cause the harm.¹⁴⁶

E. Increasing Empathy

Researchers have tried to induce empathy in two ways. First, a person's emotional state may be conveyed to the prospective empathizer through facial expressions, bodily movements, and visible injuries. Alternatively, empathy may be induced by cognitive processes such as inferences or thoughts based on contextual information, for example, by learning that someone has lost a job or been diagnosed with a serious illness.¹⁴⁷ Instructing the participant to imagine him- or herself in the other's place increases the empathic neural response above and beyond the level of empathy experienced while watching a person.¹⁴⁸ In one odd application of this idea, researchers were able to stimulate activity in the social cognition brain network of participants by asking the participants to consider whether the photographed out-group member liked a certain vegetable.¹⁴⁹ However, the same humanizing brain activity was not triggered when participants were asked to imagine what the person's age was.¹⁵⁰ One interpretation of these results is that trying to assess someone else's preferences requires imagining how that person would think about things, which has an "individuating" effect, in the words of the researchers.¹⁵¹ In contrast, estimation of age

145. See Paul Condon & David DeSteno, *Compassion for One Reduces Punishment for Another*, 47 J. EXPERIMENTAL SOC. PSYCHOL. 698, 698–701 (2011).

146. See Krueger et al., *supra* note 29.

147. See Walter, *supra* note 39, at 11.

148. See Decety & Jackson, *supra* note 49, at 84.

149. See Harris & Fiske, *supra* note 113, at 50.

150. See *id.*

151. See, e.g., Susan T. Fiske & Steven L. Neuberg, *A Continuum of Impression Formation, from Category-Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation*, 23 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 1, 1–2 (1990).

focuses on the outside, permitting the subject to use external cues, and therefore does not require imagination or individuation.

Other research corroborates these neuroscience results. Social psychologists have found that similar instructions induce empathy for out-group members,¹⁵² reduce prejudice and bias toward the out-group,¹⁵³ and improve attitudes toward the out-group as a whole.¹⁵⁴ Induced empathy can increase positive attitudes toward stigmatized groups.¹⁵⁵ In one study, participants who listened to interviews with convicted murderers and who were asked to imagine that they were in their position showed more positive feelings toward convicted murders two weeks after the study than participants who were asked to remain objective.¹⁵⁶

Similar techniques have been used to study the effects of empathy on jury decision making in criminal cases. For example, in one study, participants read a narrative about a larceny case and then were instructed to read a passage written by the defendant in order to get more information about the defendant.¹⁵⁷ Participants in a high-empathy condition were asked to put themselves in the position of the defendant while reading the passage, while participants in a low-empathy condition were asked to be objective.¹⁵⁸ Participants in a control condition did not read the passage about the defendant.¹⁵⁹ Participants in the high-empathy condition gave the defendant more lenient punishments than participants in the other two conditions and also tended to view the crime as situationally induced rather than as a product of the defendant's character.¹⁶⁰ However, across all conditions, white defendants were given more lenient punishments.¹⁶¹

II. IMPLICATIONS FOR CAPITAL SENTENCING

Now we turn to the practical uses of empathy research in capital sentencing, with a focus on jury selection, the presentation of evidence, and arguments made by defense counsel.

152. See Krystina A. Finlay & Walter G. Stephan, *Improving Intergroup Relations: The Effects of Empathy on Racial Attitudes*, 20 J. APPLIED SOC. PSYCHOL. 1720, 1727–28 (2000).

153. See Dovidio et al., *supra* note 87, at 397; Paola Sessa et al., *Taking One's Time in Feeling Other-Race Pain: An Event-Related Potential Investigation on the Time-Course of Cross-Racial Empathy*, 9 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 454, 454–55 (2014).

154. See C. Daniel Batson et al., *Empathy and Attitudes: Can Feeling for a Member of a Stigmatized Group Improve Feelings Toward the Group?*, 72 J. PERSONALITY & SOC. PSYCHOL. 105, 116–17 (1997).

155. See *id.* (studying feelings toward people with AIDS, the homeless, and convicted murderers).

156. See *id.* at 116.

157. See Johnson et al., *supra* note 87, at 1213–14.

158. See *id.* at 1214.

159. See *id.*

160. See *id.* at 1215–16.

161. See *id.* Other researchers have obtained similar results. See, e.g., Richard L. Archer et al., *Emotional Empathy in a Courtroom Simulation: A Person-Situation Interaction*, 9 J. APPLIED SOC. PSYCHOL. 275, 287–90 (1979) (mock jurors in an empathy-induction condition found the defendant's involvement in a stabbing to be more lawful and less personality dependent); Plumm & Terrance, *supra* note 20, at 201–03.

A. Jury Selection

It has long been obvious that the identity of the capital jurors matters enormously. We see this in the large disparities in willingness of various states—and various localities within states—to impose death sentences.¹⁶² We also see this in disparities between the willingness of various demographic groups to impose death sentences as reflected in public polls¹⁶³ and as revealed in mock jury studies.¹⁶⁴ Occasionally we see a very specific manifestation of the importance of the decision maker when a life sentence is imposed on a more culpable codefendant by one jury while a death sentence is imposed upon the less culpable by another jury. The neuroscience of empathy is very helpful in explaining *how* the identity of the jurors affects decision making, but it is not so helpful in figuring out how to eliminate the effects of individual differences.

1. Racially Similar Jurors

The prior evidence that race influences the decision making of capital jurors came from many, many sources. These include historical evidence of breathtaking disparities in the imposition of death sentences prior to *Furman v. Georgia*,¹⁶⁵ particularly in rape cases; multiple statistical analyses of death sentences, most of which find large and significant race-of-the-victim effects, and about half of which also find significant race-of-the-defendant effects,¹⁶⁶ including some studies with independent assessment of aggravation and mitigation;¹⁶⁷ mock jury studies that find race-of-defendant and race-of-victim effects in white jurors' assessment of both aggravating and mitigating evidence and in their choice of life or death sentences;¹⁶⁸ mock jury studies that find that diverse juries ameliorate the effects of racial discrimination; and numerous individual cases in which race played an explicit invidious role in the decision making of prosecutors, defense counsel, and jurors.¹⁶⁹

162. See John H. Blume et al., *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 171–75 (2004).

163. See Joseph Carroll, *Gallup Poll: Who Supports the Death Penalty?*, DEATH PENALTY INFO. CTR. (Nov. 16, 2004), <http://www.deathpenaltyinfo.org/gallup-poll-who-supports-death-penalty> [<https://perma.cc/M6M9-YMA7>].

164. See John K. Cochran & Mitchell B. Chamlin, *The Enduring Racial Divide in Death Penalty Support*, 34 J. CRIM. JUST. 85, 85–86 (2005).

165. 408 U.S. 238 (1972).

166. See U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5–6 (1990).

167. See David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1713–15 (1998).

168. See Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUM. BEHAV. 337, 351–53 (2000).

169. See, e.g., *Foster v. Chatman*, 136 S. Ct. 1737 (2016); *Mayfield v. Woodford*, 270 F.3d 915, 939–42 (9th Cir. 2001) (Graber, J., dissenting); Matt Ford, *A Tainted Execution in Georgia*, ATLANTIC (Apr. 12, 2016), <http://www.theatlantic.com/politics/archive/2016/04/kenneth-fults-execution-georgia/477969/> (discussing the case of Kenneth Fults, in which the public defender had “a penchant for telling racist jokes,” and a juror later signed an affidavit

What neuroscience adds to this picture is the likelihood that racially influenced decision making often is not rooted in conscious choice but stems from observably different reactions in the brain. This is not, of course, to say that racial favoritism is hardwired, or biologically determined, but rather to say that *given that race is a strong predictor of perceptions of in-group and out-group membership in our society, differential triggering of empathic responses will be common.* This means—as the prior evidence also implies—that the racial composition of the jury in a minority-race capital defendant’s case may be dispositive. However, the legal system’s current mechanism for ferreting out bias—voir dire—is unable to identify bias of which potential jurors are unaware.

Thus, neuroscience reinforces the importance of vigilant judicial enforcement of prohibitions against discrimination in jury selection. In recent years, the Supreme Court has been somewhat more vigilant in its enforcement of the prohibition against racially motivated exercise of peremptory challenges. However, reversals have largely been limited to “smoking gun” cases.¹⁷⁰ As many commentators have noted, the prohibition against discrimination in the exercise of the peremptory challenge is widely ignored, causing some commentators—and justices—to suggest its abolition. The neuroscientific findings we report argue for either more vigorous enforcement of the antidiscrimination norm or for an outright ban on peremptory challenges.

But neuroscience also suggests that enforcement of prohibitions against affirmative exclusion of minority jurors is insufficient to provide race-neutral decisions of deathworthiness. The *mechanism* by which members of the defendant’s racial or ethnic group are excluded is not the problem; it is the ultimate composition of the jury that matters. The Supreme Court, however, has explicitly rejected any right to racially similar jurors, so eradication of the effects of racially influenced empathy is not a real possibility, at least in the short run.

2. Empathetic Jurors

While voir dire is unlikely to reveal racial bias, extensive voir dire may shed light upon which jurors have the potential to see a human being behind a crime. The Supreme Court has insisted that defendants must be able to present any evidence in mitigation that might reasonably lead a juror to conclude that death is not the appropriate sentence. This insistence, however, has no meaning if seated jurors are incapable of responding with empathy to the relevant “diverse frailties” of humankind. General questions as to

stating, “I knew I would vote for the death penalty because that’s what that nigger deserved”) [<https://perma.cc/7SK9-25TE>].

170. See *Snyder v. Louisiana*, 552 U.S. 472 (2008) (as noted in the briefs, but not the Supreme Court’s opinion, the prosecutor argued, to the all-white jury he had selected, that the defendant, unlike O.J. Simpson, should not be permitted to escape death penalty); *Miller-El v. Dretke*, 545 U.S. 231 (2005) (citing numerous indicators of bias and history of explicit discrimination by the prosecutor’s office); *see also Foster*, 136 S. Ct. at 1744 (prosecution jury lists had “N” marked by the names of African American jurors).

whether jurors “can consider” evidence in mitigation cannot answer whether a particular juror can recognize and appreciate a defendant’s suffering or can only see the suffering the defendant has caused. Thus, courts that have refused to permit questioning of jurors about their receptivity to particular forms of mitigation thwart the purpose of individualized sentencing.¹⁷¹

Concomitantly, defense counsel who have relied upon generalizations about what kind of jurors are likely to vote for life—jurors who have endured hardships themselves or employed in the helping professions—must realize that such reliance is probably ill advised. Sometimes hardship hardens,¹⁷² and sometimes those who are socially isolated are more likely to be receptive to out-groups.¹⁷³

It is interesting to note that “powerful” potential jurors may be the least likely to be empathetic.¹⁷⁴ This does not, however, give clear guidance to choose the meek and lowly because the ability to “hold out” against a pro-death majority is as also critical from the defense perspective. It does, however, lend support to the conventional wisdom that the defense does not want a cohesive, socially integrated jury.

But at this point, even a search for “empathetic jurors” looks too simplistic. Does a defense lawyer want an empathetic juror? Prior to doing the research for this article, we (and we think most capital defense lawyers) would have answered that question quickly and affirmatively. But that now appears to be an unsophisticated answer. Jurors with higher levels of trait empathy may be more likely to empathize with the defendant—or they may be more likely to empathize with the victim or victim’s family and punish the defendant more harshly. Caution seems in order, and the best recommendation may be to closely question jurors about their receptivity to certain forms of mitigation and the strength of their default position preferences for life and death.¹⁷⁵

171. See, e.g., *People v. Jackson*, 695 N.E.2d 391, 407 (Ill. 1998); *Evans v. State*, 637 A.2d 117 (Md. 1994); *Witter v. State*, 921 P.2d 886, 891–92, 915–16 (Nev. 1996); *State v. Fletcher*, 500 S.E.2d 668 (N.C. 1998); *State v. Skipper*, 446 S.E.2d 252 (N.C. 1994); *State v. Wilson*, 659 N.E.2d 292, 300–02 (Ohio 1996); *State v. Powers*, 501 S.E.2d 116 (S.C. 1998).

172. See *supra* notes 81–87 and accompanying text.

173. See *supra* notes 122–24 and accompanying text.

174. See *Lammers & Stapel, supra* note 119. Jury forepersons are more likely to be male, better educated, and of “higher status”—common traits of people who traditionally hold more power in society. See Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL’Y & L. 622, 696 (2000). Jury forepersons are also more influential than other jurors and their position of power and influence may result in more punitive approaches. See *id.*

175. See generally John H. Blume et al., *Probing “Life Qualification” Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1259 (2001). In short, what we know about the neuroscience of empathy reinforces the wisdom of Colorado’s voir dire method. This method follows several simple principles: (1) jurors are selected based on their life and death views only; (2) pro-death jurors (jurors who will vote for a death sentence) are removed utilizing cause challenges, and attempts are made to retain potential life-giving jurors; (3) pro-death jurors are questioned about their ability to respect the decisions of the other jurors, and potential life-giving jurors are questioned about their ability to bring a life result out of the jury room; and (4) peremptory challenges are prioritized based on the prospective jurors’ views on punishment.

Matthew Rubenstein, *Overview of the Colorado Method of Capital Voir Dire*, CHAMPION, Nov. 2010, at 18.

B. The Presentation of Evidence

Empathy research can also inform how evidence in both aggravation and mitigation is presented.

1. Evidence in Aggravation

Viewed formally, the penalty phase of capital trials in most jurisdictions consists of prosecution evidence offered in aggravation and defense evidence offered in mitigation. States differ in whether jurors are instructed that aggravation and mitigation are to be “weighed” against each other, considered (independently) without weighing, or, as in Texas, whether future dangerousness must be assessed. But regardless of the statutory scheme, in the penalty phase, the prosecution offers evidence designed to convince the jury that the defendant deserves death, or, speaking loosely, evidence “in aggravation” of the crime.

But whether called evidence in aggravation, victim impact evidence, or evidence establishing guilt, much of the evidence presented by the state in a capital trial serves to place the defendant in an out-group, and large portions of it dehumanize him. In some measure, this is inevitable, assuming the legitimacy of capital punishment, because some people deserve to die or are not worthy of belonging to the human community. When dehumanization is based solely upon the defendant’s *deeds*, we would have to concede that it is consistent with capital punishment jurisprudence (though not, in our view, normatively justified).

However, when dehumanization is pursued through tactics such as eliciting testimony that compares aspects of the defendant’s behavior or appearance to animals¹⁷⁶ or repeated references to the race of the defendant or victim, the consequence is an increased likelihood of arbitrary decision making. There is no value to this testimony, and its elicitation should be prohibited. When judges have to make closer calls on the relevance or prejudice versus probative value of inflammatory facts—such as gang or hate group membership, religious affiliation, or undocumented presence in this country—they should be guided by the findings we have reported and assume that the prejudicial load of such facts is very high.

Moreover, the findings reported here make plain that the focus on “victim impact” approved by *Payne v. Tennessee*¹⁷⁷ was a wrong turn. Although at one time the Supreme Court deemed evidence of the moral character of the victim and the consequences of the victim’s death on surviving family members irrelevant to the capital sentencing decision, and therefore inadmissible,¹⁷⁸ it changed its mind. Now, the prosecution may present a

176. See *Darden v. Wainwright*, 477 U.S. 168, 179 (1986); *Bennett v. Stirling*, No. CV 2:13-3191-RMG, 2016 WL 1070812, at *1 (D.S.C. Mar. 16, 2016); see also *supra* notes 126–28 and accompanying text.

177. 501 U.S. 808 (1991).

178. See *id.*; *South Carolina v. Gathers*, 490 U.S. 805 (1989); *Booth v. Maryland*, 482 U.S. 496 (1987); see also John H. Blum, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257 (2003). The term “victim impact evidence” does not

“brief glance” into the life and character of the victim and the suffering *to others* caused by his or her murder.¹⁷⁹ Despite the fact that the prosecution offers “victim impact” evidence as part of its penalty phase case, the Supreme Court has declined to categorize it as evidence in aggravation, and instead has justified its admission as balancing the picture presented to the jury, which may hear a great deal about the life and characteristics of the defendant. But call it aggravation or call it a “brief glimpse,” focus on the victim raises the likelihood of empathy-induced aggression, for which there is no constitutional justification.

2. Evidence in Mitigation

We are guessing that some defense counsel looking at this Article will skip to this section. How is it that they can *create* empathy for their clients, whatever the juror’s initial preferences were? Put differently, if the search for trait empathy is not productive, perhaps a focus on state empathy is more useful.

The capital defense community has already embraced specificity and detail in the presentation of mitigation; testimony that the defendant was abused as a child is less helpful than testimony describing the nature of his injuries, the frequency of abuse, and specific episodes that a witness recalls. The CJP interviews have shown that expert testimony—which tends to be general—is most persuasive when augmented by lay witnesses observations.¹⁸⁰ The research on empathy explains why specificity matters: it is more likely to evoke the automatic affective response. One might hypothesize that expert testimony augmented by lay testimony activates both affective and cognitive forms of empathy.

Empathy research also suggests that exclusive focus on the hardships the defendant suffered might be a mistake; providing the jury with evidence that, but for those hardships, the defendant “could have been a contender” may be equally important. In other words, presenting some positive attributes and experiences of the defendant, or even a large number of mundane experiences or preferences, may be useful in promoting juror identification with the defendant. This is important because, without such identification, empathy is much less likely.

Defense counsel also should consider the possibility of trying to generate empathy for a third party (other than the victim, of course), which research suggests may spill over to the defendant. The obvious possibility is the defendant’s family, depending on how sympathetic they are, but it might also be for another person, even defense counsel in some cases. Another possibility is to use closing arguments—where lawyers have a great deal of

refer to evidence of the impact of the crime *on the victim*. While the suffering inflicted on the victim himself is undoubtedly relevant, the term refers to evidence of the impact on the victim’s family and friends.

179. See *Payne*, 501 U.S. at 808.

180. See *Garvey, supra* note 11; *Sundby, supra* note 140.

freedom to use rhetorical flourishes to illustrate their arguments—to retell familiar stories that evoke empathy.¹⁸¹

C. Arguments of Counsel

By this point, it should be obvious that counsel's use of racial imagery, or animal imagery, or any form of emphasis on the group membership of the defendant, victim, or witnesses, or comparison of the worth of the defendant's life to that of the victim, should never be permitted. The research on empathy, however, is not needed to reach this conclusion; courts have routinely condemned such inflammatory arguments for a long time. Nonetheless, courts virtually never reverse cases for such arguments, citing a host of reasons such as the "isolated" nature of the remarks, defense counsel's failure to object to the remarks, defense counsel's counterarguments, or harmlessness.¹⁸² At the very least, the neuroscience of empathy compels the conclusion that harmlessness of the error—at least with respect to the sentencing decision—should be taken off the list of acceptable reasons for affirmance.

We cannot resist noting that we are fascinated by the findings regarding asking subjects to imagine whether a wrongdoer likes vegetables. Asking jurors to imagine dietary preferences certainly would be unconventional argument, but perhaps these findings are simply confirmation of the broader principle that asking jurors to imagine the defendant's walk in life *in specific respects* is likely to remind them that the defendant is an individual. Perhaps asking jurors how they thought the defendant *felt* when he was beaten with a pipe at the age of nine, or saw his mother shot at the age of twelve is as important as eliciting the details of his abuse or trauma.

CONCLUSION: TINKERING WITH THE MACHINERY OF EMPATHY

We began this article with Dietrich Bonhoeffer's admonition that "[w]e must learn to regard people less in light of what they do or omit to do and more in light of what they suffer."¹⁸³ While we find this to be an inspirational statement, it is clearly aspirational rather than descriptive. Our introduction juxtaposed that aspiration with the response of a real juror to the question of why an African American defendant had committed murder: "Because he was just a dumb nigger."¹⁸⁴ That juror's response is a particularly ugly example of the broader truth that empathy, like justice, often is not blind.

Justice Harry Blackmun, after many years of experience with capital cases, concluded that the death penalty experiment had failed, declaring, "I no

181. One example, that is already frequently employed in closing arguments, might be to use the New Testament story of the woman caught in adultery, about whom Jesus said, "He that is without sin among you, let him first cast a stone at her." *John 8:7* (King James).

182. See Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1783 (1993).

183. See BONHOFFER, *supra* note 1, at 262.

184. See Cohen, *supra* note 2.

longer shall tinker with the machinery of death.”¹⁸⁵ The neuroscience of empathy provides one more reason to believe that the decision to sentence another human being to death is inevitably an arbitrary one, and one that cannot be divorced from either race or caprice. While we can tinker with aspects of capital trials that exacerbate caprice and discrimination stemming from empathy, we cannot alter basic neural responses to the pain of others and therefore cannot rationalize (in either sense of the word) empathic responses.

185. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).