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## Empathy, Narrative, and Victim Impact Statements

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He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie.

Mary Zvolanek,  
mother of murder victim, in her victim impact statement<sup>1</sup>

Mary Zvolanek's testimony about her daughter's death and its effect on her grandson is heartbreaking. On paper, it is nearly unbearable to read; imagine hearing it in court from Mary

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<sup>1</sup> *Payne v Tennessee*, 501 US 808, 814-15 (1991).

Zvolanek herself. Should jurors have the opportunity to hear such testimony?

In *Payne v Tennessee*, the Supreme Court held that they should.<sup>2</sup> In so doing, it overruled its decision in *Booth v Maryland*, which only four years earlier had held that impact statements by the victim's family were not admissible at a capital sentencing hearing.<sup>3</sup> At first blush, victim impact testimony possesses several attractive attributes. It gives new information that helps provide a particularized context for decision making; it brings to the legal forum an otherwise silenced narrative voice; and it supplies an undisguised opportunity for the trier of fact to exercise compassion in the legal context. How can one argue, in light of these attributes, that the victim impact statement is a story that should not be told, one that evokes emotions that ought to be suppressed?

My interest in victim impact statements was originally propelled by concern about—or, more accurately, outrage over—the result in *Payne*. This outrage flowed from several sources, including a strong belief that admitting such statements was improper, discomfort with the new<sup>4</sup> majority's rapid overruling of contrary precedent, and indignation at the inconsistency of Chief Justice Rehnquist, who denounced compassion toward a civil rights plaintiff as an invalid ground for decision in *DeShaney v Winnebago County Department of Social Services*,<sup>5</sup> yet invoked compassion toward crime victims in support of the Court's holding in *Payne*.<sup>6</sup>

It soon became obvious that however easy—and initially satisfying—it might be to blame the result in *Payne* on jurisprudential inconsistency, the most difficult questions regarding victim impact statements remain. Why is it wrong to give the oth-

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<sup>2</sup> 501 US 808, 825-27 (1991).

<sup>3</sup> 482 US 496, 502-03 (1987). For a discussion of *Payne* and *Booth*, see Part III.

<sup>4</sup> In *Booth*, Justices Powell, Brennan, Marshall, Blackmun, and Stevens constituted the majority. Justice White's dissent was joined by Chief Justice Rehnquist and Justices O'Connor and Scalia. In *Payne*, newly appointed Justices Kennedy and Souter, plus all the *Booth* dissenters, constituted the majority. The former majority dwindled to three, with the loss of Justices Powell and Brennan. See *Payne*, 501 US at 844 (Marshall dissenting) ("Power, not reason, is the new currency of this Court's decisionmaking. . . . Neither the law nor the facts supporting *Booth* . . . underwent any change in the last four years. Only the personnel of this Court did.").

<sup>5</sup> 489 US 189, 202-03 (1989) (denying relief against the state for four-year-old boy who was beaten so severely by his father that he would require hospitalization for the rest of his life, despite an avoidable governmental failure to prevent the harm).

<sup>6</sup> See Chief Justice Rehnquist's emotionally charged description of the crime and its effects, 501 US at 823.

erwise silenced victim a voice in the proceedings? Is it necessarily inappropriate to use compassion in one type of case but not another? Many who favor encouraging empathy and compassion in judging, or opening the legal process to silenced voices, have discovered that victim impact statements raise uncomfortable questions about both the empathy and narrative movements.<sup>7</sup> Ultimately, this discomfort gives rise to other significant questions: Are storytelling and the exercise of empathy unambiguously benign devices—that is, can either be considered an unmitigated good—in the legal forum? Or does a normative principle exist that identifies their benign uses, or the contexts in which they are desirable? Because they raise such significant questions, victim impact statements provide a particularly useful starting point for a broader examination of the uses of narrative and emotion in legal processes.

Explorations of the role of emotions—particularly “benign” emotions, such as empathy and compassion—and the role of storytelling<sup>8</sup> in the legal process have led to some of the most innovative and exciting legal scholarship of recent years. This Article highlights the accomplishments of this scholarship to date, and also suggests some important directions for further exploration.

The scholarship thus far has developed largely along two strands. Although to some extent the structure of this Article replicates this separation by considering emotion and narrative in separate Parts, one of its central theses is that the two strands should be more explicitly intertwined. Ordering events into a narrative is a key component of the ability to empathize with another’s suffering: “[O]ne [must] be able to run a narrative through one’s mind about what happened to the sufferer to bring the individual to his or her current state, and what might be done to help. To empathize is to understand beginnings, middles and possible ends . . . .”<sup>9</sup> The studies of emotion and narrative

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<sup>7</sup> See, for example, Martha C. Nussbaum, *Equity and Mercy*, 22 Phil & Pub Aff 83, 121-22 n 93 (1993); Lynne N. Henderson, *Legality and Empathy*, 85 Mich L Rev 1574, 1651-52 (1987); Lynne N. Henderson, *The Wrongs of Victims’ Rights*, 37 Stan L Rev 937, 990-1006 (1985); Mark G. Yudof, “Tea at the Palaz of Hoon”: *The Human Voice in Legal Rules*, 66 Tex L Rev 589, 604-06 (1988); Martha Minow, *Surviving Victim Talk*, 40 UCLA L Rev 1411, 1415-16, 1432 (1993).

<sup>8</sup> I use the terms “narrative” and “storytelling” interchangeably.

<sup>9</sup> Natalie Angier, *Scientists Mull Role of Empathy in Man and Beast*, NY Times C1, C1, C6 (May 9, 1995).

rest on considerable common ground, and each can contribute to the other.

Part I of this Article considers the topic of emotion in the law. In large part, it is an appreciation of the current scholarship, which has laid to rest the notions that law can be an emotionless endeavor and that reason can operate in a sphere untouched by emotion. However, it also identifies the need for a more nuanced exploration of these issues. Specifically, Part I notes that the current scholarship tends to treat emotions as monolithic, unambiguous entities; it has yet to contend with—much less incorporate in any meaningful way—the complex, unruly field of emotion theory.

Part I concludes that the recent scholarly focus on benign emotions such as empathy, compassion, and caring has been crucial in challenging the marginalization of these emotional modes in the legal context. Nevertheless, we must avoid placing undue faith in the power of these benign emotions and ask the difficult questions of what role these emotions ought to play and in which legal contexts they ought to play that role.

Part II follows a similar pattern. It is largely an appreciation of the scholarship on narrative, which has illuminated the pervasive narrative structure of legal discourse. Much of the narrative scholarship has focused on “outsider” narratives, which might be defined as stories by members of groups usually subordinated in, or excluded from, mainstream legal discourse. These stories both challenge preconscious assumptions about such subordinated or excluded groups and expose the partiality of the dominant narrative<sup>10</sup>—that which masquerades as the universal perspective. Part II argues that the notion of outsider narrative is significant, first, because it provides a crucial normative grounding for narrative scholarship, and second, because in doing so it reveals the limiting principle that explains why more narrative is not always better.

Although Judge Richard Posner charges that “the internal perspective—the putting oneself in the other person’s shoes—that is achieved by the exercise of empathetic imagination lacks normative significance,”<sup>11</sup> I believe that the initial impulse behind,

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<sup>10</sup> See, for example, Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 *Georgetown L J* 1845, 1845-49 (1994); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *Mich L Rev* 2411, 2412-14, 2437-41 (1989).

<sup>11</sup> Richard A. Posner, *Overcoming Law* 381 (Harvard 1995).

and much of the force guiding, the scholarship of narrative and emotion *are* imbued with normative significance. Such scholarship seeks to expose the unstated, longstanding privileging of dominant narratives and emotional attitudes in the legal arena. Put differently, the scholarship attempts to open that arena to outsider narratives and to emotional attitudes that have heretofore been marginalized or completely silenced. Parts I and II argue that the law must acknowledge and abide by this normative principle. However, when the use of narrative or the introduction of benign emotions is not directed toward this end, neither device is normatively desirable; indeed, in this instance, both may be dangerous.

I conclude that neither narratives nor benign emotions such as caring, empathy, or compassion are always helpful or appropriate in the legal arena. Whether a particular narrative ought to be heard, or a particular emotion expressed, depends on the context and the values we seek to advance. For those of us who believe that compassion has been wrongly exiled from opinions such as *DeShaney*,<sup>12</sup> that dominant legal narratives need to be challenged by the voices of outsiders,<sup>13</sup> and that legal decisions ought to be based on information from as many of those affected as possible,<sup>14</sup> the difficult questions are *which* emotions to consider in judging, *which* narratives to privilege or silence, and *how* to circumscribe the decision-making contexts in which these devices should be used.

Part III applies the normative analysis and the limiting principle developed in Parts I and II in the concrete context of victim impact statements. In Part III, I argue that victim impact statements are narratives that should be suppressed because they evoke emotions inappropriate in the context of criminal sentencing. Specifically, victim impact statements appeal to hatred, the desire for undifferentiated vengeance, and even bigotry.

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<sup>12</sup> See Susan Bandes, *The Negative Constitution: A Critique*, 88 Mich L Rev 2271, 2287-97 (1990); Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 Vand L Rev 1665, 1674-78 (1990); Benjamin Zipursky, *DeShaney and the Jurisprudence of Compassion*, 65 NYU L Rev 1101 (1990).

<sup>13</sup> See, for example, Kathryn Abrams, *Hearing the Call of Stories*, 79 Cal L Rev 971, 981 (1991); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 Stan L Rev 607, 607-08, 611-21 (1994); Jane B. Baron, *Resistance to Stories*, 67 S Cal L Rev 255, 267-69 (1994); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 Mich L Rev 2073, 2075, 2097-98 (1989); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 Iowa L Rev 803, 809, 851-52 (1994).

<sup>14</sup> Susan Bandes, *The Idea of a Case*, 42 Stan L Rev 227, 284-89 (1990).

In doing so, they may block the sentencer's ability to perceive the essential humanity of the defendant. More subtly, victim impact statements, in their insistence on evaluating the worth of victims, offend the dignity of the victim as well.

### I. THE ROLE OF EMOTION

Even a cursory foray into the writings of philosophers, psychologists and neurobiologists reveals the daunting complexity of the study of emotions. Dozens of theories attempt to explain and define that which cannot be explained or defined.<sup>15</sup>

There is widespread agreement on the impossibility of finding a definition for the term "emotion."<sup>16</sup> As Amélie Rorty explains, "[e]motions do not form a natural class."<sup>17</sup> They do not fit easily into categories such as: active or passive; essentially physical processes or psychological states not reducible to physical processes; rational, nonrational, or irrational; voluntary or involuntary; motives, attitudes, character traits, moods, or feelings; subjective or objective; reasonable or unreasonable.<sup>18</sup> Nevertheless, there is broad agreement on one crucial point—that emotions have a cognitive aspect—and its corollary—that reasoning has an emotive aspect.<sup>19</sup>

Despite the general consensus among scholars in various fields who have studied emotion, this core insight has met with continual resistance in the legal world, which generally subscribes to the formalistic belief that reason can be neatly separat-

<sup>15</sup> See George Mandler, *The Search for Emotion*, in Lennart Levi, ed., *Emotions: Their Parameters and Measurement* 1, 10 (Raven 1975) (arguing that attempts to define emotion are "misplaced and doomed to failure"); William Lyons, *Emotion* 25 n 14 (Cambridge 1980) (same). These theories fall roughly into four categories: (1) the James Lange model (explaining emotion by reference to physiological changes); (2) the psychoanalytic model (basing explanations on the work of Sigmund Freud, such as his work with repressed memory); (3) the cognitive model (holding that judgments or cognitions are central to emotion); and (4) the behaviorist model (holding that emotions are acquired behavior patterns).

<sup>16</sup> See, for example, Patricia S. Greenspan, *A Case of Mixed Feelings: Ambivalence and the Logic of Emotion*, in Amélie Oksenberg Rorty, ed., *Explaining Emotions* 223, 237 (California 1980); Ronald de Sousa, *The Rationality of Emotion* 19 (MIT 1987).

<sup>17</sup> Amélie Oksenberg Rorty, *Introduction*, in Amélie Oksenberg Rorty, ed., *Explaining Emotions* 1, 1 (California 1980).

<sup>18</sup> *Id.*

<sup>19</sup> See, for example, Martha C. Nussbaum, *The Use and Abuse of Philosophy in Legal Education*, 45 *Stan L Rev* 1627, 1634 & nn 29-32 (1993) (philosophy, anthropology, and psychology—emotion has a cognitive component); Antonio R. Damasio, *Descartes' Error: Emotion, Reason and the Human Brain* (Grosset Putnam 1994) (biology—reason has an emotive component); Nel Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* 91-92, 136-37 (California 1984) (philosophy—emotion has a cognitive aspect).

ed from emotion.<sup>20</sup> Such highly influential works as Lynne Henderson's *Legality and Empathy*,<sup>21</sup> Martha Nussbaum's works on emotion in law and philosophy,<sup>22</sup> and the groundbreaking symposium in the *Cardozo Law Review*<sup>23</sup> have enriched and illuminated legal theory by bringing to it insights from fields such as philosophy, psychology, anthropology, and neurobiology about what makes people perceive, feel, react, reason, and choose as they do.<sup>24</sup> The appearance of these and related works<sup>25</sup> has

<sup>20</sup> See, for example, *DeShaney*, 489 US at 202 (arguing that judges, like other humans, are moved by sympathy, but must resist acting solely upon this basis); *Saffle v Parks*, 494 US 484, 493 (1990) (arguing that permitting jury to give weight to sympathy threatens fairness and accuracy); *Penry v Lynaugh*, 492 US 302, 359 (1989) (Scalia concurring in part and dissenting in part) (arguing that introduction of evidence of defendant's mental retardation as a mitigating factor, unaccompanied by judicial guidance, prompts an "unguided, emotional 'moral response'"). See also Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 Harv L Rev 1, 14 (1979) (A judge must "be impartial, distant, and detached from the contestants, thereby increasing the likelihood that his decision will not be an expression of the self-interest (or preferences) of the contestants, which is the antithesis of the right or just decision."); Owen M. Fiss, *Reason in All its Splendor*, 56 Brooklyn L Rev 789, 801 (1990) ("Allowing passion to play a role in the decisional process . . . is inconsistent with the very norms that govern and legitimate the judicial power . . .").

An interesting example of the law's faith in the separation of cognition and affect is the *M'Naghten* insanity test, which is satisfied where "the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, [ ] he did not know he was doing what was wrong." *M'Naghten's Case*, 8 Eng Rep 718, 722 (HL 1843). The *M'Naghten* test has been widely criticized for its outmoded notion that the mind can be separated into cognitive, emotional, and control components. See, for example, Abraham S. Goldstein, *The Insanity Defense* 45-66 (Yale 1967) (questioning the manner in which the *M'Naghten* test is administered); Michael L. Perlin, *The Jurisprudence of the Insanity Defense* 78-84 (Carolina 1994) (criticizing the *M'Naghten* test as hopelessly outmoded); Susan Bandes, *Developments in the Insanity Defense*, 10 Barrister 41, 42 (Spring 1983) (noting critics of *M'Naghten* test "say that it is based on early, erroneous concepts of mental illness"). Nevertheless, Congress readopted the *M'Naghten* test in the wake of John Hinckley's acquittal. Insanity Defense Reform Act of 1984, Pub L No 98-473, 98 Stat 2057, codified at 18 USC § 17 (1988).

<sup>21</sup> 85 Mich L Rev 1574 (cited in note 7).

<sup>22</sup> See, for example, Martha C. Nussbaum, *Love's Knowledge: Essays on Philosophy and Literature* (Oxford 1990); Martha C. Nussbaum and Amartya Sen, eds, *The Quality of Life* (Oxford 1993); Martha C. Nussbaum, *Skepticism about Practical Reason in Literature and the Law*, 107 Harv L Rev 714 (1994).

<sup>23</sup> *Reason, Passion, and Justice Brennan: A Symposium*, 10 Cardozo L Rev 1 (1988). The symposium includes articles by, among others, Lynne Henderson, Martha Minow and Elizabeth Spelman, and Justice William Brennan, Jr.

<sup>24</sup> See, for example, Ronald de Sousa, *The Rationality of Emotions*, in Amélie Oksenberg Rorty, ed, *Explaining Emotions* 127 (California 1980) (discussing the philosophical and psychological underpinnings of emotion); Damasio, *Descartes' Error* (cited in note 19) (discussing biological underpinnings of emotion); Nussbaum, *Love's Knowledge* (cited in note 22) (discussing philosophy of emotions); Sandra Blakeslee, *Tracing the Brain's Pathways for Linking Emotion and Reason*, NY Times C1 (Dec 6, 1994) (reporting neurobiological research on the connection between reason and emotion); Angier, *Scien-*

shifted the ground of discussion. If the legal academy is not persuaded, at least it feels impelled to respond.<sup>26</sup>

The scholarship on the role of emotion in law does not seek to establish that there are *no* significant differences between reason and emotion. Rather, it persuasively demonstrates that the mainstream notion of the rule of law greatly overstates both the demarcation between the two and the possibility of keeping reasoning processes free of emotional variables.<sup>27</sup> Emotion and cognition, to the extent they are separable, act in concert to shape our perceptions and reactions. But more than that, much of the scholarship posits that it is not only impossible but also *undesirable* to factor emotion out of the reasoning process: by this account, emotion leads to truer perception and, ultimately, to better (more accurate, more moral, more just) decisions.<sup>28</sup>

The law perpetuates the illusion of emotionless lawyering and judging by portraying certain "hard" emotions or emotional stances as objective and inevitable.<sup>29</sup> Yet even a legal process devoid of such "soft" emotions as compassion or empathy is not emotionless; it is simply driven by other passions. As Martha Minow and Elizabeth Spelman point out, "logic . . . [itself] serve[s] human purposes . . . drawing on passions . . . for order, predictability, and security . . ."<sup>30</sup> Justice Brennan aptly describes as emotional the judge's "visceral temptation to help pros-

*tists Mull Role*, NY Times at C1 (cited in note 9) (reporting on scientific studies on empathy in animals).

<sup>25</sup> See, for example, Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 Cal L Rev 1011 (1989); Anthony E. Cook, *The Death of God in American Pragmatism and Realism: Resurrecting the Value of Love in Contemporary Jurisprudence*, 82 Georgetown L J 1431 (1994); Susan Moller Okin, *Reason and Feeling in Thinking about Justice*, 99 Ethics 229 (1989); Noddings, *Caring* (cited in note 19); Sara Ruddick, *Maternal Thinking*, 6 Feminist Stud 342 (1980); Anne C. Dailey, *Feminism's Return to Liberalism*, 102 Yale L J 1265 (1993).

<sup>26</sup> See, for example, Fiss, 56 Brooklyn L Rev 789 (cited in note 20); Posner, *Overcoming Law* at 368-84 (cited in note 11); Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 166 (Belknap 1993).

<sup>27</sup> See Henderson, 85 Mich L Rev at 1595-96 (cited in note 7).

<sup>28</sup> See Nussbaum, *Love's Knowledge* at 78-82 (cited in note 22); Martha L. Minow and Elizabeth V. Spelman, *Passion for Justice*, 10 Cardozo L Rev 37, 44-48 (1988); Annette Baier, *Master Passions*, in Amélie Oksenberg Rorty, ed, *Explaining Emotions* 403, 419-20 (California 1980); Marcia Lind, *Hume and Moral Emotions*, in Owen Flanagan and Amélie Oksenberg Rorty, eds, *Identity, Character, and Morality: Essays in Moral Psychology* 133, 145 (MIT 1990).

<sup>29</sup> For example, in *Parks*, the Court counterpoised the "acceptable" desire for logic, order, and predictability, and a thinly disguised hostility and impatience toward capital appeals, against the "unacceptable" specter of a capital jury relying on sympathy and emotion. 494 US at 493.

<sup>30</sup> Minow and Spelman, 10 Cardozo L Rev at 45 (cited in note 28).



ecute the criminal.”<sup>31</sup> Nevertheless, the passion for predictability, the zeal to prosecute, and mechanisms, such as distancing, repressing, and isolating one’s feelings from one’s thought processes,<sup>32</sup> are the emotional stances that have always driven mainstream legal thought; as a result, they avoid the stigma of “emotionalism.” That derogatory term is reserved for the marginalized “soft emotions”: compassion, empathy, caring, mercy.<sup>33</sup>

If we accept that emotion cannot be factored out of the reasoning process, we resolve the debate about *whether* emotion belongs in the law—emotional content is inevitable. Legal reasoning, although often portrayed as rational, does not—indeed, cannot—transcend passion or emotion. Instead, it is driven by a different set of emotional variables, albeit an ancient set so ingrained in the law that its contingent nature has become invisible.<sup>34</sup>

<sup>31</sup> William J. Brennan, Jr., *Reason, Passion, and “The Progress of the Law”*, 10 Cardozo L Rev 3, 11 (1988). See also Chief Justice Rehnquist’s impassioned description of the victim’s story in *Payne*, 501 US at 811-14.

<sup>32</sup> Isolation is a particularly interesting defense mechanism in the present context. It is defined in Burness E. Moore and Bernard D. Fine, eds, *Psychoanalytic Terms and Concepts* 49 (Yale 1990), as “[s]eparat[ing] a painful idea or event from feelings associated with it, thereby altering its emotional impact.” According to this definition, isolation may be a defense mechanism or an adaptive mechanism—a defense that “function[s] constructively [to] make action and thought more efficient.” *Id.* Specifically, “isolation, by dissociating thinking from emotions, can facilitate the logical progression of ideas by avoiding the distraction associated emotions might cause.” *Id.*

<sup>33</sup> See, for example, *Penry*, 492 US at 359 (Scalia concurring in part and dissenting in part); Susan Bandes, *Taking Justice to its Logical Extreme: A Comment on Teague v. Lane*, 66 S Cal L Rev 2453, 2465 n 73 (1993) (discussing *Penry*); Michael L. Perlin and Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 Am J Crim L 431, 452 (1995) (same).

In this context, “soft” is often a code word for feminine, and, as many feminist scholars have argued, the marginalization of soft emotions can be understood in the context of a gender-based marginalization of feminine-identified modes of lawyering. See, for example, Annette Baier, *Trust and Antitrust*, 96 Ethics 231, 247-50 (1986) (arguing that moral philosophy, because of its predominantly male tradition, has overlooked the importance of trust in human interactions); Henderson, 85 Mich L Rev at 1578-87 (cited in note 7); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women’s Lawyering Process*, 1 Berkeley Women’s L J 39, 49-50 (1985); Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv L Rev 829, 832 (1990); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 Yale L J 1373, 1373-74 (1986). See generally Robin West, *Jurisprudence and Gender*, 55 U Chi L Rev 1 (1988) (discussing ways in which feminine values and emotions have been marginalized); Nancy J. Hirschmann, *Rethinking Obligation: A Feminist Method for Political Theory* 163-216 (Cornell 1992).

<sup>34</sup> Indeed, the objectivist mode of legal reasoning portrays its method as objective and its conclusions as absolute. Thus, objectivist jurists contend that their mode of legal reasoning is the sole possible mode, rather than a choice among approaches. See Joseph Singer, *The Player and the Cards*, 94 Yale L J 1, 25-39 (1984).

The characterization of some emotional variables, stances, or mechanisms<sup>35</sup> as “emotional” and others as “reasonable” is an assertion of power—a camouflaged decision to marginalize the former and privilege the latter. Much of the importance of the scholarship on emotion lies in exposing this assertion of power and challenging the notion of a neutral, emotionless baseline.

The scholarship about the role of emotion in law teaches that the presence of emotion in legal discourse is not optional. In order to make that point, it has tended to focus on, and strive to rehabilitate, the marginalized emotions.<sup>36</sup> This has been a necessary and effective strategy. However, it is time for the focus to shift and widen. Beginning with the assumption that emotion is an inextricable part of legal discourse, we must now ask the most important question—how do we determine which emotions deserve the most weight in legal decision making, which perspectives are the most desirable?

The recent literature on emotions—philosophical, psychological, and neurobiological—essentially agrees that emotions are not merely instinctive and uncontrollable, but are also partially cognitive.<sup>37</sup> The cognitive aspect allows emotions to evolve with exposure to new information and experiences.<sup>38</sup> Thus, if one is open to new understandings, it may be possible to mitigate the limitations of one’s own perspective. It may also be possible to

<sup>35</sup> In referring to our emotional makeup, I include not only love, hate, fear, envy, compassion, contempt, and so forth, but also defense mechanisms such as suppression, repression, splitting, and denial. These mechanisms are not strictly emotions, but are unconscious mechanisms for coping with, or warding off, painful or threatening emotions. See Moore and Fine, eds, *Psychoanalytic Terms* at 48-49 (cited in note 32). To the extent that there is a clear demarcation between emotion and reason, defense mechanisms fall into the former category, since rather than transcending emotion, they are compelled by it. For a slightly different formulation, see Baron, 67 S Cal L Rev at 277-78 (cited in note 13) (“The most ‘dispassionate’ exposition of an idea reflects *some* emotion, if only that of contempt for feeling.”).

The difficulty in distinguishing “pure” emotions from reactions to emotions is part of the larger difficulty in defining emotions in general. See text accompanying notes 15-18. Indeed, empathy—the “emotion” that has received so much scholarly attention—is usually defined in psychology texts as a means of diagnosing or recognizing emotions rather than an emotion itself. See Robert Jean Campbell, ed, *Psychiatric Dictionary* 214-15 (Oxford 5th ed 1981); Moore and Fine, eds, *Psychoanalytic Terms* at 67 (cited in note 32). See also text accompanying notes 52-56.

<sup>36</sup> See, for example, Henderson, 85 Mich L Rev at 1650-53 (cited in note 7) (empathy); Colker, 77 Cal L Rev at 1022-28 (cited in note 25) (love and compassion); Cook, 82 Georgetown L J 1431 (cited in note 25) (love).

<sup>37</sup> See note 19.

<sup>38</sup> See Nussbaum, *Love’s Knowledge* at 78-79 (cited in note 22); de Sousa, *The Rationality of Emotion* at 184-90 (cited in note 16); Damasio, *Descartes’ Error* at 245-47 (cited in note 19).

consciously split off some of the factors—for example, blind spots, prejudices, and fears—that inappropriately interfere with judgment.

One of the few jurists to directly grapple with the issue of judicial self-awareness was Jerome Frank.<sup>39</sup> Frank believed that if a judge struggled for self-knowledge, he could to some extent sift out the “prejudices that inevitably shape his own perceptions and deliberations.”<sup>40</sup> Frank has been criticized for being overly sanguine about the possibility that a judge can shed his biases,<sup>41</sup> and indeed Frank does seem to view bias as an attribute that, once stripped away, leaves a neutral personality capable of neutral and unsituated decision making.<sup>42</sup> If we substitute the word “perspective” for the word “bias,” it is easy to see that it would be as impossible and undesirable to completely shed one’s perspective as it would be to shed one’s skin. The ideal is not to shed all the attributes that encompass one’s personality, but rather to become aware of—and perhaps exercise some control over—those that interfere with judgment.

But what does it mean to say that an attribute “interferes with judgment?” How is it possible to determine which are the fears, neuroses, prejudices, blind spots, and unsavory emotions that interfere with judgment, and which are the attributes and particular perspectives that make up each person’s unique personality? How is it possible to determine which other perspectives should be taken into account, and how much weight to accord them? In Judith Resnik’s words, “how can we tell the good bias from the bad?”<sup>43</sup> The enterprise founders without a normative principle to guide it.

Is it possible to decide *which* emotions belong in the law? I suggest that no emotion, no matter how benign, is an unmitigat-

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<sup>39</sup> Frank, with Thurman Arnold, exemplified a particular strand of realist thought that looked to Freudian psychology to explain judicial decision-making processes. See Kronman, *The Lost Lawyer* at 185-94 (cited in note 26). This strand seems to have virtually died out for lack of heirs. See Lynne Henderson, *The Dialogue of Heart and Head*, 10 *Cardozo L Rev* 123, 128-30 (1988).

<sup>40</sup> Kronman, *The Lost Lawyer* at 193 (cited in note 26). See also Jerome Frank, *Law and the Modern Mind* 106-07 (Peter Smith 6th ed 1970); Henderson, 10 *Cardozo L Rev* at 128-30 (cited in note 39).

<sup>41</sup> See Kronman, *The Lost Lawyer* at 194 (cited in note 26).

<sup>42</sup> Thus Kronman disputes Frank’s assumption that eliminating biases will promote uniform decision making. *Id.* This criticism seems correct, since, as Kronman notes, Frank bases his assumption on the dubious ground that legal questions have demonstrably right answers that are obscured by prejudice. *Id.* at 193-94.

<sup>43</sup> *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 *S Cal L Rev* 1877, 1928 (1988).

ed good in the context of legal decision making. Nor can less "agreeable" emotions, such as anger and fear, be dismissed across the board. There are two basic, interrelated reasons for these conclusions. First, the appropriateness of particular emotions cannot be discussed apart from the context in which they appear. For example, an appropriate emotion for a judge to employ in deciding civil liability may be inappropriate for jurors at the sentencing phase of a criminal trial.<sup>44</sup> Second, the nature of emotions is far too complex to permit broad-based judgments on their propriety. For example, as I will discuss, the term empathy has many different meanings.<sup>45</sup>

Nevertheless, we can show that certain emotions are generally more desirable than others through the development of external normative criteria. In other words, if empathy is desirable, or the hunger for revenge undesirable, we should be clear and principled about the reasons why. Such reasons may initially be grounded in law, but ultimately they will be animated by political, moral, religious, and other external values.<sup>46</sup> The debate must proceed on these parallel planes as well, for once we have articulated a normative principle, we will be prepared to evaluate whether particular emotions are valuable additions to different legal contexts.

As Susan Jacoby argues in her excellent book, *Wild Justice*, there is a deeply imbedded assumption in contemporary legal theory that justice and revenge are mutually exclusive, and indeed, that the very word "revenge" is pejorative.<sup>47</sup> Yet revenge, and even vindictiveness, have longstanding and respectable roots in historical, religious, and moral tradition.<sup>48</sup> Moreover, Jacoby makes an articulate case that revenge continues to be, in certain contexts, the morally appropriate reaction to criminality.<sup>49</sup> Jeffrie Murphy, in *Forgiveness and Mercy*, similarly argues that forgiveness is not always the morally appropriate emotional stance, and advances a spirited defense of hatred and resentment as righteous emotions in certain contexts.<sup>50</sup>

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<sup>44</sup> For a discussion of victim impact statements in criminal trials, see Part III.

<sup>45</sup> See text accompanying notes 52-54.

<sup>46</sup> Lynne Henderson makes the point that "the question of referring to 'outside' value choices itself is just moving the emotion/reason question to a more abstract level. That is, affective attachments to particular moral systems still influence choice." E-mail from Lynne Henderson to Susan Bandes (Oct 8, 1995) (on file with U Chi L Rev).

<sup>47</sup> Susan Jacoby, *Wild Justice: The Evolution of Revenge* 1-4 (Harper 1983).

<sup>48</sup> See generally *id.*

<sup>49</sup> *Id.* at 362.

<sup>50</sup> Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* 16-19, 89-90 (Cam-

The point is not that Jacoby or Murphy are necessarily correct, but rather that they are scrutinizing the appropriateness of particular emotions in different contexts. They effectively challenge the blanket condemnation of certain emotions, and do so by carefully considering the external moral, religious, and political criteria by which these emotions may be evaluated, as well as the various contexts in which they might be appropriate.

This same careful consideration must extend to emotions generally considered benign as well; the use of such emotions, to be desirable, must be grounded in external normative principles. To illustrate, I will focus on one benign emotional capacity—empathy—in some detail.<sup>51</sup> There are two major problems with the use of empathy in the legal context. First, the notion of empathy is laden with serious definitional problems—on close scrutiny, it resembles a moving target.<sup>52</sup> Second, the conceptual utility of empathy varies widely depending on the context in which it is invoked, and the purposes for which it is employed.

Henderson, in her seminal article on empathy, explains that the word has several definitions. Specifically, she describes the following three alternatives: “1) feeling the emotion of another; 2) understanding the experience or situation of another, . . . often [ ] by imagining oneself to be in the position of the other; [or] 3) action brought about by experiencing the distress of another . . . .”<sup>53</sup> Obviously, these definitions describe a wide range of cognition and behavior,<sup>54</sup> and this inherent ambiguity makes it

bridge 1988). For an excellent refutation of Murphy's position, see Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?*, 88 Mich L Rev 1448 (1990).

<sup>51</sup> Empathy is not an emotion itself, but rather a means of understanding the emotions of others. See text accompanying notes 85-87.

<sup>52</sup> “To speak of empathy has on occasion been as senseless as to discuss sitting in a box without distinguishing whether one means a compartment in a theater, the driver's seat or a big case. The word empathy sometimes means one thing, sometimes another, until now it does not mean anything.” Michael Franz Basch, *Empathetic Understanding: A Review of the Concept and Some Theoretical Considerations*, 31 J Am Psychoanalytic Ass'n 101, 102 (1983), quoting Theodor Reik, *Listening With the Third Ear: The Inner Experience of a Psychoanalyst* 356-57 (Farrar, Strauss 1948).

<sup>53</sup> Henderson, 85 Mich L Rev at 1579 (cited in note 7). See also Cynthia V. Ward, *A Kinder, Gentler Liberalism: Visions of Empathy in Feminist and Communitarian Literature*, 61 U Chi L Rev 929, 934 (1994). Ward distinguishes between projective empathy (projecting oneself into another's place) and imaginative empathy (understanding the other's point of view). These two types of empathy roughly correspond to the first and second definitions offered by Henderson.

<sup>54</sup> Lawrence A. Blum, *Vocation, Friendship, and Community: Limitations of the Personal-Impersonal Framework*, in Owen Flanagan and Amélie Oksenberg Rorty, eds, *Identity, Character, and Morality: Essays in Moral Philosophy* 174, 182-84 (MIT 1990)

difficult to advance broad claims about the desirability of empathy in law.

Empathy is desirable regardless of context in only one sense. To the extent empathy is the facility to perceive the humanity of another person, it is an unmitigated good.<sup>55</sup> In this sense, empathy facilitates the basic recognition that all people should be accorded basic human dignity. Without empathy in this sense, as Judge Posner describes in his discussion of the judges of the Third Reich, persons can be easily excluded from the human community and made into outlaws "to whom no consideration is due."<sup>56</sup> However, accepting that the ability to perceive the humanity of another person is an unmitigated good, it is not clear that empathy is the correct label for it. For example, Anthony Cook describes the same recognition, which he calls a "commitment to the innate worth and equality of all human life," as a form of Christian love.<sup>57</sup>

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(making the point, in the closely related context of a discussion of caring, that the term "care" means different things in different contexts, requiring different sensitivities and virtues).

<sup>55</sup> Arguably there are situations in which, for certain purposes, one needs to use certain defense mechanisms, such as suppression, to temporarily set aside one's awareness of another's humanity. An emergency-room physician, for example, may be more effective and efficient under such circumstances. Perri Klass, in her moving novel, *Other Women's Children* (Random House 1990), speaks of the need to control her emotions in order to work with pediatric AIDS patients. Her protagonist says: "If I had to lose children I loved, if 'love' is a word with any power at all, then surely this job would stop with the first death." Id at 263. However, Klass was not forgetting their humanity, but rather suggesting that if she loved each of them as she did her own children, she could not do her job. The danger of suppressing awareness of another's humanity, of course, is that the suppression may become repression, an unconscious mechanism that remains active when it is no longer needed. As an illustration of this danger, see Seymour Wishman's account of how his need to function dispassionately widened the distance between his emotional and intellectual reactions until he caught himself thinking of a two-year-old murder victim as "it." Seymour Wishman, *Confessions of a Criminal Lawyer* 238-40 (Times 1981). See also Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 Hum Rts 1, 15 (1975) (discussing the difficulty of separating one's role as a lawyer from one's personhood). For a deeply moving example of this pathology in the context of a different profession (specifically, of being a butler), see Kazuo Ishiguro, *The Remains of the Day* (Knopf 1989).

<sup>56</sup> Posner, *Overcoming Law* at 158 (cited in note 11). Posner notes that remembering that other human beings are human "does not require us to be able to crawl into their minds." Id at 382.

<sup>57</sup> Cook, 82 Georgetown L J at 1496 (cited in note 25). See also Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 Cornell L Rev 655, 686 (1989) (proposing use of Greek word *agape* to connote a moral emotive principle of respect for persons, or universal love); William J. Brennan, Jr., *In Defense of Dissents*, 37 Hastings L J 427, 436 (1986) ("A punishment must not be so severe as to be utterly and irreversibly degrading to the very essence of human dignity . . . [T]he fatal constitutional infirmity of capital punishment is that it treats members of the human race as

Once we move beyond the basic recognition of human dignity, empathy becomes a more problematic concept. Even if we assume empathy means feeling another's pain, or, even less than that, simply understanding the situation of another,<sup>58</sup> it is not a particularly helpful term in the legal context.<sup>59</sup> Specifically, it begs some important questions: To what extent *can* we truly feel another's pain, or even understand another's situation? And to what end do we seek this understanding?

Tennessee Williams captures the conundrum underlying the first of these questions:

Nobody sees anybody truly but all through the flaws of their own egos. That is the way we all see each other in life. Vanity, fear, desire, competition—all such distortions within our own egos—condition our vision of those in relation to us. Add to those distortions in our *own* egos the corresponding distortions in the egos of *others* and you see how cloudy the glass must become through which we look at each other.<sup>60</sup>

Let me be clear—I am in no way dismissing the effort to achieve imaginative understanding of others, but it is important to realize that the effort, however well intentioned, is constrained by each individual's particular capabilities and limitations. We best understand that which conforms to our own experience, or at least to our own brand of experience.<sup>61</sup> In order to bridge disparate types of experience, so as to facilitate empathy across a broader range of contexts, it is often necessary to emphasize commonalities, and to downplay perspectives that are not shared.<sup>62</sup> This may effectively serve to perpetuate, rather than challenge, the status quo.<sup>63</sup>

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nonhumans . . .”).

<sup>58</sup> See Brennan, 37 Hastings L J at 436 (cited in note 57); Henderson, 85 Mich L Rev at 1578-87 (cited in note 7).

<sup>59</sup> Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 Mich L Rev 2099, 2106-10 (1989).

<sup>60</sup> David Halberstam, *The Fifties* 262 (Villard 1993) (emphasis in original), quoting letter from Tennessee Williams to Elia Kazan. Or, as Ronald de Sousa more succinctly put it: “We can never attain ‘the view from nowhere.’” de Sousa, *The Rationality of Emotion* at 147 (cited in note 16), quoting Thomas Nagel, *The View from Nowhere* (Oxford 1986).

<sup>61</sup> That is, experiences familiar to those in our own circumstances: those social, ethnic, racial, economic, religious, political, or gender groups that help define us. See Ward, 61 U Chi L Rev at 944 (cited in note 53) (Projective empathy will not allow us to transcend social differences that contribute to formation of the self.).

<sup>62</sup> Note, *Sympathy as a Legal Structure*, 105 Harv L Rev 1961 (1992).

<sup>63</sup> Id. See also Robin L. West, *Adjudication is Not Interpretation: Some Reservations About the Law-as-Literature Movement*, 54 Tenn L Rev 203, 206-09 (1987) (arguing that

Consider, for example, the dark underbelly of empathy, as illustrated in a recent notorious case. In that case, the defendant found his wife in bed with another man at midnight, chased the man away, drank and argued with his wife until four a.m., and then fatally shot her in the head with a hunting rifle.<sup>64</sup> A Baltimore County Circuit Court judge sentenced the defendant to eighteen months in prison for voluntary manslaughter, saying "I seriously wonder how many men married five, four years would have the strength to walk away without inflicting some corporal punishment."<sup>65</sup> The judge's reaction was the one that came most easily—prereflective and self-referential. The judge starkly demonstrated his inability to diverge from his patterned, preconscious response to the situation. The useful response would have been the more difficult one—an effort to understand or experience the viewpoint most unlike his own.<sup>66</sup>

The Baltimore case is unusual because the easy identification for the judge was with the defendant. This, unfortunately, is more often true in cases of rape and domestic violence,<sup>67</sup> in

the law-as-literature movement risks perpetuating the status quo); Robin West, *Communities, Texts, and Law: Reflections on the Law and Literature Movement*, 1 Yale J L & Human 129, 131 (1988) (same); Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 Ind L J 379, 410 (1991) (arguing that authoritarian approaches to legal interpretation take a punitive or moralistic stance against deviance or change).

<sup>64</sup> See Tamar Lewin, *What Penalty for a Killing in Passion?*, NY Times A18 (Oct 21, 1994).

<sup>65</sup> Id.

<sup>66</sup> In psychoanalytic terms, the unexamined reaction of the judge might be analogized to a countertransference. The dictionary of the American Psychoanalytic Association defines countertransference as "[a] situation in which an analyst's feelings and attitudes toward a patient are derived from earlier situations in the analyst's life that have been displaced onto the patient." Moore and Fine, eds, *Psychoanalytic Terms* at 47 (cited in note 32). Especially interesting is the reference work's contrast between empathy and countertransference:

The mechanism of identification is involved in both countertransference and empathy, but there are important differences. In empathy identification is transient, a temporary sharing of derivatives expressing the patient's unconscious fantasies. Through an affective resonance with the patient clues to understanding his or her conflicts may emerge. In identification arising from unanalyzed countertransference, however, the analyst is denied this insight inasmuch as he or she is caught up in conflicts identical to those of the patient.

Id at 47-48.

<sup>67</sup> A homosexual victim may evoke a similar judicial reaction. For example, after presiding over a murder trial involving two gay victims, Judge Morris Jackson Hampton made several controversial comments to a reporter, including the following: "These two gays that got killed wouldn't have been killed if they hadn't been cruising the streets picking up teenage boys"; "I don't much care for queers cruising the streets picking up teenage boys. I've got a teenage boy."; "I put prostitutes and gays at about the same



which predominantly male judges find it easier to make the empathetic link with male defendants, than in cases of other crimes.<sup>68</sup> More often, the difficulty for the trier of fact is in making the empathetic link with the defendant,<sup>69</sup> in seeing the defendant's shared humanity. In either situation, though, the real importance of empathy lies in its counternarrative aspect—it enables the trier of fact to imagine himself in the place of another.

Before we can empathize in this way, we must realize that the dominant perspective, or one's own perspective, or any particular perspective, is not universal. Judges in particular must understand this. Whereas the juror and the attorney receive constant reminders that their perspectives are partial,<sup>70</sup> the judge is encouraged by every trapping of the judicial role to believe that his own perspective is truly universal—a grave danger indeed.<sup>71</sup>

Although the judge ostensibly speaks in his own voice, in order to appear authoritative he must project a larger, more transcendent persona.<sup>72</sup> He does this by speaking declaratively, in the language of certainty.<sup>73</sup> As Robert Ferguson explains, the

level.”; “And I'd be hard put to give somebody life for killing a prostitute.” State Commission on Judicial Conduct, *Order of Public Censure of Morris Jackson Hampton, Judge*, 238 *Judicial District Court, Dallas, Texas* (1989) (unreported determination) (on file with U Chi L Rev).

<sup>68</sup> See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich L Rev 1, 92-94 (1991) (Courts interpret feminist expert testimony on battering through the lens of cultural stereotypes.); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 UC Davis L Rev 1013, 1025 (1991) (discussing society's “classic rape myths”); Susan Estrich, *Rape*, 95 Yale L J 1087, 1141-42 (1986) (discussing the motivating principles of the Model Penal Code's approach to rape); Kim Lane Scheppelle, *The Re-Vision of Rape Law*, 54 U Chi L Rev 1095, 1104-13 (1987) (discussing rape myths and paradigms that influence judicial response to rape victims); Kathleen L. Soll, *Gender Bias Task Forces: How They Have Fulfilled Their Mandate and Recommendations for Change*, 2 S Cal Rev L & Women's Stud 633, 638-41 (1993) (reviewing gender bias task force findings, including widespread findings that male judges make decisions based on stereotypes of women's roles in marriage and society).

<sup>69</sup> Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 S Ct Rev 77, 101.

<sup>70</sup> For jurors, these include sidebars, sustained objections, and instructions not to consider certain evidence. For attorneys, these include the limits of discovery and the knowledge that the adversary system itself encourages advocates to be partial.

<sup>71</sup> See generally Dennis E. Curtis and Judith Resnik, *Images of Justice*, 96 Yale L J 1727 (1987) (discussing historical personifications of “justice” and their effect on judges' self-conceptions).

<sup>72</sup> Professor Ferguson calls this speaking in the “monologic voice.” Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 Yale J L & Human 201, 204-08 (1990).

<sup>73</sup> *Id.* at 210-13.

judicial opinion (particularly the majority opinion) seeks to achieve the rhetoric of inevitability,<sup>74</sup> a rhetoric which admits of no freedom of choice on the part of the judge.<sup>75</sup> According to Robert Cover, this rhetoric must give the "impression . . . of bowing . . . to the inexorable force of crystal clear demands," so that regardless of his decision in any case, the judge may experience himself as a moral person who is simply bowing to irresistible forces that transcend his own conscience or sense of justice.<sup>76</sup> Thus the judge's claim to speak in a universal voice goes hand-in-hand with his claim to have moved beyond individual emotions and morals into the emotionless realm of the rule of law.

This judicial mentality exacts terrible costs. It demeans litigants and others whose claims fall outside the ambit of the "universal" voice,<sup>77</sup> those whose claims evoke emotions that the judge either cannot understand or cannot admit feeling (such as racial hatred).<sup>78</sup> This mentality conversely privileges emotions that the judge doesn't think of as "emotional" (such as the zeal to prosecute and the desire for revenge).<sup>79</sup> Most disturbingly, it permits a retreat from responsibility. Because the judge has not truly understood the consequences to the excluded litigants, and because, to the extent he has understood them, he has not accepted responsibility for causing them, he is able to exact these costs while minimizing his own emotional distress.<sup>80</sup>

<sup>74</sup> Id at 213-16.

<sup>75</sup> Id.

<sup>76</sup> Robert M. Cover, *Justice Accused* 233 (Yale 1975).

<sup>77</sup> See, for example, *Bowers v Hardwick*, 478 US 186 (1986) (holding that sexual activities of gays and lesbians are not protected by the Constitution); *Webster v Reproductive Health Services*, 492 US 490 (1989) (holding that states are not constitutionally required to allow access to public facilities for the performance of nontherapeutic abortions, thereby limiting indigent women's access to abortion services).

<sup>78</sup> See Cover, *Justice Accused* at 227 n \* (cited in note 76) (relating the admittedly speculative theory that "deep' urges to hurt, to exercise power, [and] to cause suffering existed in some antislavery judges"). See also Vivian Berger, *Payne and Suffering—A Personal Reflection and a Victim-Centered Critique*, 20 Fla St U L Rev 21, 25 (1992) (Judges cannot avoid "racially selective empathy."); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan L Rev 317, 321 (1987) (noting the "reluctance to admit that the illness of racism infects almost everyone").

<sup>79</sup> See, for example, *Payne*, 501 US at 825-26 (holding that a bar to the admissibility of victim impact statements would be unfair to the prosecution).

<sup>80</sup> This is, of course, an oversimplification. Cover discusses the emotional turmoil felt by the antislavery judges. Cover, *Justice Accused* at 226-56 (cited in note 76). Moreover, I do not mean to suggest that judges have a monopoly on the use of the universal voice. Indeed, the problem of complacency, of mistaking our own particular perspective for the universal perspective, is common to all of us. I merely suggest that the trappings of their posts encourage such myopia, which—due to the power of the office—may have serious and unparalleled consequences.

Therefore, the empathetic mode does have important attributes to offer the judge. First of all, it can help the judge understand, experientially rather than intellectually, that "[t]here is another world 'out there,'"<sup>81</sup> and that many people live under conditions very different from those with which he is familiar. In a criminal case, the effort to understand the defendant's perspective can yield information valuable for both the guilt and sentencing phases of the trial. As I discuss below, this type of understanding is not necessarily incompatible with judging—one may understand a defendant's perspective without absolving him of responsibility.<sup>82</sup> In addition, simply incorporating some of the language of empathy and compassion into the judicial vocabulary would enable a judge to face more directly the "burden and pain of judging."<sup>83</sup>

Nevertheless, before we ask how best to incorporate empathy into judging, we should acknowledge that the relationship between a judge and a defendant is not a therapeutic one. The judge is, after all, ultimately there to pass judgment. In the criminal context he is there to sentence. In the capital context, the sentence may be death.<sup>84</sup>

Empathy, by itself, is merely an instrumental concept. It is not an emotion, benign or otherwise, but rather a capacity, a tool used to achieve a variety of ends. Psychoanalysts regard empathy as a means of diagnosing and treating their patients.<sup>85</sup> Trans-

<sup>81</sup> *Beal v Doe*, 432 US 438, 463 (1977) (Blackmun dissenting). See also *Ohio v Akron Center for Reproductive Health*, 497 US 502, 541 (1989) (Blackmun dissenting) (quoting *Beal*).

<sup>82</sup> See text accompanying notes 214-20.

<sup>83</sup> Resnik, 61 S Cal L Rev at 1926 (cited in note 43).

<sup>84</sup> To this end, consider Carl Rogers's conception of the empathy issue in the context of judging: Can or should the judge accompany the defendant to "wherever [the defendant's] feelings lead him, no matter how strong, deep, destructive, or abnormal these feelings may seem?" See Campbell, ed, *Psychiatric Dictionary* at 215 (cited in note 35). Robert Cover provides a powerful answer:

[A]s the judge interprets . . . she also acts—through others—to restrain, hurt, render helpless, even kill the prisoner. Thus, any commonality of interpretation . . . [is] destroyed by [these] divergent experiences . . . [W]hether or not the judge and prisoner share the same philosophy of punishment, they arrive at the particular act of punishment having dominated and having been dominated with violence, respectively.

Robert M. Cover, *Violence and the Word*, 95 Yale L J 1601, 1609 (1986). See also Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 Ind L J 1103, 1110-13 (1995) (discussing law's violence in capital context).

<sup>85</sup> See Moore and Fine, eds, *Psychoanalytic Terms* at 67 (cited in note 32) ("Empathy . . . is a temporary, partial ego regression in the service of the analytic process,

planting the concept from the psychological to the legal context erases its ordinary meaning.<sup>86</sup> Therefore, empathy must be redefined in the legal context with reference to the instrumental ends for which it is employed. Dr. Michael Basch put it well:

Empathy is first and foremost a capacity. Strictly speaking, it is value-free. Empathic thinking . . . is a function that the human brain at a certain level of development is potentially capable of performing, no more and no less. This is often not understood, and empathy becomes confused with altruism and other-directedness, though it need not be employed in the service of either goal.<sup>87</sup>

What one does with the insight provided by empathic understanding remains to be determined by the nature of the relationship between the people involved and the purpose for which the empathic capacity was engaged by its user in the first place.<sup>88</sup>

Thus, empathy lends itself to many ends, in the legal arena as elsewhere. Although the term often evokes appealing images of friends experiencing each others' joys and sorrows, in the legal arena empathy can be used—or misused—across the whole spectrum of human relationships: for example, between lawyer and client,<sup>89</sup> suspect and investigator or prosecutor, and litigant and judge. In addition to the example of the judge in a capital case, consider two other illustrations of the use of empathy. First, empathy is a tool of the court-ordered psychiatrist, who, depending on his findings, may testify against the interests of the defendant. As Daniel Shuman explains:

[The] information is gathered during a forensic relationship that is unbalanced; it is not a voluntary relationship that [the] patient chooses to enter or terminate. The participants do not share a common goal of patient benefit. The rules of

permitting an easily reversible trial identification with the analysand.”).

<sup>86</sup> See Ward, 61 U Chi L Rev at 934-35 n 19 (cited in note 53) (arguing that “the attempted transformation of empathy from a psychological to a political concept creates intractable problems”).

<sup>87</sup> Basch, 31 J Am Psychoanalytic Ass'n at 119 (cited in note 52) (citations omitted).

<sup>88</sup> Id at 123 (citations omitted).

<sup>89</sup> For a nuanced and affecting account of one lawyer's attempt to understand the limits of her ability to empathize with a client on welfare, see Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 Buff L Rev 1, 21-32 (1990).

confidentiality do not apply. It is an adversarial relationship arising out of a judicial proceeding, with the examiner having the capacity to influence the result of a judicial proceeding against the defendant.<sup>90</sup>

Second, empathy is a tool of the police officer interrogating a suspect. Police manuals advise interrogators to win the trust of the suspect by using such empathetic devices as sympathizing with the suspect's plight and placing themselves in the suspect's shoes.<sup>91</sup> The tactics used to elicit a confession from Susan Smith exemplify graphically the use of empathy in this context.<sup>92</sup> After telling her that he knew she was lying, the officer interrogating Ms. Smith prayed with his suspect, and held her hand.<sup>93</sup> The officer probably felt compassion for Ms. Smith, but he also had a job to do.<sup>94</sup> As with the sentencing judge and the court-ordered psychiatrist, the police interrogator used empathetic listening to win and then betray his suspect's trust in a situation in which he held the balance of power.<sup>95</sup> In all of these examples, empathy helps one participant gain knowledge and understanding from another who has no choice but to cooperate, and who has much to lose from his cooperation. It thus serves to further exacerbate the imbalance of power, and thereby ratify rather than challenge the status quo.

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<sup>90</sup> Daniel W. Shuman, *The Use of Empathy in Forensic Examinations*, 3 *Ethics & Behav* 289, 296 (1993) (citations omitted). See generally Michael L. Perlin, *Power Imbalances in Therapeutic and Forensic Relationships*, 9 *Behavioral Sci & L* 111 (1991) (discussing the power imbalances in forensic mental examinations between therapists and criminal suspects).

<sup>91</sup> See *Miranda v Arizona*, 384 US 436, 450-52 (1966), citing Fred E. Inbaugh and John E. Reid, *Criminal Interrogation and Confessions* 34-55, 87 (Williams & Wilkins 1962).

<sup>92</sup> Rick Bragg, *A Killer's Only Confidant: The Man Who Caught Susan Smith*, NY Times A10 (Aug 4, 1995):

[A]lthough he was her hunter, he also became the person she could lean on, rely on, trust . . . .

. . .

He had to hold her together even as he and other investigators picked her story apart, had to coax and soothe and even pray beside her, until he sensed that the time was right to confront her and try to trick her into confessing.

<sup>93</sup> See *id.* The officer falsely told Smith he knew she was lying because his deputies had staked out the spot from which she claimed a black carjacker had kidnapped her boys and had witnessed nothing. *Id.*

<sup>94</sup> See *id.*

<sup>95</sup> See Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 *Yale L J* 259, 286-88 (1993) (discussing power imbalances in police interrogation).

Empathy is an instrumental concept, and, in the legal arena, it is also a *political* concept. Ideas about therapeutic empathy and commonality of interpretation look foolishly sentimental when the empathizer is in a dominant position.<sup>96</sup> The real challenge is to create actual political equality.<sup>97</sup> Empathy may be harnessed in service of this ideal, but by itself it won't get us there.

## II. THE ROLE OF NARRATIVE

Richard Delgado was right—happily—when he said that these days, everyone seems to be writing stories, or else writing about stories.<sup>98</sup> The turn toward storytelling has enriched the legal academy in countless ways. Thus, the idea of *excluding*, or *silencing*, certain stories sounds at first positively heretical.<sup>99</sup> At first glance, it appears that if stories are a positive force, more stories must be better. In legal scholarship, this is undoubtedly true—inclusion of a multiplicity of voices seems an unmitigated good.

However, the term “narrative” is employed by legal scholars to describe a good deal more than simply stories appearing in law journals.<sup>100</sup> The transformative insight of narrative scholarship is that narrative structures and conventions shape *all* legal dis-

<sup>96</sup> See note 84.

<sup>97</sup> See Ward, 61 U Chi L Rev at 933, 954 (cited in note 53) (“[V]ague endorsements of empathic understanding” mask the “apparent conflict between the political values of diversity and equality.”).

<sup>98</sup> Delgado, 87 Mich L Rev at 2411-12 (cited in note 10).

<sup>99</sup> See Scheppele, 87 Mich L Rev at 2097-98 (cited in note 13) (When points of view collide, “it does not serve courts well to simply suppress one of them.”). Indeed when we speak of the storytelling movement in scholarship, as Delgado did in the sentence noted above, multiplicity seems purely positive. Serious discussion of the scholarship is salutary, see Abrams, 79 Cal L Rev at 976-77 (cited in note 13) (arguing that to be taken seriously, narrative scholarship must be subjected to examination and criticism); Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U Colo L Rev 683, 703-16 (1992) (suggesting standards for criticism); Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 Cal L Rev 889, 912-40 (1992) (discussing evaluative criteria for scholarship in general, including narrative scholarship), and evaluation of it may be necessary for certain purposes; see Daniel A. Farber and Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 Stan L Rev 807 (1993) (undertaking an evaluation of narrative scholarship). For reactions to Farber and Sherry see Baron, 67 S Cal L Rev 255 (cited in note 13); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 Vand L Rev 665 (1993); Fajer, 82 Georgetown L J 1845 (cited in note 10); Johnson, 79 Iowa L Rev 803 (cited in note 13). But the idea of silencing portions of it is offensive.

<sup>100</sup> See Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 Va L Rev 1229, 1253 (1995) (questioning the definition of “narrative” in the context of legal scholarship).

course.<sup>101</sup> When terms such as narrative and storytelling are thus used to describe legal discourse generally, we must proceed carefully in making claims about *which* stories belong in the legal arena. It is no longer useful merely to invoke such values as the inclusion of multiple voices. The efficacy of narrative in the law cannot be discussed acontextually. Whether a particular narrative should be heard in any given legal context will depend on particulars—the type of proceeding, the type of narrative, and ultimately, the intended and actual effects of the narrative.

Scholarship about narrative draws on literary insights to illustrate that all of us—including the players in the legal arena—order our experiences into stories. We make sense of the world by ordering it into metaphors,<sup>102</sup> and ultimately into narratives with familiar structures and conventions—plot, beginning and end, major and minor characters, heroes and villains, motives, a moral.<sup>103</sup>

In this context, metaphor is not merely an optional, rhetorical flourish. It is our most pervasive means of ordering our expe-

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<sup>101</sup> Kathryn Abrams notes: "For the trial attorney, 'law' is inevitably about presenting concrete and nonlinear stories, about sensing the features of a narrative that will engage a judge's or juror's attention or expose the tension in a legal rule." Abrams, 79 Cal L Rev at 1043 (cited in note 13). See also Robert M. Cover, *Foreword: Nomos and Narrative*, 97 Harv L Rev 4, 5 (1983) ("[L]aw and narrative are inseparably related."); Scheppele, 87 Mich L Rev at 2073 (cited in note 13) ("[L]aw has always been concerned with narratives."); Baron, 67 S Cal L Rev at 262 (cited in note 13) ("Law is itself a story . . . [and] a way of telling stories . . ."). Judicial opinions are also often referred to as stories. See Ferguson, 2 Yale J L & Human at 201-04 (cited in note 72) (proposing to analyze judicial opinions as a literary genre). See also Deborah S. Gordon, "'Jug Jug' to Dirty Ears": Maryland v. Craig Through a Literary Lens, 66 NYU L Rev 1404 (1991) (using literary techniques to interpret a judicial opinion); Abrams, 79 Cal L Rev at 1051 (describing Justice Marshall's dissent in *City of Richmond v. J. A. Croson Co.*, 488 US 469, 528-61 (1989), as an opposition narrative). Some of the most creative recent scholarship reconceptualizes the dominant canon in a particular field as a "story." See generally Judith Resnik, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 Vand L Rev 1021 (1994) (describing and challenging the conventional story of the federal courts); Akhil Reed Amar, *Law Story*, 102 Harv L Rev 688 (1989) (same); Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 Vand L Rev 993 (1994) (same).

<sup>102</sup> George Lakoff and Mark Johnson, *Metaphors We Live By* 3-6 (Chicago 1980). See generally Haig Bosmajian, *Metaphor and Reason in Judicial Opinions* (Southern Illinois 1992) (discussing the role of metaphor in judicial opinions).

<sup>103</sup> See James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* 168-74 (Wisconsin 1985) ("The story is the most basic way we have of organizing our experience and claiming meaning for it."); Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 Mich L Rev 2225, 2228 (1989) (Narrative corresponds "closely to the manner in which the human mind makes sense of experience.").

rience into conceptual systems.<sup>104</sup> In order to process our observations and experiences, we have to place them in a pre-existing conceptual structure. Like novelists, we use our metaphors to build stories—stories that also must fit into pre-existing conceptual structures.<sup>105</sup>

Each individual is situated in her own experience. Moreover, in order to interpret and understand that experience, each individual must filter it through the lens of her own point of view.<sup>106</sup> Who we are determines what we notice, what seems important, how we react to it, what connections we draw, and what meaning we attach to things.<sup>107</sup> Thus, both the stories we hear and the stories we tell are shaped by who we are.

Before our experiences can be imported into the legal context, they must pass through yet another filter, this one constructed by the law, and consisting of specific legal rules that govern our ability to understand, structure, and talk about experience.<sup>108</sup> The conventions of legal narrative govern not only *which* narratives are appropriate or permitted in which legal settings, but also *how* these stories are told, including who may tell them, when interruption is permitted, which amounts and types of information are included and which are deemed irrelevant.<sup>109</sup>

<sup>104</sup> Lakoff and Johnson, *Metaphors* at 3-6 (cited in note 102).

<sup>105</sup> Gary Peller, *The Metaphysics of American Law*, 73 Cal L Rev 1151, 1181 (1985). See also Ronald Dworkin, *A Matter of Principle* 146-66 (Harvard 1985) (comparing legal interpretation with interpretation in other fields of knowledge, particularly literature); Ronald Dworkin, *Law's Empire* 228-32 (Belknap 1986) (comparing legal interpretation with writing a "chain novel").

<sup>106</sup> See Minow and Spelman, 10 Cardozo L Rev at 51-53 (cited in note 28); Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 Harv L Rev 10, 45-50 (1987); Catharine Wells, *Situated Decisionmaking*, 63 S Cal L Rev 1727, 1743-44 (1990).

<sup>107</sup> See Wells, 63 S Cal L Rev at 1728-31 (cited in note 106); Lakoff and Johnson, *Metaphors* at 227-28 (cited in note 102); Peller, 73 Cal L Rev at 1175-81 (cited in note 105). See also Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, New Yorker 56, 62 (Oct 23, 1995) ("[I]t's a fallacy . . . to equate shared narratives with shared meanings." For example, "the communal experience afforded by the public narrative [of the O.J. Simpson trial] was splintered by the politics of interpretation.").

<sup>108</sup> Peller, 73 Cal L Rev at 1182-93 (cited in note 105); Yudof, 66 Tex L Rev at 593 (cited in note 7). See generally Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 Yale L J 763 (1995) (discussing ways in which pleading conventions shape and impoverish the stories litigators can tell).

<sup>109</sup> Patricia Ewick and Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 L & Soc'y Rev 197, 206-08 (1995). See also White, 38 Buff L Rev at 49 (cited in note 89) (describing a successful attempt to tell a narrative that deviated from the rules of legal storytelling).



In short, narratives—albeit narratives conforming to a particular set of implicit and explicit rules—pervade legal discourse. There can be no debate about *whether* narrative belongs in the law. Such an argument would begin from the faulty assumption that we have a choice about whether to permit narratives into legal discourse. Delgado calls this assumption the “empathic fallacy,” which he defines as the belief that we can escape the screening of new stories through the medium of the old.<sup>110</sup> That is, the dominant storyteller experiences himself, not as telling a story, but rather as speaking in the universal voice.<sup>111</sup> The legal discourse we observe, create, and participate in is already ordered into narratives. It is just that some are more visible than others.

Descriptively, the concept of narrative provides useful ways of thinking about how we order and understand our experience. But the danger of legal narratives is precisely that they do use familiar conventions and structures. When we tell law stories, then, we may be merely reproducing the conventional narrative, with its implicit, existing norms.<sup>112</sup> This danger will always exist unless we explicitly acknowledge the normative function of counternarrative—to challenge the notion of a nonsituated, omniscient narrator, to expose false claims of universality and their web of underlying assumptions, and to open up the legal arena to otherwise silenced or marginalized voices.<sup>113</sup> Narrative, like empathy, is a tool that can be used either to perpetuate the status quo, or to challenge it in order to move the law forward. To achieve the latter objective, extrinsic moral and political criteria must inform the use of narrative.

Katharine Bartlett makes this point neatly in her review<sup>114</sup> of Mary Ann Glendon’s book, *Abortion and Divorce in Western*

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<sup>110</sup> Delgado, 46 Vand L Rev at 667 (cited in note 99). Delgado explains that since new stories are screened through the structure established by old stories, deviations from the old, familiar structure tend to be rejected.

<sup>111</sup> See Peller, 73 Cal L Rev at 1181 (cited in note 105) (“When particular representational categories . . . achieve hegemony in a particular community, description is taken as fact rather than ‘mere’ opinion or ideology.”).

<sup>112</sup> See Mark Kingwell, *Let’s Ask Again: Is Law Like Literature?*, 6 Yale J L & Human 317, 331 (1994) (Interpretive legal theory risks merely recapitulating existing community norms.); Ewick and Silbey, 29 L & Soc’y Rev at 205 (cited in note 109) (“[N]arratives may actually be complicit in constructing and sustaining the very patterns of silencing and oppression that some narrative scholars seek to reveal through the use of narrative method.”).

<sup>113</sup> See Abrams, 79 Cal L Rev at 975-76 (cited in note 13).

<sup>114</sup> Katharine T. Bartlett, *Storytelling*, 1987 Duke L J 760.

Law.<sup>115</sup> Bartlett notes that Glendon uses storytelling, a familiar tool "within politically leftist or progressive circles,"<sup>116</sup> to argue for a decidedly conservative agenda: restricting access to divorce and abortion.<sup>117</sup> According to Bartlett, this demonstrates that storytelling is an indeterminate form that can serve contradictory purposes. "*The questions, as always, are: who gets to tell the story and what agenda will the telling serve.*"<sup>118</sup>

We cannot avoid the problem of deciding *which* law stories ought to be told, and which should be given precedence. As Robert Cover so powerfully reminds us, stories in the legal arena are told on "a field of pain and death. . . . A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life."<sup>119</sup> Not every story can prevail, and the consequences for the loser can be enormous. Moreover, as I discuss below in the context of victim impact statements, not every story can or should be told. Often, one story (usually the dominant story) drowns out or preempts another (usually the alternative story). Because it is the dominant story, its character as narrative is invisible. "[T]he tale appears to tell itself."<sup>120</sup> In short, for the alternative story to be heard, sometimes the dominant story must be excluded.

Another means by which traditional legal narrative conventions reinforce the status quo is by treating certain law stories as anecdotes—or isolated, disconnected tales.<sup>121</sup> Consider a recent opinion by Judge Frank Easterbrook. He begins the opinion:

<sup>115</sup> Mary Ann Glendon, *Abortion and Divorce in Western Law* (Harvard 1987).

<sup>116</sup> Bartlett, 1987 Duke L J at 762 (cited in note 114).

<sup>117</sup> Glendon, *Abortion and Divorce* at 58-62, 104-11 (cited in note 115).

<sup>118</sup> Bartlett, 1987 Duke L J at 765 (cited in note 114) (emphasis added). Several scholars have made similar points. See, for example, Massaro, 87 Mich L Rev at 2109 (cited in note 59) (Empathy can be invoked to support a variety of conflicting legal ends.); Minow and Spelman, 10 Cardozo L Rev at 47 (cited in note 28) (Litigants construct conflicting narratives to support their respective positions.); Baron, 67 S Cal L Rev at 266 (cited in note 13) (discussing the connection between narrative and power); Minow, 40 UCLA L Rev at 1435 (cited in note 7) (Stories can be used to advance a variety of conflicting ends.).

<sup>119</sup> Cover, 95 Yale L J at 1601 (cited in note 84) (discussing legal interpretation). See also West, 54 Tenn L Rev at 205 (cited in note 63) (Adjudication is an imperative command, not an act of interpretation.); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 Yale L J 1860, 1893-97 (1987) ("[L]aw is steeped in violence and social control.").

<sup>120</sup> Ewick and Silbey, 29 L & Soc'y Rev at 213 (cited in note 109).

<sup>121</sup> *Id.* at 216-17. See also Martha Minow and Elizabeth V. Spelman, *In Context*, 63 S Cal L Rev 1597, 1646-47 (1990) (Attention to particularity that aims to highlight people subject to domination is not an unthinking immersion in overwhelming detail, but a sustained inquiry into the structures of domination in our society.).

"Anthony Croom is a punk who grew up to be a thug."<sup>122</sup> He continues in the same vein.<sup>123</sup> Judge Easterbrook writes an arresting story, but his storytelling mode here merely recapitulates the familiar, dominant narrative of individual criminality, fault, and blameworthiness. I argue, by contrast, that there are alternative, less visible stories here that ought to be told. Croom's story began much earlier than the point at which Judge Easterbrook picked it up, and is part of a larger social and historical context that Judge Easterbrook's narrative completely omits.<sup>124</sup> Thus, we can treat each offender as a punk who grows up to be a thug, or, instead, we can try to understand—and perhaps short-circuit—the process by which it occurs. The dominant narrative convention masks the connection between the individual case and larger systemic patterns, thus discouraging systemic reform.<sup>125</sup>

Once we acknowledge the instrumental, political nature of legal narrative, we can enter the difficult discussions of why marginalization of some narratives occurs,<sup>126</sup> how to separate the wrongly excluded narratives<sup>127</sup> from those that ought to be

<sup>122</sup> *United States v Croom*, 50 F3d 433, 434 (7th Cir 1995).

<sup>123</sup> The story continues:

His first juvenile conviction was for battery. Next came a conviction for child molestation . . . . Later Croom was convicted of burglary and other offenses. The burglary conviction disqualified Croom from possessing guns, but he thumbed his nose at the law. One day, while attired like a refugee from a gangster movie, with gloves and a hat pulled down to cover his face, Croom bolted from a meal into the arms of police, who recovered a semi-automatic weapon.

Id at 434.

<sup>124</sup> Harris, 1991 S Ct Rev at 101 (cited in note 69). See also Minow and Spelman, 63 S Cal L Rev at 1632-34 (cited in note 121) (Failure to consider context leads to decisions favoring the powerful and wealthy.); Robin West, *Narrative, Responsibility and Death: A Comment on the Death Penalty Cases From the 1989 Term*, 1 Md J Contemp Legal Issues 161, 174 (1990) (Narrative is needed to explain the social and historical causes of criminal behavior.).

<sup>125</sup> Numerous examples of the law's proclivity for isolating systemic conduct exist. See, for example, Bandes, 42 Stan L Rev at 299 (cited in note 14) (discussing how standing doctrine is interpreted to deny jurisdiction to litigate collective interests, by portraying those interests as atomistic); Susan Bandes, Monell, Parratt, Daniels and Davidson: *Distinguishing a Custom or Policy from a Random, Unauthorized Act*, 72 Iowa L Rev 101, 157 & n 414 (1986) ("When systemic [governmental] wrongdoing is incorrectly reduced to a series of purportedly disconnected tort claims, [rather than a § 1983 municipal liability claim,] serious abuses of state power will go unchecked.")

<sup>126</sup> See, for example, Scheppele, 87 Mich L Rev at 2084-97 (cited in note 13) (discussing "mechanisms that tend to exclude 'outsider' stories").

<sup>127</sup> Commentators have offered various definitions of outsider narratives. Many of these focus on the characteristics of the narrator. See, for example, Delgado, 87 Mich L

excluded, how to include the wrongly marginalized narratives in legal discourse, and how to ensure that they are actually heard.<sup>128</sup> This is an unavoidably normative, value-laden discussion, as it should be.<sup>129</sup> Choosing which story to tell, in the legal context, is an awesome responsibility, the consequences of which we ignore at our peril.

The scholarship on the emotional content of law and the scholarship on the narrative content of law, then, both emphasize our individual differences and the biases that inevitably shape our understanding of the law. However, bias is a misleading term in this context if its recognition implies that there is an unbiased norm. More accurately, every understanding of the law is partial, situated, and contingent—who we are shapes what we hear and understand.

Accepting this premise paves the way for the crucial insight of both strands of scholarship. The law can present itself as authoritative, hard, and inevitable, transcending passion, bias, and individual morality, by marginalizing certain modes of perception and placing its imprimatur on others. Compassion, empathy, and mercy are marginalized as “emotional” and therefore inappropriate,<sup>130</sup> while at the same time the hatred and prejudice in *Bow-*

Rev at 2412 n 8 (cited in note 10) (defining “outgroup” as “any group whose consciousness is other than that of the dominant one”); Fajer, 82 Georgetown L J at 1848 (cited in note 10) (referring to traditionally excluded groups); Eskridge, 46 Stan L Rev at 608 (cited in note 13) (“Outsider work generally consists of writings of authors who are female, non-white, and/or gay.”). Of course, as these scholars recognize, definitions that rely on membership in particular groups may fall into an essentialist trap; most of us are insiders for some purposes, and outsiders for others. See, for example, Johnson, 79 Iowa L Rev at 808 n 26 (cited in note 13) (Legal scholars from traditionally excluded groups are both insiders and outsiders.); Abrams, 79 Cal L Rev at 1012 n 143 (cited in note 13) (A scholar who has studied narratives but not experienced similar events is both an insider and an outsider.). See also Dailey, 102 Yale L J at 1267-73 (cited in note 25) (discussing anti-essentialism in the context of narrative and empathy). Other definitions focus, not on the identity of the narrator, but on the characteristics or purpose of the narrative. See, for example, Ewick and Silbey, 29 L & Soc’y Rev at 220 (cited in note 109) (defining outsider narratives as those that subvert rather than replicate hegemony); Gates, *Thirteen Ways*, New Yorker at 57 (Oct 23, 1995) (cited in note 107) (defining counternarratives as “the means by which groups contest [the] dominant reality and the fretwork of assumptions that supports it”).

<sup>128</sup> See, for example, Dailey, 102 Yale L J at 1278 (cited in note 25) (stating that feminist narrative effort requires empathic listener).

<sup>129</sup> See Singer, 94 Yale L J at 62 (cited in note 34) (“No theory can legitimately choose our moral ends for us; we should not want theory to do this for us.”).

<sup>130</sup> See, for example, *Saffle v Parks*, 494 US 484, 493 (1990) (“Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror’s emotions than on the actual evidence . . .”); *Penry v Lynaugh*, 492 US 302, 359 (1989) (Scalia concurring in part and dissenting in part) (criticizing the Court for requiring jurors to make “an unguided, emotional ‘moral response’”). See also Bandes, 66 S Cal L Rev at 2464-65 (cited in note 33) (Some judges fear emotions such as mercy and compassion threaten fairness

ers v *Hardwick*,<sup>131</sup> the mean-spirited formalism of *Lockhart v Fretwell*<sup>132</sup> or *DeShaney*,<sup>133</sup> and the zeal to prosecute and execute in *Herrera v Collins*,<sup>134</sup> are portrayed as being inexorably compelled by logic and precedent. This categorization represents an assertion of power to privilege one emotional mode and denigrate another. As to narrative, certain categories of stories are relegated to the status of outsider narratives—suspect, implausible, and optional<sup>135</sup>—while others speak the rhetoric of universality and inevitability, and are thus authoritative.<sup>136</sup> This dichotomy likewise represents an assertion of power to privilege some voices and marginalize or even silence others.<sup>137</sup> Eventually, in both the emotional and the narrative contexts, the assertions of power become invisible, and the dominant emotional mode, the insider narrative, appears neutral and natural.

This insight provides the normative grounding for both strands of scholarship, and thus the limiting principle that allows us to define where in the legal context certain emotions are appropriate. First and foremost, this principle tells us that neither narrative nor any particular emotion is an unmitigated good, desirable regardless of context. Unguided discretion can be dangerous. In a court of law, as opposed to a therapist's office, not every voice can be given its due cost-free. The order of the day is not unconditional acceptance, but rather weighing, deciding,

and accuracy.). See also text accompanying notes 29-33.

<sup>131</sup> 478 US 186, 197 (1985) (Burger concurring) (citing with approval Blackstone's definition of sodomy as "the infamous crime against nature," "an offense of 'deeper malignity' than rape," and "a heinous act 'the very mention of which is a disgrace to human nature'"). See also Henderson, 85 Mich L Rev at 1638 (cited in note 7) ("*Hardwick* bristles with emotion . . . but it is the emotion of hate, not that of empathy").

<sup>132</sup> 506 US 364 (1993).

<sup>133</sup> 489 US 189.

<sup>134</sup> 506 US 390 (1993). See also *Coleman v Balkcom*, 451 US 949, 956-64 (1981) (Rehnquist dissenting from denial of certiorari) (asserting that death penalty appeals are too numerous and lengthy and frustrate the administration of the penalty). See also Robert Weisberg, *A Great Writ While It Lasted*, 81 J Crim L & Criminol 9, 9-10 (1990) (discussing *Coleman*); Transcript of Oral Argument in *McFarland v Scott*, 114 S Ct 2568 (1994) (on file with U Chi L Rev) (Chief Justice Rehnquist berates an attorney from the Texas Resource Center for filing "last minute" appeals on behalf of petitioners on death row.)

<sup>135</sup> See Eskridge, 46 Stan L Rev at 621 (cited in note 13) (Cultural insiders have difficulty responding intuitively to some outsider narratives.); Delgado, 87 Mich L Rev at 2412 (cited in note 10) (The stories of outsiders are "suppressed, devalued, and abnormalized."); Baron, 67 S Cal L Rev at 263-64 (cited in note 13) ("Accounts that are at odds with traditional or dominant assumptions can [ ] be silenced or rendered implausible.").

<sup>136</sup> See Cover, *Justice Accused* at 232-36 (cited in note 76); Ferguson, 2 Yale J L & Human at 213 (cited in note 72).

<sup>137</sup> See Peller, 73 Cal L Rev at 1274-75 (cited in note 105).

judging, and sentencing. Not every empathetic impulse is appropriate. As a result, we need some safeguards to ensure that critical reflection supersedes preconscious prejudice, and to ensure equality of treatment. The challenge, then, is to design frameworks that incorporate and respond to the experiences of subordinate groups.<sup>138</sup> In Part III, I illustrate and apply these principles in the context of victim impact statements.

### III. VICTIM IMPACT STATEMENTS

Death penalty jurisprudence provides a particularly rich context for a discussion of emotion and narrative in the law because it implicates all of the themes noted above. Current Eighth Amendment doctrine requires capital sentencing to be contextual and particularistic. Yet this requirement raises converse concerns about unguided discretion and inadequate structure. Capital sentencing heightens the tension, always present in the law, between structured and contextual decision making:<sup>139</sup> both aspects are crucial to the constitutionality of the enterprise yet they seem mutually exclusive.<sup>140</sup> As Robert Weisberg has said, “[c]apital punishment is at once the best and worst subject for legal rules.”<sup>141</sup> The stakes are so high, the decision calls out for objective rules. Yet the ultimate decision is “an intensely moral, subjective matter.”<sup>142</sup>

Capital punishment jurisprudence is also unavoidably emotional. Indeed, it is one of the rare areas of law in which an explicit dialogue about emotion takes place. Cases such as *California v Brown*, which considered the constitutionality of an antisympathy jury instruction, discuss mercy, sympathy, and emotion, and their place in capital sentencing.<sup>143</sup> Less explicit but also pervasive in death cases are the emotions of anger, outrage, frustration, impatience, vengeance, fear, and, arguably, racial hatred. Capital cases often extract a palpable emotional toll from their participants, including some Supreme Court justices.<sup>144</sup> The high stakes and the inherent subjectivity of the judg-

<sup>138</sup> Deborah L. Rhode, *Feminist Critical Theories*, 42 Stan L Rev 617, 632 (1990).

<sup>139</sup> See generally Wells, 63 S Cal L Rev 1728 (cited in note 106) (discussing structural and contextual models of decision making).

<sup>140</sup> See Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L Rev 1147, 1164-86 (1991).

<sup>141</sup> Robert Weisberg, *Deregulating Death*, 1983 S Ct Rev 305, 308.

<sup>142</sup> Id.

<sup>143</sup> 479 US 538, 542-43 (1987). See also *Saffle v Parks* 494 US 484, 493-94 (1990) (discussing *Brown*); Bandes, 66 S Cal L Rev at 2463-66 (cited in note 33) (criticizing *Parks*).

<sup>144</sup> See, for example, William J. Brennan, Jr., *Foreword: Neither Victims nor Execu-*

ment—with its requisite balancing of mercy, vengeance, and retribution<sup>145</sup>—make this a context in which the emotional variables present in all legal decision making exist exquisitely close to the surface.

Likewise, capital punishment is thick with narrative content.<sup>146</sup> Austin Sarat talks about the thick narrative of violence and death in the guilt phase of the trial, and the thick narrative of the defendant's life and humanity in the penalty phase.<sup>147</sup> One has only to read Chief Justice Rehnquist's two-page description of the crime in *Payne*,<sup>148</sup> and Justice Blackmun's detailed description of the execution in *Callins v Collins*,<sup>149</sup> to understand both the power and the strategic capabilities of the use of narrative.

Capital punishment jurisprudence thus contains many of the buzzwords found in contemporary legal scholarship—"contextual," "particularistic," "emotion-laden," "rife with narrative." The controversy over victim impact statements provides a concrete setting for an examination of these terms. For example, a recent defense of victim impact statements by Paul Gewirtz illustrates how these terms, which seem to describe desirable attributes, can be used to argue for undesirable outcomes. When uninformed by normative criteria, the terms prove entirely malleable.<sup>150</sup>

*tioners*, 8 Notre Dame J L Ethics & Pub Policy 1 (1994) (discussing his opposition to the death penalty); *Callins v Collins*, 114 S Ct 1127, 1130 (1994) (Blackmun dissenting from denial of certiorari) ("From this day forward, I no longer shall tinker with the machinery of death. . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed."); Randall Coyne, *Marking the Progress of a Humane Justice: Harry Blackmun's Death Penalty Epiphany*, 43 Kan L Rev 367 (1995) (discussing the evolution of Blackmun's capital punishment jurisprudence in light of his longstanding personal opposition to the death penalty); Joan W. Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 Wis L Rev 1345, 1396-98 (describing pervasive emotional reactions among participants in the death penalty process).

<sup>145</sup> See *Spaziano v Florida*, 468 US 447, 477-84 (1984) (Stevens dissenting) (Capital punishment is not a legal but an ethical judgment—an assessment of the moral guilt of the defendant.).

<sup>146</sup> See, for example, Robin West, *The Supreme Court, 1989 Term—Foreword: Taking Freedom Seriously*, 104 Harv L Rev 43, 90-91 (1990) (discussing role of narrative in recent Supreme Court capital cases); West, 1 Md J Contemp Legal Issues 161 (cited in note 124) (same).

<sup>147</sup> Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, 27 L & Soc'y Rev 19, 39-40 (1993).

<sup>148</sup> 501 US at 811-13.

<sup>149</sup> 114 S Ct 1128, 1128 (1994).

<sup>150</sup> See generally Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial*, in Peter Brooks and Paul Gewirtz, eds, *Law's Stories: Narrative and Rhetoric in the Law* 135 (Yale 1996) (defending the use of victim impact statements in criminal sentencing).

Gewirtz argues that victim impact statements possess several attributes currently valued in progressive circles.<sup>151</sup> They are a form of narrative, and moreover, they are outsider narratives; they are a vehicle through which otherwise silenced voices may be heard in the judicial process.<sup>152</sup> They are contextual and particularistic—they invite case-by-case consideration of the harm to the victim and survivors, and of what punishment it ought to elicit.<sup>153</sup> Finally, in Gewirtz's words, they "invite[ ] empathetic concern in a way that abstractions and general rules do not, and encourage [ ] appreciation of complexity."<sup>154</sup> Thus, as Gewirtz adroitly demonstrates, victim impact statements appear to possess all of the progressive, pragmatic, and feminist<sup>155</sup> attributes we say we value.

Nevertheless, victim impact statements ought to be suppressed. *Booth* was correctly decided—at least in its result—and the *Payne* Court erred in overruling it. This conclusion rests on a rejection of either narrative or empathy as an absolute good, and on an insistence that their attributes be judged both contextually and according to moral principles.<sup>156</sup> Victim impact statements

<sup>151</sup> See *id.* at 142-43.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* Gewirtz argues:

To be sure, the defendant's story and the victim's or survivor's story are about different matters, but in the context of sentencing they can be seen as counter-stories, which should both be available to the decisionmaker. (Indeed, in the most literal sense, victim impact evidence consists of stories of victimized and silenced people, who are the usual concern of many in the "storytelling movement.") If particularized storytelling should have a greater place in the law, does not the particularized story of the murder victim and the victim's survivors warrant that place?

*Id.*

<sup>155</sup> *Id.* See also Howarth, 1994 *Wis L Rev* at 1403 (cited in note 144) ("Once emotions—including feminine emotions such as pity and sympathy and masculine emotions such as anger—are recognized as a valuable part of moral judging, victim-impact evidence can be permitted within the sentencing process.").

<sup>156</sup> The most basic objection to victim impact statements in the capital context is the larger objection to the death penalty itself. As Justice Blackmun observed, the conflicting constitutional demands for individualized sentencing and guided discretion simply cannot both be met. The "goal of eliminating arbitrariness and discrimination" from the administration of the death penalty, furthered by the use of guided discretion, can never be achieved without compromising individualized sentencing. *Callins*, 114 S Ct at 1129 (Blackmun dissenting from denial of certiorari). See also Steven G. Gey, *Justice Scalia's Death Penalty*, 20 *Fla St U L Rev* 67, 81 (1992) (Eliminating arbitrary imposition of the death penalty is inconsistent with preserving individualized sentencing.); Sundby, 38 *UCLA L Rev* at 1147, 1164-86 (cited in note 140) (discussing the "inherent tension" between guided discretion and individualized consideration). The death penalty offends



are stories that should not be told, at least not in the context of capital sentencing, because they block the jury's ability to hear the defendant's story. Moreover, they evoke emotions that do not belong in that context.

Victim impact statements illustrate the pitfalls of acontextually prioritizing any emotion—no matter how benign the emotion may seem. Likewise, they illustrate that storytelling can be used for distinctly unprogressive ends. Ultimately, they illustrate the emptiness of the concepts of empathy and narrative when they are not constrained by extrinsic normative, political, or moral principles.

### A. The Wrong Emotions

Most scholars who study emotion agree that emotions are partially cognitive, and, therefore, educable.<sup>157</sup> If emotions can indeed be educated, then we must face the question of whether emotions are hierarchical. That is, are certain emotions more desirable—for example, more moral, ethical, healthy, helpful, or utilitarian—than others?<sup>158</sup>

Many philosophers and psychologists have studied this question. The philosopher Ronald de Sousa, for example, suggests several possible principles for distinguishing good from bad emotions.<sup>159</sup> Ultimately, he concludes that very few emotions are completely without moral foundation—he singles out prejudices of race, class, and sex as “unredeemably nasty by-products of evolution and development.”<sup>160</sup>

A number of contemporary philosophers have advanced arguments that emotions are hierarchical, and that particular emotions deserve privileged places in the hierarchy.<sup>161</sup> Martha Nussbaum, for example, has eloquently argued that in the context of judging and punishing accused criminals, equity and mer-

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fundamental justice because it must inevitably be either arbitrary, on the one hand, or insufficiently attuned to the unique circumstances of each defendant, on the other. However, for the purposes of discussion, I will assume that the death penalty is at least capable of being applied in a constitutional manner.

<sup>157</sup> See notes 19 and 38.

<sup>158</sup> As I indicated, there is an additional question: is any emotion, no matter how benign it seems, desirable regardless of context? See text accompanying notes 44-45.

<sup>159</sup> de Sousa, *The Rationality of Emotion* at 306-07 (cited in note 16). These principles are motivational, logical, ethical, and experiential. *Id.*

<sup>160</sup> *Id.* at 315-16. Also making de Sousa's “unredeemably nasty” list are envy, motiveless malice, certain forms of resentment, and despair. *Id.*

<sup>161</sup> Needless to say, philosophers at least since Plato and Aristotle have been wrestling with these questions. In this article, I address only current philosophical efforts.

cy are emotions of a higher order than the primitive emotions associated with the retributive urge.<sup>162</sup> Also influential have been Nel Noddings's argument for caring<sup>163</sup> and Lynne Henderson's for empathy.<sup>164</sup> Yet respected scholars have also advanced spirited defenses of resentment and hatred<sup>165</sup> as well as revenge.<sup>166</sup> Perhaps all scholars would stipulate that prejudice and bigotry are emotions of a lower order, not to mention generally unconstitutional when acted upon. Beyond this stipulation, however, it would be difficult to find consensus for any particular hierarchy.

Despite the disagreement on the value of particular emotions, the philosophic debate does reflect a consensus of a more important sort: all appear to agree that value choices are possible, and even unavoidable, when we talk about how we should live our emotional lives. The debate over victim impact statements is, unavoidably, about just such choices. Their defenders call them vehicles for such benign values as empathic concern and inclusion. I argue that the emotions they evoke—hatred, bigotry, and unreflective empathy—demean the dignity of both victim and defendant.

In the capital context, the threshold question is how victim impact statements comport with the dictates of the Eighth Amendment. Today, however, it is clearer than ever that the Eighth Amendment does not "dictate" much at all. To see this, one need only contrast Justice Brennan's conception of the Eighth Amendment as precluding the death penalty entirely<sup>167</sup> with Justice Scalia's conception of the Eighth Amendment as permitting each community nearly unlimited power to both im-

<sup>162</sup> See Nussbaum, 22 Phil & Pub Aff at 125 (cited in note 7). See also Nussbaum, *Love's Knowledge* at 213 (cited in note 22) (Mercy and "humane patience" are preferable to "cruel retaliation.").

<sup>163</sup> Noddings, *Caring* at 98-103 (cited in note 19) (discussing criminal punishment within the context of an ethic of caring).

<sup>164</sup> Henderson, 85 Mich L Rev at 1578-93 (cited in note 7) (discussing the need to incorporate empathy into the legal system).

<sup>165</sup> Murphy and Hampton, *Forgiveness and Mercy* at 16-19, 89-90 (cited in note 50). See text accompanying notes 47-50.

<sup>166</sup> Jacoby, *Wild Justice* at 362 (cited in note 47). See text accompanying notes 47-50.

<sup>167</sup> See *Furman v Georgia*, 408 US 238, 305 (1972) (Brennan concurring); Brennan, 8 Notre Dame J L Ethics & Pub Policy at 4-9 (cited in note 144). See also Alan I. Bigel, *Justices William J. Brennan, Jr. and Thurgood Marshall on Capital Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the Court*, 8 Notre Dame J L Ethics & Pub Policy 13, 108 (1994) (Justice Brennan never wavered from his position "that the death penalty was offensive to human dignity.").

pose the death penalty and define its parameters.<sup>168</sup> Justice Brennan's understanding of the Eighth Amendment flows from his belief in the basic dignity of every member of the human race;<sup>169</sup> Justice Scalia's flows from his belief in the importance of local control and deregulation.<sup>170</sup> More specifically, Justices Brennan and Scalia have sharply divergent views on the purposes of punishment, and these go a long way toward explaining their views on victim impact statements. Although external values should inform the interpretation of any provision of the Bill of Rights,<sup>171</sup> the Eighth Amendment makes such information mandatory; by incorporating a community judgment,<sup>172</sup> it guarantees that individual emotional and moral choices will be part of the decision.<sup>173</sup>

There is a moral crux to the decision whether to admit victim impact statements. The decision requires judging the value of the emotions the statements evoke, both toward the defendant and toward the victim. At bottom, the moral objection to victim impact statements is that they deny the humanity—and the basic dignity—of both defendant and victim.

## B. The Defendant

Victim impact statements evoke not merely sympathy, pity, and compassion for the victim,<sup>174</sup> but also a complex set of emotions directed toward the defendant, including hatred, fear, racial animus, vindictiveness, undifferentiated vengeance, and the desire to purge collective anger. These emotional reactions have a crucial common thread: they all deflect the jury from its duty to consider the individual defendant and his moral culpability.

<sup>168</sup> *Payne*, 501 US at 833-35 (Scalia concurring).

<sup>169</sup> See Brennan, 8 Notre Dame J L Ethics & Pub Policy at 7 (cited in note 144), and note 167.

<sup>170</sup> *Payne*, 501 US at 833-35 (Scalia concurring). But see Walter C. Long, *Appeasing a God: Rawlsian Analysis of Herrera v. Collins and a Substantive Due Process Right to Innocent Life*, 22 Am J Crim L 215, 238 n 139 (1994) (suggesting that "Justice Scalia . . . hides his own probable essentialist support for the death penalty behind the language of majority rule").

<sup>171</sup> See Bandes, 88 Mich L Rev at 2342-47 (cited in note 12).

<sup>172</sup> See, for example, *Trop v Dulles*, 356 US 86, 100-01 (1958) (The meaning of the Eighth Amendment changes as human standards of decency evolve.).

<sup>173</sup> See Weisberg, 1983 S Ct Rev at 388-95 (cited in note 141).

<sup>174</sup> Indeed, as I argue below, they are sometimes at odds with the true emotional needs of the victim. See text accompanying notes 221-38.

### 1. Undifferentiated vengeance.

*Booth* held victim impact statements inadmissible, noting that the jury's decision to sentence the defendant to death must rest on the character of the individual defendant and the circumstances of the crime, and not on extraneous factors such as the character of the victim.<sup>175</sup> *Payne* rejected this rationale, holding that the defendant is not entitled to receive individualized "consideration wholly apart from the crime which he ha[s] committed."<sup>176</sup>

The rationale adopted by the *Payne* majority obfuscates the real issue. Of course, in many respects the harm caused by a criminal act is relevant to determining the defendant's level of responsibility, at both the guilt and sentencing phases.<sup>177</sup> To take an easy example, murder and attempted murder are defined and punished differently, even though the act and the intent may be identical in each case, and the only difference may be the

<sup>175</sup> 482 US at 504-05.

<sup>176</sup> 501 US at 822.

<sup>177</sup> Justice Scalia argues that courts routinely consider factors unrelated to the defendant's personal responsibility and moral guilt: "We may take away the license of a driver who goes 60 miles an hour on a residential street; but we will put him in jail for manslaughter if, though his moral guilt is no greater, he is unlucky enough to kill someone during the escapade." *Booth*, 482 US at 519 (Scalia dissenting). However, Justice Scalia seems to conflate the uncontroversial position that crimes may be treated differently based on the harm they cause, see, for example, note 178, with a position that conflicts with the legal principle of *nulla poena sine lege* (the requirement of prior notice that particular conduct is criminal). See generally Paul Robinson, *Fundamentals of Criminal Law* 49 (Little, Brown 1988) (discussing principle of *nulla poena sine lege*). It is an essential tenet of due process that if the defendant's conduct does not meet the criteria for a previously defined crime, he cannot be punished for that conduct. See, for example, *Connally v General Construction Co.*, 269 US 385, 391 (1926) (Due process, fair play, "and the settled rules of law" require that "the terms of a penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties."). This requirement is reflected in the constitutional prohibition against ex post facto laws. US Const, Art I, §§ 9, 10. The legislature has wide latitude to define criminal conduct and the punishments for that conduct, but it must do so in advance.

Thus to the extent that courts take the magnitude of harm into consideration, they must do so within the boundaries previously authorized by legislative enactment. It is an interesting question whether a legislature could prescribe differential penalties for murder depending on, for example, whether the victim had a family. Certainly, as Justice White points out, legislatures have prescribed that the death penalty is available for those whose crimes harm certain categories of victims, such as police officers on active duty or the President of the United States. *Booth*, 482 US at 517 n 2 (White dissenting). It is an entirely different matter—and entirely inappropriate—to leave the power of differential treatment in the hands of the jury, with no prior notice to the defendant and no prior guidance about which of the victim's characteristics are to be considered. I thank Paul Robinson for helping me to clarify these issues.

fortuity of whether the victim survived or died.<sup>178</sup> But certain other fortuities ought to be irrelevant. Again taking an easy example, the law ought not to condone punishment of a defendant that varies according to the social class or the race of his victim. Such ugly disparities are undeniably part of the realist landscape, but *Payne* completely avoided the question of whether the legal system, by permitting victim impact statements, should encourage them.

The usual justifications advanced for the death penalty are retribution and deterrence.<sup>179</sup> The justifications for admitting victim impact statements, however, arguably satisfy a different, less savory, set of objectives. Justice Scalia's dissenting argument in *Booth*, which ultimately prevailed in *Payne*, was that punishment should be keyed not to the defendant's moral guilt, but to the total harm caused by his actions, whether direct or tangential, intended or unintended, foreseeable or unforeseeable.<sup>180</sup> Steven Gey suggests that this rationale for victim impact statements is far more radical than garden-variety retribution. Gey argues that, under Scalia's view, the sentencing body at a capital trial could "use the unanticipated and unknown consequences of a particular defendant's actions as an aggravating factor"<sup>181</sup> in sentencing the defendant, solely "because society has an abstract need to ameliorate its 'public sense of injustice' at criminal harms generally."<sup>182</sup>

As Gey points out, the idea of venting collective outrage diverges sharply from traditional retributive theory, which does not use punishment merely as a means to promote some other

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<sup>178</sup> See, for example, the Illinois sentencing guidelines, which provide a permissible range of twenty to sixty years for first-degree murder, 730 ILCS § 5/5-8-1(a)(1)(a) (1994), but only six to thirty years for attempted murder, 720 ILCS § 5/8-4(c)(1) (1994); 730 ILCS §5/5-8-1(a)(3) (1994). Under the Illinois scheme, murder, but not attempted murder, can be the predicate offense for a sentence of death. 720 ILCS § 5/9-1(a)-(b) (1994). See also Bandes, 88 Mich L Rev at 2280-81 (cited in note 12) ("The law sometimes chooses to focus on the act apart from its consequences, . . . and more often chooses to focus on the act in relation to its consequences."). The question of whether failed attempts ought to be punished as severely as completed crimes is one that fascinates theorists. For a recent colloquy on the subject, see Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It*, 37 Ariz L Rev 117 (1995); Gary Watson, *Closing the Gap*, 37 Ariz L Rev 135 (1995) (responding to Feinberg); Barbara Herman, *Feinberg on Luck and Failed Attempts*, 37 Ariz L Rev 143 (1995) (same).

<sup>179</sup> Presumably, rehabilitation is out.

<sup>180</sup> See Gey, 20 Fla St U L Rev at 120 (cited in note 156), discussing Scalia's dissent in *Booth*, 482 US at 519-21.

<sup>181</sup> Gey, 20 Fla St U L Rev at 123 (cited in note 156).

<sup>182</sup> *Id.*

good.<sup>183</sup> Martha Nussbaum makes a similar point. She argues that a characteristic of primitive forms of justice is a lack of concern for the particulars of retribution—such as the existence of mitigating circumstances or even whether the person who pays for the wrong was the one who committed it.<sup>184</sup> She sees victim impact statements as a vehicle for venting society's crude passion for revenge.<sup>185</sup>

To the extent victim impact statements are driven by a thirst for undifferentiated vengeance, and therefore shift the focus from the moral culpability of the individual defendant, they offend a bedrock moral principle. Rules concerning life and death should not operate like lotteries.<sup>186</sup> Rather, when our society is choosing *which* heinous murderers to kill and which to spare, its gaze ought to be carefully fixed on the harm they have caused and their moral culpability for that harm, not on irrelevant fortuities such as the social position, articulateness, and race<sup>187</sup> of their victims and their victims' families.

<sup>183</sup> Id.

<sup>184</sup> Nussbaum, 22 Phil & Pub Aff at 89-90 (cited in note 7).

<sup>185</sup> Id at 121-22 n 93.

<sup>186</sup> See Dworkin, *Law's Empire* at 178-86 (cited in note 105) (discussing principle that "checkerboard" decisions—decisions based on arbitrary and irrelevant criteria, such as that every third defendant should be executed—should be ruled out because they fail to take account of the moral status of persons); Kingwell, 6 Yale J L & Human at 330 (cited in note 112) (discussing Dworkin).

Indeed, the idea of purging collective outrage, or scapegoating, evokes Shirley Jackson's terrifying, classic short story, *The Lottery*, in which the person to be executed in a mass stone-throwing ceremony was chosen by lot. Shirley Jackson, *The Lottery*, in *The Lottery* 219 (Bentley 1980). See also Margaret Atwood's description in her dystopian novel, *The Handmaid's Tale*, of public cathartic executions, called salvagings, and of Particications, at which the spectators are permitted to execute the wrongdoer with their bare hands. Margaret Atwood, *The Handmaid's Tale* 272-81 (Houghton Mifflin 1986). See also Teree E. Foster, *Beyond Victim Impact Evidence: A Modest Proposal*, 45 Hastings L J 1305, 1320 (1994) (a satiric defense of victim impact statements, arguing that such statements achieve a communal catharsis that would be even more effectively achieved by public executions). See also *Families of victims can view executions in Texas*, Chi Trib Section 1 at 20 (Nov 18, 1995) (reporting that Texas will join California, Virginia, Louisiana, and Washington in permitting victims' families to view executions).

<sup>187</sup> The Baldus studies, the accuracy of which the Supreme Court did not dispute in *McCleskey v Kemp*, 481 US 279, 291 n 7 (1987), demonstrated that the victim's race is the most significant variable determining whether a defendant will receive the death penalty. Blacks who killed whites were sentenced to death at nearly twenty-two times the rate of blacks who killed blacks, and more than seven times the rate of whites who killed blacks. Id at 327 (Blackmun dissenting). See generally David C. Baldus, George Woodworth, and Charles A. Pulaski, Jr., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* (Northeastern 1990). See also Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* 221-35 (BasicBooks 1994) (discussing Baldus studies and *McCleskey*); Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 Mich L Rev 1741, 1795-1800 (1987) (same).

## 2. The right emotions in the wrong contexts.

Victim impact statements illustrate concretely the ambiguous nature of the term empathy, the dangers of arbitrariness and prejudice inherent in encouraging empathy without sufficient structural safeguards, and the undesirability of empathy unaccompanied by critical reflection. Victim impact statements convey information; is Paul Gewirtz correct to suggest that more information is better? Assuming the empathy elicited by the statements is good, why not encourage it by exposing the decision maker to more voices? There are several problems with this reasoning and its underlying assumptions.

First, not everyone is equipped to hear every voice. We feel empathy most easily toward those who are like us.<sup>188</sup> As for people from backgrounds—ethnic, religious, racial, economic—unlike our own, however, there is a pervasive risk that our ability to empathize will be inhibited by ingrained, preconscious assumptions about them.<sup>189</sup> We all have limited perspectives and a limited ability to empathize with those who do not share our life experiences and values.<sup>190</sup>

When the unusual case comes along in which the members of a capital jury are able to see the defendant as one of their own, we take notice. Consider the recent decision of the jury in Susan Smith's trial for drowning her two sons. The jury was drawn from the close-knit community of Union, South Carolina,<sup>191</sup> where Smith and her extended family had lived for a considerable time.<sup>192</sup> The jurors declined to sentence Smith to death, citing sympathy for her difficult life, sympathy for her family, which would lose yet another member if she were executed, and their own need to live in the community with the Smith family.<sup>193</sup> Juror Roy Palmer said that had he voted for death, "he still would have had to pass by Smith's family members in the streets

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<sup>188</sup> See Robert L. Katz, *Empathy: Its Nature and Uses* 5-6 (Glencoe 1963); Heinz Kohut, *Introspection, Empathy, and Psychoanalysis*, 7 *J Am Psychoanalytic Ass'n* 459, 463 (1959); Basch, 31 *J Am Psychoanalytic Ass'n* at 112 (cited in note 52).

<sup>189</sup> See Harris, 1991 *S Ct Rev* at 94 (cited in note 69) (voicing concern that jurors may not recognize their own invisible, preconscious assumptions); Lawrence, 39 *Stan L Rev* at 317-18, 322-23 (cited in note 78) (discussing the frequently unconscious nature of racial prejudice).

<sup>190</sup> Massaro, 87 *Mich L Rev* at 2121 (cited in note 59).

<sup>191</sup> See Rick Bragg, *Union, S.C., Is Left a Town Torn Asunder*, *NY Times* A8 (July 24, 1995).

<sup>192</sup> Mike Dorning, *Susan Smith's jurors felt her pain*, *Chi Trib Section 1* at 3 (July 30, 1995).

<sup>193</sup> *Id.*

and supermarket aisles of this small town. 'I might have wanted to hang my head,' said Palmer.<sup>194</sup> Most felt outrage and contempt toward Susan Smith, but the jurors saw her as an individual, a human being, someone like them in important ways.<sup>195</sup> Ultimately they felt compassion for her and could not vote to kill her.<sup>196</sup>

More often, for the jury to empathetically connect with the defendant during the sentencing phase of a capital trial is an extremely difficult task. Not only has the defendant been convicted of a heinous crime—a fact that by itself sets him very much apart from the jury's experience—but he may be from a radically different socioeconomic milieu as well.<sup>197</sup> Thus, the jury has difficulty making an empathetic connection without the help of judicial rules and structures that both encourage that connection and place in perspective the more natural, instinctive connection that most jurors feel with the victim. No matter how well intentioned the members of the jury might be, to the extent their feelings toward the defendant are preconscious, widely shared, and, therefore, effectively invisible, they will be unable to critique or to distance themselves from those feelings without the help of rules that limit their discretion.

The feeling of identification with the victim of a crime often comes naturally.<sup>198</sup> In fact, some psychological literature identifies fear of being in the same position of suffering as an important component of empathy.<sup>199</sup> Whether this ought to qualify as

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<sup>194</sup> Id.

<sup>195</sup> See Bragg, *Union, S.C.*, NY Times at A8 (cited in note 191). Bragg's article appeared in the New York Times while the sentencing jury was deliberating. The article predicted that the jury would be sympathetic to Smith, noting that eight of the jurors had family members who had received therapy, one had a son who committed suicide, and most knew someone who had either committed or attempted suicide. Id. See also Rick Bragg, *Carolina Jury Rejects Execution for Woman Who Drowned Sons*, NY Times A1, A8 (July 29, 1995) (One juror "had been Mrs. Smith's babysitter when she was a child, and others had friends or co-workers who saw members of her family almost every day, at the mill, at the Wal-Mart, at ball games.").

<sup>196</sup> See Dorning, *Susan Smith's jurors*, Chi Trib Section 1 at 3 (cited in note 192). For a contrary example, consider the statement of a prospective juror in the trial of a gay man for murder, quoted in John Berendt, *Midnight in the Garden of Good and Evil: A Savannah Story* 370 (Random House 1994): "I have no use for gays,' the man admitted during jury selection, 'but I don't mind it so much if they live somewhere else.'"

<sup>197</sup> See Welsh S. White, *The Death Penalty in the Nineties: An Examination of the Modern System of Capital Punishment* 43 & n 106 (Michigan 1994) (Prosecutors assume "jurors will be more likely to impose the death penalty on someone they regard as an outsider.").

<sup>198</sup> For some triers of fact, however, unshared characteristics make identification with the victim difficult. For further discussion, see text accompanying notes 221-24.

<sup>199</sup> See, for example, Dennis Krebs, *Empathy and Altruism*, 32 J Personality & Soc



putting oneself in another's shoes or simply as a prereflective and self-referential reflex<sup>200</sup> is an interesting semantic question. Indeed, some scientists argue this kind of empathy is of a lesser, instinctual variety:

[These] researchers argue that a version of empathy developed with the evolution of mammals, which care for their young over a protracted period and thus require a mechanism for identifying need in others—the young—and responding appropriately. These scientists define empathy as including some seemingly fraternal behaviors that have a nearly automatic feel to them. If you see a person bump a shin into a fire hydrant, for example, you very likely will wince with vicarious pain. Such knee-jerk reactions suggest to some that empathy is an evolutionarily ancient response, its neural and physiological mechanisms in place long before the advent of *Homo sapiens* or even primates.<sup>201</sup>

Even if one chooses to call this reflexive identification empathy, it lacks a crucial component of understanding—critical distance. Contrary to Justice Stevens's assertion in his dissent in *Payne*, the problem with victim impact statements is not that they evoke emotion rather than reason.<sup>202</sup> Rather, it is that they evoke unreasoned, unreflective emotion that cannot be placed in any usable perspective.<sup>203</sup> In evidentiary terms, victim impact statements are prejudicial and inflammatory. They overwhelm the jury with feelings of outrage toward the defendant and identification with the victim. Finally, victim impact statements diminish the jury's ability to process other relevant evidence, such as evidence in mitigation. This point identifies the

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Psych 1134, 1143-45 (1975) (Feeling of similarity is important component of empathy.).

<sup>200</sup> See notes 64-69 and accompanying text.

<sup>201</sup> Angier, *Scientists Mull Role*, NY Times at C1 (cited in note 9). See also Basch, 31 J Am Psychoanalytic Ass'n at 119 (cited in note 52) ("[M]uch of the time we are emphatically attuned to the affective state of others primarily to fulfill our own needs and to spare ourselves pain."); Daniel Goleman, *Emotional Intelligence* 98 (Bantam 1995) (noting that the original technical meaning of empathy was motor mimicry: a physical imitation of the distress of another, which then evokes the same feeling in oneself).

<sup>202</sup> See *Payne*, 501 US at 856 (Stevens dissenting).

<sup>203</sup> See *Brown*, 479 US at 542-43 (distinguishing between tethered and untethered sympathy); Harris, 1991 S Ct Rev at 91 (cited in note 69) (discussing the ideal of reflective emotionality). See also Basch, 31 J Am Psychoanalytic Ass'n at 119 (cited in note 52) ("To be empathetic an individual must be able to separate himself sufficiently from his feelings and emotions so that instead of simply reacting to them he can establish their genesis and the significance they have in the context in which they are experienced."). See also note 68.

fatal flaw in Gewirtz's "more is better" argument. The admission of a victim impact statement does not simply expand the jury's empathetic horizons by making the victim more human. Instead, it interferes with—and indeed may completely block—the jury's ability to empathize with the defendant or comprehend his humanity.<sup>204</sup>

### 3. The skewed playing field.

*Payne* incorrectly assumes that victim impact statements remedy an inequality of treatment between victim and defendant.<sup>205</sup> However, there is no requirement of parity in the treatment of victim and defendant.<sup>206</sup> As I have argued in detail elsewhere, the Bill of Rights is designed to level the playing field between the defendant and the *state*; its provisions afford extra protections to the former to counteract the awesome power of the latter.<sup>207</sup> Thus, in the context of capital punishment, the Eighth Amendment has been properly interpreted to give the defendant more latitude than it gives the state. Specifically, it requires courts to admit unlimited mitigation evidence, so that the jury may choose to be merciful for any reason or no reason at all,<sup>208</sup> yet it requires courts to limit aggravation evidence to that which is relevant to the defendant's character and the circumstances of the crime.<sup>209</sup> It thus tries, albeit vainly, to achieve the oxymoronic ideal of "guided discretion."<sup>210</sup>

<sup>204</sup> Ewick and Silbey explain that the dominant narrative may have the effect of colonizing the listener's consciousness—preempting the ability to hear alternative stories. 29 L & Soc'y Rev at 213 (cited in note 109).

<sup>205</sup> 501 US at 825-27.

<sup>206</sup> The Constitution does not speak to the rights of victims. See Henderson, 37 Stan L Rev at 948-53 (cited in note 7) (discussing the rise of the victims' rights movement).

<sup>207</sup> See generally Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 S Cal L Rev 1019 (1987) (arguing against the assumption that the state possesses trial-related rights "equal in weight to those of the accused"). See also Berger, 20 Fla St U L Rev at 47 & n 132 (cited in note 78) (discussing imbalances between the procedural rights of the state and the accused).

<sup>208</sup> *Eddings v Oklahoma*, 455 US 104, 110 (1982) (Trier of fact may not be "precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."), quoting *Lockett v Ohio*, 438 US 586, 604 (1978).

<sup>209</sup> See *Payne*, 501 US at 856 (Stevens dissenting) (Decision to impose death penalty must be based "solely on evidence that tends to inform the jury about the character of the offense and the character of the defendant."); *Enmund v Florida*, 458 US 782, 801 (1982) (Punishment must be tailored to defendant's "personal responsibility and moral guilt."); Gey, 20 Fla St U L Rev at 79 (cited in note 156) (arguing that "evidence supporting a death sentence must relate to specific, statutory aggravating factors").

<sup>210</sup> See Paul Whitlock Cobb, Jr., Note, *Reviving Mercy in the Structure of Capital Pun-*

Finally, even assuming the playing field between victim and defendant ought to be level, the *Payne* Court is incorrect in believing that victim impact statements achieve this purpose. *Payne* states that:

[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.<sup>211</sup>

The Court here assumes that, in the absence of victim impact statements, the defendant has the advantage at the penalty phase. To the contrary, the empathic connection between jury and victim is, in most cases, easily made.<sup>212</sup> The jury, having just convicted the defendant of a heinous crime, is far more likely to begin the penalty phase feeling empathy toward the victim than the defendant.<sup>213</sup> It is the defendant who is at a disadvantage, and who needs rules and structures to enable the jury to make the empathic connection with him. It is the defendant whose life is in the jury's hands, who is in danger of being dehumanized, and who is literally threatened with banishment from the human community. In order to decide whether to exercise mercy, the jury must attempt to put itself, at least briefly, in the shoes of the defendant. The jury's ability to do so is hampered by the admission of statements that play upon its natural empathy for the victim.

Martha Nussbaum defends the Aristotelian concept of the equitable person as one who "judges with" the wrongdoer.<sup>214</sup> In this conception, in order to accurately judge the wrongdoer, one

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*ishment*, 99 Yale L J 389, 395-98 (1989) (arguing that the current regime of guided discretion inhibits the jury's ability to be merciful); Sundby, 38 UCLA L Rev at 1161-64 (cited in note 140) (discussing the tension between "individualized consideration" and "guided discretion").

<sup>211</sup> *Payne*, 501 US at 825, quoting *Booth*, 482 US at 517 (White dissenting).

<sup>212</sup> See text accompanying notes 196-201.

<sup>213</sup> The preliminary findings of the Capital Jury Project ("CJP")—a multidisciplinary study of how capital jurors decide between life and death—confirm this. The CJP found that the jurors surveyed displayed a startling imbalance in favor of the prosecution. The CJP suggests several factors that might explain the imbalance: (1) pervasive ineffectiveness of defense counsel; (2) proneness of capital jurors to favor the prosecution; and (3) that the guilt phase may close the jurors' minds to the subsequent mitigation evidence. William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind L J 1043, 1100-01 (1995).

<sup>214</sup> Nussbaum, 22 Phil & Pub Aff at 94 (cited in note 7).

must see things from his point of view; only then does one comprehend what obstacles he faced.<sup>215</sup> One might object, as Judge Posner does, that "when we succeed in looking at the world through another's eyes, we lose the perspective necessary for judgment."<sup>216</sup> Indeed, as I argued earlier, it is important not to confuse the sentencing phase of a criminal trial with the therapeutic process. The defendant has been convicted of a crime, and he must be punished. Nevertheless, the function of the sentencing hearing is to provide the sentencing body with additional information about the wrongdoer in order to inform the determination of an appropriate sentence. Moreover, it is possible to understand the wrongdoer's actions more fully without absolving him of blame.<sup>217</sup> As Alice Miller says, telling the murderer's story doesn't exonerate him, but "show[s] that every one of his actions had a meaning that can be discovered only if we free ourselves from the compulsion to overlook the context."<sup>218</sup>

Moreover, information gained in attempting to understand any given wrongdoer may be useful not merely in adjudicating his individual case, but also in comprehending the larger societal context in which crime and punishment take place.<sup>219</sup> The ratio-

<sup>215</sup> *Id.*

<sup>216</sup> Posner, *Overcoming Law* at 382 (cited in note 11).

<sup>217</sup> The jurors in the Susan Smith trial, for example, had no trouble convicting her of the murder of her two young sons. Indeed, they reached a verdict in just two and one half hours. See Bragg, *Union, S.C.*, NY Times at A8 (cited in note 191). However, they did not sentence her to death, saying they were moved by psychiatric testimony describing her depressions, her father's suicide, her molestation, "and a pattern of destructive sexual relationships as an adult." Dorning, *Susan Smith's jurors*, Chi Trib Section 1 at 3 (cited in note 192). They expressed hope that "she might now get the psychiatric help they thought she needed." *Id.*

<sup>218</sup> Alice Miller, *For Your Own Good: Hidden Cruelty in Child-Rearing and the Roots of Violence* 226 (Farrar 1983) (Hildegard Hannum and Hunter Hannum, trans). Or, in the words of Gary Gilmore's brother, as he begins the deeply affecting story of the familial, religious, economic, and other factors that shaped his and Gary Gilmore's lives:

I have a story to tell. It is a story of murders: murders of the flesh, and of the spirit; murders born of heartbreak, of hatred, of retribution. It is the story of where those murders begin, of how they take form and enter our actions, how they transform our lives, how their legacies spill into the world and the history around us. And it is a story of how the claims of violence and murder end—if, indeed, they ever end. . . . And if I ever hope to leave this place, I must tell what I know.

Mikal Gilmore, *Shot in the Heart* x-xi (Doubleday 1994).

<sup>219</sup> See Miller, *For Your Own Good* at 199-200 (cited in note 218); Harris, 1991 S Ct Rev at 78 (cited in note 69); Sarat, 27 L & Soc'y Rev at 40 (cited in note 147). See also Patricia J. Williams, *The Executioner's Automat*, *The Nation* 59, 63 (July 10, 1995) ("[F]ocusing . . . on *who* has committed the crime reminds us that there is a logic in each life. Not so much a logic to be endured or sanctioned, but sometimes a life course that

nale underlying *Payne* emphasizes the connections among victims. One might even say it panders shamelessly to the victims' rights movement. Concomitantly, it seeks to atomize and isolate each defendant in a fault-based world of his own making. Such reasoning is sadly blind to the fact that it is possible to hold the defendant responsible for the consequences of his wrongful act without forgetting that there are historical, political, racial, and economic determinants that consistently disadvantage particular groups.<sup>220</sup> To the extent larger systemic change may be capable of breaking this vicious circle of crime and punishment, the additional information gained through empathizing with capital defendants can only be useful.

### C. The Victim

Victim impact statements are billed as encouraging empathy for the victim, allowing the otherwise silenced victim to tell his story, and, more generally, empowering victims in the legal system.<sup>221</sup> Quite to the contrary, though, victim impact statements may actually disempower, dehumanize, and silence victims. In short, victim impact statements offend human dignity—the victim's as well as the defendant's.

A major problem with victim impact statements is that they may not be helpful to the victim—or even true to the victim's experience—despite the victims' rights rhetoric. Justice Scalia argues that the statements lay out the full reality of the human suffering caused by the defendant.<sup>222</sup> But the suffering of crime victims may take many different forms, and it is difficult and dangerous to generalize about what victims experience, what victims want, or what is best for victims.<sup>223</sup> Martha Minow points out that the victim impact statement itself does not really encourage empathy in the sense of allowing us to know the victim in his or her particularity. Instead, it generally draws on

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sheds light on what should never have been.”).

<sup>220</sup> See Harris, 1991 S Ct Rev at 78 (cited in note 69) (“[T]he Court’s jurisprudence of victimhood . . . turns a blind eye to the larger social and historical context in which guilt and innocence are created and maintained.”).

<sup>221</sup> See, for example, *Booth*, 482 US at 520-21 (Scalia dissenting).

<sup>222</sup> *Id.*

<sup>223</sup> See Henderson, 37 Stan L Rev at 964-66 (cited in note 7) (criticizing common assumptions about crime victims); Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 Emory L J 1247, 1273-81 (1994) (arguing that victims’ rights movement “only selectively addresses victims’ concerns”); Berger, 20 Fla St U L Rev at 44 n 119 (cited in note 78) (“Victims of crime and their survivors do not speak with a single voice.”).

stock "victim" imagery. Anything richer would undermine the desired sense of victimhood.<sup>224</sup>

For example, in a recent article describing his experience as the victim of a violent crime, Bruce Shapiro told a complex story about his experience and the host of contradictory emotions it evoked.<sup>225</sup> On one point he was unambivalent: he disliked being used to advance draconian anticrime legislation. He stated: "As crime victim and citizen what I want is the reality of a safe community—not a politician's fantasyland of restitution and revenge."<sup>226</sup> I question whether there is room for complex, compassionate, and politically liberal narratives like his in the *Payne* lexicon. More likely, as Henderson and others have argued, the victim impact statement benefits the conservative crime control agenda more consistently than it benefits the victim.<sup>227</sup>

Victim impact statements offend victims' individuality and dignity in an even more pernicious way. In *Payne*, Chief Justice Rehnquist stated that the "victim impact evidence is not offered to encourage comparative judgments [of the victim's worth, but] . . . is designed to show instead *each* victim's 'uniqueness as an individual human being.'"<sup>228</sup> But saying it doesn't make it so. As one satirical article put it, "the entire tenor of the Court's *Payne* opinion implicitly stamps an imprimatur upon this blunt fact: Some murder victims are necessarily more valuable than others."<sup>229</sup>

Victim impact statements permit, and indeed encourage, invidious distinctions about the personal worth of victims. In this capacity, they are at odds with the principle that every person's life is equally precious, and that the criminal law will value each life equally when punishing those who grievously assault human dignity.

Commentators have observed that the victims' rights movement revives the concept of privatized justice,<sup>230</sup> by portraying

<sup>224</sup> Minow, 40 UCLA L Rev at 1432 (cited in note 7). See also Ewick and Silbey, 29 L & Soc'y Rev at 208 (cited in note 109) (Stories in the legal arena must be shaped according to narrative conventions that will exclude certain aspects as irrelevant.).

<sup>225</sup> Bruce Shapiro, *One Violent Crime*, The Nation 437 (Apr 3, 1995).

<sup>226</sup> Id at 452.

<sup>227</sup> See Henderson, 37 Stan L Rev at 966-68 (cited in note 7).

<sup>228</sup> 501 US at 823.

<sup>229</sup> Foster, 45 Hastings L J at 1312 (cited in note 186). The article satirically suggests that in calculating the damage inflicted by a murderous act, "impairment points" be awarded for various factors, including the status of the victim. Id at 1311.

<sup>230</sup> The early Anglo-Saxons, like other primitive societies, ceded responsibility for punishment of breaches of the criminal law to the victim's family, which used such private

the criminal case as a struggle between the defendant and the victim's family and by seeming to erase the role of the state.<sup>231</sup> With *Payne*, the Court has disinterred a primitive version of privatized justice, one that not only pits the defendant against the victim's family, but revives the notion that different victims call for different levels of compensation.<sup>232</sup> In so doing, the Court forgets that the notion of valuation belongs in tort law, not in criminal law.<sup>233</sup> As George Fletcher argues, "[t]he peculiarities of the victim count for everything in determining the proper amount of compensation for personal injury. But they should not count in determining the gravity and proper punishment for a criminal act."<sup>234</sup> Every victim's life is of equal value.

Moreover, if there are loved, law-abiding, gentle, and undeserving victims, then there must be unloved, lawbreaking, violent, and deserving victims as well. The *Payne* court has not satisfactorily ruled out the possibility of minitrials on the victim's character.<sup>235</sup> One amicus brief in a related case argued that victim impact statements are as fair to defendants as they are to the prosecution because "[a]n individual convicted of murdering a drug dealer . . . could make a reasonable claim in mitigation that

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means as lynchings and blood feuds. See Brown, 43 Emory L J at 1254-55 (cited in note 223); Charles Rembar, *The Law of the Land: The Evolution of Our Legal System* 92-99 (Simon & Schuster 1980). Money payment, known as "wergeld," was often offered as a substitute for the feud, to take the place of vengeance and appease the family. If the victim was killed, the payments varied according to the victim's status. *Id.* at 97-98. Gradually, criminal offenses came to be considered offenses against the state, and the state eventually developed a monopoly on the right to punish criminal wrongdoing. Brown, 43 Emory L J at 1254. See also Jacoby, *Wild Justice* at 114-23 (cited in note 47) (discussing the history and continuing existence of private settlements in various cultures).

<sup>231</sup> See, for example, Harris, 1991 S Ct Rev at 101 (cited in note 69).

<sup>232</sup> See George P. Fletcher, *With Justice for Some: Victims' Rights in Criminal Trials* 198-201 (Addison-Wesley 1995) (arguing that victim impact statements confound compensation and punishment).

<sup>233</sup> See Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 BU L Rev (forthcoming 1996). Professor Robinson argues that criminal law is centered on the concept of moral blameworthiness, whereas tort is centered on, *inter alia*, compensation of injury and efficient distribution of loss. *Id.*

<sup>234</sup> Fletcher, *With Justice for Some* at 201 (cited in note 232).

<sup>235</sup> See *Payne*, 501 US at 823 (dismissing objections that victim impact statements will lead to minitrials on the victim's character as ill founded); *Booth*, 482 US at 518 & n 3 (White dissenting) (dismissing prospect of minitrials as speculative). But see *Payne*, 501 US at 846 n 1 (Marshall dissenting) (calling the *Payne* majority's treatment of the issue of minitrials "completely unresponsive"). See also Berger, 20 Fla St U L Rev at 50-51 (cited in note 78) (arguing that *Payne* raises a serious specter of minitrials, in that it "not only allows defendants to counter proof of a victim's good character," but also "allows defendants to place the character of a victim on trial even if the prosecutor did not").

his act actually *benefited* society by ridding the community of a merchant of violence and death.<sup>236</sup>

Finally, to the extent valuation does occur, it will often be very difficult to detect because much of it will take place *sub rosa*. Angela Harris raises the concern that victim impact statements play on our preconscious prejudices and stereotypes.<sup>237</sup> And while it is unlikely that any jury expressly debates the issue, the Baldus studies demonstrate that juries value white victims more than they do black victims, and that their most feared scenario is the black defendant murdering the white victim.<sup>238</sup> Victim impact statements thus have the ugly potential to introduce these repugnant calculations into the sentencing process, and to do so with the sanction of the state.

#### D. Counternarratives

The *Payne* Court chooses to tell a particular story. Its narrative about the defendant's violence and personal responsibility is thick,<sup>239</sup> as is its narrative about the victim's individual characteristics. It chooses not to tell other stories: the complex story of the defendant's own web of personal circumstances; the larger story of "other kinds of violence, [such as] the violence of racial injustice, poverty and abuse, . . . [and] of the law itself";<sup>240</sup> and the story of the likely denouement, namely, the state-sanctioned violence of an execution.<sup>241</sup>

Paul Gewirtz suggests that victim impact statements expose a certain hypocrisy in liberal circles—that many liberals who generally praise the place of stories in law want to see these statements excluded. He observes:

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<sup>236</sup> Motion for Leave to File Brief and Brief of Washington Legal Foundation et al as Amici Curiae in Support of Petitioner, in *Ohio v Huertas* (No 89-1944) 17 (on file with U Chi L Rev). *Huertas* was a case in which the Supreme Court at first granted certiorari, 498 US 807 (1990), in order to reconsider *Booth*; the Court later dismissed the writ as improvidently granted, 498 US 336 (1991). See also Berger, 20 Fla St U L Rev at 37-40 (cited in note 78) (discussing *Huertas*).

<sup>237</sup> See Harris, 1991 S Ct Rev at 94-95 (cited in note 69).

<sup>238</sup> See *McCleskey v Kemp*, 481 US 279, 326-27 (Blackmun dissenting) (discussing statistical disparities dependent on victims' race); Harris, 1991 S Ct Rev at 97 n 96 (cited in note 69) (discussing Blackmun's dissent in *McCleskey*). For a more thorough discussion of the statistical disparities revealed by the Baldus studies, see Abramson, *We, the Jury* at 224-31 (cited in note 187).

<sup>239</sup> For a graphic narrative of Payne's crime, see *Payne*, 501 US at 811-14.

<sup>240</sup> Sarat, 27 L & Soc'y Rev at 25 (cited in note 147).

<sup>241</sup> For a thick narrative about execution, see Justice Blackmun's dissent in *Callins*, 114 S Ct at 1128-29.



[F]or some in the storytelling movement, the point is not simply to strengthen the place of stories in law, but to strengthen stories making particular political points; [ ] some proponents of storytelling in law are not really making a claim about the general value of storytelling as an alternative way of knowing and persuading, but rather a claim about the strategic value of *some* stories as an alternative way of promoting a particular substantive point of view.<sup>242</sup>

He is correct—storytelling is political. The point is not, *and cannot be*, simply to strengthen the place of stories in law. If indeed the storytelling movement advocates simply “more stories,” it is naive and lacks normative significance. Just as law is not therapy, it is not a storytelling convention. In fact, most thoughtful proponents of storytelling are quite conscious of the importance of stories as outsider narratives—ways of opening up the legal process to the stories not usually told or heard.<sup>243</sup>

The important point, both generally and in regard to victim impact statements, is that not every story should be told, or every voice heard, in the legal context. The question is *always* which narratives we should privilege and which we should marginalize or even silence. *Booth* rested on the recognition that different stories are appropriate in different contexts, and that in the context of the capital sentencing hearing, the focus must be on the story of the defendant’s character and circumstances.<sup>244</sup> *Booth* further recognized that victim impact statements would not merely expand the number of stories available to the trier of fact, but, rather, would divert and detract from this constitutionally required focus.<sup>245</sup>

We do not need elaborate structures to assist us in feeling fear, pain, and grief for those like us who have suffered violence at the hands of the other.<sup>246</sup> This is already the dominant narrative of the criminal trial. The difficult challenge lies in making

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<sup>242</sup> Gewirtz, *Victims and Voyeurs* at 143 (cited in note 150).

<sup>243</sup> For works championing outsider narratives in legal scholarship, see generally Fajer, 82 Georgetown L J 1845 (cited in note 10); Baron, 67 S Cal L Rev 255 (cited in note 13); Abrams, 79 Cal L Rev 971 (cited in note 13); and Delgado, 87 Mich L Rev 2411 (cited in note 10).

<sup>244</sup> 482 US at 502-03 (Sentencing decisions must be based on “the character of the individual [defendant] and the circumstances of the crime.”).

<sup>245</sup> 482 US at 502-07.

<sup>246</sup> See Howarth, 1994 Wis L Rev at 1394 & n 255 (cited in note 144) (Research shows close connection between jurors and victims.).

possible the decision maker's identification with the other.<sup>247</sup> To achieve that goal the legal system needs to afford the decision maker an opportunity to hear the counternarrative, not the stories of the parties with whom it already empathizes. *Payne*, coupled with *Brown*, which permits the judge to instruct the jury not to give in to its natural sympathy toward the defendant,<sup>248</sup> does not merely seek to give a voice to the silenced victim; perhaps it does not *even* seek that. The victim impact statement was never intended simply to provide more information; rather, it has a political and strategic purpose all its own. The victim impact statement dehumanizes the defendant<sup>249</sup> and employs the victim's story for a particular end: to cast the defendant from the human community.

#### CONCLUSION: WHY CAN'T LAW BE MORE LIKE LITERATURE?

I have argued that neither empathy nor narrative can be considered an unmitigated good in the legal context—that each must be assessed in light of external normative principles. To the extent we recognize that the law is imbued with narrative and emotional content, we can begin to identify the dominant narratives that were heretofore invisible, and to evaluate those that ought to be privileged. But just as notions of narrative and empathy cannot determine our values for us, neither is the notion of outsider narratives outcome determinative. Identifying marginalized narratives unmask privilege and allows us to discuss what ought to be done about it. But the hard questions still remain.

I think of Mark Yudof's question: What of the voice of the rapist?<sup>250</sup> He concludes that though the rapist's voice is human, "[t]he rape victim's human voice does and should drown [it] out."<sup>251</sup> It is true that the rapist, however impoverished or abusive his background, must be held accountable for his crime. But in this situation, both the rapist and the rape victim may be

<sup>247</sup> See note 197.

<sup>248</sup> 479 US at 541-43. The Court upheld an instruction that the jury "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *Id.* at 540. The Court interpreted this instruction as an admonition to ignore "only the sort of sympathy that would be totally divorced from the [mitigating] evidence adduced during the penalty phase." *Id.* at 542.

<sup>249</sup> Markus Dirk Dubber, *Regulating the Tender Heart When the Axe Is Ready to Strike*, 41 *Buff L Rev* 85, 135 (1993).

<sup>250</sup> Yudof, 66 *Tex L Rev* at 602 (cited in note 7).

<sup>251</sup> *Id.*

outsiders, in various ways. Just as the rapist's guilt may be better understood in a larger social, political, and historical context, so too the law—as constructed and interpreted by men—has for historical and political reasons shown far too much sympathy and even forgiveness for the rapist. Unavoidably, we will need to evaluate “competing claims of victimization,”<sup>252</sup> and there is no magic formula for doing so without reference to extrinsic values.

If we try to understand the rapist, what will result? Judge Posner says the following:

To understand another person completely is to understand the causality of his behavior, to see . . . [it] as determined rather than responsible. . . . If we understand a criminal's behavior as well as we understand a rattlesnake's behavior, we are unlikely to accord him much dignity and respect.<sup>253</sup>

Perhaps. Maybe all we will feel is contempt, loathing, and a desire for revenge. On the other hand, Martha Nussbaum praises the philosopher Seneca, who argued that a merciful attitude achieves more accurate results; it regards “each particular case as a complex narrative of human effort in a world full of obstacles.”<sup>254</sup> In Toni Morrison's novel, *The Bluest Eye*,<sup>255</sup> she tells the story of Pecola Breedlove, a black girl in a society that defines goodness and beauty in terms of whiteness. Many forces converge to ensure Pecola's destruction, but her father, Cholly Breedlove, contributes far more than his share to her misery. Ultimately, he rapes her—in fact, he rapes her twice. These two acts, coupled with her mother's act of blaming her for the rapes, propel her into madness.

The remarkable achievement of the novel is that the reader does come to understand Cholly—he is a product of ongoing, brutal dehumanization, described in heartbreaking detail. One cannot possibly forgive or excuse Cholly's treatment of Pecola, but neither can one ignore his humanity.<sup>256</sup> Morrison has en-

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<sup>252</sup> Minow, 40 UCLA L Rev at 1437 (cited in note 7).

<sup>253</sup> Posner, *Overcoming Law* at 382 (cited in note 11).

<sup>254</sup> Nussbaum, 22 Phil & Pub Aff at 103 (cited in note 7).

<sup>255</sup> Toni Morrison, *The Bluest Eye* (Washington Square 1970).

<sup>256</sup> Here is Morrison's own description of her intention:

I tell you at the beginning of *The Bluest Eye* on the very first page what happened, but now I want you to go with me and look at this, so when you get to the scene where the father rapes the daughter, which is as awful a thing, I suppose, as can be imagined, by the time you get there, it's almost irrelevant because I want you to *look* at him and see his love for his daughter and his powerlessness to help her pain. By

sured that we will see him as a person—and that is an accomplishment.<sup>257</sup>

Law is not literature, but people are not rattlesnakes. The Court's recent death penalty jurisprudence has a decidedly political agenda—it dehumanizes the defendant in order to more easily cast him out of the human community.<sup>258</sup> We ought not to pretend that storytelling and empathy are value neutral, when in fact they are potent weapons in the battle over a basic question of values: whether every human being is entitled to some dignity.

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that time his embrace, the rape, is all the gift he has left.

Claudia Tate, ed, *Black Women Writers at Work* 125 (Continuum 1983) (interviewing Morrison).

<sup>257</sup> In *Beloved*, surely one of the most remarkable novels of our time, Morrison succeeds in evoking understanding for a mother's decision to kill her baby, rather than return herself and the baby to slavery. Toni Morrison, *Beloved: A Novel* (Knopf 1987).

<sup>258</sup> See Bandes, 66 S Cal L Rev at 2453 n 3 (cited in note 33) (When defendants are treated as nameless and dehumanized, it is easier for courts to deny the consequences of their decisions.).