

GEORGE FLOYD AND EMPATHY STORIES

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In this essay, I explore the stories that lawyers tell on behalf of clients in the context of empathy, and also consider the power of proximity, particularly physical proximity, in forging deep connections with clients. Empathy has played a key, if sometimes silent, role in the endeavor of giving clients “back their lives,” whether in case theory or in lawyering more generally. A renewed focus on empathy—informed by Bryan Stevenson’s idea of proximity—can more securely ground lawyers in the lived experience of their clients.

I use the context of the murder of George Floyd and the subsequent trial of Derek Chauvin as the starting point for exploring how empathy can impact lawyering in the criminal legal system. I then discuss three commonly-understood formulations of empathy—feeling the emotion of another person, understanding the situation or experience of another person and taking action to address the distress of another person—both as reflected in lawyering literature and in Michelle Obama’s remarkable speech at the 2020 Democratic convention. I coin the term “fierce” empathy as a formulation of empathy that may avoid some of the pitfalls of an empathic lawyering stance.

I conclude with a reflection on how the value of proximity—a value rooted in physical connection, witnessing, and connection to place—arises out of a commitment to empathy and can allow empathy to flourish. I conclude by sharing a client story that illustrates how the challenges of COVID-19 have caused me to approach physical proximity with clients.

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INTRODUCTION

In this essay, I return to a theme that I first explored in an early law review article: the idea of a client-driven, client-centered vision of case theory focused on the real lives of clients.¹ At that time, the prevailing view of case theory utilized a doctrinal, rather than a story-based, framework in litigation. In that article, I defined case theory as “an explanatory statement linking the ‘case’ to the client’s experience of the world.”² Now, the idea of a case theory as a story is familiar and widespread, and has deepened the understanding of law and the lives of clients from marginalized communities, in substantive areas as diverse as sentencing³, discrimination against low wage workers,⁴ disability law,⁵ property law⁶ and Title IX.⁷ The lives and experiences of these clients have been central to this reframing of case theory.

Here, I explore the stories that lawyers tell on behalf of clients in the context of empathy, and also consider the power of proximity, particularly physical proximity, in forging deep connections with clients. While the idea of case theory as a story is no longer new, a renewed focus on empathy and proximity can more securely ground lawyers in the lived experience of their clients.

Empathy has played a key, if sometimes silent, role in the endeavor of giving clients “back their lives,” whether in case theory or in lawyering more generally. A rich lawyering literature explores empathy, including Richard Delgado’s article contrasting empathy and false empathy⁸ and Stephen Ellman’s work on empathy and client counseling.⁹ Many scholars have advocated that empathy be taught in law

¹ Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994).

² *Id.* at 487. I surveyed several lawyering approaches—traditional, client-centered and critical—and formulated a different approach to case theory, both in terms of substance, decisionmaking and ethics. I argued that case theory “serves as a lens for shaping reality, in light of the law, to explain the facts, relationships, and circumstances of the client and other parties in the way that can best achieve the client’s goals.” *Id.* I built on this concept of case theory in a later article where I framed case theory as a storyline. Binny Miller, *Teaching Case Theory*, 9 CLIN. L. REV. 293, 296 (2002).

³ Kimberly A. Thomas, *Sentencing: Where Case Theory and the Client Meet*, 15 CLIN. L. REV. 187 (2008).

⁴ Llezlie Green Coleman, *Wage Theft in Lawless Courts*, 107 CAL. L. REV. 1303 (2019).

⁵ JoNel Newman, *Identity and Narrative: Turning Oppression Into Client Empowerment in Social Security Disability Cases*, 79 ALB. L. REV. 373 (2015).

⁶ Rashmi Dyal-Chand, *Pragmatism and Postcolonialism: Protecting Non-Owners in Property Law*, 63 AM. U. L. REV. 1683 (2014).

⁷ Kelly Alison Behre, *Deconstructing the Disciplined Student Narrative and Its Impact on Campus Sexual Assault Policy*, 61 ARIZ. L. REV. 885 (2019).

⁸ Richard Delgado, *Rodrigo’s Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61 (1996).

⁹ Stephen Ellmann, *Empathy and Approval*, 43 HASTINGS L. J. 991 (1992).

school clinics and in law school more generally.¹⁰ And a vast and growing literature explores the importance of empathy in judicial decisionmaking.¹¹

Empathy has become a more prevalent concept in recent years and has permeated popular culture. The 2016 election of Donald Trump fueled the increasing use of the term; by the 2020 campaign, Trump's lack of empathy was a common theme. In an article discussing Trump's visit to Kenosha, Wisconsin after the shooting of Jacob Blake and despite opposition from Wisconsin's governor and Kenosha's mayor, the author notes that the visit "reaffirmed what we have known for some time, namely, that in contrast to Biden, Trump lacks empathy and is motivated only by his own personal interests."¹²

One month later, in an opinion piece entitled "Trump Is Running Against Empathy," another commentator stated that "Trump's presidency boils down to the notion that caring about others or helping others with no expectation of material personal gain is a weakness."¹³ In speaking to Fox News after Trump lost the election, Brad Parscale, Trump's former campaign manager, said that suburban voters abandoned Trump because he downplayed the severity of COVID-19 and prioritized re-opening the economy instead of demonstrating empathy. Parscale stated, "I think a young family with a young child who [was] scared to take them back to school wanted to see an empathetic president and an empathetic Republican party. I think that—and I've said this multiple times—he chose a different path."¹⁴

¹⁰ John L. Barkai & Virginia O. Fine, *Empathy Training for Lawyers and Law Students*, 13 SW. U. L. REV. 505, 507–09 (1983); Laurel E. Fletcher & Harvey M. Weinstein, *When Students Lose Perspective: Clinical Supervision and the Management of Empathy*, 9 CLIN. L. REV. 135, 136–37 (2002); Ian Gallacher, *Thinking Like Nonlawyers: Why Empathy is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance*, 8 LEGAL COMM. & RHETORIC 109, 110 (2011); Philip M. Genty, *Clients Don't Take Sabbaticals: The Indispensable In-House Clinic and the Teaching of Empathy*, 7 CLIN. L. REV. 273, 275 (2000); Peter Margulies, *Re-Framing Empathy in Clinical Legal Education*, 5 CLIN. L. REV. 605, 606 (1999); Joshua D. Rosenberg, *Teaching Empathy in Law School*, 36 U. SAN. F. L. REV. 621, 636–37 (2002).

¹¹ Stina Bergman Blix, *Different Roads to Empathy: Stage Actors and Judges as Polar Cases*, 1 EMOTIONS & SOC'Y 163, 171–74 (2019); Laura P. Moyer & Susan B. Haire, *Trailblazers and Those That Followed: Personal Experiences, Gender, and Judicial Empathy*, 49 LAW & SOC'Y REV. 665, 667, 670–71 (2015).

¹² Richard Cherwitz, *Trump's Conduct in Kenosha Reaffirms His Lack of Empathy for Others, Selfish Political Motivations in All Things*, IOWA CITY PRESS-CITIZEN (Sept. 8, 2020), <https://amp.press-citizen.com/amp/5742898002>.

¹³ Elizabeth Spiers, *Trump Is Running Against Empathy*, WASH. POST (Oct. 30, 2020) <https://www.washingtonpost.com/outlook/2020/10/30/trump-empathy-virtue-signaling>.

¹⁴ Thomas Colson, *Trump Lost to Biden Because He Lacked 'Empathy' for Coronavirus Victims, Says His Former Campaign Manager*, BUS. INSIDER (Dec. 2, 2020), <https://www.businessinsider.in/politics/world/news/trump-lost-to-biden-because-he-lacked-empathy-for-coronavirus-victims-says-his-former-campaign-manager/articleshow/>

Empathy is as important in lawyering as it is in every aspect of our lives. In this essay, I use the context of the murder of George Floyd and the subsequent trial of Derek Chauvin as the starting point for exploring how empathy can impact lawyering in the criminal legal system. I conclude with a reflection on how the value of proximity arises out of a commitment to empathy and share a client story that illustrates how the challenges of COVID-19 have caused me to approach physical proximity with clients. If the images and voices from the murder and the trial can invoke greater empathy for how we perceive people in the criminal justice system more generally, empathy both for individuals and their situations, then perhaps strategies rooted in empathy will become the new norm. We can consider the many faces of empathy and in the process, reframe empathy.

I. GEORGE FLOYD: EMPATHY ON TRIAL

Many of the facts in the trial of Derek Chauvin for the murder of George Floyd were undisputed. The video taken by courageous bystander Darnella Frazier, who recorded Floyd's arrest and the image of Derek Chauvin kneeling on George Floyd's neck as he pled for his life, speaks for itself. The sound of George Floyd uttering the words "I can't breathe" and crying out for his mother are forever imprinted in the minds and hearts of millions of people. The actions and the perpetrator were clear, so the defense centered its case theory on the cause of Floyd's death, arguing that Floyd had died because he had an underlying heart condition and was under the influence of drugs.¹⁵

While many of the prosecution witnesses focused on how Chauvin failed to follow proper procedures and used unlawful restraints in his arrest and detention of Mr. Floyd, a theme underlying the trial was empathy. The prosecution wanted the jurors to see Mr. Floyd's humanity in contrast to the lack of empathy—or any human feeling at all—demonstrated by Chauvin, either at the murder scene or during the trial. In an often-quoted line from the closing argument, prosecutor Jerry Blackwell argued that George Floyd did not die because his heart was too large but "because Mr. Chauvin's heart was too small."¹⁶ Another prosecutor uttered the word "human" more than a dozen times in closing argument. Alternate juror Lisa Christensen

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¹⁵ Holly Bailey, *Derek Chauvin's defense opens with focus on George Floyd's drug use, rebuttal testimony on use of force*, WASH. POST (Apr. 13, 2021), <https://www.washingtonpost.com/nation/2021/04/13/derek-chauvin-trial/>.

¹⁶ Clint Berge, *Prosecution Says George Floyd Died Because Derek Chauvin's 'Heart Was Too Small'*, WQOW (Apr. 19, 2021), <https://wqow.com/2021/04/19/prosecution-says-george-floyd-died-because-derek-chauvins-heart-was-too-small/>.

said that “[s]he left the courtroom feeling a profound sense of empathy for Mr. Floyd,” and that the prosecution had put “a face on a human being.”¹⁷

The video may have told the jurors everything they needed to see and hear. It would be difficult to not feel empathy for George Floyd as he pled for his life while he was being murdered by Chauvin. In dying, Mr. Floyd was an incomparable witness to his own murder. As he was dying he called out for his mother, a profoundly moving plea that resonated with many observers. In a compelling essay, Lonnae O’Neal describes Mr. Floyd calling out “Momma!” as “a prayer to be seen.”¹⁸ Bystanders who observed Mr. Floyd begging for help wept on the witness stand. Many regretted not doing more to try to stop Chauvin from murdering George Floyd.¹⁹ Charles McMillan, a 61-year-old man who tried to help Mr. Floyd, was so overcome in watching video footage of the murder at trial that at first he couldn’t speak. When he did speak, all he could say was “Oh, my God.”²⁰

But the prosecution went beyond the story told by the video to directly confront the defense’s argument that Mr. Floyd died because he had ingested drugs, not because of Chauvin’s actions. There was medical evidence, some of it disputed, on the cause of Mr. Floyd’s death, and there was uncontradicted evidence that Mr. Floyd had ingested drugs. The prosecution confronted the evidence of drug use head on by putting a human face on Mr. Floyd’s drug use. Mr. Floyd’s girlfriend, Courtney Ross, testified about their mutual struggle with opioid addiction and their efforts to get clean.²¹ Rather than shying away from Mr. Floyd’s addiction, the testimony tried “to provide a nuanced understanding of the complexities of addiction” in order to rebut racist stereotypes about Black drug addicts.²² George Floyd’s

¹⁷ Tim Arango, John Eligon & Shaila Dewan, *How the Trial Over Floyd’s Death Flipped the Script for Black Victims*, N.Y. TIMES (Apr. 24, 2021), <https://www.nytimes.com/2021/04/24/us/george-floyd-black-victims.html>.

¹⁸ Lonnae O’Neal, *George Floyd’s Mother Was Not There, But He Used Her As a Sacred Invocation*, NAT. GEO. (May 30, 2020), <https://www.nationalgeographic.com/history/article/george-floyds-mother-not-there-he-used-her-as-sacred-invocation>.

¹⁹ Darnella Frazier, who recorded the now-famous video of Floyd’s final moments, spoke of her feelings of guilt, saying amid tears, “It’s been nights I stayed up apologizing and apologizing to George Floyd for not doing more and not physically interacting and not saving his life.” Nicholas Bogel-Burroughs & Marie Fazio, *Darnella Frazier Captured George Floyd’s Death on Her Cellphone. The Teenager’s Video Shaped the Chauvin Trial*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2021/04/20/us/darnella-frazier-video.html>.

²⁰ Sean Collins, *Why the Chauvin Trial Feels So Momentous*, VOX (Apr. 12, 2021), <https://www.vox.com/22372672/derek-chauvin-trial-george-floyd-momentous-trauma-pain-police-reform>.

²¹ Arango et al., *supra* note 17.

²² Collins, *supra* note 20.

sister, Bridget Floyd, said, “I feel like [the jurors] walked away wishing that they could have met my brother, because of all the great things people had to say about him. . . . Because that’s who he really was—he was not all the things the defense was making him out to be.’”²³

In the face of the prosecution’s efforts to evoke the jury’s empathy for George Floyd by humanizing him, Derek Chauvin appeared impassive throughout the trial and in the video of George Floyd’s murder.²⁴ While many of his facial expressions would have been hidden by the mask he wore,²⁵ his eyes were not. Chauvin mostly focused on taking notes, but when he did look up from his notes, one witness described his stare as “‘cold’ and ‘heartless.’”²⁶

The audience—whether George Floyd’s family, the witnesses, the judge, the jury, the country or the world—watched the events unfold from the context of their own experiences. In a moving and brilliant opinion piece in the *WASHINGTON POST* published five days after the death of George Floyd, Michele Norris writes about her hope of the possibility of change alongside skepticism that it will occur. She begins her essay with these words: “I was born and raised in Minneapolis, 10 blocks from the intersection where George Floyd had the life squeezed from his body.”²⁷ Ms. Norris, a Black Minnesotan, describes the complicated legacy of reform efforts targeted to assist Blacks in the Twin Cities of Minneapolis and St. Paul, where they failed, and why real reform may be elusive. Racial disparities between Blacks and whites are now amongst the worst in the country after Minneapolis abandoned an integration plan it began in the 1960’s and continued for the following two decades. Norris hopes that this trend can be reversed “now that this smoldering moment has peeled back the ‘Minnesota Nice’ veneer in the same way paint has buckled and blistered around all those burning buildings.”²⁸

As a white person raised in Minnesota, following a long line of ancestors beginning with my great-great grandmother who moved

²³ Arango et al., *supra* note 17.

²⁴ Steve Karnowski & Michael Tarm, *EXPLAINER: Here’s Why Derek Chauvin Won’t Testify at Trial*, ABC NEWS (Apr. 15, 2021), <https://abcnews.go.com/US/wireStory/explainer-officer-trial-floyd-death-testify-77094060>.

²⁵ Stephen Groves, *EXPLAINER: Did Mask Hamper Chauvin’s Image at Murder Trial?*, ASSOCIATED PRESS (Apr. 19, 2021), <https://apnews.com/article/derek-chauvin-mask-closing-arguments-779d8b11006413a5004d4f271812ddf1>.

²⁶ *Id.* “‘He didn’t care. It seemed as if he didn’t care what we were saying,’ said Darnella Frazier.” *Id.*

²⁷ Michelle L. Norris, Opinion: *It’s Hard to Hear ‘Minnesota Nice’ Without Undertones of Irony and Despair*, WASH. POST (June 4, 2020), <https://www.washingtonpost.com/opinions/2020/06/04/its-hard-hear-minnesota-nice-without-undertones-irony-despair/>.

²⁸ *Id.*

west to Minnesota in the nineteenth century, I watched the trial and the video through a lens clouded by guilt, shame, outrage and despair. Emotionally and intellectually, I know that racism is everywhere; it infuses our institutions and ourselves. Minnesota is no less a racist place than anywhere else in the United States and may be worse than some other places. But in some deep place I harbor a naïve hope that Minnesotans are better than that, and that hope is crushed every time a Minnesota police officer kills an unarmed Black person. Hope is replaced by shame and outrage.

I will never forget the night that Philando Castile was murdered by St. Anthony police officer Jeronimo Yanez after a traffic stop in Falcon Heights, a St. Paul suburb not far from where my father and stepmother live in southeast Minneapolis. Castile was driving with his girlfriend Diamond Reynolds and her four-year-old daughter. I was listening to the news on the radio and heard the irrational panic and alarm in Yanez's voice as Castile reached for his wallet but explained that he had a licensed gun in the car. Then shots rang out, and Reynolds was shouting in fear and anger. I recognized the sound of fear in Yanez's voice; it was the sound of irrational white panic and fear of Black men. I knew how the story would end even before it ended.

By all accounts, Castile was a gentle man. He wore dreadlocks and worked in nutrition services at a cafeteria in a St. Paul elementary school. The kids at school adored him. He often paid the debt of students who could not afford lunch.²⁹

Yanez was charged with manslaughter and dangerous discharge of a firearm. According to author and former FBI agent Larry Brubaker, who has written two books on officer-involved shootings, the Castile case was "the first time an officer has been charged for a fatal shooting in Minnesota in more than 200 cases that spanned over three decades."³⁰ A jury acquitted Yanez, and the City of St. Anthony later paid a multimillion-dollar settlement to Castile's family.³¹

²⁹ Jessica Lussenhop, *Philando Castile Death: 'I Lost My Best Friend in a Police Shooting'*, BBC NEWS (June 3, 2020), <https://www.bbc.com/news/world-us-canada-52896872> (as described by Castile's friend Greg Crockett); Libor Jany & Anthony Lonetree, *Quiet, Unassuming Philando Castile Was 'Like Mr. Rogers With Dreadlocks'*, STAR TRIBUNE (July 8, 2016), <https://www.startribune.com/quiet-unassuming-philando-castile-was-like-mr-rogers-with-dreadlocks/385892971/>; Sheila Regan, "Mr. Rogers with Dreadlocks": A grieving community remembers police shooting victim Philando Castile, SALON (July 8, 2016), https://www.salon.com/2016/07/08/mr_rogers_with_dreadlocks_a_grieving_community_remembers_police_shooting_victim_philando_castile/.

³⁰ Tim Nelson, Jon Collins & Riham Feshir, *Officer Charged in Castile Shooting*, MINN. PUBLIC RADIO (November 16, 2016), <https://www.mprnews.org/story/2016/11/16/officer-charged-in-castile-shooting>.

³¹ German Lopez, *Philando Castile Minnesota Police Shooting: Officer Cleared of Manslaughter Charge*, VOX (June 16, 2017), <https://www.vox.com/2016/7/7/12116288/minnesota-police-shooting-philando-castile-falcon-heights-video>; Mitch Smith, *Philando Castile Fam-*

When I watched the video of Derek Chauvin with his knee on George Floyd's neck, I could not help but see the face of Philando Castile, the face of my teenager, the faces of black colleagues and friends, and the faces of my clients. I teach a criminal defense clinic where for many years I represented children and adults facing misdemeanor and minor felony charges. About 5 years ago, I began representing individuals convicted as children of serious crimes and sentenced to long sentences, some tantamount to life without parole. Most of my clients are Black men. They could be George Floyd. Any Black person could be George Floyd.

Before I watched the video of George Floyd's murder, I didn't think that I could bear to see it. Lonnae O'Neal writes that she dreaded watching the video,³² but watched "for us, the living. It's my sacred charge. I am a black mother." I am not a Black mother; I can only imagine the pain of a Black mother in that moment. But I am a mother, and I am a human, and I also chose to watch the video to bear witness. As a mother, I wanted my teenager, who is Black, to watch the video with me before the shock of finding it on the internet. I wanted to be there to support them in watching the brutal scene unfold. We watched the video together, in almost complete silence. Watching George Floyd's murder was traumatizing in a way that words cannot express. I haven't watched it again, but the images are burned into my memory. Since then, my family and I have talked about the many things Mr. Floyd's murder represents—an act of racism, structural racism, police brutality, the unfettered exercise of power and dominance, and unspeakable cruelty, among other things—but the trauma persists.

Since the verdict, much has been written about the impact of George Floyd's death on police reform and criminal legal system reform more generally. His death has sparked a racial justice reckoning, from protests in the aftermath of the killing and the resurgence of the Black Lives Matter movement, to calls for increased attention to diversity, equity and inclusion and reform of the law school curriculum.

I have been reflecting on this "smoldering moment"³³ for much of the past year and wondering whether it can smolder for more than a moment, or a year, and change how the clients I represent are viewed in the criminal legal system. Does the empathy story shown in the video of George Floyd's murder, or the empathy stories told about

ily Reaches \$3 Million Settlement, N.Y. TIMES (June 26, 2017), <https://www.nytimes.com/2017/06/26/us/philando-castile-family-settlement.html>.

³² "I didn't want to watch whatever it is that compels someone to put his knee into a man's neck, until he can no longer draw breath." O'Neal, *supra* note 18.

³³ Norris, *supra* note 27.

him at trial, translate to how my clients are viewed in the system? I'd like to think that these stories will inform how decisionmakers—whether judges at resentencing or the parole commission—see my clients, but will they?

I am thinking in particular about the clients that my students and I represent who are serving life or de facto life sentences. All but one of my clients are Black; all but one have been convicted of a homicide; all are men.

This representation grew out of my passion for representing children—although I had never represented children in the adult system—and the fact that in *Montgomery v. Louisiana*³⁴ the United States Supreme Court in 2016 made it possible for clients facing these long sentences to go back to court and seek new sentences. Thus began my journey with what I call “long haul lawyering,” a term that I borrow shamelessly from my colleague Susan Bennett, who coined it in the context of community and economic development lawyering,³⁵ but which I think applies equally in criminal defense work representing “long sentence servers.” “Long sentence servers” is the name of the group that Maryland lawyers, policymakers and activists have formed to discuss litigation and policy affecting individuals serving long sentences. This term accurately describes the legal context of the lives of all of the men that I represent. They can seek a variety of legal remedies to address their situations—parole, motions to correct illegal sentences, resentencing hearings—but whatever the remedy, they are long sentence servers.

So how might my clients' stories resemble George Floyd's? George Floyd grew up in Houston, Texas. He was a high school athlete who was raised in a strong and loving family with limited resources. He became involved in the criminal legal system at a young age. Mr. Floyd was in and out of the criminal legal system at different points in his life, with his most serious conviction being for robbery. He struggled with substance abuse throughout his adult life. He became the father of several children before he moved to Minnesota, seeking a fresh start, following a friend who had moved there for a job. Throughout his life, Mr. Floyd worked a number of low wage jobs, most recently working security at a homeless shelter and as a bouncer at various nightclubs in Minneapolis.³⁶ He was a large man;

³⁴ 577 U.S. ___, 136 S. Ct. 718 (2016).

³⁵ Susan D. Bennett, *On Long-Haul Lawyering*, 25 FORDHAM URB. L. J. 771 (1998).

³⁶ Luis Andres Henao, Nomaan Merchant, Juan Lozano & Adam Geller, *A Long Look at the Complicated Life of George Floyd*, CHI. TRIB. (June 11, 2020), <https://www.chicagotribune.com/nation-world/ct-nw-life-of-george-floyd-biography-20200611-cx-mlynpyvjczpbe6izfduzwv54-story.html>.

friends and family described him as a gentle giant, and as a gregarious person who made friends easily.³⁷ The impact of racism on his life—and on the opportunities that were available to him—is undeniable.

When I think about my clients, I think they may have led lives not unlike George Floyd, had they not been involved in the impulsive acts that led them to take another person's life. They all come from childhoods where they experienced toxic stress from living in poverty in neglected neighborhoods where violence was frequent, and attending underfunded schools that could not begin to meet their needs. Some of my clients had loving families; some had abusive families. Had they survived their tumultuous teen years, they would have matured, and might have settled down, found jobs, raised families and avoided future involvement in the criminal legal system, or they might have been in and out of that system. They were incarcerated before they could grow into their adult lives. They have been victimized, but they are portrayed as perpetrators in the criminal legal system, not victims. The impact of racism on their lives is undeniable.

II. EMPATHY DEFINED

George Floyd's personal story cannot be separated from the image of his murder. These stories, taken together, evoked feelings of profound empathy. How does empathy in its many manifestations help lawyers advocate for clients similar to the people I represent?

The relevance of these stories may depend on the concept and definition of empathy. In her foundational work on the clash between legality and empathy, Lynne Henderson provides a framework for understanding the many faces of empathy.³⁸ The first form of empathy is the experience of feeling the emotion of another person. The second is understanding the experience or situation of another person, either affectively or cognitively. The third is the action taken in response to seeing the distress of another person. While much has been written about empathy since Henderson wrote her article in 1987, many authors return to the themes that she emphasized.

Jean Decety offers a definition that reflects Henderson's terminology for the first and second types of empathy, explaining that empathy is a broad construct that "refers to the ability to sense other people's emotions, coupled with the ability to imagine what someone

³⁷ Nicquel Terry Ellis & Tyler J. Davis, *He'll Never See Her Grow Up: George Floyd Mourned by Children, Family, Friends and Strangers*, USA TODAY (May 28, 2020), <https://www.usatoday.com/story/news/2020/05/28/george-floyd-remembered-gentle-giant-family-calls-death-murder/5265668002/>.

³⁸ Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987).

else might be thinking or feeling.³⁹

Lucie Fung, a lawyer in a nonprofit office portrayed in Gerald Lopez's classic work, *REBELLIOUS LAWYERING*, observes that "empathy can also reduce the distance between those in a law office and the client, in part by helping transport legal workers to the dimension in which the client actually lives when bringing a painful problem to some unknown professional for help."⁴⁰ For the aspect of empathy rooted in action, Fung notes that "[e]mpathy can reawaken one's own sense of hurt, wrong and outrage, all of which, in turn, can fuel a search for possible solutions, legal or 'extra-legal.'"⁴¹

In her speech at the 2020 Democratic Convention, Michelle Obama brilliantly captured the idea of the three forms of empathy that Henderson theorized. As Obama explained:

Empathy: that's something I've been thinking a lot about lately. The ability to walk in someone else's shoes; the recognition that someone else's experience has value, too. Most of us practice this without a second thought. If we see someone suffering or struggling, we don't stand in judgment. We reach out because, "There, but for the grace of God, go I." It is not a hard concept to grasp. It's what we teach our children.⁴²

Obama fully invoked the third form of empathy in urging us to take action:

So, it is up to us to add our voices and our votes to the course of history, echoing heroes like John Lewis who said, "When you see something that is not right, you must say something. You must do something." That is the truest form of empathy: not just feeling, but doing; not just for ourselves or our kids, but for everyone, for all our kids.⁴³

III. EMPATHY AND LAWYERING

I next turn to the question of what it means for lawyers to tell empathy stories on behalf of their clients. In my clinic, I assign to students the articles written by Charles Ogletree⁴⁴ and Abbe Smith,⁴⁵

³⁹ Jean Decety, *Empathy in Medicine: What It Is, and How Much We Really Need It*, 133 AM. J. MEDIC. 561, 563 (2020).

⁴⁰ GERALD LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 101 (1992).

⁴¹ *Id.* Lopez explains that the lawyers featured in his book are composites.

⁴² Michelle Obama, Address at 2020 Democratic National Convention, (Aug. 17, 2020), (transcript available at *Transcript: Michelle Obama's DNC Speech*, CNN, Aug. 18, 2020, <https://www.cnn.com/2020/08/17/politics/michelle-obama-speech-transcript/index.html>).

⁴³ *Id.*

⁴⁴ Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993).

⁴⁵ Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured*

which take different views of the role of empathy in criminal defense practice. Ogletree offers an impassioned case for the importance of empathy in criminal defense lawyering,⁴⁶ while Smith points to the dangers of burnout and “too much heart and not enough heat.”⁴⁷ While these articles are about the relationship of lawyers to their clients, not the stories that lawyers tell on behalf of their clients, they still have important lessons to offer about empathy stories.

As I watched the George Floyd trial, I considered what kind of lawyer might be best positioned to make these kinds of empathy arguments on behalf of disadvantaged clients. Prosecutors are in a unique situation. They are accustomed to making empathy arguments on behalf of victims; it should hardly come as a surprise that they would portray George Floyd as a human being who deserved dignity and respect, rather than being murdered in cold blood as he pled for his life. But it did, in fact, surprise observers because black victims of police shooting are rarely portrayed with empathy. Media commentators described the trial strategy as “momentous”⁴⁸ in differing from other trials where police have shot Black victims and as having “flipped the script”⁴⁹ in its portrayal of Black victims of police shootings.

Criminal defense attorneys have the harder job of convincing a judge or jury of the inherent humanity of their clients. Perhaps an empathic defender is best positioned to understand and capture the humanity of her client. Ogletree is right that forming a relationship of trust and a connection to clients is vitally important. The kind of empathy that he espouses may be closest to Henderson’s description of empathy as the ability to understand the experience of another person. The connection that he describes may be more emotional or affective than cognitive, and these experiences lead him to describe the lawyer client relationship as one grounded in friendship.

Abbe Smith argues that empathic defender faces challenges that defenders who are less empathic do not. She describes the kind of relationships that Ogletree aspired to with his clients as one of unbounded love,⁵⁰ and worries that public defenders who are motivated by empathy will invariably become “burned out, worn out and emotionally spent.”⁵¹ She tells the story of former clinic students Erin and

Ego of the Empathic, Heroic Public Defender, 37 U.C. DAVIS L. REV. 1203 (2003).

⁴⁶ See Ogletree, *supra* note 44.

⁴⁷ See Smith, *supra* note 45.

⁴⁸ Collins, *supra* note 20.

⁴⁹ Arango et al., *supra* note 17.

⁵⁰ Smith, *supra* note 45, at 1223.

⁵¹ *Id.* at 1205.

Zeke,⁵² who were among the most talented and committed students that she taught. They left their public defender jobs after two years, citing burnout and exhaustion.

While excessive empathy may not be the primary cause of the burnout that Smith observes in her former students, Smith is not alone in seeing dangers in empathy. Lucie Fung, the lawyer in *REBELLIOUS LAWYERING*, offers a different critique of empathy, describing the experience of a colleague who felt that she “empathized *too much* (or at least in the wrong way)” with clients and came to understand “how much she *didn’t* understand” about the situations that clients faced.⁵³ Fung warns against “spontaneous, unreflective empathy” and cautions against the idea that what lawyers “may understand as ‘empathy’ is always a good thing, the necessary starting point for radical work.”⁵⁴

Fung’s insight that however much lawyers try to understand their clients, they may get it wrong reminds me of a comment that a student made in my first year of clinical teaching. In a class discussion about the role of empathy in client-centered lawyering, my student suggested that it would be arrogant to assume that he and his classmates (and probably his clinical teachers, although he didn’t say that), most of whom were white, and middle-class, could really understand the experiences of their clients, all of whom were poor, and most of whom were people of color. No discussion of empathy is complete without talking about how, however imperfectly, lawyers seek to cross boundaries, of race, of class, and other life experiences that separate them from their clients.

I have been thinking lately about a different kind of empathy, an empathy that is rooted in compassion and a desire to bridge the differences among us but is also defined by courage and defiance. I have coined the term “fierce” empathy to describe this kind of empathy. This idea of empathy invokes Michelle Obama’s call to “stand fierce” against hatred⁵⁵ and the courage that is an essential feature of movement lawyering.⁵⁶

The idea of fierce empathy brings to mind my recent trip to the Eastern Shore of Maryland, where my teenager and I were talking about Harriet Tubman. My teenager remembered the trip we took six years ago to visit Dorchester County, and the birthplace of Harriet Tubman. We visited Tubman’s birthplace and drove a portion of the

⁵² Erin and Zeke are not actual students but composites of students that Smith has taught. *Id.* at 1204–08.

⁵³ LOPEZ, *supra* note 40, at 101 (emphasis in original).

⁵⁴ *Id.*

⁵⁵ Obama, *supra* note 42.

⁵⁶ Betty Hung, *Movement Lawyering as Rebellious Lawyering: Advocating with Humility, Love and Courage*, 23 CLIN. L. REV. 663, 667–69 (2017).

route of the Underground Railroad. The Tubman Byway is a self-guided driving tour that winds for more than 125 miles through Maryland's Eastern Shore, and then another 98 miles through Delaware. It includes forty-five historically significant sites related to the Underground Railroad.⁵⁷

One of Harriet Tubman's earliest acts of courage occurred at the Bucktown General Store where as a young girl she intervened when an overseer was abusing another enslaved person. The overseer threw a heavy weight at the young boy, and instead of hitting him, the weight hit Tubman in the head. The signage at this stop on the Tubman Byway refers to Tubman's defense of her friend as "a daring act of defiance."⁵⁸

For the rest of Tubman's life, she suffered headaches and sleepless nights and experienced visions and hallucinations. Despite these challenges, she led many enslaved individuals to freedom, including members of her own family.

None of us can be Harriet Tubman. However heroic our actions at times may be,⁵⁹ we are not leading enslaved people to freedom through the dangerous waterways of the Eastern Shore and risking our lives in the process. Yet the idea of defiance and fierceness captures something important about lawyers who advocate for clients who otherwise would not have their voices heard.

Fierce empathy is a far cry from the kind of wallowing in sadness and despair that may have caused Smith's former students to become "emotionally spent."⁶⁰ Fierce empathy is also different from the kind of friendship that Ogletree describes forming with some of his clients. The kind of friendship he envisions involves serving as a confidante to his clients, attending their weddings and the funerals of family members, and taking calls at all hours of the day and night.⁶¹

Fierce empathy may be closer in kind to the way Lucie Fung, the public interest lawyer in Lopez' book, describes empathy as a "sense of hurt, wrong and outrage."⁶² The effort to understand the situation or experience of another person can fuel this outrage by bringing lawyers and clients closer together.

In future work, I'd like to explore how empathy may look differ-

⁵⁷ ABOUT THE BYWAY, <https://harriettubmanbyway.org/the-byway/>.

⁵⁸ The Harriet Tubman Underground Railroad Byway Driving Tour Guide 22; http://harriettubmanbyway.org/newhtbw/wp-content/uploads/2017/03/TubmanBywayGuide_2017.pdf. The Bucktown Village Store is stop #17 on the Tubman Byway.

⁵⁹ Ogletree, *supra* note 44, at 1275–77. Abbe Smith understands Charles Ogletree's heroism stance as a desire to "rescue" clients. Smith, *supra* note 45, at 1238.

⁶⁰ Smith, *supra* note 45, at 1205.

⁶¹ Ogletree, *supra* note 44.

⁶² LOPEZ, *supra* note 40, at 101.

ent in different lawyering frameworks. Empathy is closely associated with client-centered lawyering theory, whose proponents were among the first to see empathy as a key practice in lawyering.⁶³ Empathy is closely intertwined with narrative theory and the idea of using the client's life experience to tell the client's legal story. Does Bryan Stevenson's idea of proximity to clients, one that he identifies in his classic book, *JUST MERCY*,⁶⁴ help fuel a fierce empathy?

During a summer in law school, Stevenson visited Henry, a condemned man on death row in Georgia. Lawyers at the Southern Prisoners Defense Committee ("SPDC"), where Stevenson worked, sent him to the prison to tell Henry that he would not be executed in the coming year. The SPDC did not yet have a lawyer to take Henry's case, but they wanted him to understand his situation. Henry was happy to hear that he would live at least another year because his wife and children could visit him without the burden of knowing an execution date. Stevenson and Henry connected through their shared love of music; they "talked about everything" and soon they were "both lost in conversation."⁶⁵ After three hours, a prison guard angrily interrupted their conversation, roughly handcuffing his wrists and shackling his ankles. As Henry stumbled out the door, he sang a hymn that Bryan remembered from attending church as a child. Stevenson experienced Henry's song as a "precious gift" that gave Stevenson an "astonishing measure of [Henry's] humanity."⁶⁶

As a result of Stevenson's experiences that summer, he decided to become a death penalty lawyer. He writes: "Proximity to the condemned and the incarcerated made the question of each person's humanity more urgent and meaningful, including my own."⁶⁷ Stevenson remembers his grandmother's advice: "You can't understand most of the important things from a distance. You have to get close." Steven-

⁶³ In their seminal book describing a client-centered approach to interviewing and counseling, David Binder and Susan Price posit that "empathetic understanding" is a key component of an effective client interview. DAVID A. BINDER & SUSAN PRICE, *LEGAL INTERVIEWING & COUNSELING: A CLIENT-CENTERED APPROACH*, 14, 20, 41, 94 (1977). Binder and Price are credited with being the first authors to introduce client-centered lawyering to law students. See SUSAN BRYANT, ELLIOTT S. MILSTEIN & ANN C. SHALLECK, *TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY* (2014).

⁶⁴ BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (2014) [hereinafter STEVENSON, *JUST MERCY*]. Stevenson expands on the idea of proximity in a 2018 speech that he gave to CEO's interested in addressing social problems. Bryan Stevenson, *The Power of Proximity*, *Fortune Magazine CEO Initiative 2018*, YouTube (June 27, 2018), <https://www.youtube.com/watch?v=SMKIpycFaOg> [hereinafter Stevenson, *Power of Proximity*].

⁶⁵ STEVENSON, *JUST MERCY*, *supra* note 64, at 10.

⁶⁶ *Id.* at 12.

⁶⁷ *Id.*

son contrasts the closeness and proximity he experienced with people on death row with the distance he experienced during his first year of law school.⁶⁸

In a later chapter in the book, Stevenson describes Walter McMillian, a client on death row who was later exonerated, as demonstrating “remarkable” empathy for Stevenson, the prison guards and others. McMillian “spent a lot of time imagining what other people were thinking and feeling that might mitigate their behavior.”⁶⁹

From these stories, Stevenson appears to view proximity and empathy as different but intertwined concepts: proximity is rooted in physical presence and closeness, while empathy involves more of an imaginative process. Proximity would appear to make possible a more reflective kind of empathy, one that has the capacity to be more genuine and more long-lasting. The idea of lawyering rooted in proximity to clients seems closely related to accompaniment; the idea of going on a journey with a client and staying connected to clients even when finding a good solution to a client’s problem may be elusive.⁷⁰

Four years after *JUST MERCY* was published, Stevenson gave a speech in 2018 to CEOs interested in addressing social problems. In that speech he returned to the idea of proximity, this time not limited to individual relationships but as one of the key means of achieving a more just world.⁷¹ Stevenson’s understanding of proximity is rooted in his childhood in a segregated community in southern Delaware. He described his grandmother hugging him so hard as a child that he could barely breathe, while asking him “Can you feel me hugging you?” Stevenson credited his grandmother with teaching him about the importance of proximity, and described himself as “the product of someone’s decision to get proximate” when lawyers came to southern Delaware to end the practice of segregated schools.

Stevenson talks about how he first “got proximate” to death row inmates in law school, and urges the audience to “get proximate” to the poor and the vulnerable. He contrasts proximity with “isolation” and “distance.” As in *JUST MERCY*, the speech portrays proximity as possessing a strong physical component and sense of place. Stevenson also weaves in the idea of witnessing, which he describes as

⁶⁸ *Id.* at 14.

⁶⁹ *Id.* at 103.

⁷⁰ Margaret Reuter, Stephen Rosenbaum & Danielle Pelfrey Duryea, *Attorney as Accompanateur: Resilient Lawyering When Victory Is Uncertain or Nearly Impossible*, 59 WASH. U. J. L. & POL’Y 107, 108–09 (2019). In a compelling essay, Susan Bennett notes that proximity can create space for empathy. Susan Bennett, *Empathy, Spring, and the Fervorino*, 10 AM. U. J. GENDER, SOL. POL’Y & L. 49 (2002).

⁷¹ Stevenson, *Power of Proximity*, *supra* note 64. The others are change narratives, stay hopeful and do things that are uncomfortable and inconvenient.

“transformative.”

Stevenson tells many heart-wrenching stories in the book and in his 2018 speech, none more heart-wrenching than the story about a 14 year old boy charged with murdering his mother’s abusive boyfriend. After being taken into custody, the boy spent the first three days and nights in a jail with adults. The boy was sexually and physically abused by so many inmates that he couldn’t remember how many inmates had abused him.⁷² The boy was shorter than five feet tall and weighed less than one hundred pounds. When Stevenson visited the boy in jail, at first the boy couldn’t speak at all, but then was able to talk and cry hysterically after Stevenson got physically close to him, eventually holding the boy in his arms. The boy begged Stevenson not to leave, and Stevenson promised to protect him from the men. In the book, we learn that the boy was moved to safer custody, and later charged as a juvenile.

In his speech, Stevenson uses this story to argue that proximity is the solution to narratives that have “separated us from some of these children” and have thus allowed the pain, suffering and trauma that this boy experienced to remain unaddressed. He urges that “there is power in proximity.”

The importance of proximity to clients is why we ask our students to visit clients in their homes, or jails, or wherever they might reside (sadly this option has been curtailed during COVID). It’s not just that meeting a client in person helps foster a trusting relationship, but the physical proximity to the place where they lead their lives is an important aspect of connection. But this proximity to clients in prison is not without its challenges. One commentator, in describing the clinic that he teaches at the University of Brescia in Italy, explained the some of his clinic students were “frightened by the hostile context” of prison and refused to return to visit their clients.⁷³

I felt the positive power of proximity most profoundly in a recent experience I had visiting a client in prison while COVID restrictions were still in place. Our client had been granted a new sentencing hearing and was being held without bond until the new hearing. The court agreed to vacate our client’s sentence and hold a new hearing after the clinic filed a motion arguing that his 90-year sentence for attempted murder, a crime committed when he was sixteen years old, was tantamount to a life without parole sentence. His sentence did

⁷² STEVENSON, JUST MERCY, *supra* note 64, at 115–26.

⁷³ Andres Gascon-Cuenca, Carla Ghitti & Francesca Malzani, *Acknowledging the Relevance of Empathy in Clinical Legal Education: Some Proposals from the Experience of the University of Brescia (IT) and Valencia (ESP)*, 25 INT’L J. CLIN. LEGAL EDUC. 218, 243 (2018).

not allow for a “meaningful opportunity for release” as that standard was interpreted in a recent decision by Maryland’s highest court in the context of sentences that imposed a specific term of years,⁷⁴ and as required by the United States Supreme Court in *Miller v. Alabama*.⁷⁵

A public defender joined the clinic in representing our client at the resentencing hearing. This co-counsel arrangement gave our client access to additional resources, including funds for mitigation experts, counsel with expertise in representing juveniles tried and sentenced as adults in Baltimore, and valuable reentry services should the client be released.⁷⁶ The date of the sentencing hearing changed several times, and it was unclear if the student attorneys would be able to get up to speed quickly enough to represent the client on the actual sentencing date. The clinic’s role was to help in preparing the sentencing memorandum and to assist the client in speaking to the judge at the hearing.

The hearing was scheduled as a virtual hearing because of concerns about COVID. Our client would remain in prison while his lawyers, family, and friends participated from other locations. The students and I knew that our client’s full humanity would not be apparent in a virtual hearing and did not want him to be alone during a sentencing hearing with so much at stake. He broke down crying in several phone calls before the hearing and expressed a lot of anxiety about the hearing. Our client has an intellectual disability, and coupled with his anxiety, he worried that he would not be able to read his prepared statement to the judge.

It was during those moments that I decided that I needed to go to the prison to accompany our client during the hearing. The decision was likely unwise, given the prevalence of COVID in Maryland prisons, but I believed I could make a difference by being with our client. I had known our client for more than four years and had a close relationship with him. The students wanted to come as well, but visiting the prison would pose problems under the law school’s COVID policies. I talked the decision over with colleagues and my spouse, who was out of town with our teenager at the time, and decided to go the prison, knowing that I could quarantine after the visit at home before my family returned.

⁷⁴ *Carter v. State*, 461 Md. 295 (2018).

⁷⁵ 567 U.S. 460, 479 (2012).

⁷⁶ The Maryland Office of the Public Defender had a strong interest in participating in the case, given that our client’s resentencing hearing was the first resentencing hearing scheduled in a Maryland court after the Maryland Court of Appeals in *Carter v. State* determined that lengthy term of years sentences for juveniles could be unconstitutional. Our clinic often represents clients on referral from the Office of the Public Defender; this was the first case where that office entered an appearance as co-counsel.

After negotiating several bureaucratic hurdles, and presenting a negative COVID test result, I received permission to visit our client and “attend” the hearing. I had no formal role in the hearing but was present to support our client in whatever way he needed. We sat in a cramped room with rudimentary videoconferencing capabilities along with two correctional officers. On several occasions, a correctional officer asked me to help her navigate the Zoom technology. I was able to help, which should amuse anyone who knows of my limited tech skills.

Everyone in the room wore masks, but physical distancing was impossible. The client and I sat less than a foot apart watching the hearing on a small laptop screen. Looking back on it, this close physical proximity meant that I could stay closely enough connected to the client for him to be able to speak to the judge. I stayed off screen as much as possible so that the judge would focus on the client, not me. I put my hand on the client’s knee and smiled encouragingly at him.

The client broke down crying shortly after he began reading his statement to the judge. I nodded and smiled at him, and our client paused, collected himself, and continued reading. Later, a correctional officer waved and pointed at me, signaling that I should remove my hand from my client’s knee.

The story has a happy ending, or as happy as most endings can be in a criminal legal system based on mass incarceration where injustice is commonplace. The judge told our client that his statement and expression of remorse for his crime was the most heartfelt and authentic statement that she had heard in the decades that she had worked as a public defender and a judge. The client received a sentence that resulted in his release four months after the hearing.⁷⁷ Neither the client nor I contracted COVID, and he is now home reconnected with his loving family and living with his mother and stepfather.

For me, the experience of being in such close physical proximity to the client, in such challenging circumstances, was profound. I was not the lawyer for the hearing. I had no speaking role in the hearing. What I had to offer was proximity and connection. It was an incredibly moving experience, and different than any other lawyering experience I have had before.

What does this experience have to do with George Floyd, or the hope that judges and juries may be more likely to see the humanity of

⁷⁷ The judge imposed the original sentence but suspended all but 35 years. Our client faced an additional year of executed time under the sentence imposed, as well as 55 years of back up time should he violate probation. Under the new sentence, our client was immediately eligible for parole. He was released on parole after the clinic represented him on a successful parole application and also began serving his five-year period of probation.

our clients? In one sense, George Floyd's murder brought us proximate to the incredible brutality of one person, but also to a system that allows that kind of brutality to persist and thrive. We saw Mr. Floyd at his most vulnerable, dying at the hands of a police officer. Proximity is powerful, and it can change minds and hearts. Proximity may be a necessary condition for empathy to flourish, whether that empathy is based in feeling, understanding or action.