

2019

Rebooting Empathy for the Digital Generation Lawyer

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Recommended Citation

Lauren Newell, Rebooting Empathy for the Digital Generation Lawyer, 34 Ohio St. J. Disp. Resol. 1 (2019).

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Rebooting Empathy for the Digital Generation Lawyer

LAUREN A. NEWELL*

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I. INTRODUCTION

*You never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it.*¹

*You don't know how it feels / You don't know how it feels to be me*²

Sometime in the last decade or two, “talking to someone” stopped meaning speaking with a person face-to-face, and it started meaning interacting with that person through some form of technology. The Internet and our computers, cell phones, smartphones, smartwatches, tablets, e-readers, mp3 players, fitness trackers, and virtual assistants—collectively known as information and communication technologies (ICTs)³—are our constant companions.⁴ There seems to be nowhere we will not bring our ICTs and nothing we will not use them for; from birth to death, sleep to wakefulness, hello to goodbye, there is an app for that.⁵

¹ HARPER LEE, *TO KILL A MOCKINGBIRD* 36 (1960).

² TOM PETTY, *You Don't Know How It Feels*, on *WILDFLOWERS* (Warner Bros. Records 1994).

³ See Michael P. O'Driscoll et al., *Work-Related Technological Change and Psychological Well-Being*, in *TECHNOLOGY AND PSYCHOLOGICAL WELL-BEING* 106, 106 (Yair Amichai-Hamburger ed., 2009). Because new types of ICTs are constantly being developed, a list of all existing ICTs would soon be laughably out of date. Accordingly, this Article should be understood to refer to ICTs in the broadest, most inclusive sense, including both the devices we use (e.g., tablets and smartphones) and the websites and programs we run on those devices (e.g., email, social media websites, and apps). “App” is short for “application,” as in a program that runs on a phone, tablet, or smartwatch. Anita Campbell, *What the Heck Is an “App”?*, *SMALL BUSINESS TRENDS* (Mar. 7, 2011), <https://smallbiztrends.com/2011/03/what-is-an-app.html>.

⁴ Access to ICTs varies greatly worldwide and across different socioeconomic groups. See JOHN PALFREY & URS GASSER, *BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES* 14 (2008) (acknowledging that access to ICTs varies across countries and populations, so it cannot be assumed that everyone born after a certain year will have the same exposure to ICTs). The broad generalizations this Article makes about “our lives,” “the Digital Generation,” and “the legal profession” are intended to reflect the average experience of adults and young people in the United States and the U.S. legal profession, with the caveat that these generalizations are likely not applicable to adults and young people in every country worldwide or even to adults and young people in every socioeconomic group within the United States.

⁵ See “Ovia Pregnancy Tracker,” *iTunes App Store*, iTUNES (search performed Sept. 18, 2018) (“Ovia’s personalized approach to tracking your baby’s development gives you an app as unique as your pregnancy”); “Everdays: Funeral Notices, Memorials, & Obituaries,” *iTunes App Store*, iTUNES (search performed July 18, 2017) (app that “helps

This is even more true for today's young people—a group I call the Digital Generation⁶—than for any other segment of the population. The Digital Generation, who have never known life without ICTs, have a social media presence before they are even born.⁷ They learn to navigate a smartphone before they know how to write.⁸ They grow up communicating with others using their ICTs as intermediaries—the Digital Generation favor online interaction via text messages, social networks, instant messaging, and email over real-world interactions through face-to-face or telephonic conversations.⁹ Research suggests that the movement toward virtual communication comes with negative consequences, such as poor real-world communication skills and underdeveloped social skills.¹⁰ Most significantly, social scientists have found evidence suggesting that the Digital Generation are less empathic than prior generations of young people and have speculated that ICT usage may be to blame.¹¹

you notify family and friends when a loved one passes away”); “Good Morning Alarm Clock—Sleep Cycle Alarm Clock,” *iTunes App Store*, ITUNES (search performed July 18, 2017) (“a smart alarm clock that finds the optimal time to wake you up”); “Goodbye Contacts,” *iTunes App Store*, ITUNES (search performed July 18, 2017) (“the funnest [sic], and easiest way to get rid of those unused, unwanted contacts you haven’t spoken to in who knows how long”); “Hello—Audio Social Network,” *iTunes App Store*, ITUNES (search performed July 18, 2017) (“a simplified voice chat app with a focus on having an anonymous talk with random people nearby or from anywhere in the world”); “Sleep++,” *iTunes App Store*, ITUNES (search performed July 18, 2017) (app that “closely measure[s] both the duration and quality of your sleep”).

⁶ Lauren A. Newell, *Redefining Attention (and Revamping the Legal Profession?) for the Digital Generation*, 15 NEV. L.J. 754, 756 (2015).

⁷ See Adrienne LaFrance, *The Perils of ‘Sharenting’*, ATLANTIC (Oct. 6, 2016), <https://www.theatlantic.com/technology/archive/2016/10/babies-everywhere/502757/> (“Many children make their internet debut as grainy gray blobs on Facebook-posted ultrasound images before they’re even born.”).

⁸ See Mandy Velez, *Kids Can Use Smartphones Before They Learn to Write Their Names and Tie Their Shoes, Survey Says*, HUFFINGTON POST (Feb. 5, 2014), http://www.huffingtonpost.com/2014/02/04/kids-more-experienced-digitally_n_4724886.html.

⁹ See *infra* Part V.A.

¹⁰ See, e.g., GARY SMALL & GIGI VORGAN, IBRAIN: SURVIVING THE TECHNOLOGICAL ALTERATION OF THE MODERN MIND 21, 124 (2008); Sara Konrath, *Positive Technology: Using Mobile Phones for Psychosocial Interventions*, in ENCYCLOPEDIA OF MOBILE PHONE BEHAVIOR 871, 884 (Zheng Yan ed., 2015); George Rodman & Katherine G. Fry, *Communication Technology and Psychological Well-Being: Yin, Yang, and the Golden Mean of Media Effects*, in TECHNOLOGY AND PSYCHOLOGICAL WELL-BEING 9, 26 (Yair Amichai-Hamburger ed., 2009); Sherry Turkle, *The Flight from Conversation*, N.Y. TIMES (Apr. 22, 2012), <https://www.nytimes.com/2012/04/22/opinion/sunday/the-flight-from-conversation.html>.

¹¹ See *infra* Part V.B.

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Empathy is an amorphous concept, inconsistently defined by researchers but fundamentally important to our human relationships and interactions.¹² Empathy plays a central role in the practice of law, which calls upon its practitioners to counsel, to advocate, to persuade, and to adjudicate.¹³ Today's young ICT devotees are tomorrow's future legal professionals. There are clear negative implications for the legal profession's future if successful legal practice requires the ability to empathize, but the Digital Generation's ICT usage is diminishing their ability to do so. If the speculations about ICTs and the Digital Generation's empathy are correct, then law schools—the last bastion before the Digital Generation become practicing lawyers—must take steps to counteract this decline in their students.

This Article proceeds in six parts. Part I defines empathy and explains how social scientists measure it. Part II describes how and when humans develop empathy. Part III explains why empathy is important, both generally for human interactions and specifically for core lawyering skills. Part IV introduces the Digital Generation and discusses the research suggesting a generational empathy decline. Part V reviews suggestions others have made for increasing empathy generally and specifically in legal education. Part VI offers new suggestions that specifically target the impact ICTs may be having on future lawyers' empathy. Finally, the conclusion offers thoughts about ICTs' limitations and potential.

II. DEFINING AND MEASURING EMPATHY

A. *Defining Empathy*

Any discussion of empathy must begin by establishing a working definition of the term. This is a tricky task because there is no single, consistent definition of empathy.¹⁴ Researchers have disagreed as to whether it is primarily a cognitive mechanism or is instead primarily an affective construct¹⁵—i.e., an emotional response to another's situation. Those who see

¹² See *infra* Parts II.A., IV.A.

¹³ See *infra* Part IV.B.

¹⁴ Sara H. Konrath et al., *Changes in Dispositional Empathy in American College Students Over Time: A Meta-Analysis*, 15 PERSONALITY & SOC. PSYCHOL. REV. 180, 181 (2011) [hereinafter Konrath et al., *Dispositional Empathy*].

¹⁵ *Id.*; Sara Konrath & Delphine Grynberg, *The Positive (and Negative) Psychology of Empathy*, in PSYCHOLOGY AND NEUROBIOLOGY OF EMPATHY 63 (Douglas Watt & J. Panksepp eds.). Those who have defined empathy in more cognitive terms include psychologists Helene Borke, Francine Deutsch, and Ronald A. Madle. See generally Helene Borke, *Interpersonal Perception of Young Children: Egocentrism or Empathy?*, 5 DEVELOPMENTAL PSYCHOL. 263 (1971); Francine Deutsch & Ronald A. Madle, *Empathy: Historic and Current Conceptualizations, Measurement, and a Cognitive Theoretical*

it as an affective construct disagree whether one's emotions are directly matched to another person's affective state, whether empathy is really a manifestation of sympathy, or whether people empathize to relieve their own stress about someone else's situation.¹⁶ Others recognize that empathy is "multifaceted . . . with both affective and cognitive components."¹⁷ Psychologist C. Daniel Batson has identified at least eight psychological states that contemporary psychologists have referred to as "empathy": (1) knowing someone else's internal state ("cognitive empathy" or "empathic accuracy"), (2) adopting another's observed posture or expression ("motor mimicry" or imitation), (3) feeling the same emotion someone else feels ("emotional contagion" or "affective empathy"), (4) projecting oneself into someone else's situation ("aesthetic empathy" or *Einfühlung*), (5) imagining what another person is thinking and feeling ("imagine other perspective" or "perspective taking"), (6) imagining how one would feel and think in another's place ("imagine-self perspective"), (7) experiencing personal distress upon witnessing someone else's suffering ("personal distress"), and (8) feeling for another who is suffering ("empathic concern" or sympathy).¹⁸ Philosopher Amy Coplan offers a similar list, with six or more different conceptions of empathy.¹⁹ Thus, those who write about "empathy" may be referring to affective (or "feeling") experiences, cognitive (or "thinking") processes, or both.

In line with most contemporary theorists, this Article embraces the view that empathy is not a one-dimensional concept. Accordingly, I define empathy as the tendency to feel, imagine, understand, and/or interpret other

Perspective, 18 HUMAN DEV. 267 (1975). Those who have defined empathy in primarily affective terms include psychologists C. Daniel Batson, Martin L. Hoffman, Paul A. Miller, and Nancy Eisenberg. See generally C. Daniel Batson, *Prosocial Motivation: Is It Ever Truly Altruistic*, 20 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 65 (1987); MARTIN L. HOFFMAN, *EMPATHY AND MORAL DEVELOPMENT: IMPLICATIONS FOR CARING AND JUSTICE* (2000); Paul A. Miller & Nancy Eisenberg, *The Relation of Empathy to Aggressive and Externalizing/Antisocial Behavior*, 103 PSYCHOL. BULL. 324 (1988).

¹⁶ Miller & Eisenberg, *supra* note 15, at 9; Konrath et al., *Dispositional Empathy*, *supra* note 14, at 181; Konrath & Grynberg, *supra* note 15, at 1.

¹⁷ Sara Konrath, *The Empathy Paradox: Increasing Disconnection in the Age of Increasing Connection*, in HANDBOOK OF RESEARCH ON TECHNOSELF: IDENTITY IN A TECHNOLOGICAL SOCIETY 204, 210–11 (Rocci Luppardini ed., 2013) [hereinafter Konrath, *Empathy Paradox*].

¹⁸ C. Daniel Batson, *These Things Called Empathy: Eight Related but Distinct Phenomena*, in THE SOCIAL NEUROSCIENCE OF EMPATHY 3, 4–8 (Jean Decety & William Ickes eds., 2009) (citations omitted) [hereinafter Batson, *These Things Called Empathy*].

¹⁹ See Amy Coplan, *Understanding Empathy: Its Features and Effects*, in EMPATHY: PHILOSOPHICAL AND PSYCHOLOGICAL PERSPECTIVES 3, 4 (Amy Coplan & Peter Goldie eds., 2011).

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people's feelings, perspectives, and non-verbal communications.²⁰ This definition focuses upon *dispositional empathy*, i.e., a “chronic tendenc[y] to respond empathically,” rather than the narrower concept of *situational empathy*, i.e., empathy that is triggered or induced under specific circumstances.²¹

It is important at the outset to make clear that empathy, as herein defined, is not the same as sympathy, though the two are often conflated.²² The confusion is partly attributable to empathy's etymology. The word “empathy” is a relatively recent addition to the English language, by way of the German term *Einfühlung*, initially used by philosopher Theodor Lipps to describe aesthetic perceptions.²³ Lipps later extended this notion of *Einfühlung* to

²⁰ This definition draws from multiple conceptions of “empathy,” including the following: (1) empathy as “an emotional response that stems from another's emotional state or condition, is congruent with the other's emotional state or condition, and involves at least a minimal degree of differentiation between self and other,” Nancy Eisenberg & Richard A. Fabes, *Empathy: Conceptualization, Measurement, and Relation to Prosocial Behavior*, 14 *MOTIVATION & EMOTION* 131, 132 (1990) (citation omitted); (2) empathy as “shar[ing] or at least understand[ing] a client's feelings . . . imagin[ing] and thereby nonjudgmentally understand[ing] what it would be like to be in the client's position,” Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the “Heart” of Lawyering*, 87 *NEB. L. REV.* 1, 18 (2008); (3) dispositional empathy as “the tendency to react to other people's observed experiences,” Konrath et al., *Dispositional Empathy*, *supra* note 14, at 181 (citation omitted); (4) empathy as “experiencing perspectives and feelings more congruent with another's situation than with one's own,” Konrath & Grynberg, *supra* note 15, at 1 (citation omitted); and (5) empathy as “involv[ing] the ability to become adept at reading another person's nonverbal communications and interpreting another's underlying feelings,” Bruce J. Winick, *Client and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal With a Psycholegal Soft Spot*, 4 *PSYCHOL. PUB. POL'Y & L.* 901, 910 (1998)).

²¹ Konrath & Grynberg, *supra* note 15, at 1. Situational empathy can be induced in almost anyone under the right circumstances. *Id.*

²² Susan A. Bandes, *Taz and Empathy*, 58 *HOW. L.J.* 397, 399 (2015) [hereinafter Bandes, *Taz and Empathy*] (“[T]he most prevalent and damaging misconception is the conflation of empathy and sympathy. Sympathy is a feeling for its object and is associated with a desire to alleviate suffering. Empathy is a capacity for understanding the motives, intentions, and desires of others. Empathy, unlike sympathy, has no action tendency—it connotes the desire to stand in the shoes of another, not the desire to help another.” (emphasis in original)).

²³ Lynne N. Henderson, *Legality and Empathy*, 85 *MICH. L. REV.* 1574, 1579 (1987). Lipps was interested in “the process whereby a writer or painter imagines what it would be like to be some specific person or some inanimate object, such as a gnarled, dead tree on a windswept hillside.” Batson, *These Things Called Empathy*, *supra* note 18, at 6. Additionally,

define the psychological state of “[i]maginatively projecting oneself into another’s situation”²⁴ or “‘feeling into’ another individual’s emotional state.”²⁵ British psychologist Edward Titchener translated *Einfühlung* into “empathy” in 1909, from the Greek *empathia*, meaning “‘in’ (*en*) ‘suffering or passion’ (*pathos*).”²⁶

Confusingly, others have translated *Einfühlung* as “sympathy.”²⁷ This has led to considerable muddling of the two terms in the psychological and philosophical literature.²⁸ As Batson remarks, “Both *empathy* and *sympathy* (the term with which empathy is most often contrasted) have been used in a variety of ways. Indeed, with remarkable consistency exactly the same state that some scholars have labeled empathy others have labeled sympathy.”²⁹ Batson argues that neither labeling scheme is “correct,” either as a historical or a logical matter, and that the best way to approach this confusion is to recognize the difference between the phenomena, adopt a clear labeling scheme, and be consistent in using it.³⁰

To this end, this Article uses sympathy in the sense of “an emotional response stemming from another’s emotional state or condition that is not identical to the other’s emotion, but consists of feelings of sorrow or concern for another.”³¹ For example, imagine your friend Ognjen breaks his leg the day before he is scheduled to run his first marathon, which he planned to run in honor of his father, who died last year from pancreatic cancer. In tears, Ognjen calls you to tell you the news. You might feel concerned about Ognjen’s health

[Lipps] wrote that the appearance in the senses of the object of beauty may provide the object of aesthetic satisfaction, but is not itself the aesth[etic] satisfaction. Rather, it is the striving self that is aesthetically pleased Thus aesthetic satisfaction consists of the object, but does not reside in the object. It is in the self.

Lauren Wispé, *History of the Concept of Empathy*, in *EMPATHY AND ITS DEVELOPMENT* 17, 19 (Nancy Eisenberg & Janet Strayer eds., 1987).

²⁴ Batson, *These Things Called Empathy*, *supra* note 18, at 6.

²⁵ Jennifer H. Pfeifer & Mirella Dapretto, “*Mirror, Mirror, in My Mind*”: *Empathy, Interpersonal Competence, and the Mirror Neuron System*, in *THE SOCIAL NEUROSCIENCE OF EMPATHY* 183, 183 (Jean Decety & William Ickes eds., 2009).

²⁶ Wispé, *supra* note 23, at 20–21.

²⁷ Henderson, *supra* note 23, at 1579.

²⁸ *Id.*

²⁹ Batson, *These Things Called Empathy*, *supra* note 18, at 8 (emphasis in original).

³⁰ *Id.*

³¹ Nancy Eisenberg & Paul A. Miller, *Empathy, Sympathy, and Altruism: Empirical and Conceptual Links*, in *EMPATHY AND ITS DEVELOPMENT* 292 (Nancy Eisenberg & Janet Strayer eds., 1987).

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and sorry that he is experiencing this disappointment. This is sympathy: You are experiencing an emotional response to Ognjen's emotional state. Your response (sorrow, concern) is not identical to Ognjen's (disappointment, grief, pain, frustration, etc.), but it is congruent—you both are experiencing negative emotions.

Empathy is a broader concept. If you experience empathy, then in addition to feeling sorry for Ognjen you would be able to imagine that Ognjen is feeling grief-stricken, helpless, and frustrated. You would understand why someone who had recently lost his father and had spent months preparing to run a race in his honor would feel the lost opportunity especially acutely. You would hear him sniffing and interpret that to mean he is intensely sad (angry, demoralized, etc.). In this way, empathy is a broader concept than sympathy is. If empathy were a pizza, then sympathy might be the cheese—an important ingredient, but not the whole dish. Thus, empathy subsumes sympathy, but the two are not the same.³²

B. *Measuring Empathy*

Researchers have utilized many different approaches to measure empathy, dating back as early as the 1940s.³³ Contemporary empathy measures fall generally into three categories: self-report measures (questionnaires), behavioral measures (performance on tests and evaluation of experimental stimuli), and neuroscientific measures (brain imaging and measures of central nervous system activity, facial electromyography, and the autonomic nervous system).³⁴ Of these measures, subjective self-reports are currently the most comprehensive.³⁵ However, there are limitations to self-report measures. First, not all self-report measures are multidimensional, despite recent literature that defines empathy as a multidimensional construct

³² Sympathy is a facet of empathic concern. *See infra* note 47 and accompanying text.

³³ David L. Neumann et al., *Measures of Empathy: Self-Report, Behavioral, and Neuroscientific Approaches*, in MEASURES OF PERSONALITY AND SOCIAL PSYCHOLOGICAL CONSTRUCTS 257, 257 (Gregory J. Boyle et al. eds., 2015). For additional descriptions of empathy measures and their methodological limitations, see Miller & Eisenberg, *supra* note 15, at 95; Eisenberg & Fabes, *supra* note 20, at 133–40.

³⁴ Neumann et al., *supra* note 33, at 258–59.

³⁵ *Id.* at 283. Not only are behavioral measures less comprehensive than self-report measures, but there is also not a great deal of evidence confirming their validity or reliability. *See id.* at 271–76. Neuroscientific measures are very promising but are still in their infancy. *Id.* at 283–84. More work needs to be done to create a standardized testing protocol and to confirm the measures' validity and reliability. *Id.* at 284. Further, neuroscientific measures require technical equipment that is often expensive to use and is prone to difficulties in interpretation if used improperly. *Id.*

involving both cognitive and affective components.³⁶ Unidimensional measures tend to skew toward measuring the affective aspects of empathy.³⁷ Second, each self-report measure is based on a somewhat different definition of empathy, owing to the lack of agreement among researchers on a single empathy definition.³⁸ Third, self-report measures may suffer from response bias—the tendency to answer questions inaccurately or untruthfully so as to appear more socially desirable (in this case, more empathic).³⁹

One widely used self-report measure of dispositional empathy is the Davis Interpersonal Reactivity Index (IRI), a twenty-eight item scale with four different subscales, each representing a different component of interpersonal sensitivity.⁴⁰ The IRI is an effective measure of empathy because it is multidimensional, measuring both affective and cognitive facets of empathy.⁴¹ Using a multidimensional measure is important if empathy is being studied over a period of time, since the cognitive and affective components of empathy could change at different rates over time.⁴² The IRI is well-validated, reliable, and an “ideal” measure for a cross-temporal meta-analysis (discussed below).⁴³

The four subscales of the IRI are empathic concern, perspective taking, personal distress, and fantasy.⁴⁴ Empathic concern and perspective taking are “the most central components of empathy.”⁴⁵ Empathic concern is “[t]he more affective component, [which] . . . represents people’s tendencies to feel what others are feeling Empathic concern involves accurately reflecting others’ emotional states, and being able to separate those states from one’s own emotions.”⁴⁶ Empathic concern is similar to sympathy.⁴⁷ For

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Konrath et al., *Dispositional Empathy*, *supra* note 14, at 181. However, the IRI is not without limitations, most notably that it relies upon analysis of self-reported data, which “might be influenced by people’s tendencies to respond in a socially desirable fashion.” *Id.* at 190.

⁴¹ *Id.* at 181.

⁴² *Id.*

⁴³ *Id.*; see also *infra* note 286 for a description of cross-temporal meta-analysis.

⁴⁴ Konrath et al., *Dispositional Empathy*, *supra* note 14, at 181.

⁴⁵ *Id.* at 185.

⁴⁶ Konrath, *Empathy Paradox*, *supra* note 17, at 210–11. Psychologist Daniel Goleman defines empathic concern as “the ability to sense what another person needs from you.” Daniel Goleman, *What Is Empathy?*, in EMPATHY: HBR EMOTIONAL INTELLIGENCE SERIES 4 (2017).

⁴⁷ See Konrath et al., *Dispositional Empathy*, *supra* note 14, at 181 (describing empathic concern as “other-oriented feelings of sympathy for the misfortunes of others . . .”).

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instance, imagine that Amanda tells her friend Sanjay that her beloved, elderly dog died.⁴⁸ If Sanjay has high empathic concern, he will feel and mirror Amanda's sadness and grief upon hearing the news, or at least feel very sorry for Amanda.

Perspective taking is "[t]he more cognitive component, [which] . . . represents people's tendencies to accurately imagine the world from another person's point of view."⁴⁹ Perspective taking involves the ability to "literally step into" another person's mind and "see things the way" that person does, including by interpreting the other person's body language and facial expressions to understand the other person's responses to a situation.⁵⁰ Empathic concern and perspective taking usually go hand-in-hand; a person who is high in one is usually high in the other.⁵¹ If Sanjay is high in perspective taking, he should be able to imagine Amanda coming home to an empty house after work and feeling lonely when her dog is not there to keep her company. Sanjay should also be able to understand how Amanda is feeling about her dog's death by interpreting Amanda's facial expressions and body language. If Sanjay is low in perspective taking, he might respond to her news by thinking about how happy she will be in the future when she gets a new puppy, while Amanda is focused on her present grief. Or Sanjay might misinterpret her facial expressions and not understand that Amanda is feeling a degree of relief that her long-suffering dog is finally at peace.

Personal distress is a "self-focused, aversive affective reaction to the apprehension of another's emotion, associated with the desire to alleviate one's own, but not the other's distress (e.g., discomfort, anxiety)."⁵² In other words, personal distress refers to the tendency to become worried or uncomfortable in the face of another person's suffering. For example, if Sanjay is high in personal distress, he might become anxious and leave the room if Amanda starts crying about her dog. Fantasy is a measure of "people's tendencies to identify imaginatively with fictional characters in books or movies"—i.e., the tendency to respond empathically to the happenings of fictional characters.⁵³ If Sanjay is high in fantasy, then he might experience

⁴⁸ For a similar example, see Konrath, *Empathy Paradox*, *supra* note 17, at 211.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* However, Konrath emphasizes that this is not necessarily the case. *Id.* It is possible to be good at reading others' emotions but bad at caring about what they are feeling (i.e., high in perspective taking but low in empathic concern). *Id.* This unusual combination of traits is likely characteristic of sociopaths. *Id.*

⁵² Nancy Eisenberg & Natalie D. Eggum, *Empathic Responding: Sympathy and Personal Distress*, in *THE SOCIAL NEUROSCIENCE OF EMPATHY* 71, 72 (Jean Decety & William Ickes eds. 2009) (citation omitted).

⁵³ Konrath et al., *Dispositional Empathy*, *supra* note 14, at 181; *see also* Pfeifer & Dapretto, *supra* note 25, at 188.

sadness when Amanda's fictional dog dies if Amanda is the protagonist of a novel, rather than a real person. While recognizing that personal distress and fantasy fall under the umbrella of empathy, this Article focuses primarily on empathic concern and perspective taking. Not only do social scientists consider these to be the most important parts of dispositional empathy, but they are also arguably the aspects of empathy of primary importance for legal actors, for the reasons discussed below.⁵⁴

III. THE DEVELOPMENT OF EMPATHY

A. *Neurological Bases of Empathy*

Empathy likely first existed to make parents interested in their children, thereby increasing the chances that the children would survive and the species would not die out.⁵⁵ From there, empathy became more expansive, probably first extending to in-group members and then extending more broadly.⁵⁶ But where does empathy come from? Psychologist Daniel Goleman traces the roots of empathy's affective components:

It springs from ancient parts of the brain beneath the cortex—the amygdala, the hypothalamus, the hippocampus, and the orbitofrontal cortex—that allow us to feel fast without thinking deeply. They tune us in by arousing in our bodies the emotional states of others: I literally feel your pain. My brain patterns match up with yours when I listen to you tell a gripping story.⁵⁷

Another neural theory similarly attributes affective facets of empathy to the amygdala and the prefrontal cortex. Goleman explains:

[T]he [empathic] response is triggered in the amygdala by the brain's radar for sensing danger and in the prefrontal cortex by the release of oxytocin, the chemical for caring We intuitively experience the distress of another as our own. But in deciding whether we will meet that person's needs, we

⁵⁴ See *infra* Part IV.B.

⁵⁵ Konrath & Grynberg, *supra* note 15, at 22; see also Goleman, *supra* note 46, at 8 (“Empathic concern has its roots in the circuitry that compels parents’ attention to their children.”).

⁵⁶ Konrath & Grynberg, *supra* note 15, at 22.

⁵⁷ Goleman, *supra* note 46, at 5–6.

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deliberately weigh how much we value his or her well-being.⁵⁸

A different hypothesis is that empathy starts with mirror neurons, a small cluster of cells in the brain that reflect, or mirror, other people's movements.⁵⁹ Mirror neurons were first discovered by a group of neurophysiologists at the University of Parma led by Giacomo Rizzolatti.⁶⁰ Rizzolatti's team was studying the neocortex area of the brain in macaque monkeys to try to learn about the motor control mechanisms that control various movements of the macaque's hands, particularly grasping movements.⁶¹ In between experiments, one of the neurophysiologists in the lab reached for something while within view of one of the monkeys.⁶² As the scientist reached, the electrodes implanted in the monkey's brain registered a discharge from a neuron within the monkey's neocortex that was associated with the grasping motion, even though the monkey had not moved and was not actually grasping anything.⁶³ After a number of experiences similar to this one, Rizzolatti's team realized that the cells in the monkeys' brains responsible for motor actions—mirror neurons—were firing when the monkeys merely observed others performing those motor actions, though the monkeys did not move themselves.⁶⁴ Put otherwise, the cells were behaving as though the monkeys were physically mirroring the scientists' actions.

There are different categories of mirror neurons: "strictly congruent" mirror neurons, "broadly congruent" mirror neurons, and "logically related" mirror neurons.⁶⁵ Psychologist Marco Iacoboni describes them as follows:

Some mirror neurons . . . show [a] tight correlation between action and perception. These cells are called strictly congruent mirror neurons because they fire for identical actions, either performed or observed. For instance, a strictly congruent mirror neuron fires when the monkey grasps with a precision grip and when the monkey sees somebody else grasping with a precision grip Other mirror neurons, however, show a less strict relationship between executed and observed actions. These are the broadly congruent mirror neurons.

⁵⁸ *Id.* at 8.

⁵⁹ JONAH LEHRER, *HOW WE DECIDE* 185 (2010).

⁶⁰ MARCO IACOBONI, *MIRRORING PEOPLE* 8 (2008).

⁶¹ *Id.* at 9–10.

⁶² *Id.* at 10.

⁶³ *Id.*

⁶⁴ *See id.* at 11.

⁶⁵ *Id.* at 25–26.

They fire at the sight of an action that is not necessarily identical to the executed action but achieves a similar goal. For instance, a broadly congruent mirror neuron may fire when the monkey is grasping food with the hand and when the monkey is seeing somebody else getting food with the mouth

. . . .
. . . . A “logically related” mirror neuron is one that, for instance, fires at the sight of food being place[d] on the table and also while the monkey grasps the piece of food and brings it to the mouth.⁶⁶

Mirror neurons do not only mirror motor actions; they can also engage our emotions: “If you see someone else smile, then your mirror neurons will light up as if you were smiling These cells reflect, on the inside, the expressions of everybody else.”⁶⁷ In other words, when we watch other people experience emotions, our brains experience something similar to the emotion we see being experienced.⁶⁸ It is possible that this neural mirroring makes empathy possible.⁶⁹ Researchers have indeed found “much empirical evidence suggesting a strong link between” neural mirroring and empathy, gathered through a variety of neuroscience methodologies.⁷⁰ Iacoboni explains:

[M]irror neurons provide an unreflective, automatic simulation . . . of the facial expressions of other people, and this process of simulation does not require explicit, deliberate recognition of the expression mimicked. Simultaneously, mirror neurons send signals to the emotional centers located in the limbic system of the brain. The neural activity in the limbic system triggered by these signals from mirror neurons allows us to feel the emotions associated with the observed

⁶⁶ *Id.* (footnote omitted).

⁶⁷ LEHRER, *supra* note 59, at 185.

⁶⁸ See Elizabeth Ann Simpson & Pier Francesco Ferrari, *Mirror Neurons Are Central for a Second-Person Neuroscience: Insights from Developmental Studies*, 36 BEHAV. BRAIN SCI. 438, 438 (2013) (“[W]hen we see emotions, there is a brain mirroring in the traditional mirror areas (premotor-parietal), as well as in deep areas of the brain involved in first-person perception of emotion, such as the cingulate cortex and the anterior insula. In other words, it is *as if* viewers experience the same emotion as that displayed by the other.” (emphasis in original)).

⁶⁹ See Timothy P. O’Neill, *Mirror Neurons, the New Neuroscience, and the Law: Some Preliminary Observations*, 39 SW. L. REV. 499, 503 (2010) (“Mirror neurons provide a neurobiological explanation for how we are able to empathize.”).

⁷⁰ IACOBONI, *supra* note 60, at 109.

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facial expressions—the happiness associated with a smile, the sadness associated with a frown. Only *after* we feel these emotions internally are we able to explicitly recognize them .

...

If this account of how mimicry can support recognition of emotions is correct, it follows that good imitators should also be good at recognizing emotions, and so endowed with a greater empathy for others.⁷¹

Put differently, we become consciously aware of others' emotions after our mirror neurons cause our brains to simulate those emotions. This hypothesis has received empirical support,⁷² though the evidence is not conclusive.⁷³ It suggests we need not actually see an experience or an emotion for our mirror neurons to simulate the experience for us. Instead, when we witness or otherwise become aware of other people enduring a painful experience, our brains fully simulate the painful experience, including any motor component, as if we were experiencing it ourselves.⁷⁴ When our mirror neurons make us feel we are actually experiencing something that we are only seeing or hearing about, it is possible for us to empathize.⁷⁵ Thus, mirror neurons may be part of the “foundation of empathy.”⁷⁶

⁷¹ *Id.* at 111–112 (emphasis in original).

⁷² There is evidence of mirroring in humans upon observing another's physical movements (both object-related movements, like holding a cup, and non-object-related movements). Alvin I. Goldman, *Two Routes to Empathy: Insights from Cognitive Neuroscience*, in *EMPATHY: PHILOSOPHICAL AND PSYCHOLOGICAL PERSPECTIVES* 31, 33–34 (Amy Coplan & Peter Goldie eds., 2011). There is also evidence of mirroring upon observation of a painful stimulation inflicted upon another person. *Id.* at 35. Additionally, researchers have found empathic mirroring when participants observed others smelling something disgusting and making a disgusted facial expression. *Id.* For a review of additional empirical research on mirror neurons, see IACOBONI, *supra* note 60, at 112–14. The brain systems involved in mirroring motor movements are different from those involved in mirroring emotions and sensations. Goldman, *supra*, at 36. For a description of research on the location of mirror neurons in the human brain, see Marco Iacoboni, *Within Each Other: Neural Mechanisms for Empathy in the Primate Brain*, in *EMPATHY: PHILOSOPHICAL AND PSYCHOLOGICAL PERSPECTIVES* 45, 52–55 (Amy Coplan & Peter Goldie eds., 2011).

⁷³ See, e.g., James M. Kilner & Roger N. Lemon, *What We Currently Know About Mirror Neurons*, 23 *CURRENT BIOLOGY* R1057, R1061 (2013) (“The functional role(s) of mirror neurons and whether mirror neurons arise as a result of a functional adaptation and/or of associative learning during development are important questions that still remain to be solved.”).

⁷⁴ See IACOBONI, *supra* note 60, at 124–25.

⁷⁵ See *id.* at 4; see also O'Neill, *supra* note 69, at 504.

⁷⁶ See IACOBONI, *supra* note 60, at 4–5 (“‘Vicarious’ is not a strong enough word to describe the effect of these mirror neurons. When we see someone else suffering or in pain,

B. *The Progression of Empathy Development*

Thus, the perennial question: Is empathy a matter of nature or nurture? Do the brain cells we are born with determine our empathic skills, or is empathy a learned behavior? The answer, as it so often is, appears to be both: “[E]mpathy is not a fixed trait like having brown eyes or long fingers. Empathy is instead a delicate cocktail blending assorted elements of inborn aptitude, social conditioning, personal history, and practice and motivation.”⁷⁷ Genetics appear to play some role, especially regarding the affective components of empathy, such as empathic concern,⁷⁸ but much of empathy is learned.

Development of empathy seems to take place largely in the first few years of life.⁷⁹ A basic form of empathy reveals itself in infancy through emotional contagion, as newborns cry in reaction to another’s distress.⁸⁰ More sophisticated forms emerge in toddlerhood, when children begin to understand that other people are distinct from themselves and have their own feelings.⁸¹ At this stage, “[t]he child may now be aware that another person and not the self is in distress, but the other’s internal states remain unknown and may be

mirror neurons help us to read his or her facial expression and actually make us feel the suffering or the pain of the other person. These moments . . . are the foundation of empathy . . .”).

⁷⁷ Paul Anderson & Sara Konrath, ‘*Why Should We Care?*’—*What to Do About Declining Student Empathy*, CHRONICLES HIGHER EDUC. (July 31, 2011), <http://chronicle.com/article/Why-Should-We-Care-What/128420/>; see also Zoe E. Taylor et al., *The Relations of Ego-Resiliency and Emotion Socialization to the Development of Empathy and Prosocial Behavior Across Early Childhood*, 13 EMOTION 822, 824 (2013) (“[B]oth genetic and environmental factors contribut[e] to changes in levels of empathy as well as to individual differences.” (citation omitted)).

⁷⁸ Sara Konrath, *Can Text Messages Make People Kinder?*, in CHARACTER: NEW DIRECTIONS FROM PHILOSOPHY, PSYCHOLOGY, AND THEOLOGY 412, 415 (Christian B. Miller et al. eds., 2015) [hereinafter Konrath, *Kinder*] (citing studies).

⁷⁹ See HOFFMAN, *supra* note 15, at 64–80; see also Taylor et al., *supra* note 77, at 1–2, 5.

⁸⁰ Taylor et al., *supra* note 77, at 1–2 (citation omitted). Others challenge the notion that reactive crying is truly empathic. See Ross A. Thompson, *Empathy and Emotional Understanding*, in EMPATHY AND ITS DEVELOPMENT 119, 126 (Nancy Eisenberg & Janet Strayer eds., 1987) (“[I]t is probably more appropriate to regard such [reactive] crying as a primitive kind of emotional contagion evoked, in part, by the similarity of the cry to the newborn’s own distress sound. Since it is clearly not a response to another’s situation, reactive crying cannot be called empathetic.”). Hoffman describes the reactive cry as “an early, rudimentary precursor of empathic distress” that is “a combination of mimicry and conditioning, with each getting an assist from imitation.” HOFFMAN, *supra* note 15, at 65. Hoffman also notes that infants do not cry in reaction to a computer-simulated infant’s cry, nor do they cry as intensely in response to the sound of their own cry or to a chimpanzee’s cry as they do in response to a cry of another human baby. *Id.* at 64–65.

⁸¹ Taylor et al., *supra* note 77, at 1–2 (citation omitted).

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assumed to be the same as one's own."⁸² Children of this age understand that others are upset and try to give comfort, but the strategies they use to provide comfort are the same strategies they themselves find comforting (e.g., a fourteen-month-old boy brings his crying friend to the boy's own mother, rather than to the friend's mother).⁸³ Empathy levels appear to stabilize around age three.⁸⁴ By this age, "one becomes aware that other people's feelings may differ from one's own and are based on their own needs and interpretations of events; consequently one becomes more responsive to cues about what the other is actually feeling."⁸⁵ Around age three, children "cannot only empathize with the fact of another's distress; they can also take the victim's role and reflect on the victim's particular needs in the situation."⁸⁶ As children increase their language skills and vocabulary, they are able to empathize with more complex emotions.⁸⁷ They also begin to empathize with a person who is not physically present after learning about the absent person's distress.⁸⁸ For example, at this stage, if a child is told that her cousin broke his arm, she can empathize with him even if she does not see him (or his arm) for herself. In late childhood, around seven to ten years of age, children become able to empathize with another person's chronic distress (e.g., long-term sadness over loss of a spouse) and with entire groups of people (e.g., starving children in another country).⁸⁹ After empathy is developed in childhood, empathy levels remain somewhat consistent over time and situations through adulthood.⁹⁰

Though it is difficult to pinpoint a true causal relationship between specific experiences and the development of empathy, researchers have identified some childhood factors that seem to affect the ability to empathize. Some of this development appears to derive from emotional socialization. For instance, encouraging children to express their feelings may help children to empathize with and understand others' emotions by giving them opportunities to understand and learn about their own.⁹¹ Validating and accepting a child's

⁸² Martin L. Hoffman, *The Contribution of Empathy to Justice and Moral Judgment*, in *EMPATHY AND ITS DEVELOPMENT* 47, 51 (Nancy Eisenberg & Janet Strayer eds., 1987) [hereinafter Hoffman, *Contribution*].

⁸³ *Id.* at 70.

⁸⁴ Taylor et al., *supra* note 77, at 824.

⁸⁵ Hoffman, *Contribution*, *supra* note 82, at 51.

⁸⁶ HOFFMAN, *supra* note 15, at 72.

⁸⁷ Hoffman, *Contribution*, *supra* note 82, at 52.

⁸⁸ *Id.*

⁸⁹ *Id.*; Martin L. Hoffman, *Empathy, Justice, and the Law*, in *EMPATHY: PHILOSOPHICAL AND PSYCHOLOGICAL PERSPECTIVES* 230, 235 (Amy Coplan & Peter Goldie eds., 2011) [hereinafter Hoffman, *Justice and the Law*].

⁹⁰ See Konrath, *Kinder*, *supra* note 78, at 415–16 (citing studies).

⁹¹ Taylor et al., *supra* note 77, at 828. The authors suggest that "parental support for emotional expression is likely part of a larger pattern of parenting that is responsive to

emotions seems to lead to higher levels of empathic responding, while discouraging emotional expression may lead to lower levels.⁹²

Other parenting behaviors play a role in children's empathy development. Generally, there is a positive correlation between a child's empathy and parental warmth, empathy, and sensitivity to the child's needs.⁹³ Parental modeling of empathic behaviors is associated with greater empathy in children.⁹⁴ A parenting style that focuses on the use of reasoning also contributes to empathy development.⁹⁵ Children whose parents "use more other-oriented discipline strategies (e.g. 'Imagine how he must feel')" display more prosocial behaviors and greater dispositional empathy.⁹⁶ Discouraging aggressive behaviors in children is also positively correlated with dispositional empathy.⁹⁷ Conversely, there is a negative correlation between a child's empathy and the parent's "harsh parental control," including corporal punishment.⁹⁸ Paternal involvement in the child's care may also matter. One longitudinal study found that adult levels of empathic concern were positively correlated with the degree to which those adults' fathers had been involved in their care when they were children.⁹⁹ Drawing together all these findings, the optimal environment for a child's empathic development is ultimately one

children's emotional needs." *Id.* However, maternal encouragement of emotional expression may be even more predictive of the child's empathic development than merely comforting the child, though the data supporting this speculation are only correlational. *Id.* at 828–829. Other variables, such as genetic effects, could be contributing factors to both a mother's empathic parenting style and also her child's empathic development. *Id.* at 828.

⁹² *Id.* at 824.

⁹³ Norma Deitch Feshbach, *Parental Empathy and Child (Mal)adjustment, in EMPATHY AND ITS DEVELOPMENT* 271, 275 (Nancy Eisenberg & Janet Strayer eds., 1987); Konrath, *Kinder*, *supra* note 78, at 416; Taylor et al., *supra* note 77, at 828.

⁹⁴ Mark A. Barnett, *Empathy and Related Responses in Children, in EMPATHY AND ITS DEVELOPMENT* 146, 151–52 (Nancy Eisenberg & Janet Strayer eds., 1987); Feshbach, *supra* note 93.

⁹⁵ Taylor et al., *supra* note 77, at 823.

⁹⁶ Konrath, *Kinder*, *supra* note 78, at 416; Taylor et al., *supra* note 77, at 827.

⁹⁷ Richard Koestner et al., *The Family Origins of Empathic Concern: A 26-Year Longitudinal Study*, 58 *J. PERSONALITY & SOC. PSYCHOL.* 709, 713 (1990); Konrath, *Kinder*, *supra* note 78, at 416 ("Parents who . . . discourage aggressive behavior elicit higher dispositional empathy and more prosocial behaviors from their children.") (citing studies).

⁹⁸ Taylor et al., *supra* note 77, at 823.

⁹⁹ Koestner et al., *supra* note 97. This study involved 379 subjects whose mothers were interviewed in 1957, when the subjects were five years old, about their and their spouses' parenting behaviors. *Id.* at 711. Seventy-five of the original sample were tested on different personality measures, including empathic concern, when they were thirty-one years old. *Id.* The research team then conducted a regression analysis to determine which of the eleven parenting dimensions would best predict adult empathic concern. *Id.* Overall, the research team found that thirty-six percent of the variance in the adult subjects'

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that (1) satisfies the child's own emotional needs and discourages excessive self concern, thereby enabling the emotions and needs of others to become more salient, (2) encourages the child to identify, experience, and express a broad range of emotions, and (3) provides numerous opportunities for the child to observe and interact with others who, through their words and actions, encourage emotional sensitivity and responsiveness to others.¹⁰⁰

Relatedly, a secure attachment between children and their primary caregivers appears to be important to the development of empathy, in that a secure attachment fosters the ability to attend to others' emotional states and to interpret their emotional cues.¹⁰¹ Attachment refers to the bond between infants and their caregivers (typically their mothers).¹⁰² Psychologists refer to three "styles" of attachment, i.e., secure, anxious, and avoidant:

Infants who are securely attached use their caregiver as a secure base while exploring novel surroundings; such infants seek contact with, and are comforted by, care-givers after separation. Infants described as anxious-ambivalent have difficulty using the caregiver as a secure base; these infants seek, then resist, contact with care-givers after separation. Finally, infants with an avoidant attachment style do not exhibit distress upon separation and do not seek contact after the caregiver's return.¹⁰³

It has been theorized that a secure attachment is an important predicate for empathy, perhaps because having a secure attachment permits children to

empathic concern scores could be attributed to parenting behaviors, with "[p]arenting behaviors reflecting the amount of time spent with the child" as the "most predictive of later levels of empathic concern." *Id.* at 712–13.

¹⁰⁰ Barnett, *supra* note 94, at 157.

¹⁰¹ Lisa M. Diamond et al., *Attachment Style, Vagal Tone, and Empathy During Mother-Adolescent Interactions*, 22 J. RES. ON ADOLESCENCE 165, 177 (2011); *see also* Barnett, *supra* note 94, at 150–51 (describing theories).

¹⁰² Adabel Lee & Benjamin L. Hankin, *Insecure Attachment, Dysfunctional Attitudes, and Low Self-Esteem Predicting Prospective Symptoms of Depression and Anxiety During Adolescence*, 38 J. CLINICAL CHILD ADOLESCENT PSYCHOL. 219, 220 (2009).

¹⁰³ *Id.* A "history of inconsistent caregiving" is often present for children with anxious attachment styles. Diamond et al., *supra* note 101, at 167. Children who "did not receive adequate, sensitive caregiving, and [who] may have been directly rebuffed in their bids for contact and security" may develop avoidant attachment styles. *Id.*

focus less upon their own emotional needs and more upon others' feelings.¹⁰⁴ Psychologist Lisa M. Diamond and colleagues suggest that children of mothers who display low degrees of empathic responsiveness are likely to develop anxious or avoidant attachment styles.¹⁰⁵ When individuals with a highly anxious attachment style are faced with another's distress, they tend to focus on their own distress and attribute this same distress to the other person rather than being sensitive to the other person's affective cues.¹⁰⁶ In turn, this self-focus interferes with their ability to experience empathy for the other person.¹⁰⁷ Avoidant attachment also tends to interfere with the experience of empathy because avoidant individuals may have little interest in, and may be inattentive to, another person's emotional cues.¹⁰⁸ Not paying attention to the other person's expressive, verbal, and facial cues makes it difficult for the avoidant individual to understand and interpret the other person's emotions and, therefore, to experience empathy.¹⁰⁹

Though much of empathic development is believed to occur in early childhood, it has been suggested that empathy continues to develop throughout middle adulthood, and perhaps even into old age.¹¹⁰ Empathy may be related

¹⁰⁴ See Barnett, *supra* note 94, at 150–151 (describing theories).

¹⁰⁵ Diamond et al., *supra* note 101, at 167.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Ed O'Brien et al., *Empathic Concern and Perspective Taking: Linear and Quadratic Effects of Age Across the Adult Life Span*, 68 J. GERONTOLOGY, SERIES B: PSYCHOL. SCI. & SOC. SCI. 168, 168 (2013). One study looked at self-reported empathy in three large, cross-sectional samples (total n= 75,263): Two were from the General Social Survey, which is a nationally representative random sample of U.S. American adults between eighteen and eighty-nine years old (n= 1,353 in 2002, 52.3% women; n= 1,330 in 2004, 53.2% women); and the third was an online survey of 72,580 adults (43% women) between eighteen and ninety years old. *Id.* at 169–70. Both General Social Surveys found a peak in empathic concern around fifty to sixty years of age, and the online sample found a peak around seventy to eighty years, with declines thereafter. *Id.* at 172. The online sample found a peak in perspective taking around fifty to sixty years old, with declines thereafter. *Id.* However, the researchers noted it is possible that these quadratic patterns may be due to generational differences, rather than age-related changes. *Id.* Similarly, psychologist Daniel Grühn and colleagues conducted a study using a thirty-two-item modified version of the empathy subscale of the California Personality Inventory to measure empathy and related measures, including intellectual functioning, affect, and psychological well-being. See Daniel Grühn et al., *Empathy Across the Adult Lifespan: Longitudinal and Experience-Sampling Findings*, 8 EMOTION 753, 755–756 (2008). Grühn and colleagues' study began with 400 participants from suburban Midwestern communities in 1992 (age ten to eighty-seven, M= 44.7 years, 51.3% women, 95% white), with 330 of the original sample returning in 1994 (age twelve to eighty-seven, M= 46.6 years, 176 women), 260 returning in 1998 (age sixteen to ninety-two, M= 50.4 years, 145 women)

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to the ability to regulate emotions, in that people with better ability to regulate their emotions may be more likely to give empathic responses.¹¹¹ As adults' emotion regulation styles change as they age, so may their empathic responses.¹¹² In self-reports, older adults tend to report being better able to regulate their emotions than younger adults are, which suggests that older adults should have greater empathic understanding than younger adults.¹¹³ However, some evidence suggests that empathy development follows an inverse U-shaped pattern and declines in old age, potentially because of age-related declines in biological and cognitive functions,¹¹⁴ including older adults' reduced capacity for processing complex emotion-related information.¹¹⁵ Overall, empirical studies show mixed results, with some finding no age differences in self-reported empathy across the adult lifespan, and others finding that older adults report lower empathy than younger adults do.¹¹⁶ No studies indicate that empathy is higher in older adults than in any other age group.¹¹⁷ Ultimately, it seems that empathy's foundations are built

plus 166 new black participants (age fourteen to eighty-two, M= 46.4, eighty-four women), and 171 of the original sample (age eighteen to ninety-three, M= 54.6 years, ninety-nine women) and sixty-five of the original black sample (age sixteen to eighty-seven years, M= 54.1 years, thirty-eight women) in 2004. *Id.* at 755. Those who returned in 2004 were similar in gender composition to the earlier waves, though slightly younger (M= 42.2 years). *Id.* at 755. In sum, there were 553 participants who responded to the empathy scale at least once: 171 people completed it once, 130 people completed it twice, 120 people completed it three times, and 132 people completed it all four times. The researchers found that older adults reported lower empathy scores than did younger adults on every testing occasion, but that there was little evidence that the decline was due to age. *Id.* at 758, 762. Instead, the authors attributed the differences to generational (cohort) differences. *Id.* at 762. With respect to the cohort effect, the researchers speculate that "the infusion of psychology into everyday life may, at least in part, account for the higher empathy scores in more recent age cohorts. For individuals in these cohorts, it may be more acceptable to talk and think about their own and others' feelings than for individuals who grew up during an earlier era." *Id.*

¹¹¹ See Grünh et al., *supra* note 110, at 754 (noting that people with good regulation styles tend to react with sympathy to others' negative emotions, while those with poor regulation styles may react with avoidance, antisocial behavior, or anger); see also Taylor et al., *supra* note 77, at 823 (reporting an association between effortful control and empathy).

¹¹² Grünh et al., *supra* note 110, at 754.

¹¹³ *Id.*

¹¹⁴ See *id.* at 760 (finding, on average, individuals' empathy tended to remain stable over the study period); see also O'Brien et al., *supra* note 110, at 169 (discussing studies).

¹¹⁵ Grünh et al., *supra* note 110, at 754–55. It is also possible that the older adults' lower empathy scores are attributable to cohort (i.e., generational) differences, rather than to age. See *id.* at 764; see also O'Brien et al., *supra* note 110, at 172.

¹¹⁶ O'Brien et al., *supra* note 110, at 169.

¹¹⁷ Grünh et al., *supra* note 110, at 755.

during the years from infancy through adolescence, rather than continuing to develop through the adult years, though “the nature of empathy may be different at different ages,” becoming more simplistic in older years as self-other differentiation decreases.¹¹⁸ Assuming, based on this research, that the development of empathy primarily occurs early on in life, anything that impacts childhood and adolescent development—like ICT exposure—is potentially relevant to the development of empathy.

IV. THE IMPORTANCE OF EMPATHY

A. *Empathy’s Importance Generally*

Those who explain why empathy is important sometimes write in dramatic terms. According to Professor Timothy O’Neill, “the ability to empathize is necessary for survival.”¹¹⁹ Iacoboni asserts that “[e]mpathy plays a fundamental role in our social lives.”¹²⁰ In less charged language, dispositional empathy is considered a desirable character trait and is associated with a variety of prosocial behaviors and positive outcomes for psychological and physical health.¹²¹ Empathizing has positive implications for both familial

¹¹⁸ *Id.* at 766.

¹¹⁹ O’Neill, *supra* note 69, at 505 (emphasis omitted).

¹²⁰ IACOBONI, *supra* note 60, at 109.

¹²¹ See Konrath, *Kinder*, *supra* note 78, at 415 (citing studies). However, there are some situations in which experiencing empathy can be problematic or undesirable. See Konrath & Grynberg, *supra* note 15, at 10–22 (describing various situations). For example, high empathy levels may lead people to put their own safety at risk to care for strangers, without first determining whether the strangers are trustworthy or the situation is safe. *Id.* at 10. Caretakers with normal empathy levels may experience fatigue or burnout when the stress and difficulty of taking care of others leads them to neglect their own self-care. *Id.* at 11. People with high levels of empathic concern may experience greater stress responses when they observe someone else who is in distress, though more research on this topic is needed before drawing any firm conclusions. See *id.* at 12–13. Further, studies have found that some people feel empathy for perpetrators of crimes (including rapists) and for immoral people, as well as for people who deliberately behave unfairly. See *id.* at 14–16. Empathy in these contexts may be undesirable, as “greater empathy for undesirable people might make empathic people see unfair actions as more acceptable, which could make empathic people more vulnerable to exploitation and less able to set limits on unfair players or even antisocial individuals.” *Id.* at 15. Finally, empathy can be biased: we tend to empathize more readily with “in-group members”—those whom we consider to be similar to ourselves. *Id.* at 17. We also tend to feel greater empathy for “weaker, more vulnerable, yet also more attractive recipients.” *Id.* Feeling empathy may make us less likely to engage in utilitarian moral reasoning and more likely to take action to save someone directly in front of us, rather than to sacrifice that person for the greater good. *Id.* at 19–20. Similarly, we may act to help a loved one at the expense of the “common good,” and may unfairly allocate resources toward a particular individual for whom we feel empathy at the expense

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(parent/child) and romantic relationships, particularly long-term romantic relationships.¹²² It “allows us to share emotions, experiences, needs, and goals.”¹²³

High measures of empathic concern and perspective taking on the IRI are correlated with prosocial attitudes and behaviors, including higher self-esteem and other-oriented sensitivity and everyday prosocial behaviors as well as “longer-term, more deliberate prosocial behaviors,” like volunteerism and charitable donations.¹²⁴ Empathy may increase both people’s motivation and their ability to inhibit harmful behaviors by enabling them to imagine the potential harm that they may cause, which suggests that having low empathy can have antisocial consequences.¹²⁵ High measures of empathy are also correlated with lesser social dysfunction (e.g., verbal aggression, loneliness, shyness, and social anxiety) and lower levels of the most problematic aspects of narcissism, namely entitlement and exploitativeness.¹²⁶ Conversely, studies show a strong correlation between low scores on the IRI and violent behavior.¹²⁷ Lack of empathy is one of the criteria used to diagnose Narcissistic Personality Disorder and is an implied—though not explicit—diagnostic criterion for Antisocial Personality Disorder.¹²⁸ Overall, “taken together, there is evidence that people with empathic character traits have an

of others. *See id.* at 20–21. For example, “an aunt may be empathetically motivated to preferentially hire her less qualified nephew over a more qualified job candidate, and thus negatively impact her company’s bottom line.” *Id.* at 20. Or a person who feels empathy for a terminally ill child may give her immediate treatment at the expense of others on the waiting list. *Id.* at 21. “This demonstrates that at times, empathic feelings can motivate unfair partiality, and thus at times lead to behaviors that might clearly violate concepts of fairness and equal allocation of resources.” *Id.*

¹²² *See* Konrath & Grynberg, *supra* note 15, at 2–3.

¹²³ IACOBONI, *supra* note 60, at 109.

¹²⁴ Konrath, *Kinder*, *supra* note 78, at 414; Konrath et al., *Dispositional Empathy*, *supra* note 14, at 181–82; *see also* Konrath & Grynberg, *supra* note 15, at 2 (meta-analysis of studies comparing different types of empathy and “prosocial behaviors such as helping, sharing, and giving to others” found that empathy and these prosocial behaviors were significantly, and positively, related). However, high measures of personal distress and fantasy on the IRI do not have similar positive associations. Konrath et al., *Dispositional Empathy*, *supra* note 14, at 182. High scores on the personal distress measure are associated with lower self-esteem, higher social dysfunction (e.g., introversion, social anxiety) and more “self-oriented” reactions to others’ distress. *Id.* High scores on the fantasy measure are associated with greater emotional vulnerability and greater self-consciousness, and do not otherwise appear to be associated with prosocial behavior. *Id.* at 181.

¹²⁵ Konrath et al., *Dispositional Empathy*, *supra* note 14, at 182.

¹²⁶ *Id.* at 183.

¹²⁷ Konrath et al., *Dispositional Empathy*, *supra* note 14, at 182–183. However, more empirical work linking high empathy with inhibition of aggression and other antisocial and criminal behaviors is needed. Konrath & Grynberg, *supra* note 15, at 5.

¹²⁸ Konrath & Grynberg, *supra* note 15, at 6.

elevated probability of acting in the interests of others across a variety of situations.”¹²⁹

In terms of physical and psychological well-being, there is evidence that people with greater empathy experience less depression, anxiety, stress, and burnout.¹³⁰ They also tend to be in better physical health and to adopt healthier lifestyles, including less consumption of tobacco and alcohol.¹³¹ Further, patients and students of doctors, therapists, and teachers who have high empathy may have better outcomes,¹³² which suggests empathy may reap physical and psychological benefits for society as a whole. As Konrath comments, “In general, empathy seems to enable people to relate to others in a way that promotes cooperation and unity rather than conflict and isolation.”¹³³

B. *Empathy’s Importance in Legal Practice*¹³⁴

Along with the general positive implications of empathy for societal and individual welfare, there are specific positive implications of empathy for the legal profession. Even so, empathy tends to be viewed as a “non-legal” concept¹³⁵—a notion bolstered by the fact that there is no definition of “empathy” in *Black’s Law Dictionary*¹³⁶—which makes discussions of empathy’s role in the legal process or its value for lawyers and other legal actors particularly fraught. There are many who believe that experiencing empathy is an “emotional” experience, which is antithetical to “rational thinking,” and other skills that are recognized as important in lawyering and adjudicating.¹³⁷ Yet others argue that empathy is a “core lawyering skill” that

¹²⁹ Konrath, *Kinder*, *supra* note 78, at 414

¹³⁰ *Id.* at 415 (citing studies).

¹³¹ *Id.* (citing studies).

¹³² *Id.* (citing studies).

¹³³ Konrath et al., *Dispositional Empathy*, *supra* note 14, at 180.

¹³⁴ Empathy’s role in a variety of lawyering skills is addressed at length in a great number of books and law review articles. This Part IV.B.’s aim is to provide an overview of each critical skill, though not necessarily an in-depth examination of them.

¹³⁵ See Mark K. Schoenfeld & Barbara Pearlman Schoenfeld, *Interviewing and Counseling Clients in a Legal Setting*, 11 AKRON L. REV. 313, 325 (1977).

¹³⁶ See BLACK’S LAW DICTIONARY (10th ed. 2014).

¹³⁷ Bandes, *Taz and Empathy*, *supra* note 22, at 399. Law professor and mediator Dwight Golann and clinical psychologist Helaine S. Golann capture this thinking nicely:

L[awyer]: The fact is, I sometimes don’t feel that I’m being professional when I work with emotions. It’s not what lawyers do.

P[psychologist]: That’s interesting—What does make you feel as if you’re acting like a professional?

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is “of extraordinary value to lawyers.”¹³⁸ The debate is complicated by the varied, and sometimes conflicting, definitions of empathy; it is difficult to agree upon whether empathy has a place in the law if we cannot agree what empathy *is*.

This Article sides squarely with those who argue that empathy is essential to the successful practice of law¹³⁹—a practice that includes, among other things, “questioning and interviewing, communicating and persuading, planning and managing, resolving conflict, entrepreneurship, working with others, and making ethical decisions.”¹⁴⁰ Reaching this conclusion depends largely upon applying the definition of empathy adopted earlier in this Article,¹⁴¹ a definition that recognizes empathy has both cognitive and affective components. As discussed in this Part D, empathy’s cognitive aspects have tremendous value for lawyers and other legal actors, even if its affective aspects may sometimes have negative consequences for legal practice.¹⁴² Accordingly, this Part D provides a brief introduction to the role of empathy in (1) client counseling, (2) legal writing, (3) advocacy, (4) negotiation, and (5) adjudication.

1. *EMPATHY AND CLIENT COUNSELING*

Client counseling is a cornerstone of legal practice. It “lies at the heart of the professional relationship between lawyer and client.”¹⁴³ The title “counselor at law” was “[a]t one time, the most lofty title a lawyer could claim Lawyers had this title printed below their names on their business cards and on the entrances to their offices. There was a recognition of the importance

L[awyer]: Dealing with facts and arguments, analyzing issues, generating strategies and, most important, solving problems.

Helaine S. Golann & Dwight Golann, *Why Is It Hard for Lawyers to Deal with Emotional Issues?: A Dialogue Between a Lawyer-Mediator and a Therapist*, 9 DISP. RESOL. MAG. 26, 26 (2003).

¹³⁸ 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: JALWD 109, 112 (2011) [hereinafter Gallacher, *Thinking Like Nonlawyers*].

¹³⁹ *E.g.*, Gerdy, *supra* note 20, at 3 (“[E]mpathy and compassion are critical for successful law practice . . .”).

¹⁴⁰ Jean R. Sternlight & Jennifer K. Robbennolt, *Psychology and Effective Lawyering: Insights for Legal Educators*, 64 J. LEGAL EDUC. 365, 365 (2015) (footnote omitted).

¹⁴¹ See *supra* note 20 and accompanying text.

¹⁴² For an overview of negative consequences of empathy in the law, see Hoffman, *Justice and the Law*, *supra* note 89, at 250–53.

¹⁴³ Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 L. & CONTEMP. PROBS. 5, 8 (1995).

of this lawyer task.”¹⁴⁴ Along with sound legal analysis and good judgment, effective client counseling requires the attorney to build rapport with the client, ask good questions, listen well, communicate clearly, and “attend[] to the client’s emotional as well as intellectual needs—all with the aim of helping clarify the client’s objectives and helping her choose the best means of achieving them.”¹⁴⁵ In short, a successful lawyer-client relationship requires the lawyer to have well-developed relationship skills.¹⁴⁶ Empathy is an essential part of attorneys’ relational arsenal because it fosters good communication and trust, it enhances attorneys’ understanding of their clients, and it reduces barriers between attorneys and clients.

Empathy helps the lawyer and client to build rapport, as well as to communicate openly and completely; all of this may lead to more thorough legal analysis, improve the legal profession’s image, and satisfy clients’ expectations.¹⁴⁷ Empathy enhances both interviewing and listening to clients.¹⁴⁸ Empathic attorneys are better able to discuss their clients’ emotions

¹⁴⁴ ROBERT F. COCHRAN, JR. ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING 1* (2d ed. 2006).

¹⁴⁵ Brest, *supra* note 143, at 8.

¹⁴⁶ See COCHRAN ET AL., *supra* note 144, at 2 (“Studies have shown that clients judge lawyers primarily, not by their advocacy skills and not even by the results obtained, but by their relational skills with clients.” (footnote omitted)). Furthermore, the authors note that “clients are most satisfied with lawyers who have the best personal skills.” *Id.* at 11; accord John E. Montgomery, *Incorporating Emotional Intelligence Concepts into Legal Education: Strengthening the Professionalism of Law Students*, 39 U. TOL. L. REV. 323, 347 (2008) (“[I]mproving the emotional competence of lawyers should lead to higher competence in professional skills that are essential to good lawyering.” (footnote omitted)); Joshua D. Rosenberg, *Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, of Human Relationships in the Practice of Law*, 58 U. MIAMI L. REV. 1225, 1229 (2004) [hereinafter Rosenberg, *Interpersonal Dynamics*] (“[S]uccess in law (as in other fields) correlates significantly more with relationship skills than it does with intelligence, writing ability, or any other known factor.”).

¹⁴⁷ Gerdy, *supra* note 20, at 19–20; Brett Williams et al., *A Psychometric Appraisal of the Jefferson Scale of Empathy Using Law Students*, 9 PSYCHOL. RES. & BEHAV. MGMT. 171, 172 (2016).

¹⁴⁸ See John L. Barkai, *How to Develop the Skill of Active Listening*, 30 PRAC. LAW. 73, 75 (1984) [hereinafter Barkai, *Develop the Skill*] (describing empathy as “a basic listening skill for personal counseling that has enormous potential for legal counseling”); Lauren E. Fletcher & Harvey M. Weinstein, *When Students Lose Perspective: Clinical Supervision and the Management of Empathy*, 9 CLINICAL L. REV. 135, 138 (2002) (interviewing requires “interpret[ing] accurately the meaning of the words uttered . . . [and] factor[ing] in verbal cues and body language used by the speaker and mak[ing] appropriate inferences.”); Neil Hamilton, *Effectiveness Requires Listening: How to Assess and Improve Listening Skills*, 13 FLA. COASTAL L. REV. 145, 147–151 (2012) (noting listening is a critical component of empathy and, somewhat circularly, that perspective taking is crucial for effective listening).

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and feelings in addition to the underlying facts; this is important not only because clients may struggle to address the factual component of their situations until the emotional component is addressed, but also because talking about feelings may spur clients to share more information in general, including underlying facts that may be legally significant¹⁴⁹:

Although some lawyers might try to keep the client's feelings out of each case, virtually every legal problem is an intertwined combination of both facts and feelings. Being a client is an emotional experience. Appropriately responding to client feelings by active listening can improve the case. A client who is preoccupied with feelings may not listen well to the lawyer and may give inaccurate or incomplete information in the interview. However, the lawyer can communicate empathic understanding to the client by active listening and thereby help the client to relax, speak freely, and recall facts which may be tied to emotional situations.¹⁵⁰

¹⁴⁹ Barkai, *Develop the Skill*, *supra* note 148, at 77.

¹⁵⁰ John L. Barkai, *Active Listening: One Way to Be a Better Advocate, Counselor, and Business Person*, 20 TRIAL 66, 66 (1984). Barkai and Virginia O. Fine describe the myriad emotions potentially at play for clients:

A potential plaintiff does not go to a lawyer when he *thinks* he has a cause of action; he goes when he *feels* he has been damaged, cheated, taken advantage of, wronged, treated unfairly or physically injured. A defendant does not appear at a lawyer's office merely with a legal document that makes him an involuntary party to a lawsuit; he arrives feeling that someone wants money or liberty. He feels unjustly accused, harassed, tormented or perhaps even that he is in the wrong. A potential plaintiff and defendant might feel embarrassed about the situation they are in or perhaps even degraded for allowing themselves to get into the situation.

Even the client who may feel no emotion about the prior events that brought him into the lawyer's office is likely to have an emotional response about seeing a lawyer or going to court.

John L. Barkai & Virginia O. Fine, *Empathy Training for Lawyers and Law Students*, 13 SW. U. L. REV. 505, 509 (1983) (emphasis in original).

Empathy helps to build trust between the client and attorney.¹⁵¹ “Trust is pivotal. It includes faith in your loyalty, a belief in your competence, and a level of comfort in dealing with you as the case progresses. Trust emboldens the client, who is generally under stress, to share more freely.”¹⁵² Thus, displaying empathy fosters better client communication.¹⁵³ Additionally, clients want their lawyers to be empathic.¹⁵⁴ Clients tend to be more satisfied with their cases’ outcomes when they view their lawyers as empathic.¹⁵⁵ Moreover, lawyers who do not focus on the interpersonal and relational aspects of representing clients are more likely to get sued for malpractice.¹⁵⁶

Experiencing empathy is also important for client counseling because it enhances lawyers’ understanding of their clients and their clients’ motivations, which has value for providing good counsel.¹⁵⁷ Empathy may better enable lawyers to understand how others “value and respond to different aspects of justice,” which is powerful in that the ability to do so “can help attorneys tap into client concerns in interviews, [and] better respond to those concerns as counselors”¹⁵⁸ Empathy also provides the starting point for understanding clients’ emotional concerns. At first blush, exploring clients’

¹⁵¹ Barkai & Fine, *supra* note 150, at 515; Laurie A. Lewis, *Winning the Game of Appellate Musical Shoes: When the Appeals Band Plays, Jump from the Client’s to the Judge’s Shoes to Write the Statement of Facts Ballad*, 46 WAKE FOREST L. REV. 983, 991 (2011).

¹⁵² Lewis, *supra* note 151, at 991 (footnote omitted).

¹⁵³ Barkai, *Develop the Skill*, *supra* note 148, at 77 (“Effective legal counseling should include empathetic understanding to help the client communicate better.”).

¹⁵⁴ Hamilton, *supra* note 148, at 147 (“Clients want respect, empathy, and problem solving from their lawyers”); Williams et al., *supra* note 147, at 172 (“[C]lients prefer lawyers they perceive as empathetic.” (footnote omitted)).

¹⁵⁵ Barkai & Fine, *supra* note 150, at 506–07; Hamilton, *supra* note 148, at 148 (footnote omitted); Williams et al., *supra* note 147, at 172.

¹⁵⁶ See Gerdy, *supra* note 20, at 12 (“Lack of caring, which is often manifest in breakdowns in communications, is at the root of many of the most common malpractice and disciplinary complaints against attorneys.” (footnote omitted)). The failure to return clients’ phone calls is a primary indicator to clients of lack of caring. *Id.* at 13. See also Sternlight & Robbenolt, *supra* note 140, at 372 (“[L]awyers who communicate with their clients more effectively are less apt to be charged with ethical infractions.” (footnote omitted)).

¹⁵⁷ See Fletcher & Weinstein, *supra* note 148, at 142 (“The ability of the lawyer to experience the emotional state of the client provides the lawyer with a far richer understanding of the client and the client’s legal needs than if the lawyer were limited to analyzing communication based on verbal content and body language alone.”).

¹⁵⁸ Sternlight & Robbenolt, *supra* note 140, at 372. Though Sternlight and Robbenolt advocate teaching psychology in general (rather than developing empathy in particular) to enhance lawyers’ ability to understand others’ perspectives of justice, perspective taking is a facet of empathy, so the same benefits likely apply.

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emotions may seem, at best, superfluous, and at worst, destructive;¹⁵⁹ however, handling these emotional concerns is both necessary and valuable for the legal representation. Failing to address the client's emotional concerns is counterproductive: "When the client holds on to strong feelings and does not express them, as will be the case when those feelings are repressed or denied, decision making is inevitably distorted."¹⁶⁰

Empathy also helps attorneys overcome barriers to their relationships with clients. Lawyers may have a hard time relating to clients' experiences, particularly if the lawyers do not approve of or respect the clients' decisions and behaviors.¹⁶¹ Empathy, including lawyers' reflecting on their own life experiences and personal reactions, can help lawyers connect to their clients and relate to them genuinely through their human similarities.¹⁶² This can also help lawyers overcome cultural differences (in the many and varied definitions of culture) between them and their clients that could otherwise impede their professional relationship. Empathy is an important part of the process of connecting with clients who have different backgrounds and perceptual frameworks than the lawyer because it helps the lawyer "to relate others' experiences to shared human understanding"¹⁶³:

The ability to relate to the client beyond cultural differences depends on the lawyer's ability to experience empathy. Empathy means being able to put oneself in the place of another. Empathy is a way for a lawyer to transcend differences by using his own humanness to understand the experiences of another. When a lawyer adopts an empathetic approach to a client, it means that, while he is aware of and values differences, he also looks beyond those differences to life experiences that can provide insight into the client's concerns, emotions, and choices. It is important for lawyers and law students to develop empathy in order to relate well to diverse clients.¹⁶⁴

¹⁵⁹ See Golann & Golann, *supra* note 137, at 28 ("Many of us worry that if we start to let parties express emotions, the situation will blow up. It'll be like uncapping a volcano—lava everywhere! And people will get burned.").

¹⁶⁰ Bruce J. Winick, *Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal with a Psycholegal Soft Spot*, 4 PSYCHOL., PUB. POL'Y, & L. 901, 911–12 (1998).

¹⁶¹ COCHRAN ET AL., *supra* note 144, at 217.

¹⁶² *Id.*

¹⁶³ *Id.* at 206.

¹⁶⁴ *Id.* at 217 (footnote omitted).

To illustrate, suppose Mariana is a junior associate at a “white shoe” law firm. She is defending a pro bono client on several drug charges. Her client grew up in a poor inner-city neighborhood. He dropped out of high school at age sixteen and has been in and out of prison several times for drug-related crimes. Mariana grew up in a safe upper-class suburb. She attended an elite college and law school and has never been to prison or been involved with drugs. In this scenario, there are (deliberately) stark contrasts between Mariana and her client—the type of contrasts in experiences that could make it difficult for Mariana to build rapport and trust with her client. However, empathy can help her. Regardless of their differences, there are likely things that matter to both Mariana and her client, like being treated fairly and with dignity, or being able to see their families. Empathy can help Mariana make a connection with her client on a human level.

While empathy’s cognitive aspects are clearly beneficial for the attorney-client relationship, the affective facets may be less beneficial. The ability to see a situation from the client’s perspective and understand the client’s emotions is critical; feeling distressed in the face of a client’s distress (personal distress) or sorry for a client (empathic concern) may be problematic.¹⁶⁵ Attorneys who experience too much affective empathy for their clients run the risk of experiencing excessive stress and burnout, losing professional objectivity, or taking action that is not in their best interests or in

¹⁶⁵ As Professors Fletcher and Weinstein write,

Identification and empathy permit lawyers to “enter” into the emotional state of their clients. To the extent that identification facilitates empathy toward the client, we assert that it is helpful. The ability of the lawyer to experience the emotional state of the client provides the lawyer with a far richer understanding of the client and the client’s legal needs than if the lawyer were limited to analyzing communication based on verbal content and body language alone. However, to the extent that identification leads to an advocate becoming overwhelmed by an emotional experience such that it clouds the attorney’s professional judgements, . . . identification creates a problem with adverse implications for the representation of the clients.

Fletcher & Weinstein, *supra* note 148, at 142. The authors define identification as “unconsciously . . . tak[ing] on the attitudes, behaviors, and perspectives of others.” *Id.* at 141 (emphasis in original). This concept is similar, though not identical, to empathic concern.

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the best interests of their clients.¹⁶⁶ For example, a sole practitioner who feels sorry for his client may incur significant personal expenses hiring expert witnesses to litigate a medical malpractice case for which he is not being paid. Or a lawyer may push her client to pursue protracted litigation rather than accept a cash settlement because the lawyer thinks her client should get “justice” in court. Also, because “empathic distress increases with the intensity of victims’ distress,” attorneys whose clients have suffered great trauma may distance themselves from their clients, avoid the representation, or think of other things when interacting with their clients so as to minimize their own distress.¹⁶⁷ For these reasons, empathy has limitations in client counseling.¹⁶⁸

2. EMPATHY AND LEGAL WRITING

Skillful and effective legal writing requires empathy because “[w]riting is an empathetic act”¹⁶⁹ This is true largely because most legal writing is intended to analyze and to persuade.¹⁷⁰ Empathy is necessary for legal analysis because it enhances attorneys’ abilities to understand clients’ stories and apply legal theories to them. It also enables lawyers to interpret their clients’ stories persuasively for a legal audience.

As described earlier in connection with client counseling,¹⁷¹ exercising empathy builds trust and rapport between attorneys and clients and assists attorneys in gaining information from their clients. Having gathered that information, attorneys can then translate their clients’ stories into a form “the legal system understands and accepts.”¹⁷² This process of understanding and translation often requires perspective taking. For example, imagine Tina is a lawyer representing Peter, who quit his job because he experienced

¹⁶⁶ See *id.* at 142–47 (discussing the challenges inherent in coping with identification, empathy, and the emotional demands of legal practice).

¹⁶⁷ Hoffman, *Justice and the Law*, *supra* note 89, at 251.

¹⁶⁸ But see Gerdy, *supra* note 20, at 25–26 (arguing that lawyers should develop compassion for their clients and that the benefits of doing so outweigh the costs).

¹⁶⁹ Gallacher, *Thinking Like Nonlawyers*, *supra* note 138, at 110.

¹⁷⁰ There are some exceptions to this. For example, drafting contracts is a form of legal writing, yet contract drafting would not generally be considered “persuasive” writing. Even so, contract drafters who are able to understand the other party’s perspective are better able to draft provisions that meet both sides’ needs.

¹⁷¹ See *supra* notes 147–53 and accompanying text.

¹⁷² COCHRAN ET AL., *supra* note 144, at 20 (describing the transformation of clients’ stories); Gerdy, *supra* note 20, at 18 (describing lawyers as translators). While this reframing, or translation, is important because it gives clients a voice in the legal system, it is also imperfect insofar as translations always alter the stories they relate. COCHRAN ET AL., *supra* note 144, at 20–21 (citing Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1299 (1992)).

workplace sexual harassment. Peter wants to bring a claim under Title VII of the Civil Rights Act of 1964 for discrimination on the basis of sex.¹⁷³ Tina plans to argue that the harassment of Peter was both severe and pervasive enough to constitute a hostile work environment.¹⁷⁴ To make this case, Tina's complaint must allege facts that show Peter's workplace was "an environment that a reasonable person would find hostile or abusive," and also that Peter "subjectively perceive[d] the environment to be abusive."¹⁷⁵ To write this complaint, Tina must first be able to gather the relevant facts from Peter. She must then be able to comprehend and relay the facts from Peter's perspective.¹⁷⁶ Perspective taking will enable Tina to draft a complaint that describes the acts, how Peter experienced them, and why a reasonable person in Peter's position would similarly experience those acts as constituting sexual harassment.¹⁷⁷ If Tina cannot understand Peter's perspective, and cannot communicate his perspective in writing, she cannot represent her client

¹⁷³ See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2012).

¹⁷⁴ See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) ("When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." (citations and internal quotation omitted)).

¹⁷⁵ *Id.*

¹⁷⁶ See *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81 (1998) ("[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' In . . . harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." (quoting *Harris*, 510 U.S. at 23) (citation omitted)).

¹⁷⁷ This is not to suggest that sexual harassment is simply a matter of perception. But context is certainly relevant to the inquiry:

The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

Id. at 81–82.

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effectively. Thus, empathy is critical for legal writing, which makes it central to effective lawyering.¹⁷⁸

Lawyers not only need to be able to empathize with their clients to understand their stories, they also need to employ empathy in conveying information to the reader of their writing.¹⁷⁹ Effective legal writing requires attorneys to step into the audience's shoes to present a compelling story.¹⁸⁰ Empathy's cognitive aspects make it possible to persuade the reader because they enable the writer to understand what matters to the reader:

[T]he importance of empathy to a writer is immediately apparent: one way to define good writing generally is that the writer displays the ability to anticipate what the reader will be thinking and to provide the information the reader seeks precisely when the reader needs it. Good persuasive legal writing is no different. A lawyer should anticipate what a judge, or other legally-informed reader, needs to read in order to accept an argument as correct and should be able to provide the necessary information at the right time.¹⁸¹

Exercising empathy in legal writing can also build trust between the author and the reader, which enhances its persuasiveness.¹⁸²

For an example of how empathy aids in written persuasion, imagine that former Solicitor General Drew S. Days were drafting a brief in *United States v. Virginia*,¹⁸³ a 1996 Supreme Court case that considered the constitutionality of the Virginia Military Institute's (VMI) male-only admissions policy.¹⁸⁴ Suppose Days hoped to persuade Justice Antonin Scalia

¹⁷⁸ See Ian Gallacher, *Do RoboMemos Dream of Electric Nouns?: A Search for the Soul of Legal Writing*, 4 CASE W. RES. J.L. TECH. & INTERNET 41, 56 (2012) [hereinafter Gallacher, *RoboMemos*] ("Empathy, in short, is not just good writing, it's good lawyering.").

¹⁷⁹ See Gerdy, *supra* note 20, at 18–19.

¹⁸⁰ Lewis, *supra* note 151, at 993.

¹⁸¹ Gallacher, *RoboMemos*, *supra* note 178, at 53; see also Hon. Jacques L. Wiener, Jr., *Ruminations from the Bench: Brief Writing and Oral Argument in the Fifth Circuit*, 70 TUL. L. REV. 187, 190 (1995–96) (asking brief writers, "If you were an appellate judge, what is it about this case that would be most likely to encourage you to reach a result favorable to your client?").

¹⁸² See Stephanie A. Vaughan, *Persuasion Is an Art . . . But It Is also an Invaluable Tool in Advocacy*, 61 BAYLOR L. REV. 635, 656 (2009) ("The advocate's goal is to create an atmosphere of trust by conveying to the audience a non-argumentative story to which the audience can relate or connect." (footnote omitted)). Taking the audience's perspective enables the author to draft such a relatable work.

¹⁸³ *United States v. Virginia*, 518 U.S. 515 (1996).

¹⁸⁴ See *id.* at 530.

to rule in favor of the government's position that VMI's male-only admissions policy violated equal protection, and that the establishment of a military-style leadership program at a female-only college as a remedial measure would fail to satisfy equal protection requirements.¹⁸⁵ Knowing that Scalia favored an originalist approach to constitutional interpretation,¹⁸⁶ Days would be well-advised to ground his argument, as much as possible, in the Constitution's text and the meaning of those words at the time of the Constitution's enactment.¹⁸⁷ He would be ill-served by a brief that relied upon contemporary policy arguments (though those arguments would likely find favor with other members of the Court).¹⁸⁸ In this way, empathic awareness of his audience would guide Days toward the most persuasive arguments.

Of course, there are limits to the statement that empathy is important to legal writing. It likely goes too far to say effective legal writing requires the writer to *feel* another person's feelings. In the prior example, persuading Scalia does not require Days to believe originalism is the preferred method of constitutional interpretation, nor to feel disdain for policy arguments in the same way Scalia did. Days need only understand how Scalia might view a policy argument, as opposed to a textual one. But understanding how Scalia might think, or seeing the issue from Scalia's perspective, could go a long way toward crafting arguments that appeal to Scalia. Thus, the perspective taking component of empathy is crucial to effective written legal persuasion.¹⁸⁹

Moreover, practicing perspective taking in legal writing may help lawyers increase their empathy generally. As Professor Ian Gallacher writes, "[E]mpathetic writing is good practice."¹⁹⁰ Like practicing any other skill,

¹⁸⁵ See generally *United States v. Virginia*, 976 F.2d 890 (4th Cir. 1992), *cert. granted*, 1995 WL 17013870 (U.S. May 26, 1995) (No. 94-1941).

¹⁸⁶ See Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989).

¹⁸⁷ See Gallacher, *RoboMemos*, *supra* note 178, at 56 ("[L]awyers should be encouraged to think as much as possible about their readers and to adjust their writing to anticipate and meet their readers' expectations."); Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1946 (2017) (describing Justice Scalia's approach to originalism).

¹⁸⁸ The Majority, in an opinion by Justice Ginsberg, held in favor of the Government. *United States v. Virginia*, 518 U.S. at 558. In dissent, Justice Scalia railed that the Court's opinion "ignore[d] the history of our people" as the "most illiberal Court . . . embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our Basic Law," despite the fact that, in Scalia's view, the Constitution took "no sides in this educational debate . . ." *Id.* at 566-67 (Scalia, J., dissenting).

¹⁸⁹ See Gallacher, *Thinking Like Nonlawyers*, *supra* note 138, at 110 ("[T]he goal of persuasive writers is to place themselves in their audience's minds in order to understand how best to influence them while they make their decisions.").

¹⁹⁰ Gallacher, *RoboMemos*, *supra* note 178, at 56.

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practicing the skill of experiencing empathy seems to help develop empathy.¹⁹¹ Even lawyers who find it difficult to experience or to express empathy in face-to-face interactions may be able to enhance their empathic skills by deliberately taking others' perspectives in their legal writing. Over time, these lawyers' empathy "muscles"¹⁹² may indeed grow stronger.

3. EMPATHY AND ADVOCACY

Much of the practice of law is advocacy—persuading others to adopt a certain viewpoint. Advocacy is central to many lawyering tasks, including writing trial documents, arguing in court, and negotiating.¹⁹³ Not surprisingly, oral advocacy benefits significantly from empathy.¹⁹⁴ There are three main ways in which empathy makes attorneys more effective advocates. First, attorneys who take the perspective of their opposing counsel can anticipate opposing counsel's arguments and develop strong counterarguments. Second, taking the perspective of the listeners—judge, jury, or otherwise—enables attorneys to craft arguments that are more persuasive to those listeners. Third, attorneys who use empathy to understand and interpret the listeners' emotional reactions to their arguments can revise, clarify, or strengthen their arguments as necessary to be persuasive.

First, empathy—particularly the perspective-taking component—is important for effective advocacy because all lawyers must consider, anticipate, and contend with, opposing arguments. Good lawyers think through the other side's likely arguments, which ultimately bolsters their own cases by enabling them to craft effective counterarguments.¹⁹⁵ Empathy heightens the ability to do this. Attorneys who can readily adopt the viewpoint of someone representing the other side can anticipate the other side's best arguments, whereas attorneys who are less able to consider the other side's viewpoint are less likely to conceive of strong opposing arguments. In turn, low perspective-taking attorneys are likely to be less prepared than high perspective-taking attorneys to predict and rebut the other side's strongest arguments.¹⁹⁶

¹⁹¹ See *infra* text accompanying note 386.

¹⁹² See *infra* text accompanying note 348.

¹⁹³ For more information about the role of advocacy in legal writing and negotiation, see Parts IV.B.4, IV.B.5. In light of those Parts, this Part IV.B.3 focuses primarily upon advocacy in the context of oral arguments.

¹⁹⁴ See Gallacher, *Thinking Like Nonlawyers*, *supra* note 138, at 112; see also Montgomery, *supra* note 146, at 326–27; see also Sternlight & Robbenolt, *supra* note 140, at 371–72.

¹⁹⁵ Vaughan, *supra* note 182, at 648.

¹⁹⁶ Professor Roger Fisher recounted his experience of working as an associate at Covington & Burling and being directed by a partner to prepare to argue a plaintiff-client's case. Bruce Patton, *In Memoriam: Roger Fisher*, 126 HARV. L. REV. 875, 891 (2013). After

Second, the best legal advocates adopt the perspective of their audience, typically a jury or judge.¹⁹⁷ This perspective taking makes the advocate more persuasive by helping the advocate anticipate and respond to the audience's foreseeable concerns. As appellate clerk Daniel L. Real comments, "Understanding the personal and ideological leanings of the judges before whom the litigant will appear will allow the litigant to better prepare arguments that are likely to be better received and more productive."¹⁹⁸ This ability to empathize is critical for persuasive oral advocacy:

A lawyer who can project him or herself into the thoughts of another and understand how that person—juror, witness, judge, or other lawyer, for example—is thinking has the ability to calibrate language, posture, and gesture in a manner calculated to persuade the subject to believe whatever argument the lawyer is making. Conversely, a lawyer who fails to make this empathetic connection with others will find it much more difficult—perhaps even impossible—to communicate effectively and persuasively, especially with nonlawyers.¹⁹⁹

Third, empathy is important to oral advocacy because it enables attorneys to understand and interpret the audience's emotions and nonverbal behaviors. Empathic advocates monitor the judge's or jury's reactions to their arguments: "[C]onfused or quizzical looks or clear indications that a[n audience member] . . . is not buying what is being said" are important indicators that the advocates need to rephrase, clarify, or bolster an

a weekend of work, Fisher and the other associates informed the partner that they had initially thought the plaintiff's case was hopeless, but ultimately believed they had found a strong argument. *Id.* at 891–92. Only then did the partner reveal to the associates that their client was the defendant. *Id.* at 892. Far from being a waste of time, having the associates prepare to argue the plaintiff's side ensured that they would understand the strengths of the plaintiff's case and would prepare to represent the defendant accordingly. *See id.*

¹⁹⁷ See James D. Dimitri, *Stepping up to the Podium with Confidence: A Primer for Law Students on Preparing and Delivering an Appellate Oral Argument*, 38 STETSON L. REV. 75, 82 (2008) (advising advocates to "try to view the case through the judges' eyes. Put yourself in the judges' shoes and ask yourself, 'If I were a judge in this case, what would I want to know about the case from the advocates?'"); *see also* Gerdy, *supra* note 20, at 18–19; *see also* Wiener, *supra* note 181, at 200; *see also* Vaughan, *supra* note 182, at 649–50.

¹⁹⁸ Daniel L. Real, *Appellate Practice in Nebraska: A Thorough, Though Not Exhaustive, Primer in How to Do It and How to Be More Effective*, 39 CREIGHTON L. REV. 29, 95 (2005).

¹⁹⁹ Gallacher, *Thinking Like Nonlawyers*, *supra* note 138, at 112 (footnote omitted).

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argument.²⁰⁰ Conversely, advocates who have lower empathy may not accurately interpret the emotional cues the listeners are providing, and they may miss opportunities to persuade their audience because of it.

To understand the importance of empathy in advocacy, imagine that Hao is defending a client whose large dog dug under a fence, escaped the client's yard, and bit a child, who now has wounds that require surgery. As Hao considers the arguments he will make to the jury, perspective taking will help him be persuasive. Are the jurors dog owners who know that determined dogs will sometimes thwart even their owners' best efforts to keep them safely in their yards? Are they cat owners disinclined to like dogs to begin with? Do they have young children whom they might be imagining the defendant's dog biting? Telling a group of cat-owning, young child-having jurors, "We all know dogs sometimes escape, through no fault of their owners" is not likely to be a successful strategy for Hao. Not only has he failed to acknowledge that the jurors might be imagining their child as the one in surgery, but he has also failed to encourage the jurors to empathize with his client. This is important because jurors may vote for the party with whom they can best empathize.²⁰¹ If Hao sees the jurors frown after he makes this statement, empathy can help him understand that his argument was not a winner; he can then change course and emphasize a different argument instead.

The same thinking applies to persuading judges. Imagine that Desirae is an attorney for a local government that has passed a new gun ordinance. Desirae is preparing for an oral argument in which she will attempt to persuade the judges to uphold the restriction. By considering the judges' perspectives, Desirae will be more effective in crafting her argument. Have these judges shown a tendency to favor gun restrictions in the past? If so, Desirae might incorporate some of the judges' own reasoning from their prior opinions, which will likely be persuasive to them. Have the judges been hostile to gun restrictions in the past? If so, Desirae can probably assume they will likewise be inclined to disfavor the new ordinance. As she prepares, she can think through the strongest arguments against her own position and then craft appropriate rebuttals. And if, while presenting her argument, she exercises empathy to notice that one of the judges looks confused by one of her statements, she can rephrase to answer the judge's question before it is even

²⁰⁰ Vaughan, *supra* note 182, at 676.

²⁰¹ See O'Neill, *supra* note 69, at 509–10 (describing Athena's vote to acquit Orestes in his trial for matricide as a result of Athena's inability to empathize with Orestes's mother), 510–12 (explaining how the trial technique of "channeling"—delivering a closing argument as though the lawyer were actually the victim and describing the victim's experience of the alleged crime through first-person narrative—could be an effective tactic for influencing the jury because it would activate the jurors' mirror neurons and make them more likely to empathize with the victim).

asked. For all of these reasons, empathy is a crucial component of effective advocacy.

4. EMPATHY AND NEGOTIATION²⁰²

As with all other lawyering skills, empathy—particularly perspective taking—is important in negotiation.²⁰³ This notion is well established in the negotiation literature.²⁰⁴ Perspective taking is important in three respects. First, the ability to see things from the counterpart’s point of view permits a negotiator to anticipate and respond to the counterpart’s concerns, or “interests,” in negotiation parlance.²⁰⁵ As Professors David Lax and James Sebenius write, “You are always more persuasive when you frame your proposals in terms of the values, beliefs, goals, and incentives of the recipient”²⁰⁶ Understanding the counterpart’s perspective makes this possible. Research suggests perspective taking enables negotiators to develop creative options and reach efficient deals that increase both individual and joint gains.²⁰⁷ Thus, empathy enables negotiators to “design value-creating deals” and “to claim a full share of that value.”²⁰⁸

Second, empathy enhances negotiators’ understanding of the emotional issues at play in the negotiation—both their own and their

²⁰² Negotiation, like advocacy, is a form of persuasion. Thus, much of the information in the prior Part IV.B.3 applies to this Part IV.B.4 as well.

²⁰³ See Montgomery, *supra* note 146, at 326–27; see also Rosenberg, *Interpersonal Dynamics*, *supra* note 146, at 1242; see also Sternlight & Robbennolt, *supra* note 140, at 372; see also Williams et al., *supra* note 147, at 172.

²⁰⁴ E.g., ROGER FISHER & WILLIAM L. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 22–24, 29–30 (Bruce Patton ed., 3d ed. 2011) (describing the importance of perspective taking and recognizing emotions); ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 46–47 (2000) (noting “the most effective negotiators try . . . to both empathize and assert in their interactions with others,” and emphasizing the perspective taking component of empathy); Andrea Kupfer Schneider, *Teaching a New Negotiation Skills Paradigm*, 39 WASH. U. J.L. & POL’Y 13, 24–26, 29–30 (2012) (naming empathy as one of the core skills of effective negotiators); see generally DOUGLAS STONE ET AL., DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST (10th Anniversary ed., 2010) (describing a framework for approaching difficult conversations that is largely based on perspective taking).

²⁰⁵ An “interest” is a desire or concern. “Interests motivate people; they are the silent movers behind the hubbub of positions. Your position is something you have decided upon. Your interests are what caused you to so decide.” FISHER & URY, *supra* note 204, at 43.

²⁰⁶ DAVID A. LAX & JAMES K. SEBENIUS, 3-D NEGOTIATION: POWERFUL TOOLS TO CHANGE THE GAME IN YOUR MOST IMPORTANT DEALS 216 (2006) (footnote omitted).

²⁰⁷ Adam D. Galinsky et al., *Why It Pays to Get Inside the Head of Your Opponent: The Differential Effects of Perspective Taking and Empathy in Negotiations*, 19 PSYCHOL. SCI. 378, 383 (2008); Konrath & Grynberg, *supra* note 15, at 2.

²⁰⁸ LAX & SEBENIUS, *supra* note 206, at 216.

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counterparts' emotions. A failure to empathize in this way impairs negotiations and makes negotiators less effective.²⁰⁹ Similarly, empathy helps negotiators obtain information from their counterparts.²¹⁰ Being attune to emotions in a negotiation can inform negotiators about their clients' or their counterparts' priorities.²¹¹ Empathy can also promote open communication between negotiators,²¹² which furthers negotiators' understanding of their counterparts and yields additional information that can be used in the negotiation.

Third, empathy may foster a better working relationship between the negotiators. Empathy can build trust between them.²¹³ It can also promote cooperation: studies of prisoner's dilemma games—in which participants must choose either to cooperate, which benefits both parties, or to act in their own self-interest at the other's expense, which typically yields suboptimal results²¹⁴—have found that inducing empathy increases the participants' cooperativeness in the games.²¹⁵ Granted, cooperation between negotiators may not always be beneficial. If cooperation in a negotiation means sacrificing one's positions for the sake of the relationship, then empathy could have negative effects for individual negotiation outcomes.²¹⁶ However, if cooperation means that both sides are “soft on the people, [but] hard on the problem,”²¹⁷ then empathy is likely to be beneficial in a negotiation setting.

For example, imagine that Angelo is negotiating on behalf of a city with Diane, the city's chief of police who is negotiating the next year's police budget on behalf of her force.²¹⁸ If Angelo is high in perspective taking, then

²⁰⁹ Rosenberg, *Interpersonal Dynamics*, *supra* note 146, at 1242 (“[R]esearchers have concluded that the single greatest weakness of most negotiators is that they too often fail to even consider the thinking and emotions of others.” (footnote omitted)); Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCHOL. PUB. POL'Y & L. 1173, 1182 (1999) (“The inability to understand the emotional undercurrents among . . . [attorneys'] adversaries is also likely to limit their skill at negotiating and resolving controversies.”).

²¹⁰ LAX & SEBENIUS, *supra* note 206, at 216.

²¹¹ Sternlight & Robbenolt, *supra* note 140, at 370.

²¹² MNOOKIN ET AL., *supra* note 204, at 48.

²¹³ *Id.* at 49.

²¹⁴ See Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law* 82 S. CAL. L. REV. 209, 218 (2009).

²¹⁵ Konrath & Grynberg, *supra* note 15, at 2.

²¹⁶ See FISHER & ÜRY, *supra* note 204, at 22.

²¹⁷ *Id.* at 55.

²¹⁸ This example was inspired by *MAPO: City of Metropolis Negotiation*, a simulation from the Program on Negotiation at Harvard Law School. See Mark N. Gordon et al., *MAPO: City of Metropolis Negotiation*, PROGRAM ON NEGOTIATION: HARVARD LAW SCHOOL, available at <https://www.pon.harvard.edu/shop/mapo-administration-negotiation/> (last visited Sept. 29, 2018).

in his preparation for the negotiation he can imagine what might be important to the police force, such as reliable equipment that keeps the officers safe.²¹⁹ He could then anticipate that Diane might ask for an increase in the budget to pay for new semiautomatic weapons that do not have to be reloaded as frequently. In the negotiation Angelo might respond to Diane's request by saying, "I can imagine that officer safety is important to you, and it's important to me, too. Let's see if we can reallocate some money in the budget to pay for the new weapons." Now imagine that Angelo is low in perspective taking, and he does not think through Diane's interests before the negotiation. Now when Diane makes the request for semiautomatic weapons Angelo might respond by saying, "You already have guns. If you want new weapons on top of what you already have, we're going to have to cut from somewhere else." The substance is the same: in both cases, Angelo's proposed resolution is to reallocate funds to pay for the new weapons. But in the first instance, Angelo understood Diane's point of view (caring about officer safety), found merit in it (he agreed officer safety is important), and communicated his understanding to Diane (acknowledging the importance of officer safety).²²⁰ Engaging in this perspective taking is likely to have a positive effect on the negotiation, even if Angelo were not able to find additional funds for the new weapons.²²¹

Now imagine that Diane has just asked Angelo for an additional vacation day for the officers. Angelo has not said anything in response, but he has wrinkled his nose, grimaced, and looked off to the side. If Diane is high in empathy, she likely realizes that Angelo has had a negative emotional reaction to her request.²²² Based on the nonverbal feedback she has just received, Diane might ask Angelo why that proposal is troubling to him, leading to additional information gathering. Of course, skilled negotiators know how to use displays of emotion strategically, and not necessarily congruent with their true feelings. For example, Diane might ask Angelo for a four percent pay raise for the force and Angelo might express an intensely negative emotional reaction in an attempt to negotiate the raise down to three percent, when what he truly feels is relief because he was authorized to grant up to a five percent raise. But if Diane senses that Angelo is feigning his resistance, she may understand that she should stick firm to her four percent request.

²¹⁹ See FISHER & URY, *supra* note 204, at 174.

²²⁰ See ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* 27–36 (2005) (describing the steps for expressing appreciation in a negotiation).

²²¹ *Id.* at 26–27, 37–38 (describing the benefits of appreciating and communicating that understanding of another person's point of view).

²²² Fisher and Shapiro point out that it is difficult to identify and deal directly with individual emotions in a negotiation. *Id.* at 12–14. They suggest instead focusing on "core concerns"—"human wants that are important to almost everyone in virtually every negotiation"—that underlie emotions in a negotiation. *Id.* at 14–15.

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As with the other aspects of lawyering, empathic concern is less helpful in a negotiation than perspective taking is, and it may actually be harmful if it leads negotiators to sacrifice their self-interest.²²³ For example, imagine that Angelo (truthfully) tells Diane that his job depends upon his ability to reach a favorable deal with the police force, and that he would be unable to afford the private nursing home his mother lives in if he got fired. If Diane is high in empathic concern and thus strikes an unfavorable deal for her side because she feels sorry for Angelo, then empathic concern has been a detriment to her negotiation. However, empathic concern may be beneficial in negotiations that involve strong negative emotions: “[I]n disputes, negotiators often come to the table angry and with a desire to be heard, and empathy may help calm them and soften outbursts that can escalate conflict.”²²⁴ If Diane arrives at the negotiating table angry because Angelo’s predecessor reneged on a deal he had struck with her during her last negotiation with the city, empathic concern may make Angelo sympathize with Diane’s anger. In response, he may be more inclined to listen to her concerns, and he may be better able to rebuild her trust. As Angelo and Diane’s negotiation illustrates, empathy is a powerful tool in negotiation.

5. EMPATHY AND ADJUDICATION²²⁵

To state that much has been written about the role of empathy in judging is to understate matters considerably. A great deal of ink has been spilled pondering whether empathy is a desirable and necessary,²²⁶ or even

²²³ See Galinsky et al., *supra* note 207, at 383 (finding empathy to be “at times, a detriment to both discovering creative solutions and self-interest”). Galinsky and colleagues define empathy as “an other-focused emotional response that allows one person to affectively connect with another[,] [s]ometimes labeled sympathy or compassion.” *Id.* at 378. In the parlance of this Article, Galinsky and colleagues are speaking of empathic concern.

²²⁴ *Id.* at 383.

²²⁵ This Part IV.B.5 focuses on judges, but all fact-finders can accurately be said to be involved in “judging.” Accordingly, the same discussion is relevant to juries, arbitrators, etc. For more information regarding written and oral persuasion of judges, see the above text accompanying notes 179–189, 197–200.

²²⁶ Bandes contends that

it should be uncontroversial that judges need empathy [because] . . . [e]mpathy helps us to understand what others are thinking, feeling and perceiving, and to predict how others will react. It is an essential capacity for living in the social world, and a basic component of moral reasoning . . .

avoidable,²²⁷ aspect of being a judge. The debate over judicial empathy became decidedly heated—a so-called “empathy war”²²⁸—following statements made on the presidential campaign trail by then-Senator Barack Obama that, if he were to become president, empathy would be an important

. . . To apply the law, judges must constantly seek to understand and predict motivations, intentions, perceptions, and other aspects of human conduct. Empathy makes that understanding possible.

Susan A. Bandes, *Empathetic Judging and the Rule of Law*, CARDOZO L. REV. DE-NOVO 133, 138–39 (2009) [hereinafter Bandes, *Empathetic Judging*] (footnotes omitted). Similarly, Judge Richard Posner counts empathy as part of the recipe for judicial decisionmaking: “Another cousin of intuition and another major factor in judicial decisions in the open area is ‘good judgment,’ an elusive faculty best understood as a compound of empathy, modesty, maturity, a sense of proportion, balance, a recognition of human limitations, sanity, prudence, a sense of reality, and common sense.” RICHARD A. POSNER, HOW JUDGES THINK 117 (2008) (footnote omitted). Other arguments in favor of empathic judging abound. See generally, e.g., Susan A. Bandes, *Moral Imagination in Judging*, 51 WASHBURN L.J. 1 (2011); Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944 (2012); Henderson, *supra* note 23, at 1574; Rebecca K. Lee, *Judging Judges: Empathy as the Litmus Test for Impartiality*, 82 U. CIN. L. REV. 145 (2014); Robin West, *The Anti-Empathic Turn*, in PASSIONS AND EMOTIONS: NOMOS LIII 243 (James E. Fleming ed., 2012). There are impassioned arguments that reach the opposite conclusion. Georgetown University Law Center Affiliated Scholar Brenner Fissell argues, “Adjudication *ought* only involve the application of *cognitive* faculties (especially reason, logic, etc.), and the implementation of *affective* faculties in the endeavor is illicit.” Brenner Fissell, *Modern Critiques of Judicial Empathy: A Revised Intellectual History*, 2016 MICH. ST. L. REV. 817, 821 (emphasis in original); accord ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789 (1990); J. Harvie Wilkinson III, *Subjective Art; Objective Law*, 85 NOTRE DAME L. REV. 1663 (2010); Orin Kerr, *Legal Ambiguity, Empathy, and the Role of Judicial Power*, THE VOLOKH CONSPIRACY (May 13, 2009), <http://volokh.com/2009/05/13/legal-ambiguity-empathy-and-the-role-of-judicial-power/> [<https://perma.cc/8U89-HJ92>].

²²⁷ Bandes argues that judicial empathy is unavoidable: “[I]t is misleading to discuss *whether* judges should exercise empathy. They should, and they inevitably do. The questions are *for whom* they exercise it, how accurately they exercise it, how aware they are of their own limitations and blind spots, and what they do to correct for those blind spots.” Bandes, *Empathetic Judging*, *supra* note 226, at 135–36 (emphasis in original); accord Lee, *supra* note 226, at 175 (“Because judges will likely view the facts from some standpoint—that is, they will have some empathy for one party, whether they try to or not—judges will be acting partially unless they actively think about what it is like to stand in the place of the party more differently situated from them.”). Others disagree. See Fissell, *supra* note 226, at 822–36 (reviewing arguments).

²²⁸ Richard Just, *The Empathy War*, NEW REPUBLIC (Jul. 14, 2009), <https://newrepublic.com/article/50893/the-empathy-war>.

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criterion in his selection of judges²²⁹ (a point that Obama reiterated as president when Justice David Souter retired and the search for his replacement began²³⁰).

The controversy sparked by Obama's remarks continued throughout the confirmation hearings for Obama's nominee to the Supreme Court, then-Judge, now-Justice, Sonia Sotomayor. Lines from a speech that Sotomayor delivered at the University of California, Berkeley, School of Law in 2001 took center stage:

Whether born from experience or inherent physiological or cultural differences, . . . our gender and national origins may and will make a difference in our judging I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.²³¹

This comment was discussed at length in Sotomayor's confirmation hearings as part of a broader debate about the role of empathy in judging.²³² Not all of the senators were convinced by Sotomayor's assurances at the hearings that the law, rather than her background, would be the basis for her decisions, and there remained concern that "empathy" would play an improper role in Sotomayor's judicial decisionmaking.²³³

²²⁹ Senator Barack Obama, Remarks at the Planned Parenthood Action Fund Conference (July 17, 2007) (quoted in *Hearing on the Nomination of Elena Kagan to the Supreme Court Before the U.S. S. Comm. on the Judiciary*, 111th Cong. 2 (2010)) (statement of Edward Whelan, president of the Ethics and Public Policy Center) ("We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old—and that's the criterion by which I'll be selecting my judges."); see Bandes, *Empathetic Judging*, *supra* note 226, at 134–35 (describing the "contentious and often frustrating debate" following Obama's remarks).

²³⁰ President Barack Obama, *Obama's Remarks on the Resignation of Justice Souter*, N.Y. TIMES (May 1, 2009), <http://www.nytimes.com/2009/05/01/us/politics/01souter.text.html> ("I view that quality of empathy, of understanding and identifying with people's hopes and struggles as an essential ingredient [in a Supreme Court Justice] for arriving at just decisions and outcomes.").

²³¹ Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKLEY LA RAZA L.J. 87, 92 (2002).

²³² See *Sotomayor Promises "Fidelity to the Law"*, CBS NEWS (Jul. 13, 2009, 2:47 PM), <http://www.cbsnews.com/news/sotomayor-promises-fidelity-to-the-law/>; see also *Sotomayor Explains "Wise Latina" Comment*, CBS NEWS (Jul. 14, 2009, 1:25 PM), <http://www.cbsnews.com/news/sotomayor-explains-wise-latina-comment/>.

²³³ See *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm.*

The Supreme Court confirmation hearings for then-Judge, now-Justice, Neil Gorsuch revived the debate about the role of empathy in judging. This time, Gorsuch's dissenting opinion in *TransAm Trucking, Inc. v. Administrative Review Board*²³⁴ captured much of the attention. The majority in *TransAm* held that a truck driver, who was fired for abandoning a trailer rather than waiting in subzero temperatures for a repair truck, was unlawfully terminated in violation of the whistleblower provisions of the Surface Transportation Assistance Act.²³⁵ In dissent, Gorsuch argued that the truck driver violated his employer's instructions by *operating* the truck (i.e., driving away), while the statute at issue only prohibits firing employees for their *refusal to operate* vehicles.²³⁶ Gorsuch mused, "It might be fair to ask whether *TransAm's* decision was a wise or kind one. But it's not our job to answer questions like that. Our only task is to decide whether the decision was an illegal one."²³⁷

Several senators raised the *TransAm* dissent in their opening statements at Gorsuch's confirmation hearing.²³⁸ Gorsuch was later pressed to

on the Judiciary, 111th Cong. 2 (2009) (statement of Hon. Sonia Sotomayor) ("The process of judging is enhanced when the arguments and concerns of the parties to the litigation are understood and acknowledged. That is why I generally structure my opinions by setting out what the law requires and then by explaining why a contrary position, sympathetic or not, is accepted or rejected. That is how I seek to strengthen both the rule of law and faith in the impartiality of our justice system. My personal and professional experiences help me listen and understand, with the law always commanding the result in every case."); *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 2 (2009) (statement of Sen. Jefferson Sessions, Ranking Member, S. Comm. on the Judiciary) ("Call it empathy, call it prejudice, or call it sympathy, but whatever it is, it is not law. In truth it is more akin to politics, and politics has no place in the courtroom.").

²³⁴ *TransAm Trucking, Inc. v. Admin. Review Bd.*, 833 F.3d 1206, 1215 (10th Cir. 2016).

²³⁵ *Id.* at 1213–14.

²³⁶ *Id.* at 1215–16 (Gorsuch, J., dissenting).

²³⁷ *Id.* at 1215 (Gorsuch, J., dissenting).

²³⁸ See, e.g., *Confirmation Hearing on the Nomination of Hon. Neil Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 2 (2017), <https://www.judiciary.senate.gov/imo/media/doc/BlumenthalStatement03-20-2017%20.pdf> (opening remarks of Sen. Richard Blumenthal, Member, S. Comm. on the Judiciary); *Confirmation Hearing on the Nomination of Hon. Neil Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 2 (2017), <https://www.judiciary.senate.gov/imo/media/doc/FeinsteinStatement03-20-2017%20.pdf> (opening remarks of Sen. Dianne Feinstein, Ranking Member, S. Comm. on the Judiciary); *Confirmation Hearing on the Nomination of Hon. Neil Gorsuch to Be an Associate Justice*

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imagine what he would have done had he been in the trucker's position.²³⁹ In response, Gorsuch demurred, saying, "I don't know, I wasn't in the man's shoes," but also that he "empathized with . . . [the trucker] entirely" and "totally empathize[d] and underst[ood]" the trucker's situation.²⁴⁰ Following the hearings, Gorsuch and his dissenting opinion were called "cold"²⁴¹ and "callous[er]."²⁴² Yet others defended Gorsuch, arguing that a judge's role is not to decide cases based upon his or her personal feelings, and that a focus on empathy in judging is misplaced.²⁴³

It is clear from these two very different confirmation hearings that there is not a consensus about the appropriateness of empathy in judges (at least at the Supreme Court level). However, some of the discord may be attributable to the inconsistent definitions of empathy. Those who argue against empathy in judging seem to define empathy in largely affective terms—that is, they seem to be concerned that judges with high empathic

of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 115th Cong. 2 (2017), <https://www.judiciary.senate.gov/imo/media/doc/HironoStatement03-20-2017%20.pdf> (opening remarks of Mazie Hirono, Member, S. Comm. on the Judiciary).

²³⁹ *Supreme Court Confirmation Hearings*, C-SPAN (Mar. 21, 2017), <https://www.c-span.org/video/?425138-1/supreme-court-nominee-stresses-independence-calls-criticism-judges-disheartening&start=20719>.

²⁴⁰ *Id.*

²⁴¹ Lucia Graves, *Neil Gorsuch's Confirmation Hearing Revealed His Hidden Similarity to Trump*, *GUARDIAN* (Mar. 25, 2017), <https://www.theguardian.com/us-news/2017/mar/25/neil-gorsuch-confirmation-hearing-empathy-analysis> (excoriating Gorsuch's "cold cognitive empathy coupled with a dearth of compassion").

²⁴² Jed Handelsman Shugerman, *Neil Gorsuch and the "Frozen Trucker"*, *SLATE* (Mar. 21, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/03/neil_gorsuch_s_arrogant_frozen_trucker_opinion_shows_he_wants_to_be_like.html ("I have read very few modern opinions that were more callously written than Gorsuch's *TransAm* dissent.").

²⁴³ See, e.g., Press Release, Sasse: "We Issue Only Black Robes" (Mar. 20, 2017), <https://www.sasse.senate.gov/public/index.cfm/press-releases?ID=EA7A8B92-AD20-45FA-B5EE-BACDABB2F448> ("Empathy is not the role of a Supreme Court Justice. It is our job as legislators—men and women who are hired and fired by the American people—to empathize, to identify with people's hopes and struggles. The judge must instead faithfully and dispassionately apply the law to the facts of the case."); David Harsanyi, *Schumer Attacks Gorsuch for Doing His Job*, *NAT'L REV.* (Mar. 17, 2017), <http://www.nationalreview.com/article/445847/chuck-schumers-attacks-neil-gorsuch-un-american-shameful> ("Normalizing the idea that the Constitution should be subservient to progressive conceptions of 'justice' goes back to Barack Obama, who in 2008 promised to nominate justices who shared 'one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy.' The Left hailed this gibberish as proof of a thoughtful temperament, when in reality it's a feel-good argument to subordinate the constitutional duties of the president and the court to feelings.").

concern will make rulings on the basis of their sympathies for the parties rather than on the basis of the relevant laws.²⁴⁴ If their definition of empathy is really synonymous with empathic concern (or with sympathy), their conclusion seems reasonable. In contrast, those who argue in favor of judicial empathy seem to emphasize empathy's cognitive aspects—meaning they focus on the benefits of judicial perspective taking.²⁴⁵ If they define empathy primarily as perspective taking, their conclusion is also reasonable because making certain adjudications requires taking prescribed perspectives.

It is problematic for judicial decisionmaking to be dominated by empathic concern because, among other reasons, it will likely lead to inconsistent outcomes. Consider, for example, *Douglass v. Delta Air Lines, Inc.*, a wrongful death damages suit brought by the widow of a forty-year-old man killed in a plane crash.²⁴⁶ In this suit, evidence was introduced of the close family relationship enjoyed by the decedent, his widow, and her three minor children, along with evidence of various types of damages the family suffered from his loss: “loss of future earnings, mental anguish on the part of the plaintiffs, loss of society and companionship, and loss of inheritance.”²⁴⁷ By all accounts, this was a tragic loss of a devoted family man with a record of service to his country and a bright future ahead of him.²⁴⁸ Suppose the appellate judges in this case were to rule on the trial court's award of damages based largely upon their degree of empathic concern for the surviving family—to the extent to which they feel the emotions of (or at least emotions congruent to) the family's emotions. The damage award would likely be quite high, perhaps far in excess of what an “objective” fact-finder would deem appropriate. Even if empathic concern plays a smaller role in the court's decisionmaking, the judges might choose to base the awardable damages upon the most optimistic future earnings and investment scenarios presented to the

²⁴⁴ See, e.g., O'Neill, *supra* note 69, at 509 (arguing that the “real issue” in Supreme Court death penalty cases “was whether the Justices viscerally related to the murder victim or to the murder defendant on Death Row. Whose pain did the Justices feel? Whose experiences did the Justices mirror?”); see also Fissell, *supra* note 226, at 830–34 (describing these arguments).

²⁴⁵ E.g., Bandes, *Empathic Judging*, *supra* note 226, at 137 (“A judge uses empathy as a tool toward understanding conflicting claims. Empathy assists the judge in understanding the litigants' perspectives. It does not help resolve the legal issue of which litigant ought to prevail.”).

²⁴⁶ *Douglass v. Delta Air Lines, Inc.*, 897 F.2d 1336, 1337 (5th Cir. 1990).

²⁴⁷ *Id.* at 1338.

²⁴⁸ *Id.* at 1337–39 (noting “[t]here is little dispute concerning the strong family ties [or] the anguish that the survivors have suffered . . .” and describing the decedent as “well educated, a former military officer and FBI special agent, and a gifted regional vice president for a telecommunications firm”).

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court based on their feelings for the family.²⁴⁹ Most people would likely object to this influence of empathy—it seems unjust because it depends upon the judges' sympathies rather than upon some measure that would be applied more or less equally to all people in the plaintiff's situation.²⁵⁰ According to Judge Richard Posner, taking such "a personal liking for a litigant or his lawyer" is a "forbidden move[] in the judicial game" because "[i]ndignation at a wrong is consistent with corrective justice; sympathy for a litigant is not."²⁵¹

At the same time, few would probably disagree that taking the surviving family's perspective is not only appropriate but is actually necessary in this case. Determining the appropriate pecuniary and non-pecuniary damages depends upon understanding the surviving family's circumstances: their financial circumstances following the death of the primary breadwinner, their grief and trauma upon the loss of a beloved spouse and father, etc. While the awarded damages would differ from case to case, the differences would largely be attributable to the plaintiffs' differing circumstances.²⁵² For instance, the surviving family of a decedent who made \$40,000 per year would very likely receive less in pecuniary damages than the family of a decedent who earned \$400,000 per year. But this type of disparity does not implicate injustice in the same way as would an award based upon how sympathetic the judges found the plaintiffs.

Perspective taking is even more important in judging when the legal standard demands it.²⁵³ Any time the law requires consideration of "reasonableness," this consideration implicates perspective taking. Most often the standard is objective—what a reasonable person would do.²⁵⁴ Less

²⁴⁹ *Id.* at 1338–40.

²⁵⁰ See Bandes, *Tax and Empathy*, *supra* note 22, at 399 ("Empathy is . . . an essential capacity for judging whereas sympathy can be a problematic emotion for judging." (footnote omitted)).

²⁵¹ POSNER, *supra* note 226, at 106.

²⁵² Of course, some amount of variance would still remain; the potential influence of empathic concern is almost impossible to eliminate because of the degree of discretion in making non-quantitative judgments. See *Douglass*, 897 F.2d. at 1345 ("[T]he loss of positive benefits flowing from the love, comfort, companionship, and society that [the children] . . . would have enjoyed had their father lived . . . is difficult, if not impossible, to quantify precisely, and we are not qualified to substitute our subjective judgment for that of the district court.").

²⁵³ For a review of legal doctrines that require perspective taking, see Colby, *supra* note 226, at 1966–82.

²⁵⁴ See, e.g., Securities Act of 1933, 15 U.S.C. § 77k (1998) ("In determining . . . what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property."); *Graham v. Connor*, 490 U.S. 386, 396 (1989) ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene . . ."); RESTATEMENT (SECOND) OF TORTS § 283 (AM. LAW INST., 1965) ("Unless

frequently the standard is subjective—reasonableness under the circumstances as the particular actor faced them.²⁵⁵ Either way, the judge is being asked to adopt the point of view of someone else and to determine whether, under those circumstances, the conduct or belief at issue is reasonable. Without perspective taking, this is an impossible task. And so, even if there were agreement that the affective components of empathy are not properly a part of judging, the cognitive components certainly are.

V. THE DIGITAL GENERATION AND THEIR EMPATHY

A. *Meet the Digital Generation*

Today there is a new generation of young people who have never known a world in which computers, the Internet, and cell phones did not exist. There is no consensus on what this group should be called,²⁵⁶ exactly what birth year separates them from earlier generations,²⁵⁷ or even whether it is appropriate to refer to them as a generation at all.²⁵⁸ What probably can be

the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.”).

²⁵⁵ See, e.g., *State v. Leidholm*, 334 N.W. 2d 811, 817–18 (N.D. 1983) (In the context of self-defense, “the finder of fact must view the circumstances attending an accused’s use of force from the standpoint of the accused”); MODEL PENAL CODE § 210.3(b) (AM. LAW INST., 1985) (“[A] homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.”).

²⁵⁶ For different examples of how scholars refer to this generation, see, e.g., LARRY D. ROSEN, *IDISORDER: UNDERSTANDING OUR OBSESSION WITH TECHNOLOGY AND OVERCOMING ITS HOLD ON US* 7 (2012) [hereinafter ROSEN, *IDISORDER*] (referring to the “Net Generation” and the “iGeneration,” depending upon their age); DON TAPSCOTT, *GROWN UP DIGITAL: HOW THE NET GENERATION IS CHANGING YOUR WORLD* 16 (2009) (noting that the “Net Generation” are also known as the “Millennials” and “Generation Y,” while “Generation Next” are also known as “Generation Z”); Marc Prensky, *Digital Natives, Digital Immigrants Part 1*, 9 *ON THE HORIZON* at 1 (2001) (“Digital Natives”).

²⁵⁷ See, e.g., JUDITH HORSTMAN, *THE SCIENTIFIC AMERICAN BRAVE NEW BRAIN* 56 (2010) (naming those born after 1980 “digital natives”); LARRY D. ROSEN, *REWired: UNDERSTANDING THE IGENERATION AND THE WAY THEY LEARN* 12–13 (2010) [hereinafter ROSEN, *REWired*] (the “Net Generation” were born in the 1980s, while the “iGeneration” were born in the 1990s and the 2000s); TAPSCOTT, *supra* note 256, at 16 (establishing that the “Net Generation” were born between January 1977 and December 1997 while “Generation Next” were born between January 1998 and the present).

²⁵⁸ See PALFREY & GASSER, *supra* note 4, at 14. Professors John Palfrey and Urs Gasser argue that it is more useful to think of young people with ICT exposure as a

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agreed upon is that what makes this generation unlike any other generation before them is their lifelong exposure to ICTs. These young people are the *Digital Generation*.²⁵⁹

It is hardly astonishing that digital technology plays a big part in the Digital Generation's lives. According to a 2015 Pew Research Center report on technology use by American teens,²⁶⁰ 92% of teens ages thirteen to seventeen use the Internet every day, and 24% use it "almost constantly."²⁶¹ Seventy-six percent of teens are on social media, including 81% of older teens.²⁶² Eighty-seven percent own or have access to a laptop or desktop computer, and 58% own or have access to a tablet.²⁶³ Eighty-eight percent of teens own or have access to a cell phone, and 73% have smartphones.²⁶⁴

population, rather than a generation, given the differences in ICT access among different people within that age group. *Id.*; see also *supra* note 4.

²⁵⁹ The eldest of the Digital Generation are currently in their early- to mid-thirties, while the youngest are just being born. This is, admittedly, a broad span of years. Others have divided this group into at least two different generations but the dividing lines seem rather arbitrary. See *supra* notes 256–57. I consider the entire group to be the Digital Generation. However, for the sake of consistency with much of the research cited herein, this Article uses "Digital Generation" primarily in reference to today's "tweens," teens, and college-age youth—i.e., young people roughly ages eleven to twenty-two.

²⁶⁰ All the statistics cited in this Part A refer to technology use by young people in the United States. As with the generalizations about adults in this Article, generalizations about the Digital Generation are not intended to—and are unlikely to—represent technology habits of young people worldwide, given the variance in access to ICTs in different countries and different populations. *Cf. supra* note 4.

²⁶¹ AMANDA LENHART ET AL., PEW RESEARCH CTR., TEENS, SOCIAL MEDIA & TECHNOLOGY OVERVIEW 2015 16 (2015), available at <http://www.pewinternet.org/2015/04/09/a-majority-of-american-teens-report-access-to-a-computer-game-console-smartphone-and-a-tablet/>. This report, the first in a series of reports issued by the Pew Research Center examining teens' technology use, is based on 2014 and 2015 nationally representative online surveys of 1060 parents and their 1060 teens, ranging in age from thirteen to seventeen years old, with a plus or minus 3.7% margin of error. *Id.* at 2, 41, 42. Among members of the Digital Generation aged eighteen to twenty-nine years old, 99% report using the Internet. *Internet/Broadband Fact Sheet*, PEW RESEARCH CTR. (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/internet-broadband/>.

²⁶² LENHART ET AL., *supra* note 261, at 25.

²⁶³ *Id.* at 10. In comparison, 78% of eighteen- to twenty-nine-year-olds own a laptop or desktop computer, while 50% own a tablet. MONICA ANDERSON, PEW RESEARCH CTR., TECHNOLOGY DEVICE OWNERSHIP: 2015 10, 12 (2015), available at <http://www.pewinternet.org/2015/10/29/technology-device-ownership-2015/>. This report is based on a 2015 nationally representative telephone survey of 1907 adults aged eighteen years and older, with an overall plus or minus 2.6% margin of error. *Id.* at 6.

²⁶⁴ LENHART ET AL., *supra* note 261, at 8. Older members of the Digital Generation report even greater numbers. The Pew Research Center found that as of 2016, 100% of eighteen- to twenty-nine-year-olds owned a cell phone, and 92% of those were

Ninety-one percent of these teens at least occasionally use their mobile devices to access the Internet.²⁶⁵ Ninety-one percent of teens who have cell phones send text messages.²⁶⁶ Teens with cell phones report sending or receiving about thirty text messages per day, though girls between fifteen and seventeen years old average about fifty²⁶⁷—somewhere between 1500 and 2500 per month. Others estimate even higher numbers, with some teens sending and receiving closer to 4000 text messages per month.²⁶⁸

The Digital Generation struggle to go even fifteen minutes without checking their ICTs for new messages,²⁶⁹ which is perhaps not surprising considering they are more likely to communicate with other people in their lives via text message than by talking to them on the phone or in person.²⁷⁰ In

smartphones. *Mobile Fact Sheet*, PEW RESEARCH CTR. (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/mobile/>.

²⁶⁵ LENHART ET AL., *supra* note 261, at 14.

²⁶⁶ *Id.* at 17.

²⁶⁷ *Id.* at 19.

²⁶⁸ See NIELSEN, STATE OF THE MEDIA 2010: U.S. AUDIENCES & DEVICES 3 (2011), *available*

at <http://www.nielsen.com/content/dam/corporate/us/en/newswire/uploads/2011/01/nielsen-media-fact-sheet-jan-11.pdf>. An analysis of over 60,000 phone bills from the third quarter of 2010 found the number of text messages sent and received in a month was 1178 for children twelve and under, 1707 for eighteen- to twenty-four-year-olds, and a staggering 3705 for thirteen- to seventeen-year-olds. *Id.* at 3–4. A more recent estimate found that eighteen- to twenty-four-year-old smartphone owners send and receive 3853 text messages each month, or roughly 128 per day. Alex Cocotas, *Chart of the Day: Kids Send a Mind Boggling Number of Texts Every Month*, BUSINESS INSIDER (Mar. 22, 2013, 3:45 PM), <http://www.businessinsider.com/chart-of-the-day-number-of-texts-sent-2013-3>.

²⁶⁹ See ROSEN, IDISORDER, *supra* note 256, at 7, 13. A study of message checking habits among different generations found that 64% of “Net Generation” respondents (born in the 1980s) check every fifteen minutes or less for text messages, while 42% check for cell phone calls, and 36% check Facebook. *Id.* at 13. Of those respondents from the “iGeneration” (born in the 1990s), 62% check texts, 34% check calls, and 32% check Facebook every fifteen minutes or less. *Id.* at 7, 13. In contrast, of the Baby Boomers surveyed, 18% check texts, 20% check calls, and 8% check Facebook with the same frequency. *Id.* at 13.

²⁷⁰ See AMANDA LENHART, PEW RESEARCH CTR.’S INTERNET & AMER. LIFE PROJECT, TEENS, SMARTPHONES & TEXTING 16–17 (2012), *available at* <http://www.pewinternet.org/2012/03/19/teens-smartphones-texting/>.

This 2011 nationally representative telephone survey of 799 teens (aged twelve to seventeen years old) and their parents found (with a plus or minus 4.8% margin of error) that 63% of teens communicate with others every day by text, compared to 39% who talk on a cell phone, 35% who socialize face-to-face outside of school, 29% who exchange messages through social networking sites, 22% who use instant messaging, 19% who talk on landlines, and a mere 6% who exchange emails. *Id.* at 16–17, 19.

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fact, most of the time that young people are awake and not in school, they are using some form of digital technology. Teens, ages thirteen to eighteen years old, spend almost nine hours per day doing things like “watching TV, movies, and online videos; playing video, computer, and mobile games; using social media; using the Internet; reading; and listening to music.”²⁷¹ “Tweens,” ages eight to twelve, log almost six hours per day.²⁷² Teens average six hours and forty minutes of “screen media” per day, while tweens spend roughly four and a half hours on screens.²⁷³ Almost a third of the time that these youngsters are using digital media, they are multitasking, using multiple media at once.²⁷⁴

²⁷¹ COMMON SENSE MEDIA, THE COMMON SENSE CENSUS: MEDIA USE BY TEENS AND TWEENS 13 (2015), available at <https://www.commonsensemedia.org/research/the-common-sense-census-media-use-by-tweens-and-teens>. The average was eight hours and fifty-six minutes per day. *Id.* Of this, teens spend an average of twenty-eight minutes reading, whether in print or on a screen. *Id.* at 25. This report by Common Sense Media is based on a 2015 online survey of a nationally representative sample of 2658 U.S. children aged between eight and eighteen years with a plus or minus 1.9% margin of error. *Id.* at 7, 11. This study counts each instance of media use separately—e.g., if a teen listens to music for one hour at the same time she browses the Internet, the study reports two hours of media use. *See id.* at 9; *see also id.* at 8 (describing what was or was not included in each type of media use).

²⁷² *Id.* at 13. The report states that the younger group averages five hours and fifty-five minutes daily. *Id.* This group averages twenty-nine minutes of reading time, including both print and screen media. *Id.* at 25.

²⁷³ *Id.* at 19. “Screen media” time includes “time spent engaging in visual media activities on screen devices, including watching TV or videos, playing games, video chatting, searching the Internet, and reading or writing on a computer, tablet, or smartphone. It does not include time spent listening to music through screen devices.” *Id.* at 8.

²⁷⁴ VICTORIA J. RIDEOUT ET AL., HENRY J. KAISER FAMILY FOUNDATION, GENERATION M²: MEDIA IN THE LIVES OF 8- TO 18-YEAR-OLDS 33 (2010), available at <http://kff.org/other/event/generation-m2-media-in-the-lives-of/> (reporting that young people use two or more media concurrently 29% of the time they are using media). This finding comes from a nationally representative survey conducted in 2008 and 2009 of 2002 third through twelfth grade public, private, and parochial school students aged eight to eighteen, including 702 volunteers who completed seven-day media use diaries, with a plus or minus 3.9% margin of error. *Id.* at 6. Multitasking varies in frequency depending upon the type of medium being used, with 48% of young people reporting multitasking “some of the time” or “most of the time” while playing video games, as compared to 53% while reading, 68% while watching TV, 66% while using a computer, and 73% while listening to music. *Id.* This variance likely has to do with the different mental resources required to engage with different media. Psychologist Larry Rosen attributes the greater likelihood of multitasking while listening to music than while playing video games to the fact that playing video games requires greater mental resources (vision, hearing, and manual skills, along with logic and problem solving), making it more difficult to multitask while playing. ROSEN,

These figures do not even count the time that teens and tweens use media for school-related purposes.²⁷⁵

The Digital Generation interact with their ICTs from the moment they wake up right up until the moment they close their eyes.²⁷⁶ Even sleep cannot part them from their ICTs and the thousands of messages they send and receive every month. Many of them wake up in the middle of the night to check their messages and send a text or an email, or they are awakened by an incoming call or message.²⁷⁷ Clearly, ICTs are a big part of the Digital Generation's lives. Their generation is defined by the facts that they have grown up with digital technology, that they spend a lot of time every day using it, and that they tend to use more than one form at a time.

B. Evidence of an Empathy Decline

ICTs have had a tremendous impact on the interpersonal interactions of people of all ages:

REWired, *supra* note 257, at 81. Unfortunately, the 2015 Common Sense Media study did not inquire about multitasking. See COMMON SENSE MEDIA, *supra* note 271, at 9.

²⁷⁵ COMMON SENSE MEDIA, *supra* note 271, at 7. Teens reported using digital devices an average of forty-six minutes per day for school work, while tweens used them an average of fifteen minutes daily for school work. *Id.* at 81.

²⁷⁶ See Press Release, Nat'l Sleep Foundation, Annual Sleep in America Poll Exploring Connections with Communications Technology Use and Sleep (Mar. 7, 2011), available at <http://sleepfoundation.org/media-center/press-release/annual-sleep-america-poll-exploring-connections-communications-technology-use->. A poll of 1508 Americans between ages thirteen and sixty-four reports (with a plus or minus 2.5% margin of error) that 55% of thirteen- to eighteen-year-olds surf the Internet within the hour before sleep, and 56% send, read, or receive text messages. *Id.*

²⁷⁷ See *id.* In this poll, 18% of thirteen- to eighteen-year-olds reported being awakened by a phone call, text message, or email at least a few nights a week. *Id.* Additionally, in a 2013 nationally representative survey of 1103 parents and caregivers of children aged six to seventeen years old, parents reported that 43% (plus or minus 4%) of their fifteen- to seventeen-year-olds sent or read text messages, emails, or other electronic communications after initially going to sleep. NAT'L SLEEP FOUNDATION, 2014 SLEEP IN AMERICA® POLL: SLEEP IN THE MODERN FAMILY: SUMMARY OF FINDINGS 5, 36 (2014), available at <http://sleepfoundation.org/sites/default/files/2014-NSF-Sleep-in-America-poll-summary-of-findings—FINAL-Updated-3-26-14.pdf>. Further, a 2011 study of 3500 people from 1100 corporations worldwide found that 77% of "Net Generation" employees (born in the 1980s) keep their cell phone in their bedroom, and 60% keep it within arm's reach. ROSEN, IDISORDER, *supra* note 256, at 7, 9. Those who keep it within reach are 60% more likely than average to awaken and check it for new messages. *Id.* at 9.

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People now routinely interrupt dinners and face-to-face conversations with cell phone calls and text messages, and just walking down the street is an anthropological experience of “man (and woman) with new technology.” Joggers have little white nubs stuffed into their ears, bikers talk on the phone with one hand and steer with the other, fathers pushing strollers look like they are talking to themselves unless one notices the little black attachment coming out of their heads, coffee shops are filled screen-to-screen, with overflowing outlets and quiet, blank-faced patrons, and toddlers effortlessly crack passwords on their parents’ iPhones to play games.²⁷⁸

Of course, just because our interactions are changing does not mean that this change is necessarily bad. There are certainly benefits, chief among them the ability to keep in touch with geographically-distant friends and loved ones easily and instantaneously, whether via phone, text, email, or video chat. If given the option, few of us would likely choose to retreat back to the days when keeping in touch with an out-of-state relative meant waiting days or weeks between handwritten letters and racking up long-distance phone call charges.

But, as marvelous as the new technology is, it is also hugely disruptive in ways that we perhaps do not fully understand. The more obvious changes are to our behaviors. Consider your last trip to a restaurant. Did you make the reservation through a website or an app?²⁷⁹ Did the host check you in on a computer? Was the wine list presented to you on a tablet?²⁸⁰ Did your companions text you to say they were running late? Did you check the latest news on your phone while you waited for them? Did you take a picture of your entrée and post it on social media?²⁸¹ Did your server run your credit card using a tablet point of sale?²⁸² Did your companions use an app to pay you back for their parts of the bill?²⁸³

The less obvious changes may be to our emotional processes. Leaving aside a discussion of ICTs’ impact on other generations,²⁸⁴ recent research

²⁷⁸ Konrath, *Empathy Paradox*, *supra* note 17, at 214.

²⁷⁹ See, e.g., OPENTABLE, <https://www.opentable.com> (last visited July 26, 2017).

²⁸⁰ See, e.g., *Wine Lists Go Digital*, FSR MAGAZINE (Aug. 2011), <https://www.foodnewsfeed.com/fsr/wine/wine-lists-go-digital>.

²⁸¹ See, e.g., INSTAGRAM, <https://www.instagram.com/?hl=en> (last visited July 26, 2017).

²⁸² See, e.g., SQUARE, <https://squareup.com/pos/restaurant> (last visited July 26, 2017).

²⁸³ See, e.g., VENMO, <https://venmo.com/about/product/> (last visited July 26, 2017).

²⁸⁴ In all likelihood, most effects of ICT exposure could be experienced by members of older generations in the same ways those effects are experienced by the Digital

suggests that ICTs may be having negative effects on the Digital Generation's psychological development. Specifically, a recent study of American college students suggests that empathy may be declining among this generation.²⁸⁵ Dr. Sara Konrath, director of Indiana University's Interdisciplinary Program on Empathy and Altruism Research (iPEAR), and her team conducted a cross-temporal meta-analysis²⁸⁶ of seventy-two samples (n= 13,737) of American

Generation, though the effects on the Digital Generation may appear sooner. See Konrath, *Empathy Paradox*, *supra* note 17, at 214 ("It is not surprising that negative effects of technology would be apparent in college students first, as they tend to have access to resources and time and to be quick to adopt new technology."). However, since the focus of this Article is the Digital Generation, and since much of the social science research has used members of the Digital Generation as subjects, this Part V.B will likewise focus on the Digital Generation.

²⁸⁵ A study of college students is likely not representative of the general population. However, since many—if not most—American law students and lawyers obtain their undergraduate degrees from colleges and universities in the United States before entering law school, studies of U.S. undergraduates provide some information about the people who ultimately become lawyers in the U.S.

²⁸⁶ Psychologists use this method to study how a certain trait varies across generations of people who were approximately the same age when the trait was measured. See Jean M. Twenge et al., *Egos Inflating Over Time: A Cross-Temporal Meta-Analysis of the Narcissistic Personality Disorder*, 74 J. PERSONALITY 875, 876 (2008). This "time-lag method" enables psychologists to separate the effects of generation from the effects of age. *Id.* For example, imagine that researchers want to know whether people are more philanthropic now than people were fifty years ago. They administer a questionnaire to a group comprising twenty-year-olds and seventy-year-olds that asks about their philanthropic tendencies, and they find that the seventy-year-olds score much lower on measures of philanthropy than the twenty-year-olds do. Unfortunately, it is not possible to tell from these data whether the elder subjects' philanthropy scores are lower because their generation is less philanthropic than current generations are, or whether the elder subjects have become less philanthropic as they have gotten older. A cross-temporal meta-analysis aims to eliminate this confounding effect by examining multiple studies conducted at different points in time with people of the same age in each study—e.g., studies of college students conducted from 1950 to 2000. See *id.* It does not, however, permit any conclusions to be drawn about whether the trait being studied varied over that time period in any age group other than the one being studied (e.g., a time-lag study of college students from 1950 to 2000 does not provide any data about senior citizens during that same time period). Konrath et al., *Dispositional Empathy*, *supra* note 14, at 190. The use of cross-temporal meta-analysis to study generational differences has been criticized for relying upon potentially non-representative "convenience" samples of college students from four-year colleges. See Kali H. Trzesniewski et al., *Is "Generation Me" Really More Narcissistic Than Previous Generations?*, 76 J. PERSONALITY 903, 904–05 (2008); but see Brent W. Roberts et al., *It Is Developmental Me, Not Generation Me: Developmental Changes Are More Important Than Generational Changes in Narcissism—Commentary on Trzesniewski & Donnellan*, 5 PERSPECTIVES ON PSYCHOL. SCI. 97, 98–99 (2010) (citation omitted) (defending the meta-analysis technique). However, this criticism is less of a concern for the purposes of a discussion of law schools and lawyers because U.S. law

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college students' responses to the IRI²⁸⁷ collected in published studies from the late 1970s to the 2000s to compare changes in their dispositional empathy scores over time.²⁸⁸ The authors found significantly lower scores overall on empathic concern and perspective taking between 1979 and 2009.²⁸⁹ They found the most pronounced decline in the latest sampling years, which “suggests that empathy has been decreasing in college students primarily since 2000.”²⁹⁰ Declines in empathic concern and perspective taking are troubling because these are other-focused traits that have been linked in past research to increased prosocial behaviors and fewer antisocial behaviors.²⁹¹ Ideally, we

schools require the equivalent of a four-year B.A. degree as a prerequisite for admission. *Applying to Law School*, LSAC, <https://www.lsac.org/jd/diversity-in-law-school/racial-ethnic-minority-applicants/minorities-in-legal-education-applying-to-ls> (last visited July 26, 2017). It is, of course, still possible that the types of students likely to participate in a psychological study are not representative of those who go on to attend law school. See Trzesniewski et al., *supra*, at 904–05.

²⁸⁷ See *supra* text accompanying notes 40–44.

²⁸⁸ Konrath et al., *Dispositional Empathy*, *supra* note 14, at 180, 184–85. The research team obtained these samples by searching the Web of Knowledge (a database comprising nearly all scholarly journals in the fields of medicine and the social, behavioral, biological, and physical sciences) for published studies (as well as a handful of unpublished honors theses, dissertations, and data sets) of responses to the IRI subscales collected from college students at “conventional 4-year institutions.” See *id.* at 185 (providing a detailed description of the inclusion criteria). Only seven of the samples were collected before 1990. *Id.* at 187. For a description of how the research team handled the small number of samples before 1990, see *infra* note 290. Of the students in the authors' sample, approximately 63.1% were female and 69% were white; their mean age was 20.27. *Id.* at 185. The authors note that there have been “minimal” demographic changes in the college student body over the time period studied, with both the socioeconomic status of college students and the racial composition of college student samples remaining stable. *Id.* at 184.

²⁸⁹ Konrath et al., *Dispositional Empathy*, *supra* note 14, at 185. Converting the changes in empathic concern and perspective taking to percentiles and assuming a normal curve, the authors found a 48% decrease in empathic concern between 1979 and 2009 and a 34% decrease in perspective taking. *Id.* at 186. There were no significant changes in either the fantasy or personal distress subscales. *Id.* at 185. The observed changes remained after the authors controlled for a measure of general economic health. *Id.* at 188. For a detailed description of how the research team analyzed the data and compared the IRI scores over time, see *id.* at 185–86.

²⁹⁰ *Id.* at 187. Because there were few samples collected before 1990, see *supra* note 287, the research team split their data set into two time periods: one from 1979 to 1999 and the other from 2000 to 2009. *Id.* There were no statistically significant changes in any of the IRI subscales from 1979 to 1999; there were, however, significant declines in empathic concern and perspective taking (but not in fantasy or personal distress) between 2000 and 2009. *Id.*

²⁹¹ Konrath et al., *Dispositional Empathy*, *supra* note 14, at 187; see also *supra* text accompanying notes 124–29.

would want people's scores on these subscales to increase with each new generation, not decrease.

The evidence from this meta-analysis is correlational, not causal—even assuming this study is correct in concluding that empathy has declined among college students over the last decade and a half,²⁹² the data do not tell us *why* that decline has occurred.²⁹³ But, in light of the drastic increase in ICT usage in recent years, particularly social media usage,²⁹⁴ Konrath's team speculates that the rising prominence of ICTs in the Digital Generation's everyday lives is likely a contributing factor:

With so much time spent interacting with others *online* rather than in reality, interpersonal dynamics such as empathy might certainly be altered. For example, perhaps it is easier to establish friends and relationships online, but these skills might not translate into smooth social relations in real life [P]eople today have a significantly lower number of close others to whom they can express their private thoughts and feelings. Alternatively, the ease and speed of such technology may lead people to become more readily frustrated or bored when things do not go as planned, resulting in less empathic interactions. Furthermore, people simply might not have time to reach out to others and express empathy in a world filled

²⁹² Given the small number of studies in this analysis from before 1990, the limitations of the IRI, and the concerns about cross-temporal meta-analysis in general, it is important not to overstate the conclusiveness of this analysis's findings. See *supra* notes 40, 286, 288, and 290. However, since law schools have been roundly criticized for their failings with respect to empathy training, assuming there is an empathy decline among the Digital Generation for the sake of argument and taking ameliorative steps on that basis is likely to be beneficial regardless of the validity of Konrath and her colleagues' findings.

²⁹³ Konrath et al., *Dispositional Empathy*, *supra* note 14, at 187 ("Our data cannot directly speak to the causes of the observed decline in empathy over time."); see also Konrath, *Empathy Paradox*, *supra* note 17, at 220 ("Until more research is conducted, we can perhaps be content to complain about the youth, because we now have such cold hard facts to support our pre-existing beliefs about them. But we will have to take pause when it comes to blaming 'these newfangled contraptions' for 'kids these days' without further evidence.").

²⁹⁴ See ANDREW PERRIN, PEW RESEARCH CTR., SOCIAL MEDIA USAGE: 2005–2015 (Oct. 8, 2015), available at <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/>; see also Konrath et al., *Dispositional Empathy*, *supra* note 14, at 188 (citing Lance Whitney, *Twitter, Facebook Use up 82 Percent*, CNET (Feb. 22, 2010, 9:17 AM) <https://www.cnet.com/news/twitter-facebook-use-up-82-percent/>).

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with rampant technology revolving around personal needs and self-expression.²⁹⁵

Along these same lines, there is evidence that mobile phone usage can cause declines in empathy.²⁹⁶ Konrath also believes ICT usage has implications for adult attachment styles. Similar to infant attachment styles,²⁹⁷ adult attachment styles “involve people’s tendencies to form or avoid interpersonal bonds.”²⁹⁸ They “refer to the motivational systems underlying

²⁹⁵ Konrath et al., *Dispositional Empathy*, *supra* note 14, at 189 (emphasis in original). The authors suggest that the content of modern media might also have a negative impact on empathy, insofar as it features non-empathic characters (e.g., aggressive, competitive, and narcissistic reality television stars) and constant depictions of violence and suffering, to the extent that viewers may become desensitized. *Id.* at 188–89. The authors also point to various societal trends that may be related to (and may contribute to) this empathy decline over time. *See id.* at 187–89. For example, the Digital Generation appear to be an especially self-focused generation—“one of the most self-concerned, competitive, confident, and individualistic cohorts in recent history,” according to critics. *Id.* at 187. The Digital Generation report being very interested in getting rich and little interested in giving to charity (even when controlling for economic hardship). *See id.* at 187–88 (citations omitted). Bullying in schools is on the rise, particularly bullying by females. *Id.* at 189 (citing Christian Berger & Phillip C. Rodkin, *Male and Female Victims of Male Bullies: Social Status Differences by Gender and Informant Source*, 61 *SEX ROLES* 72 (2009)). Family sizes have been shrinking, from an average of 2.44 children in 1965 to an average of 1.86 in 2015, U.S. BUREAU OF THE CENSUS, FM-3: AVERAGE NUMBER OF OWN CHILDREN UNDER 18 PER FAMILY BY TYPE OF FAMILY: 1955 TO PRESENT (2015), available at <https://www.census.gov/hhes/families/data/families.html>, which may mean “that children are less likely to learn important empathy-related skills in early home environments” through interactions with siblings. Konrath et al., *Dispositional Empathy*, *supra* note 14, at 189. The authors also note an increase in narcissism among American college students over time, which is relevant because narcissism is negatively correlated with empathy. *See id.* at 183, 187. However, this finding concerning increasing narcissism is disputed, with some researchers finding no significant increase. *See* Twenge et al., *supra* note 286, at 876; Jean M. Twenge et al., *Further Evidence of an Increase in Narcissism Among College Students*, 76 *J. PERSONALITY* 919, 920 (2008). *But see* Jeffrey J. Arnett, *The Evidence for Generation We and Against Generation Me*, 1 *EMERGING ADULTHOOD* 5, 6 (2013); M. Brent Donnellan et al., *An Emerging Epidemic of Narcissism or Much Ado About Nothing?*, 43 *J. RES. PERSONALITY* 498, 500 (2009); Trzesniewski et al., *supra* note 286, at 904–05; Kali H. Trzesniewski & M. Brent Donnellan, *Rethinking “Generation Me”*: A Study of Cohort Effects from 1976–2006, 5 *PERSPECTIVES ON PSYCHOL. SCI.* 58 (2010).

²⁹⁶ Konrath, *Kinder*, *supra* note 78, at 417 (citing studies).

²⁹⁷ *See supra* text accompanying notes 102–03.

²⁹⁸ Sara H. Konrath et al., *Changes in Adult Attachment Styles in American College Students Over Time: A Meta-Analysis*, 18 *PERSONALITY & SOC. PSYCHOL. REV.* 326, 327 (Apr. 12, 2014), available at <http://psr.sagepub.com/content/early/2014/04/08/1088868314530516.abstract> [hereinafter Konrath et al., *Attachment Styles*].

social relationships that explain differences in how people connect with and relate to others.”²⁹⁹ There are four adult attachment styles: secure, dismissing, preoccupied, and fearful.³⁰⁰ Adult attachment is typically measured using a self-report questionnaire.³⁰¹ One of the most widely used questionnaires is the Relationship Questionnaire (RQ), which contains statements corresponding to the four adult attachment styles and asks respondents to choose which statement best applies to them.³⁰² Konrath’s team conducted a cross-temporal, meta-analysis of the responses that 25,242 American college students gave in ninety-four samples of the RQ administered between 1988 and 2011.³⁰³ The authors found a significant decrease in the proportion of American college students with secure attachment styles over time, and an increase in insecure

²⁹⁹ *Id.* at 327.

³⁰⁰ *Id.* “*Secure attachment* characterizes people who are comfortable with intimacy and autonomy.” *Id.* (emphasis in original). People with secure attachment styles hold positive views of both themselves and others. *Id.* They tend to trust others and to place importance on their ongoing relationships; they generally have rather stable social and emotional lives and tend to report greater satisfaction with the quality of their social relationships overall. *Id.* at 328. They are the most likely of all attachment styles to display prosocial behaviors towards others, like compassion and helping. *Id.* Finally, they “have high self-esteem, high self-acceptance, high self-confidence, and low subjective distress.” *Id.* “*Dismissing attachment* characterizes people who are self-reliant and value autonomy to an extreme degree, often at the expense of intimacy with others. This can result in interpersonal ‘coldness.’” *Id.* at 327 (emphasis in original). People with dismissing attachment styles hold positive views of themselves, but negative views of others. *Id.* They are more likely to be comfortable without close relationships than other styles are. *See id.* at 328. “Dismissing attachment is negatively related to sociability, empathy, socialization, communality, and tolerance.” *Id.* (citation omitted). People with dismissing attachment styles tend to score lower on measures of empathy than do those with other styles. *Id.* at 330. “*Preoccupied* people typically have low self-worth and are anxious in close relationships.” *Id.* at 2 (emphasis in original). People with a preoccupied attachment style hold negative views of themselves and positive views of others. *Id.* They “strongly desire to be emotionally close to others, but they are easily upset and worried if closeness in relationships is not reciprocated.” *Id.* at 329. “*Fearful attachment* characterizes people who desire intimacy but have a general distrust for others, thereby avoiding involvement in relationships that may lead to rejection.” *Id.* at 327 (emphasis in original). People with fearful attachment styles hold negative views of both themselves and others. *Id.* They are low in self-confidence, assertiveness, agency, sociability, and warmth; high in passivity; and highly sensitive to rejection. *Id.* at 329. “Fearful attachment is negatively related to sociability, empathy, socialization, communality, independence, self-control, and tolerance.” *Id.* (citation omitted).

³⁰¹ *Id.* at 327.

³⁰² *See id.*

³⁰³ *See* Konrath et al., *Attachment Styles*, *supra* note 298, at 329, 333. The sample was 34.12% male and 72.7% white, with a mean age of 20.17. *Id.* at 333.

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attachment styles (dismissing, preoccupied, and fearful).³⁰⁴ In particular, the proportion of dismissing students increased by 56.12% between 1988 and 2011.³⁰⁵ The data indicated a significant decline in the proportion of college students who held positive views of others over the study period, but no significant changes in the proportion who held positive views of themselves.³⁰⁶ The decline in positive views of others seems to have driven college students' reporting of less secure and more insecure attachment styles over time.³⁰⁷ As Konrath and colleagues describe their findings, "compared with college students in the late 1980s, a larger proportion of students today agree that they are 'comfortable without close emotional relationships.'"³⁰⁸ Though these data are only correlational, the authors suggest that the rise of ICTs may have played a role in the changing attachment styles.³⁰⁹ The authors speculate that

³⁰⁴ *Id.* at 333. The data indicated a 15.08% decrease in secure attachment between 1988 and 2011 and a 14.44% increase in insecure attachment styles during the same period. *Id.* Of the insecure attachment styles, dismissing and fearful styles—both of which involve a negative view of others—rose over time, while the preoccupied style—which involves a positive view of others—decreased somewhat. *Id.* (reporting a 17.65% increase in fearful style and a 19.25% decrease in preoccupied style).

³⁰⁵ *Id.* at 334 (reporting 11.93% of students with a dismissing style in 1988 and 18.62% in 2011). However, it is not possible to conclude from this study whether the increase in dismissing attachment styles is a function of the age group responding to the RQ or of increasingly negative views of others among all Americans over the study's time period. *Id.* at 339. The study's authors also examined data from the General Social Survey, which asked nationally representative groups of Americans across different age groups a question about whether other people can generally be trusted, and found a decline in trust among all age groups between 1988 and 2012 (other than those ages fifty-six and higher). *Id.* While this finding suggests that the change in adult attachment styles may be "a combination of a time-period effect (i.e., general changes in society that affect most age groups) and a generational effect (i.e., changes that influence certain generations more than others)," more research would be need to be done on these issues. *Id.*

³⁰⁶ *Id.* at 334. In 1988, 31.71% of American college students held positive views of others according to the RQ measures, while only 10.48% did so in 2011—a 66.96% decrease. *Id.* However, 21.82% held positive views of themselves in 1988 according to the RQ, and a very similar 20.47% reported doing so in 2011—a 6.19% decline. *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 12.

³⁰⁹ See Konrath et al., *Attachment Styles*, *supra* note 298, at 338–39. However, Konrath and her colleagues caution it is likely that many causal factors are involved in the changing attachment styles; the authors do not make any causal claims regarding these social indicators. *Id.* at 338. They also speculate that, because early parent-child relationships strongly influence adult attachment styles, changes within families between the 1960s and early 1990s may also have played a role in the increase in dismissing attachment. *Id.* at 337–38. For example, more recent college students may have been raised by parents who focused more on bolstering their self-esteem than on teaching them to care for others, which might have resulted in more dismissing views of others. *Id.* at 338. Alternatively, the fact that more mothers participated in the labor force in the early 1990s

the more time and energy people have invested in their online identities, the less time they have spent interacting with people in real life.³¹⁰ Moreover, correlational studies of social media use and narcissism “suggest that the media designed to connect individuals that began to emerge in the late 1990s may have had the paradoxical effect of making people more self-oriented”³¹¹ This decline in secure attachment parallels the decline in empathy that Konrath and colleagues found over roughly the same time period,³¹² which is perhaps not surprising, given the links between attachment and empathy.³¹³

ICTs may be impacting the Digital Generation’s empathy and attachment style by disrupting development of their interpersonal skills, potentially even from the time when they are young children—a crucial time for empathy development.³¹⁴ Research indicates that face-to-face interaction is important for learning.³¹⁵ Social connection and interaction are especially important for early learning in babies and children.³¹⁶ Watching where grown-ups gaze helps children to learn what is important in their environment and what they should pay attention to.³¹⁷ Children absorb more information by looking at another person face-to-face than by looking at a person on a television screen.³¹⁸ Chronic exposure to television, videos, and the Internet may prevent children from developing all of their senses in a balanced way, as these media provide more stimulation of sight and sound than of other senses.³¹⁹

(when the most recent generation of college students studied were born) than in the mid 1960s (when the first generation was born) could have resulted in parents’ having less quality time with their children. *Id.* Increases in divorce and in single-parent families over that time period may also have contributed to the more recent generations’ decreased comfort with intimacy and desire to connect with others and increased sense of independence. *Id.* Straining circumstances from economic challenges and different military conflicts may also have affected the more recent generations’ development and their attachment styles. *Id.* at 339.

³¹⁰ *Id.* at 338.

³¹¹ *Id.* at 339. However, more research must be done before drawing any firm conclusions about the positive and negative outcomes of ICT use. *Id.*

³¹² Konrath, *Empathy Paradox*, *supra* note 17, at 212.

³¹³ See *supra* text accompanying notes 101–9.

³¹⁴ See *supra* notes 79–90 and accompanying text.

³¹⁵ HORSTMAN, *supra* note 257, at 64.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.* This chronic exposure puts these children at a higher risk of developing ADHD. *Id.* The Digital Generation take in a great deal of information and demand “near-instant communication”; this type of mental processing is similar to ADHD, and some have attributed the rise in ADHD to the pervasiveness of ICTs. *Id.* at 59.

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We traditionally develop our capacity to understand others' emotional experiences and learn and practice our empathic skills during childhood and adolescence.³²⁰ Face-to-face communication exposes us to visual (facial expressions, eye contact, and posture), auditory (words, tone, and speed of talking), tactile (distance between us and touch), and chemical (pheromones and olfactory clues) signals from our conversation partners, and it is likely that practicing regularly in this multisensory environment can help to improve our empathy skills.³²¹ We may need a combination of these signals to motivate us to be kind to each other and to elicit compassion.³²² Communication via ICTs leaves out a lot of these signals—even videoconferencing via Skype allows users to look *at*, but not directly *into*, each other's eyes.³²³ For this reason, spending lots of time interacting with ICTs, especially social media, has likely hindered the Digital Generation's development of the brain circuitry necessary to achieve these developmental milestones.³²⁴

Moreover, even though ICTs “can help to lubricate existing social relationships by keeping people in touch via regular check-ins,”³²⁵ they can also help the Digital Generation to avoid face-to-face communication: “Mobile phones are often used to strategically block out in person social interactions. During unwanted or awkward face-to-face conversations, people use them to psychologically escape, and they can also be used to avoid such interactions in the first place, by screening or blocking calls.”³²⁶ Not surprisingly, face-to-face social interactions have been declining over the last several decades.³²⁷

In the guise of helping the Digital Generation to connect with others and increase their network of friends, social media may actually be contributing to increased isolation. Konrath calls this “the empathy paradox—that as we are becoming more interdependent in a *global* sense we are becoming less interdependent within our individual lives.”³²⁸ Young people

³²⁰ SMALL & VORGAN, *supra* note 10, at 30; *see supra* text accompanying notes 79–90.

³²¹ Konrath, *Empathy Paradox*, *supra* note 17, at 215.

³²² *Id.*

³²³ *Id.*

³²⁴ *See* SMALL & VORGAN, *supra* note 10, at 30.

³²⁵ Konrath, *Kinder*, *supra* note 78, at 412; *see also* Chris Lam, *The Efficacy of Text Messaging to Improve Social Connectedness and Team Attitude in Student Technical Communication Projects: An Experimental Study*, 27 J. BUS. & TECH. COMM. 180, 184 (“SMS [text messages] can be used to foster and maintain relationships between people who are already close with each other, as well as between acquaintances who do not know each other well.”).

³²⁶ Konrath, *Kinder*, *supra* note 78, at 412.

³²⁷ *Id.* at 417 (citing studies).

³²⁸ Konrath, *Empathy Paradox*, *supra* note 17, at 213 (emphasis in original).

have reported having diminished capacities to care about, and connect with, other people in recent decades.³²⁹ If friends displease the Digital Generation on social media, they can “unfriend” or “unfollow” those friends, effectively writing the friends out of their social media existence. After a bad date with someone they meet on Tinder or Bumble,³³⁰ they can block the bad date’s messages and even create a new dating profile, becoming a different person to make it hard for the bad date to find them. The Digital Generation may see pictures and posts of a thousand friends on Facebook, but they may spend their weekends at home, alone, in front of a screen. The Digital Generation’s social media presence creates the illusion of a bustling social life, while they spend little time actually interacting with other people. Rather than deep friendships, social media “capitalize on weaker bonds, or what one sociologist famously called ‘the strength of weak ties.’”³³¹ Thus, the rise of social media may be contributing to the Digital Generation’s retreat from meaningful interpersonal relationships.³³²

Unsurprisingly,

[a] subsequent reduction in empathy is consistent with these trends [toward social isolation], as younger people more frequently remove themselves from deep interpersonal social situations and become immersed in isolated online environments. These physically distant online environments could functionally create a buffer between individuals, which makes it easier to ignore others’ pain or even at times to inflict pain on others.³³³

³²⁹ Konrath, *Kinder*, *supra* note 78, at 417 (citing studies).

³³⁰ See BUMBLE, <https://bumble.com/> (last visited July 28, 2018); see also “Tinder,” *iTunes App Store*, iTUNES (search performed July 31, 2017).

³³¹ Konrath, *Empathy Paradox*, *supra* note 17, at 217 (citation omitted). Though these social media connections may be more numerous than deep friendships, deep relationships likely do more for psychosocial well-being. See Patti M. Valkenburg et al., *Friend Networking Sites and Their Relationship to Adolescents’ Well-Being and Social Self-Esteem*, 9 CYBERPSYCHOL. & BEHAV. 584, 589 (2006) (“Research on adolescent friendships suggests that the quality of friendships and romantic relationships may be a stronger predictor of social adjustment than the sheer number of such relationships.” (footnote omitted)).

³³² See Konrath, *Kinder*, *supra* note 78, at 417 (“American college students are now more likely to report insecure attachment styles, saying, for example, that they are comfortable without close relationships.” (citation omitted)).

³³³ Konrath et al., *Dispositional Empathy*, *supra* note 14, at 183 (citation omitted). A famous fictional example of the power of a buffer comes from *Sex and the City*, a popular television show that aired on HBO from 1998 to 2004. *Sex and the City* (HBO 1998–2004). In one episode, the main character Carrie Bradshaw’s boyfriend breaks up with her via a Post-It note that reads “I’m sorry / I can’t / Don’t hate me—.” Carrie and her friends are

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Social media also allow Digital Generation users to be “virtually anonymous,” which “can loosen people’s sense of what is appropriate and responsible conduct, and cause them to behave in ways that they normally would not.”³³⁴ Being anonymous can create a state of disinhibition that—together with physical distance—makes it easier to ignore the feelings of the person they are interacting with.³³⁵ Konrath and colleagues write, “When comparing anonymous to named online interactions, I am almost certain that the ones that involve people’s real names would be more civil and other-oriented than anonymous ones.”³³⁶

In addition, social media may tend to reduce empathy by giving users too much information, as well as by permitting them to tailor the information they receive. Konrath argues that social media increase the possibility of becoming overwhelmed by all the information the users receive, including information about the suffering of the world, which may dull their empathic abilities.³³⁷ If the Digital Generation constantly come across sad or depressing material, they may become inured to it and “tune it out.” They are better able to tune out information they do not want to see because social media are highly customizable. The algorithms that search engines and social network sites use filter users’ results so they are more likely to receive information that suits their interests.³³⁸ The same is true all across the Internet thanks to algorithms that track users’ online habits and then curate what they see online, creating an “echo chamber phenomenon . . . ; we make our preferences known and then have them fed back to us, affirming our choices.”³³⁹ While this is convenient because it increases personalization, “it is possible that this is simply creating an entire universe of the self. It would not be surprising if this ‘web of one’

scandalized, as much by the fact that he broke up with her as by the fact that he did so via Post-It. “A Post-It? That’s infuriating,” Carrie’s friend Charlotte exclaims. “I remember when breaking up over the phone was considered bad form,” Carrie responds. *Sex and the City: The Post-It Always Sticks Twice* (HBO 2003–2004). These days, the fact that Carrie received an actual break-up message, as opposed to rejection by silence (or “ghosting”), would be almost commendable. See Andrea Wesley, *Sex and the City Would Be a Different Show in the Tinder Era*, BOLDE, <http://www.bolde.com/sex-and-the-city-would-be-a-different-show-in-the-tinder-era/> (last visited June 27, 2017) (commenting that, in today’s day and age, Carrie’s boyfriend “would have just ignored Carrie’s texts ever again as a means of breaking up with her like our modern day ghosters”).

³³⁴ Konrath, *Empathy Paradox*, *supra* note 17, at 215.

³³⁵ *Id.* at 215–16.

³³⁶ *Id.* at 216.

³³⁷ *Id.*; *c.f. supra* notes 166–67 and accompanying text.

³³⁸ Konrath, *Empathy Paradox*, *supra* note 17, at 216.

³³⁹ Shayna Hodkin, *The Internet of Me: Creating a Personalized Web Experience*, WIRED, <https://www.wired.com/insights/2014/11/the-internet-of-me/> (last visited July 9, 2018).

created even more self-centeredness in future years as the personalizing technology becomes more widely adopted and sophisticated.”³⁴⁰ Such self-centeredness is the opposite of the other-oriented experience of empathy.

Finally, ICTs take up time, which leaves the Digital Generation with less available time and energy for others.³⁴¹

Time is a limited resource, and time online is almost always time not being spent in person (or very low quality time, if it is in person). Whether or not the [I]nternet in itself is detrimental to our abilities to socially connect, anything that takes us away from the social world is likely to make such skills rusty, at best.³⁴²

If developing and maintaining empathic skills requires sustained and repeated interpersonal interaction and practice, then ICTs, which can separate the Digital Generation from meaningful interpersonal interactions, may serve to decrease these skills.³⁴³

Speculative though this empathy decline in the Digital Generation may be, this is a distressing prospect. As Part III lays out,³⁴⁴ empathy is a core competency for legal professionals. Today’s Digital Generation college students are tomorrow’s legal professionals. Thus, a trend of declining empathy among college students is a worrisome trend for the legal profession—a profession that is already much castigated for its lack of empathy.³⁴⁵ If ICTs are even partly to blame for this decline, this is a situation that law schools must address.

³⁴⁰ Konrath, *Empathy Paradox*, *supra* note 17, at 216.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ It is possible that the opposite is true, and that social media may serve some empathy-enhancing purpose. For instance, social media provides an outlet for displays of empathy. Franklin M. Collins, *The Relationship Between Social Media and Empathy* 12–13 (2014) (unpublished M.S. thesis, Georgia Southern University) (on file with author). Collins writes, “[T]hrough conversations with others on Facebook, social support is received from other Facebook users by reaching out to each other to comfort, provide emotional support and display empathy.” *Id.* at 13. Further, social media may also permit users to practice their textual communication skills—i.e., it is possible that through repeated textual exchanges on social media, users may become more adept at communicating via text, and as a result they may in time display greater empathy in their textual communication. *Id.* at 18. However, Collins acknowledges the current lack of research examining potential connections between the empathic behaviors of social media users and their social media usage itself. *Id.* at 13.

³⁴⁴ *See supra* Part IV.B.

³⁴⁵ *See infra* notes 354–69 and accompanying text.

VI. SUGGESTIONS FOR INCREASING EMPATHY

D. *Generally*

For some people, experiencing empathy is fairly effortless; for others, it is a skill that must be learned and a habit that must be practiced.³⁴⁶ Though the bulk of empathy development occurs during childhood, adults can also increase their dispositional empathy.³⁴⁷ Psychologists Paul Anderson and Sara Konrath compare “[t]he ability to empathize . . . [to] a muscle capable of growth, atrophy, disability, and even regeneration (think Scrooge). People have different innate capacities for building certain muscles, just as we have different incentives for being empathetic and experiences in honing our skills to empathize.”³⁴⁸

Specific programs and training methods have proven effective in increasing people’s empathy. First, success has come from “[s]ocio-emotional intervention programs,” which have achieved increases in adult empathy “when similarity between the self and others is emphasized, after role-playing another person’s feelings or situation, after observing others’ misfortunes, and after exposure to highly empathic role models.”³⁴⁹ Second, research at Massachusetts General Hospital suggests that mindfulness meditation training can yield increases in affective components of empathy: in one successful intervention at the hospital using mindfulness techniques, doctors were taught “to focus using deep, diaphragmatic breathing and to cultivate a certain detachment—to watch an interaction from the ceiling, as it were, rather than being lost in their own thoughts and feelings.”³⁵⁰ Being attuned to their own emotional state also put the doctors in a position to be attuned to the patients’ emotions—i.e., if a doctor sensed his or her own negative emotions during an interaction with a patient, he or she might suppose that the patient were also feeling negative emotions.³⁵¹ Third, if all else fails, faking empathy—“act[ing] in a caring way—looking people in the eye and paying attention to their expressions, even when you don’t particularly want to”—can start to trigger empathic responses.³⁵²

³⁴⁶ Anderson & Konrath, *supra* note 77.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ Konrath, *Kinder*, *supra* note 78, at 416 (citations omitted).

³⁵⁰ Goleman, *supra* note 46, at 7.

³⁵¹ *Id.*

³⁵² *Id.* at 7.

E. In Law School

The man drank his latte and leafed through the papers. He was a curious man, full of twitches and extra movements. It took me several minutes to realize that when he touched his hand to his hip pocket, which he did frequently, it was because he had some kind of buzzing device hidden away, and by touching it he could stop its buzzing. This man's attention was in many places at once

"Are you in a drug treatment program?" the man asked.

"No."

"Are you a registered sex offender?"

"No."

"Have you ever been convicted of a felony? Spent any time in jail?"

"No."

The man stuffed the papers back in the envelope.

"This is nothing," he said. "Where is your daughter now?"

"She wanted to go to school. Should I have kept her home?"

"No, that's good. You're being responsive to her needs.

That's important. Listen, this is not something you should be overly concerned with. I'll demand a summary judgment. I can't see why we won't get it. The child will be yours free and clear."

Denny bristled.

"By 'the child' you mean my daughter, Zoë?"

"Yes," the man said, sizing up Denny. "I mean your daughter, Zoë."³⁵³

Lawyers are not very popular.³⁵⁴ They often struggle to empathize, which impairs their client representations and contributes to their being disliked as a profession.³⁵⁵ This unpopularity may stem partly from the fact

³⁵³ GARTH STEIN, *THE ART OF RACING IN THE RAIN: A NOVEL 182–83* (2008).

³⁵⁴ Rosenberg, *Interpersonal Dynamics*, *supra* note 146, at 1226.

³⁵⁵ See Barkai & Fine, *supra* note 150, at 505, 509 ("Most people are probably less eager to see a lawyer than to see a doctor."); *see also* Brest, *supra* note 143, at 5 ("Although lawyers add great value to society, the esteem in which our profession is held—not only by the public, but by practitioners themselves—has declined greatly in recent years."); *see also* Gerdy, *supra* note 20, at 6–11 (describing studies that reveal widespread client dissatisfaction with lawyers, the legal profession, and the lawyer-client relationship); *see also* Rosenberg, *Interpersonal Dynamics*, *supra* note 146, at 1225–26 ("As a law professor, I spend most of my waking hours helping to turn good, likeable people into . . . disliked and unhappy lawyers."); *see also* Silver, *supra* note 209, at 1182 ("Deficits in interpersonal

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that people who enter the legal profession tend to think differently than the general population.³⁵⁶ For instance,

[p]re-law students, law students, and lawyers are uniformly less interested in people, in emotions, and interpersonal concerns. In fact, evidence suggests that humanistic, people-oriented individuals do not fare well, psychologically or academically, in law school or in the legal profession. Law students and lawyers overwhelmingly (male and female) display an orientation . . . toward rights and justice, logic, thinking, and rationality without regard to their personal values. They tend not to apply their personal values to problems nor do they usually consider interpersonal harmony or humanistic concerns in making decisions

Lawyer attributes documented only during law school or thereafter are the following: a great emphasis on logic, thinking, rationality, justice, fairness, rights, and rules; a low interest in people, emotional concerns, and interpersonal matters; a low level of altruism; sociability; authoritarianism; a great need for achievement; masculine traits such as competitiveness and aggression; and insecurity, defensiveness, anxiety, internal discomfort, and higher than normal levels of psychiatric distress.³⁵⁷

Comparing lawyers to the general population, lawyers “appear to be more competitive, aggressive, and achievement-oriented”³⁵⁸ “They tend to display a disproportionate preference for the personality dimensions of Introversion, Intuition, Thinking, and Judging [on the Myers-Briggs Type

intelligence adversely affect attorneys’ capacity to empathize with their clients, counsel them, and gain their trust.”)

³⁵⁶ See Susan J. Bell & Lawrence R. Richard, *Anatomy of a Lawyer: Personality and Long-Term Career Satisfaction*, in FULL DISCLOSURE: DO YOU REALLY WANT TO BE A LAWYER? 149, 152 (Susan J. Bell ed., 2d ed., ABA 1992); see also Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1403–10 (1997) [hereinafter Daicoff, *Know Thyself*]; see also Susan Daicoff, *Lawyer, Be Thyself: An Empirical Investigation of the Relationship Between the Ethic of Care, the Feeling Decisionmaking Preference, and Lawyer Wellbeing*, 16 VA. J. SOC. POLICY & L. 87, 112–20 (2008) [hereinafter Daicoff, *Be Thyself*]. Of course, any attempt to generalize about a population is bound to be inaccurate with respect to the population’s individual members.

³⁵⁷ Daicoff, *Know Thyself*, *supra* note 356, at 1405 (footnotes omitted).

³⁵⁸ *Id.* at 1408.

Indicator] more than the general population, and tend to be more homogenous in personality type than the general population.”³⁵⁹

Law school seems to amplify the disparity between lawyers and the general population. As students progress through law school, they tend to become more cynical, realistic, competitive, aggressive, and ambitious, while they also may become less altruistic and intellectual (“i.e., less philosophical and introspective”).³⁶⁰ Further,

³⁵⁹ *Id.* at 1409 (footnotes omitted). “The Myers-Briggs Type Indicator [MBTI] is an extensively-used personality test . . .” Daicoff, *Be Thyself*, *supra* note 356, at 112. It scores the taker on four personality continua. *Id.* The four continua measure “(1) how a person prefers to orient his or her life” (Extraversion/Introversion), “(2) how a person perceives or gathers data” (Sensing/Intuition), “(3) how a person makes decisions” (Thinking/Feeling), and “(4) how a person prefers to interact with the outer world” (Judging/Perceiving). Barbara J. Gilchrist, *The Myers-Brigg Type Indicator as a Tool for Clinical Legal Education*, 10 ST. LOUIS U. PUB. L. REV. 601, 605 (1991). Of all the continua, the most dramatic difference between lawyers and the general population is on the Thinking/Feeling continuum: In the general population, approximately 35% percent of females and 60% of males prefer Thinking to Feeling, while 66% of female lawyers and 81% of male lawyers prefer Thinking. Daicoff, *Be Thyself*, *supra* note 356, at 112–13. Despite the terminology, the Thinking/Feeling continuum does not refer to how “emotional” one is. *Id.* at 113.

Those who prefer to make decisions on the basis of Thinking prefer to come to closure in a logical, orderly manner. They can readily discern inaccuracies and are often critical. They can easily hurt others’ feelings without knowing it. They are excellent problem-solvers. They review the cause and effect of potential actions before deciding. Thinkers are often accused of being cold and somewhat calculating because their decisions do not reflect their own personal values. They focus on discovering truth, and they seek justice.

Those who prefer to make decisions on the basis of Feeling apply their own personal values to make choices. They seek harmony and, therefore, are sensitive to the effect of their decisions on others. They need, and are adept at giving, praise. They are interested in the person behind the idea or the job. They seek to do what is right for themselves and other people and are interested in mercy.

Bell & Richard, *supra* note 356, at 152.

³⁶⁰ Daicoff, *Know Thyself*, *supra* note 356, at 1405–06.

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[t]hose who come to law school with a “rights” orientation, somewhat similar to . . . [the Myers-Briggs] Thinking dimension, are either unchanged or graduate with this orientation further ingrained. Those who come to law school with an “ethic of care,” perhaps linked to . . . [the Myers-Briggs] Feeling dimension, appear to adopt a rights orientation by the end of the first year.³⁶¹

Law schools are frequently criticized for their failure to develop law students’ empathy.³⁶² As the Carnegie Foundation’s 2007 report on legal education observed, law schools train students to “think like a lawyer” very soon after they arrive at school, but they “give only casual attention to teaching students how to use legal thinking in the complexity of actual law practice,” and they “fail to complement the focus on skill in legal analyses with effective support for developing ethical and social skills.”³⁶³ Students are taught substantive law without the context of the impact those legal concepts have on “the lives and emotions of real people.”³⁶⁴ Critics argue that the legal curriculum emphasizes “logic and ‘critical thinking’ to the exclusion of the emotional and ‘human’ aspects of legal analysis”³⁶⁵ The traditional law school curriculum puts

³⁶¹ *Id.* at 1405–06 (footnote omitted).

³⁶² See, e.g., Fletcher & Weinstein, *supra* note 148, at 144 (“Legal education devotes insufficient attention to developing the attendant skills and mechanisms lawyers need to negotiate successfully the emotional demands of the profession.”); see also Hamilton, *supra* note 148, at 153 (“The required law school classroom curriculum . . . continues to emphasize cognitive-analytical skills with virtually no attention to relationship and communication skills”); see also Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What’s Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 596–97 (1994); see also Montgomery, *supra* note 146, at 336, 338–39; see also Rosenberg, *Interpersonal Dynamics*, *supra* note 146, at 1226; Williams et al., *supra* note 147, at 172 (“Research suggests that law students tend to have low empathy.” (footnote omitted)).

³⁶³ WILLIAM M. SULLIVAN ET AL., SUMMARY: EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW, SUMMARY 5, 6 (2007) [hereinafter *Carnegie Report*].

³⁶⁴ Gerdy, *supra* note 20, at 30.

³⁶⁵ *Id.* at 30. Yet Rosenberg explains why it is not wholly irrational for legal education to focus on analytical thinking instead of emotional skills:

Law schools have their own reasons for not focusing on teaching relationship skills. First of all, law schools were designed to train would-be lawyers in the skills peculiar to the practice of law—those skills that make lawyers different from everyone else

Since law schools were formed, and grew, to train would-be lawyers in the things that make

little focus on teaching students about the roles empathy and compassion play in legal practice or about interacting with clients.³⁶⁶ Gallacher contends that

[m]any law students . . . come to law school with a predisposition in favor of the prevalent pedagogical style to be found there. For those who do not, the empathetic response is systematically trained out of them in a first-year curriculum in which most, if not all, their doctrinal classes share the common attribute of changing the way students think, from intelligent laypeople to “lawyers.” And while the process of teaching students to “think like lawyers” defines law school, it is not without its costs. The disambiguation of life used by legal educators to compel students to “think like lawyers” drains the landscape of the color nuance presented by the cases the students study. Perhaps this brings some of the scene’s elements into sharper focus, but the process renders the entire picture monochromatic, flat, and sterile.³⁶⁷

Thus, critics claim that legal education not only fails to increase students’ empathy, but it actively decreases it.³⁶⁸

lawyering *different* from other professions, it makes sense that these schools would not have been designed to teach those skills and abilities which are (or, more accurately, ought to be) a fundamental part of *every* profession.

Rosenberg, *Interpersonal Dynamics*, *supra* note 146, at 1278–79 (footnotes omitted) (emphasis in original). Moreover, “thinking like a lawyer” is valuable: “No small part of attorneys’ ability to perform a multitude of intellectual tasks derives from their academic education. It is in large part for its success in training the mind as it does that American legal education has rightly been called ‘a remarkable success story.’” Jamison Wilcox, *Borrowing Experience: Using Reflective Lawyer Narratives in Teaching*, 50 J. LEGAL EDUC. 213, 215 (2000). The question remains whether legal education values “thinking like a lawyer” to an appropriate degree. See Rosenberg, *Interpersonal Dynamics*, *supra* note 146, at 1229 (“[M]ost lawyers and academics vastly overestimate the importance of reason and logic Real time, real life interactions implicate emotions, learned patterns of behavior, habituated perspectives and frames of reference, and other human, but not reasoned, responses.”).

³⁶⁶ Gerdy, *supra* note 20, at 4. See also Brest, *supra* note 143, at 5 (Legal education is “strikingly weak in teaching . . . foundational skills and knowledge that lawyers need as counselors, problem solvers, negotiators, and as architects of transactions and organizations . . .”).

³⁶⁷ Gallacher, *Thinking Like Nonlawyers*, *supra* note 138, at 116.

³⁶⁸ See Susan Daicoff, *Law as a Healing Profession: The “Comprehensive Law Movement”*, 6 PEPP. DISP. RESOL. L.J. 1, 6–7 (2005) (discussing changes in law students’

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Recognizing the value of empathy in legal practice, scholars have argued that law schools must seek to develop their students' empathy.³⁶⁹ Many authors have offered thoughtful suggestions for ways to increase empathy among law students. These suggestions can be broadly categorized as (1) refocusing the curriculum, (2) modeling and simulating empathic behavior, (3) introducing students to other perspectives, and (4) borrowing from medical schools. This Part B describes each of these suggestions.

1. REFOCUSING THE CURRICULUM

Many scholars advocate some nature of curricular reform to focus more on the "human aspects of lawyering," including "empathy, altruism, service, and understanding the emotions at play in the law."³⁷⁰ Two recent assessments of legal education, the Carnegie Report and the 2007 Best Practices Report by the Clinical Legal Education Association, propose

values occurring during law school related to de-emphasis of interpersonal and emotional concerns); Silver, *supra*, note 209, at 1181 ("The personality profile of the typical law student; the emphasis on rational, analytical discourse and the Socratic method in law school; the talents that are ratified and rewarded in practice: all contribute to the devaluation and denial of emotional processes and influences.") ("By the time one graduates from law school, empathic abilities may seldom be in evidence.").

³⁶⁹ E.g., Gallacher, *Thinking Like Nonlawyers*, *supra* note 138, at 140 ("[I]t is likely that there is no single solution to the conundrum of how to make lawyers more empathetic, and the best solution is to seek to permeate empathetic development before, during, and after law school."); Gerdy, *supra* note 20, at 31 (suggesting legal education would be more effective if it focused more on various interpersonal skills, including empathy). However, there are those who do not believe it is possible to teach empathy: "Many professional educators question whether skills like empathy and compassion can actually be taught, and critics argue that understanding clients and others and interacting with empathy and compassion elude teaching." *Id.* at 36 (footnote omitted); see also Brest, *supra* note 143, at 9 (expressing skepticism that practical lawyering skills can be effectively taught in law school unless they are regularly practiced); see also Philip M. Genty, *Clients Don't Take Sabbaticals: The Indispensable In-House Clinic and the Teaching of Empathy*, 7 CLINICAL L. REV. 273, 275 (2000) ("[E]mpathy skills can be taught only with actual clients and only in an in-house model in which we are working directly with the students and clients.").

³⁷⁰ Gerdy, *supra* note 20, at 31 (footnote omitted); e.g., Brest, *supra* note 143, at 8–9; Paula Franseze, *Empathetic Teaching and Empathetic Learning*, 21 LAW TEACHER 54, 54–55 (2014); Daicoff, *Be Thyself*, *supra* note 356, at 92; Gallacher, *Thinking Like Nonlawyers*, *supra* note 138, at 148–49; Emily J. Gould, *The Empathy Debate: The Role in Law, Mediation and the New Professionalism*, 36 VT. B.J. 23, 24 (2010); Menkel-Meadow, *supra* note 362, at 619–21; Montgomery, *supra* note 146, at 348–52; Martha C. Nussbaum, *Reply to Amnon Reichman*, 56 J. LEGAL EDUC. 320, 323–25 (2006); Rosenberg, *Interpersonal Dynamics*, *supra* note 146, at 1234–35; Silver, *supra* note 209, at 1197–98.

sweeping curricular changes to address these and other concerns.³⁷¹ The Carnegie Report recommends adopting an “integrated, three-part curriculum” that combines teaching traditional legal analysis along with practical lawyering skills and “exploration and assumption of the identity, values and dispositions consonant with the fundamental purposes of the legal profession.”³⁷² It cites approvingly examples such as Southwestern Law School, which revamped its first-year curriculum to decrease the doctrinal course load and add a lawyering course that teaches, among other things, advocacy and interviewing skills.³⁷³ The Best Practices Report recommends utilizing a variety of teaching methods while reducing use of the case method and Socratic dialogue.³⁷⁴ One recommended best practice is to use “context-based education throughout the curriculum,” including “how to resolve human problems and cultivate practical wisdom.”³⁷⁵

Others have proposed more targeted changes to the current law school curriculum. Gallacher advocates starting the process of instilling empathy in students even before law school begins with a pre-law summer school course.³⁷⁶ Such a course might involve giving students the facts of the case and asking what they think the law should be (to help them focus on the human factors that should affect the decision); examining texts exploring the nature of decisionmaking and how logical decisions can be made in an ethical, empathic context; having students study the facts and strategies used in extended litigations (e.g., the O.J. Simpson trial) and discussing why the strategies were or were not successful; or reading literature focused on provoking empathic responses.³⁷⁷ Gallacher suggests adapting this summer course for inclusion in the regular curriculum, as well as adding a required course during the first year that focuses on law practice’s empathic and ethical aspects.³⁷⁸

Other proposed curricular changes involve the first-year curriculum in

³⁷¹ See generally ROY STUCKEY ET AL., BEST PRACTICES IN LEGAL EDUCATION: A VISION AND A ROAD MAP 97–104 (2007), available at http://www.cleaweb.org/Resources/Documents/best_practices-full.pdf; Carnegie Report, *supra* note 363.

³⁷² Carnegie Report, *supra* note 363, at 8.

³⁷³ *Id.* at 11.

³⁷⁴ See STUCKEY ET AL., *supra* note 371, at 97–104.

³⁷⁵ *Id.* at 104.

³⁷⁶ See Gallacher, *Thinking Like Nonlawyers*, *supra* note 138, at 141.

³⁷⁷ See *id.* at 141–44 (providing examples of law courses currently being taught and describing how they could be adapted as pre-law courses that would stimulate students’ empathic responses).

³⁷⁸ See *id.* at 146–48.

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particular, in an attempt to set a tone for the rest of law school.³⁷⁹ In addition to the course at Southwestern Law School cited in the Carnegie Report,³⁸⁰ many other first-year courses focused on practical lawyering and interpersonal skills have been added to the curricula at law schools in the U.S. and other countries.³⁸¹ Introducing these courses early in legal education “paint[s] a broader (and arguably more humane) picture as to what it means to be, and practise [sic], as a lawyer. The rational, detached, argumentative conceptions of the adversarial lawyer can be situated alongside modes of legal practice where human narratives, relationships and emotions assume equal importance.”³⁸² Another opportunity for empathy building in the first-year curriculum is the legal research and writing course. Like others, Gallacher proposes empathy-enhancing changes to this course, including designing written assignments that contextualize legal analysis more realistically and trigger students’ empathic responses.³⁸³

Professors Jean Sternlight and Jennifer Robbennolt advocate approaching the issue of developing interpersonal skills in law students by introducing the science of psychology into the law school curriculum, whether through a course devoted to psychology and lawyering, or through integration into existing courses on other topics, ranging from law clinics to skills-based classes to professional responsibility courses and even to core doctrinal

³⁷⁹ It is important that these empathy-building courses be offered in the first year because, as Gallacher writes, “Although students often have access to courses that engage some or all of this material in the upper-class curriculum, the damage is, by then, likely done, and the students will likely have difficulty reintegrating a more empathetic approach to analysis into their newly created lawyer personas.” *Id.* at 147–48.

³⁸⁰ See *supra* text accompanying note 373.

³⁸¹ See, e.g., HARVARD LAW SCHOOL, <http://hls.harvard.edu/dept/jdadmissions/admission-hls/student-perspectives/> (last visited July 17, 2017); UNIVERSITY OF MISSOURI, <http://catalog.missouri.edu/schooloflaw/jurisdoctor/> (last visited July 17, 2017); UNIVERSITY OF THE PACIFIC MCGEORGE SCHOOL OF LAW, http://www.mcgeorge.edu/Students/Academics/JD_Degree/Curriculum_Overview.htm (last visited July 17, 2017). At Queensland University of Technology Law School in Brisbane, Australia, a pilot course called Lawyering and Dispute Resolution was added as a first-year elective, with the goal of helping students “develop an emergent sense of professional identity and focusing on non-adversarial lawyering practices” in order “for them to become happy, healthy and competent professionals . . .” Rachael M. Field & James Duffy, *Law Student Psychological Distress, ADR and Sweet-Minded, Sweet-Eyed Hope*, 23 AUSTRALASIAN DISP. RESOL. J. 195, 200 (2012).

³⁸² Field & Duffy, *supra* note 381, at 202.

³⁸³ Gallacher, *Thinking Like Nonlawyers*, *supra* note 138, at 110, 146–47 (“[L]egal writing training . . . holds the key to restoring empathy to its appropriate role as a crucial skill for all lawyers.”); see also, e.g., Gerdy, *supra* note 20, at 56–57.

courses.³⁸⁴ They note that “even recent calls for adding more practical skills training to law schools do not particularly emphasize that lawyers need good interpersonal and decision-making skills”³⁸⁵ To this end, Professor Joshua Rosenberg teaches a course in interpersonal dynamics. He argues that a course of this nature is valuable because “we simply cannot learn communication skills the same way we learn *information*. We need to learn them as we learn other *skills*, such as dancing or tennis—by practicing, getting feedback, and practicing some more.”³⁸⁶

Former dean of Stanford Law School Paul Brest agrees that legal learning could be greatly enhanced by incorporating other disciplines, including psychology, economics, statistics, decision theory, and risk analysis.³⁸⁷ Brest proposes a “complementary curriculum” comprising “a series of advanced courses that integrate the fundamental lawyering skills of counseling, problem solving, and negotiation with insights from other disciplines, including economics, psychology, and business.”³⁸⁸ This curriculum would rely heavily upon transactional case studies as a complement to the traditional case method.³⁸⁹ This type of call for curricular reform is not new. In 1968 Professor Andrew Watson advocated collaboration between law faculty and a faculty member from the behavioral science fields to inform law school classes with behavioral science material.³⁹⁰ Adopting an interdisciplinary curriculum along the lines of these suggestions would likely support law students’ empathy by placing greater emphasis on interpersonal relations than is found in the traditional law school curriculum.

2. MODELING AND SIMULATING EMPATHIC BEHAVIOR

The second broad category of suggestions focuses on developing empathy within the current curriculum through modeling and simulations, particularly in clinical education and in “skills” courses such as Alternative Dispute Resolution. Several authors have highlighted the importance of

³⁸⁴ See Sternlight & Robbennolt, *supra* note 140, at 375–84. For example, Sternlight incorporates psychology into her civil procedure courses by encouraging students to consider the optimal ways to interview clients and how best to counsel them about their procedural options as she teaches them about the psychology of procedural justice. *Id.* at 382 n.123.

³⁸⁵ *Id.* at 367.

³⁸⁶ Rosenberg, *Interpersonal Dynamics*, *supra* note 146, at 1233–34 (emphasis in original).

³⁸⁷ Brest, *supra* note 143, at 10–11.

³⁸⁸ *Id.* at 5.

³⁸⁹ *Id.* at 9–10.

³⁹⁰ Andrew S. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91, 153–54 (1968).

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providing students with empathic role models, whether these are practicing attorneys or clinical supervisors.³⁹¹ As Professor Kristin Gerdy writes, “Role models provide students with a powerful introduction to the behavior they will need and want to develop themselves.”³⁹² The topic of modeling empathic behavior is addressed at length in the clinical literature, with a variety of recommendations for how clinical supervisors can better support their students’ empathic development.³⁹³ Several scholars suggest that professors and clinical supervisors model empathic behaviors and then provide students the opportunity to practice and reflect on that behavior, with coaching, assessment, and feedback.³⁹⁴ Others have proposed having students observe experienced lawyers use empathic skills in a real client interview, mediation, or some other practice setting.³⁹⁵ Though observing empathy in others is not as effective as practicing empathic behaviors oneself, providing students with attorney or professor role models can still be a useful way to teach students what empathic interactions look like in legal practice.³⁹⁶ This suggestion recalls the old adage that more is caught than is taught. Much as children learn empathic behaviors from observing their parents, students can learn them from observing professional role models.³⁹⁷ The use of “exposure to highly empathetic role models” as a means to increase empathy has empirical support.³⁹⁸

A related suggestion is to give students opportunities to practice their empathy-related skills in role-play or simulation exercises, with coaching and

³⁹¹ See, e.g., Genty, *supra* note 369, at 275; Gerdy, *supra* note 20, at 58; Montgomery, *supra* note 146, at 340; STUCKEY ET AL., *supra* note 371, at 111.

³⁹² Gerdy, *supra* note 20, at 58.

³⁹³ See, e.g., Stephen Ellman, *Empathy and Approval*, 43 HASTINGS L.J. 991, 991 (1992) (“Clinical legal educators . . . have repeatedly endorsed the value of empathy.”); Fletcher & Weinstein, *supra* note 148, at 147–55 (asserting the clinical supervisor’s role properly includes educating students about the role of empathy in legal practice and offering a three-step supervision model clinicians can use to approach empathy and identification).

³⁹⁴ See Fletcher & Weinstein, *supra* note 148, at 152 (“[T]he supervisor should model these [empathic] behaviors with students and in situations in which students will observe the supervisor acting in [a] professional role with clients and others.”); Hamilton, *supra* note 148, at 161–62; Joshua D. Rosenberg, *Teaching Empathy in Law School*, 36 U.S.F. L. REV. 621, 637 (2002) (“Basically, teaching empathy, just as teaching any other behavioral skill, involves (1) having someone model and explain the behavior; (2) having the student practice the behavior; and (3) providing useful individual feedback.”).

³⁹⁵ See Hamilton, *supra* note 148, at 175–79 (providing examples of ways in which students could observe and reflect upon experienced practitioners’ listening skills).

³⁹⁶ Gerdy, *supra* note 20, at 58.

³⁹⁷ This is not to suggest that law students are childlike, but rather to acknowledge that being immersed in an empathic environment likely aids in learning empathic behavior.

³⁹⁸ Anderson & Konrath, *supra* note 77.

feedback.³⁹⁹ The Best Practices Report promotes simulation-based courses as a way for students “to learn how lawyers resolve human problems.”⁴⁰⁰ For example, Professor Neil Hamilton proposes a listening role-play exercise in which the listener is asked to summarize what another student has said and to assess the feelings the listener believed the other student experienced while speaking.⁴⁰¹ Professor Barbara Glesner Fines offers a role-play exercise for use in a professional responsibility course, “an especially appropriate classroom in which to address empathetic understanding of the client . . .”⁴⁰² The goal of Fines’s simulation, which features a bar exam applicant seeking an accommodation, is to “internalize the feelings and perspectives of a client.”⁴⁰³

While simulations and role-play exercises could be introduced into doctrinal classes to extend learning of black letter law, they also serve as the basis for “experiential” courses mandated by the American Bar Association (ABA).⁴⁰⁴ For example, courses in dispute resolution and client counseling are often largely built around role-play and simulation exercises, with coaching from the teaching faculty and other students along with class debriefing sessions.⁴⁰⁵ Many of the exercises used in these classes involve role-plays with “clients” to give students practice in client interviewing and counseling.⁴⁰⁶

³⁹⁹ See Barkai & Fine, *supra* note 150, at 518–28 (describing an empathy skills training program utilized at the University of Hawaii School of Law); see also Gerdy, *supra* note 20, at 60–61 (suggesting legal educators incorporate role-play exercises that allow students to serve as “attorneys” representing a “client” in a given scenario).

⁴⁰⁰ STUCKEY ET AL., *supra* note 371, at 111.

⁴⁰¹ Hamilton, *supra* note 148, at 171–72.

⁴⁰² Barbara Glesner Fines, *Teaching Empathy Through Simulation Exercises: A Guide and Sample Problem Set 3* (Nov. 19, 2008) (unpublished manuscript) (on file with author).

⁴⁰³ *Id.*

⁴⁰⁴ The ABA law school accreditation standards now require that each student complete at least six experiential learning credit hours in law clinics, field placements, or simulation courses. A.B.A. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 303(a)(3) (2016–17). For an explanation of what counts toward these experiential credit hours, see *id.*

⁴⁰⁵ Two popular repositories of role-play and simulation exercises are the Dispute Resolution Resource Center at the Northwestern University Kellogg School of Management and the Program on Negotiation at Harvard Law School. Many of the exercises are accompanied by teaching notes, including suggestions for how to conduct debriefing sessions. See *Negotiation Exercises*, DISPUTE RESOLUTION RESOURCE CENTER, <https://new.negotiationexercises.com/> (last visited Jul. 20, 2017); *Teaching Materials & Publications*, PROGRAM ON NEGOTIATION: HARVARD LAW SCHOOL, <https://www.pon.harvard.edu/store/> (last visited Jul. 20, 2017).

⁴⁰⁶ E.g., Robert Bordone & Jonathan Cohen, *DONS Negotiation*, PROGRAM ON NEGOTIATION: HARVARD LAW SCHOOL (2010), available at <https://www.pon.harvard.edu/shop/dons-negotiation/>; Bruce Patton & Sheila Heen, *Eazy’s*

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Though it is not possible to simulate accurately all of the pressures and intricacies of actual law practice,⁴⁰⁷ role-play exercises provide students with a chance to build and practice empathic skills in a supportive environment in which failure is a learning point, not a client-relations disaster. Like exposure to empathic role models, role-play exercises that introduce students to others' feelings or circumstances have been shown to increase empathy.⁴⁰⁸

3. INTRODUCING OTHER PERSPECTIVES

The third broad category of suggestions that have been made for increasing law students' empathy is exposing students to other people's perspectives, whether fictional or real. Several scholars have recommended incorporating literature and drama into the course materials as an exercise in perspective taking.⁴⁰⁹ Aside from being a welcome break from reading cases, reading about the feelings and perspectives of people involved in legal situations can help students understand the experience of being a client.⁴¹⁰ In this way, "literature promotes valuable types of empathy and compassion."⁴¹¹ Many schools have a course called Law and Literature, or something similar, and some of these courses—though not all—emphasize the type of perspective taking that is likely to lead to increases in empathy.⁴¹²

Another version of this suggestion involves stories, but this time real ones: Professor Emeritus Jamison Wilcox suggests assigning "lawyer stories"—"books written for the intelligent nonprofessional reader that recount and reflect upon stories of attorneys' work"—to supplement traditional course readings and to provide context and realism to the

Garage, PROGRAM ON NEGOTIATION: HARVARD LAW SCHOOL (2008), available at <https://www.pon.harvard.edu/shop/eazys-garage-four-party-lawyers-clients-version/>.

⁴⁰⁷ Simulations are also a less useful pedagogical tool if students do not take them seriously: "Lackadaisical preparation . . . makes the exercise a waste of time for . . . [students'] learning . . . Likewise, lackadaisical role playing . . . renders these simulations less effective." Fines, *supra* note 401, at 4. Even if students approach the exercises with the utmost seriousness, some critics fault them for their inescapable lack of realism. "[A] simulation does not allow students to feel the coercive power of the legal system and to understand their client's fear of, and responses to, that power. In order to learn the skills of empathy, our students need to be able to work with *actual* clients." Genty, *supra* note 369, at 283 (emphasis in original).

⁴⁰⁸ Anderson & Konrath, *supra* note 77.

⁴⁰⁹ See Gerdy, *supra* note 20, at 54; see also Martha C. Nussbaum, *Cultivating Humanity in Legal Education*, 70 U. CHI. L. REV. 265, 277–78 (2003).

⁴¹⁰ Gerdy, *supra* note 20, at 54.

⁴¹¹ Nussbaum, *Reply to Amnon Reichman*, *supra* note 370, at 325.

⁴¹² See *id.* Nussbaum notes, "There are many courses called 'Law and Literature' or something like that, and they are very heterogeneous." *Id.*

material.⁴¹³ Lawyer stories “show the human side of law practice little dealt with in traditional courses: how attorneys counsel clients, work with fellow attorneys, negotiate with others (both lawyers and nonlawyers), gain the cooperation of witnesses, and deal with judges, court clerks, and others.”⁴¹⁴ The corollary, “client stories”—stories from real clients (either students with actual prior experience being clients themselves or real-life clients willing to serve as guest speakers)—could also be presented so that students can gain perspective on what it is like to be a client.⁴¹⁵

Finally, empathy scholars have suggested that law schools encourage students to have real-life exposure to others’ experiences, such as sitting in court for a day and observing what the parties are going through—their fears, frustrations, confusion, anxiety, etc.—or volunteering at homeless shelters or battered women’s shelters so they gain insight into the lives of people who might someday be their clients.⁴¹⁶ This suggestion features in the Best Practices Report as well, which advocates exposing students to actual legal practice—for example, observing practicing lawyers or judges, touring a jail, interviewing a client about business contracts, or assisting a bar association project with interviews of unrepresented litigants—preferably in their first law school semester.⁴¹⁷ Of course, clinical work is another avenue whereby students can gain exposure to others’ experiences and perspectives, and the demands of their day-to-day lives.⁴¹⁸

Like the suggestions to provide law students with empathic role models and to utilize role-play exercises, the suggestion of exposing them to different perspectives is one with some degree of empirical support. Exposing students to others’ misfortunes has been shown to improve their ability to empathize.⁴¹⁹ It is easy to grow callous about the people involved in legal situations when reading about them in rather sterilized appellate cases. Exposing students to the reality of those people’s stories can keep students in touch with the emotional, human element of lawyering and, if nothing else, can provide practice in viewing a situation through the lens of someone else’s eyes. As Anderson and Konrath write, “Imaginatively taking on another person’s thoughts and identifying with their emotions are two habits at the core of empathy.”⁴²⁰ Introducing other people’s perspectives is a step toward creating these habits.

⁴¹³ Wilcox, *supra* note 365, at 213, 218.

⁴¹⁴ *Id.* at 235.

⁴¹⁵ Gerdy, *supra* note 20, at 59–60.

⁴¹⁶ *Id.* at 61.

⁴¹⁷ STUCKEY ET AL., *supra* note 371, at 111, 112.

⁴¹⁸ Genty, *supra* note 369, at 275; STUCKEY ET AL., *supra* note 371, at 112–13.

⁴¹⁹ Anderson & Konrath, *supra* note 77.

⁴²⁰ *Id.*

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4. BORROWING FROM MEDICAL SCHOOLS

The final suggestion draws from the literature and experiences of another professional school whose students are in many ways comparable to law students: medical school. Like the practice of law, the practice of medicine is significantly enhanced, both in terms of patient satisfaction and in terms of patient outcomes, when the practitioners are empathic.⁴²¹ And, like lawyers, doctors are frequently criticized for their lack of empathy.⁴²²

The parallels between law and medicine are easy to see. Both fields train their practitioners in intensely competitive graduate schools that attract high-achieving, competitive individuals.⁴²³ Both fields require their professionals “to understand and care about people,”⁴²⁴ and yet both also require those professionals to maintain a certain degree of detachment from

⁴²¹ See Jerry A. Colliver et al., *Reports of the Decline of Empathy During Medical Education Are Greatly Exaggerated: A Reexamination of the Research*, 85 ACAD. MED. 588, 588 (Apr. 2010) (“Empathy is arguably the most important psychosocial characteristic of a physician engaged in patient care.”); Jean Decety & Aikaterini Fotopoulou, *Why Empathy Has a Beneficial Impact on Others in Medicine: Unifying Theories*, 8 FRONTIERS IN BEHAV. NEUROSCI. 1, 2–3 (2015) (explaining the benefits of empathy in medicine).

⁴²² See Rebecca Garden, *The Problem of Empathy: Medicine and the Humanities*, 38 NEW LITERARY HIST. 551, 553 (2007).

⁴²³ See Colliver et al., *supra* note 420, at 588 (Some “criticize the ‘medical school selection process, arguing that the premedical treadmill gives precedence to science majors who have high grades and test scores, and who demonstrate personality characteristics such as detachment and competitiveness’ and argue that this process ‘undervalues qualitative or affective aspects of the applicants’ characters and accomplishments.” (quoting Jack Coulehan & Peter C. Williams, *Vanquishing Virtue: The Impact of Medical Education*, 76 ACAD. MED. 598, 599 (2001))).

⁴²⁴ Gerdy, *supra* note 20, at 4.

those they serve.⁴²⁵ And in both fields there are those who maintain that empathy is misplaced, that it interferes with necessary objectivity.⁴²⁶

Like law schools, medical schools are frequently criticized for contributing to declining empathy among their students.⁴²⁷ In response, medical schools have invested substantial energy in recent decades in improving their teaching of empathy and compassion.⁴²⁸ One significant teaching tool used in medical schools is standardized client cases—i.e., the medical students interview “patients” (trained actors) with standardized case histories and symptoms and discuss their care with them, and then the students receive feedback from their instructors on their interviewing skills, including

⁴²⁵ See Fletcher & Weinstein, *supra* note 148, at 145–50 (describing lawyers’ need to cultivate professional boundaries and to avoid excessive identification with their clients); Anna Smajdor et al., *The Limits of Empathy: Problems in Medical Education and Practice*, 37 J. MED. ETHICS 380, 381 (2011):

To replace clinical objectivity with empathy is counterproductive in medicine. A doctor who flinches as he makes an incision will be a worse surgeon—even if a better human being—than one who effectively dissociates himself from the feeling that he is cutting human flesh . . . Medical practice relies partly on doctors’ ability to distance themselves from the subjective world of the patient.

⁴²⁶ See, e.g., *supra* notes 226, 242–43 and accompanying text; Fletcher & Weinstein, *supra* note 148, at 142, 145–50; Garden, *supra* note 422, at 553 (“The persistent objection to empathy in medical culture derives from the now decades-old arguments in the literature voicing the concern that empathy interferes with scientific and medical objectivity.” (emphasis omitted)).

⁴²⁷ See Howard M. Spiro, *What Is Empathy and Can It Be Taught?*, in *EMPATHY AND THE PRACTICE OF MEDICINE: BEYOND PILLS AND THE SCALPEL* 10 (Howard M. Spiro et al. eds., 1993) (“Isolation, long hours of service, chronic lack of sleep, sadness at prolonged human tragedies, and depression at futile and often incomprehensible therapeutic maneuvers turn even the most empathic of our children from caring physicians into tired terminators.”); see also Mohammadreza Hojat et al., *An Empirical Study of Decline in Empathy in Medical School*, 38 MED. EDUC. 934, 939 (2004) (“[C]onditions such as transient social relationships, hurried and fragmented patient-care giver relationships, and avoidance of intimacy during medical training can have deleterious consequences on medical students’ and residents’ humanistic qualities.” (footnotes omitted)); see also John Spencer, *Decline in Empathy in Medical Education: How Can We Stop the Rot?*, 38 MED. EDUC. 916, 917 (2004) (discussing how the medical school learning environment contributes to a decline in empathy among medical students).

⁴²⁸ See Linda A. Deloney & C. James Graham, Wit: *Using Drama to Teach First-Year Medical Students About Empathy and Compassion*, 15 TEACHING & LEARNING IN MED. 247, 247 (2003).

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their empathic communication.⁴²⁹ Other interventions include journal writing assignments,⁴³⁰ training to recognize empathic moments,⁴³¹ and the study of literature.⁴³²

Recognizing the parallels between legal and medical education, some legal scholars suggest borrowing techniques from medical schools to develop students' empathy. For instance, Karen Barton and colleagues developed a pilot project at Scotland's Glasgow Graduate School of Law (GGSL) to use standardized clients in the same way that medical schools use standardized patients.⁴³³ The researchers had students interview a group of actors trained to give standardized responses about a legal matter and reviewers assessed the students' interviewing skills and communication with the client.⁴³⁴ The project was so successful that the GGSL decided to use the standardized client protocol in place of the mandatory interviewing examination it had previously used.⁴³⁵ The authors concluded that using standardized clients "may have [a] transformative effect in legal education in the United States and elsewhere."⁴³⁶

Gerdy, too, proposes empathy-building techniques adapted from medical education.⁴³⁷ Along with suggestions to incorporate drama and literature in the classroom and to make use of role modeling and role-plays,⁴³⁸ Gerdy proposes several teaching techniques utilized in medical schools that law schools could adopt. First, Gerdy describes the so-called "White Coat

⁴²⁹ See, e.g., Kayleen Papin & Joan Bedinghaus, A STRUCTURED MEDICAL INTERVIEWING COURSE: SEVEN STANDARDIZED PATIENT CASES (2008), available at http://www.mcw.edu/FileLibrary/User/facdev/medical_interviewing.pdf.

⁴³⁰ Lydialyle Gibson, *Mirrored Emotion*, 98 U. CHI. MAG. 4 (2006), <http://magazine.uchicago.edu/0604/features/emotion.shtml>; Garden, *supra* note 422, at 554. For a discussion of the use of journals to increase law student empathy, see *infra* text accompanying notes 458, 471.

⁴³¹ Gibson, *supra* note 430.

⁴³² Garden, *supra* note 422, at 554. For a discussion of the use of literature to increase law student empathy, see *infra* text accompanying notes 457–70.

⁴³³ See Karen Barton et al., *Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence*, 13 CLINICAL L. REV. 1 (2006). The GGSL project developed out of the Effective Lawyer-Client Communication (ELCC) project, an international, interdisciplinary effort to improve lawyer-client communication. See *id.* at 6. A number of law schools in the U.S. and elsewhere conducted pilot studies using standardized clients that assisted in the creation of the ELCC standardized client protocol. See *id.* at 9–12.

⁴³⁴ *Id.* at 19–22, 30–41.

⁴³⁵ *Id.* at 50. The interviewing examination comprised a "simulated interviewing exercise that is assessed according to detailed criteria based on review of the videotaped performance by" adjunct professors. *Id.* at 3.

⁴³⁶ *Id.* at 51.

⁴³⁷ See Gerdy, *supra* note 20, at 41–52.

⁴³⁸ See *supra* text accompanying notes 391–96, 399–401, 409–11.

Ceremony,” in which entering medical students are “presented with white coats to emphasize the human side of medicine and as a symbol of the importance of compassion and humility in medical practice.”⁴³⁹ Gerdy suggests a similar symbolic ceremony for law students, such as a “briefcase” ceremony, in which students are “encouraged to place items in their briefcases that symbolize their future clients, their dedication to humanity and service, and their acceptance of and dedication to the highest values of the profession.”⁴⁴⁰

Another pedagogical tool used by medical schools to increase empathy is reflection techniques, which include a variety of techniques for becoming aware of one’s own experiences and feelings, as well as the feelings and experiences of other people.⁴⁴¹ Reflection can be facilitated in small group discussions with faculty members, in which students reflect on their experiences in school and their feelings, or through “in-class exercise[s] that call[] on students to reflect on their personalities and their ability to relate to others.”⁴⁴² Reflective writing assignments, including “critical incident reports, personal narratives, and point of view writing,” may also build empathy.⁴⁴³ Critical incident reports are reflective journals in which the medical student “assess[es] her own interactions with patients and . . . reflect[s] upon her own effectiveness,” in the course of which “the student will likely identify both incidents where she acted with empathy and compassion and incidents where, in looking back on them, she wished she had been more caring or tried harder to understand the patient’s needs and desires.”⁴⁴⁴ Personal narratives are reflections upon a personal experience of the medical student, or of the student’s friend or close family member, often in the context of an experience with an illness.⁴⁴⁵ Personal narratives are useful in particular because they invite perspective taking—the perspective of a patient, not that of a doctor.⁴⁴⁶ Point-of-view writing is a more deliberate exercise in perspective taking: “These assignments require students to write from the patient’s emotional and social perspective about his or her illness and its consequences. These exercises require the student to make an empathetic shift in perspective and to reflect upon experiences from the perspective of another.”⁴⁴⁷

⁴³⁹ Gerdy, *supra* note 20, at 42 (footnote omitted).

⁴⁴⁰ *Id.* at 53.

⁴⁴¹ *Id.* at 44.

⁴⁴² *Id.* at 45.

⁴⁴³ *Id.*

⁴⁴⁴ Gerdy, *supra* note 20, at 46.

⁴⁴⁵ *Id.* at 46.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.* at 48 (internal quotations omitted) (footnotes omitted).

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Gerdy suggests incorporating reflection techniques into the legal curriculum, such as “ask[ing] students to list qualities of a good attorney,” then “describ[ing] what they think clients need, want, and feel when they come to see a lawyer,” and then comparing the two lists to see “if there is anything on the list of qualities that might help the lawyer address the feelings on the client’s list.”⁴⁴⁸ Additionally, Gerdy recommends in-class discussions that encourage law students to consider the needs, wants, and feelings of parties in the cases they read and to write reflectively on their own experiences, feelings, and learning.⁴⁴⁹ Given the many similarities between the legal and medical professions, Gerdy’s suggestions that legal educators look to their medical colleagues for inspiration are good ones.

VII. NEW SUGGESTIONS FOR THE DIGITAL GENERATION

Each of the suggestions presented in the Part VI has merit, and all could be adopted to further the goal of producing more empathic law school graduates. But none of those suggestions specifically targets the challenges posed by the Digital Generation’s ICT exposure. Without addressing the impact of ICTs on law students’ empathy, those solutions may not be sufficient to combat the Digital Generation’s purported empathy decline. With this in mind, this Part VII offers four empathy-building solutions that confront the challenges this new generation of law students faces.

A. *Raising Awareness of Technology’s Effects*

The first suggestion is a modest one. Its aim is to instill professionalism in first-year law students and to set expectations of client-centered legal practice, much like the call for first-year lawyering classes and Gerdy’s “briefcase ceremony.”⁴⁵⁰ It is simply this: law schools should expressly address with first-year students the concerns about empathy in the legal profession and about the role ICTs may be playing in declining empathy. This could take place via a talk during first-year orientation if it fits within the orientation’s programming—perhaps alongside the discussion of stress and student wellbeing that many schools include in their orientations.⁴⁵¹ It could

⁴⁴⁸ *Id.* at 56.

⁴⁴⁹ *Id.* at 56–57.

⁴⁵⁰ See *supra* text accompanying note 440.

⁴⁵¹ See, e.g., *Incoming Students: Orientation*, CAPITAL UNIVERSITY LAW SCHOOL, <http://law.capital.edu/JDorientation/> (last visited Jul. 31, 2017) (new student orientation schedule including a discussion of health and wellness in law school); *Maintaining Balance in Law School*, UC HASTINGS COLLEGE OF THE LAW (Aug. 15, 2013), available at <http://www.uchastings.edu/student-life/student->

also be incorporated into the first-year curriculum through required readings in a lawyering skills class or a legal research and writing course.⁴⁵² The discussion would also fit well in a professional responsibility course as part of a lesson about client relations.

This suggestion is modest because it requires little effort and investment on behalf of the schools, and because its effects, in isolation, probably will not be significant. Yet it is an important building block that sets the stage for the recommendations discussed below and affirms the school's commitment to producing high-empathy graduates. It fits alongside calls in the Carnegie Report, Best Practices Report, and elsewhere to incorporate in the legal education curriculum more of the "human" element of lawyering and to affirm early on in students' legal education the value of lawyering skills beyond analysis of cases.⁴⁵³ Raising students' awareness of ICTs' effects on empathy is a natural—and necessary—part of the broader discussion of professionalism and practical lawyering, just as educating them about appropriate social media usage and email etiquette now is.⁴⁵⁴

Moreover, explicitly acknowledging potential detriments of ICT usage is important because the Digital Generation's awareness of ICTs' negative effects is probably low: just as few students in the 1950s likely viewed ballpoint pens as their educational downfall,⁴⁵⁵ few Digital Generation students likely perceive ICTs as having a negative impact on their empathic skills.⁴⁵⁶ To paraphrase Alcoholics Anonymous, the first step is recognizing that there is a problem. Thus, if legal education is to counteract deleterious

services/Orientation/MaintainingBalancePresentationSlides.pdf (first-year student orientation presentation including tips for managing stress).

⁴⁵² A discussion of empathy and the role of ICTs certainly fits better within a lawyering and professionalism class, but in the absence of one, it could be part of the legal research and writing curriculum.

⁴⁵³ See *supra* notes 370–75 and accompanying text.

⁴⁵⁴ See, e.g., Luci Hague & Alex Winkelman, *Emailing Professionally*, THE WRITING CTR. AT GEORGETOWN UNIV. L. CTR. (2015), available at <https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/Hague-Winkelman-Emailing-Professionally.pdf>; *Social Media Etiquette @ Oklahoma City University School of Law*, OKLAHOMA CITY UNIVERSITY SCHOOL OF LAW, available at <http://law.okcu.edu/wp-content/uploads/2014/08/Social-Media-Guidelines.pdf>.

⁴⁵⁵ See ALLAN COLLINS & RICHARD HALVERSON, *RETHINKING EDUCATION IN THE AGE OF TECHNOLOGY: THE DIGITAL REVOLUTION AND SCHOOLING IN AMERICA* 31 (2009) (observing that, in 1950, ballpoint pens were decried as “the ruin of education in our country”).

⁴⁵⁶ See Newell, *supra* note 6, at 798 nn.336–37 (describing research suggesting the Digital Generation do not believe their ICT usage is problematic); see also COMMON SENSE MEDIA, *supra* note 271, at 17 (reporting most teens do not believe watching TV, using social media, or texting while doing homework affects their work).

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effects of ICT usage on law students' empathy, the first step is raising awareness of the problem.

B. *Journaling About Interpersonal Interactions and ICTs*

The second suggestion is an adaptation of the reflection techniques used in medical education.⁴⁵⁷ As Gerdy explains,

Reflection benefits the persons trying to increase their empathy and compassion because reflecting on their own lives and the lives of others allows the persons to “inspect the memories and associations triggered” by their own experience, and in so doing “they become all the more available and use [sic] to their patients [and clients.]” The simple awareness of one’s “own feelings and experiences deepens [her] capacity to respond empathically to patients . . .

⁴⁵⁸

The benefits of reflective journals—i.e., “an informal record including notes, essays, or narratives that is kept and added to daily or weekly . . . usually contemporaneous with the . . . experience”⁴⁵⁹—in legal education have been explored previously.⁴⁶⁰ These benefits include promoting metacognition,⁴⁶¹ enhancing self-directed learning,⁴⁶² strengthening problem-solving skills,⁴⁶³

⁴⁵⁷ See Gerdy, *supra* note 20, at 44–48; see also *supra* text accompanying notes 441–49.

⁴⁵⁸ Gerdy, *supra* note 20, at 44 (quoting Sayantani DasGupta & Rita Charon, *Personal Illness Narratives: Using Reflective Writing to Teach Empathy*, 79 ACAD. MED. 351, 351–52 (2004)).

⁴⁵⁹ Harriet N. Katz, *Personal Journals in Law School Externship Programs: Improving Pedagogy*, 1 T.M. COOLEY J. PRAC. & CLIN. L. 7, 8 (1997).

⁴⁶⁰ See generally Bobbi McAdoo, *Reflective Journal Assignments in Teaching Negotiation*, in ASSESSING OUR STUDENTS, ASSESSING OURSELVES 65 (Noam Ebner et al. eds., 2012); see also Katz, *supra* note 459; J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLINICAL L. REV. 55 (1996).

⁴⁶¹ McAdoo, *supra* note 460, at 66. As McAdoo explains, journals “bring the learning process to active consciousness, which enables learners to continue to practice and refine their skills and understandings well after a course is finished.” *Id.* (citation omitted).

⁴⁶² Ogilvy, *supra* note 460, at 69.

⁴⁶³ *Id.* at 73 (“Journals can be a place for learners to engage in active problem-solving by putting into concrete form an expression of the problem to be solved; by articulating sub-problems; by sorting through the often chaotic circumstances surrounding a problem to clarify issues and obstacles; by identifying emotional baggage that is interfering with a solution to the problem; and by brainstorming, analyzing, and evaluating solutions.”).

providing additional opportunities to practice writing,⁴⁶⁴ and stress relief,⁴⁶⁵ among others. They are a frequently-used pedagogical tool in a variety of disciplines,⁴⁶⁶ and, as discussed above, are being used in medical school to boost student empathy.⁴⁶⁷ In law schools, journal writing is a common assignment in dispute resolution courses and other “skills” courses,⁴⁶⁸ as well as in clinical education.⁴⁶⁹ As the ABA places greater emphasis on experiential learning,⁴⁷⁰ journals are likely to be even more commonplace in legal pedagogy.

The journal writing that is already occurring is certainly beneficial, and it supports empathic development.⁴⁷¹ But to address the specific impact that ICTs may be having on the Digital Generation’s empathy, rather than reflect generally upon their law school experience, the Digital Generation should be instructed to reflect upon the impact of ICTs on their feelings, experiences, and interactions with others. The first step could be an “awareness” journal—that is, a journal intended to make students aware of exactly how often they use their ICTs and when they do so.⁴⁷² For instance, in

⁴⁶⁴ McAdoo, *supra* note 460, at 67; Ogilvy, *supra* note 460, at 64. As Ogilvy writes,

Requiring students to write journals . . . can be a way to encourage students to interact with the materials under study in a deeper and more critical manner. Through writing about what and how they are studying, students can move from superficial comprehension to employing critical thinking skills in their engagement with the material.

Id.

⁴⁶⁵ Ogilvy, *supra* note 460, at 82–83.

⁴⁶⁶ McAdoo, *supra* note 460, at 65.

⁴⁶⁷ See *supra* note 430.

⁴⁶⁸ McAdoo, *supra* note 460, at 65.

⁴⁶⁹ Katz, *supra* note 459, at 8.

⁴⁷⁰ To count toward the six experiential learning credit hours required by the ABA, an experiential learning course must “provide opportunities for self-evaluation.” A.B.A. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 303(a)(3) (2016–17); see *supra* note 403.

⁴⁷¹ See Hamilton, *supra* note 148, at 162 (“[S]elf-reflection is critical to the development of empathy.” (footnote omitted)).

⁴⁷² A similar technique is used to produce more mindful eating behaviors. Dieters are encouraged to keep food diaries in which they record what they ate, when they ate it, and what the surrounding emotional and other circumstances were when they ate. Kendall Krause, *Keeping Food Diary Doubles Weight Loss*, ABC NEWS: HEALTH & FITNESS (Jul. 8, 2008), <http://abcnews.go.com/Health/Fitness/story?id=5327486>. The goal of this record is to make dieters aware not only of how many calories they are actually consuming, but also to recognize patterns of eating behavior. Kristin Kirkpatrick, *Food Diary: Why This*

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connection with a first-year lawyering class,⁴⁷³ students could be instructed to keep a record for one week (or even a day or two) of every time they check their phones (for the time or to read new emails, texts, or other messages), read a new message on the computer, send an email or a message, log onto the Internet, or place or accept a phone call. As much as possible, they should also record the surrounding circumstances: what they were doing (e.g., studying, standing in line, sitting in class, talking to a friend,⁴⁷⁴ etc.) and what emotions they were experiencing (e.g., boredom, loneliness, happiness, etc.). Given the number of messages the Digital Generation send and receive each day,⁴⁷⁵ they are unlikely to keep a perfect record,⁴⁷⁶ and they may very well quit before the assigned period of awareness has elapsed. Perfection is not necessary; the goal is simply to recognize how frequently they interact with their ICTs and under what circumstances.

The second step, which could occur the following week, is to have students review their awareness journals to detect patterns. For example, did they check their messages most frequently when they were bored and sitting in class or studying, or when they were happily conversing with friends? Was there a certain time of day or location or emotional state in which they were more likely to interact with their ICTs? Having found patterns, students could then write a brief reflection about them to deepen their understanding. For instance, writing “I check my phone a lot when I’m bored in class” is powerful: it identifies a cause and effect and gives the student the ability to substitute a different behavior if he chooses, such as reviewing his class outline when boredom strikes. Writing “I read text messages when I’m talking to my friends” is even more powerful: it identifies a behavioral pattern that could have adverse consequences for the student’s interpersonal relationships.⁴⁷⁷ She

Weight Loss Tactic Is So Effective, HUFFINGTON POST: THE BLOG (Nov. 11, 2010, 7:20 AM), http://www.huffingtonpost.com/kristin-kirkpatrick-ms-rd-ld/how-writing-everything-do_b_780535.html.

⁴⁷³ This suggestion could be implemented in connection with any class; it simply fits neatly with a course that aims to build awareness of professional behaviors. The reflections contemplated here need not be graded, though compliance will likely be better if they are.

⁴⁷⁴ Professor Sherry Turkle remarks, “My students tell me about an important new skill: it involves maintaining eye contact with someone while you text someone else” Turkle, *supra* note 10, at SR1. See also Hamilton, *supra* note 148, at 163–66 (describing a listening exercise in which students rate how frequently they take phone calls, look at their cell phones, or send text messages during conversations with others).

⁴⁷⁵ See *supra* text accompanying notes 267–68.

⁴⁷⁶ Instructors could facilitate the journaling process by creating a simple worksheet with spaces to record the time, circumstances, and emotions surrounding the ICT interaction. The worksheet could be more guided, offering suggested responses, or more free form, simply providing the format for students to record their responses.

⁴⁷⁷ As Turkle puts it, “[W]e have sacrificed conversation for mere connection” Turkle, *supra* note 10, at SR1.

can then make a conscious choice to put her phone in her bag, out of reach, when talking to her friends. The reflection paper could also include a type of action plan—i.e., the student could memorialize her choice to focus on her friends by writing “To improve my relationship with my friends, I will put my phone in my bag when talking to them.”⁴⁷⁸

To extend the reflection further, a third and fourth week could be spent asking students to record and then reflect on others’ use of ICTs during their interactions with the students. For example, students might notice that their friends frequently browse news sites while they converse, or that their professors respond to new emails during office hour appointments. As they did in week one, students should record the instance of ICT usage and the surrounding circumstances, and this time they should also record their emotional reaction (or lack thereof) to the other person’s ICT usage. Then, as they did in week two, students should review the record to identify patterns. Perhaps they do not mind if their friends scroll through reddit⁴⁷⁹ while they chat. Maybe it annoys them if their professor types a quick email during a conversation about the course material. The point is simply to identify the relationship between others’ ICT usage and their response to it.

Finally, during the fifth week students should write a reflection on what it might be like to be a client interacting with an attorney who uses ICTs in the ways the students observed over the last few weeks. For example, if a student notices she uses ICTs frequently while interacting with others, she could reflect on how her clients might feel if she checked her messages during a meeting with them. Or, if a student found himself feeling annoyed with his professor for answering an email during an appointment, the student could reflect on how he might feel devalued if he were a client whose attorney typed out an email during a consultation. This final step combines both affective components of empathy (recognizing and feeling others’ emotions) as well as cognitive components (taking the client’s perspective and understanding the client’s emotions) and ties them explicitly to ICT usage.

The benefits of this suggestion are that it is virtually free and requires very little training, while it can yield significant insights regarding patterns of ICT usage and the impact of that usage on others. A potential drawback is that it requires some degree of consistent effort to record the instances of ICT usage accurately, which means there is a substantial risk of non-compliance, even assuming the reflection would be submitted for a grade. Moreover, there is a

⁴⁷⁸ This suggestion could be incorporated into the worksheet discussed *supra*. See *supra* note 475. For example, the worksheet might say, “To improve my _____, I will _____.” The student would then fill in “relationship with my friends” and “put my phone in my bag.”

⁴⁷⁹ The website reddit bills itself as “the front page of the internet.” REDDIT, <https://www.reddit.com/>.

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chance that students will be on “good behavior” with their ICTs and will not experience any negative interpersonal interactions on account of ICT usage during the observation period, and will conclude that ICT usage presents no problem for them.⁴⁸⁰ But, much like we become attuned to how frequently we say “um” after someone points it out to us, students who are taught to observe ICTs’ impact on their lives will likely gain self-awareness from the experience.⁴⁸¹

C. *Learning How to Communicate Face-to-Face*

Lawyers communicate with their clients in all sorts of ways: face-to-face meetings, videoconferences, phone calls, emails, and even text messages.⁴⁸² It has been said that, because lawyers are being asked to be proficient in all these many forms of digital communication, law schools should be teaching students how to become so.⁴⁸³ Additionally, law professors’ experience with inappropriate communication from students⁴⁸⁴ has caused law schools to pay attention to this topic and offer students instruction about appropriate online communication.⁴⁸⁵

Law schools are entirely correct in concluding that part of today’s practical legal education must be teaching students how to interact professionally in the workplace. They are also correct that, for lawyers, this means learning how to interact professionally in all the various communication media. Clients demand that their lawyers communicate with

⁴⁸⁰ In the same way, there is a risk that dieters who are keeping food journals will have a perfectly healthy—but non-representative—week of eating while keeping the journal, which could lead them to believe (erroneously) that they have ideal eating behaviors.

⁴⁸¹ This clearly assumes that ICTs are having at least some negative impact on the Digital Generation’s interactions, which is perhaps a false assumption. That said, in light of the social science research discussed in Part V, I feel fairly comfortable making it.

⁴⁸² See James M. Cooper, *Towards a New Architecture: Creative Problem Solving and the Evolution of the Law*, 34 CAL. W.L. REV. 297, 304–05 (1997) (discussing the difference between lawyers who use electronic communication and those who do not).

⁴⁸³ See Richard Granat & Marc Lauritsen, *Teaching the Technology of Practice: The 10 Top Schools*, 40 LAW PRAC. MAG. (2014), https://www.americanbar.org/publications/law_practice_magazine/2014/july-august/teaching-the-technology-of-practice-the-10-top-schools.html.

⁴⁸⁴ See, e.g., Robin Effron, *Instilling a Sense of Professionalism in Our Students*, PRAWFSBLAWG (Feb. 11, 2010, 12:05 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2010/02/instilling-a-sense-of-professionalism-in-our-students.html>.

⁴⁸⁵ E.g., Hague & Winkelman, *supra* note 454.

them electronically;⁴⁸⁶ attorneys who are unwilling or unable to meet this demand are likely to find themselves with fewer clients than they otherwise would have.⁴⁸⁷ Failing to educate law students to interact with their future clients on those clients' terms is pedagogical malfeasance.

With that said, law schools must also be careful not to go too far in the other direction—i.e., they must not fail to teach students *how* to communicate verbally (whether face-to-face, over the phone, or via videochat) and *when* to opt for a low-tech, high context mode of communication over a high-tech, low context one. Put more directly, law schools must help their students develop good judgment about the most effective means of communication. There are times when written communication is efficient, both in the sense that it is cost-effective and in the sense that it effectively communicates all the relevant information (in both directions) and sufficiently promotes or maintains the lawyer's working relationship with the client (or opposing counsel, etc.). Then there are times when a solution could be reached much more quickly, smoothly, and, ultimately, profitably if all the necessary parties sat in a room together to hammer out a deal. We know that the Digital Generation already tend to turn to ICTs for communication purposes, and that they tend to pick the leanest communication medium (i.e., text messages) over other, richer, forms (e.g., phone calls).⁴⁸⁸ Legal educators have a responsibility to teach students about when this is not a wise choice and to push them to do otherwise.

Assuming law schools have already raised students' awareness of the shortcomings of ICT communication,⁴⁸⁹ solidifying student's understanding involves pushing them to do what may be uncomfortable for them: communicate in person, or, at a minimum, by phone. The most natural place

⁴⁸⁶ Dean R. Dietrich, *Handling Clients' Text Messages*, WIS. LAW. (Apr. 1, 2016), <http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=89&Issue=4&ArticleID=24756>.

⁴⁸⁷ There are surely established lawyers who represent the exception to this rule. Much as there are restaurant patrons who are willing to pre-pay for dinner months in advance to score a reservation at a lauded restaurant, there are clients who will accept "old school" communication from attorneys because the representation they receive is otherwise superior. See *Alinea*, TOCK, <https://alinea.tocktix.com/> (last visited July 3, 2017) (online reservation system for Alinea, a Michelin 3-Star-rated restaurant in Chicago that requires a prepaid (\$175–385 per person) reservation, typically months in advance of the reservation date). However, Digital Generation lawyers just starting in legal practice will undoubtedly need to conform more to their clients' wishes than will those with more established practices.

⁴⁸⁸ See *supra* note 269; see generally Richard L. Daft & Robert H. Lengel, *Organizational Information Requirements, Media Richness and Structural Design*, 32 MGMT. SCI. 554 (1986) (describing a theory of communication media richness).

⁴⁸⁹ See *supra* Part VI.A.

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for this training to happen is in clinical placements.⁴⁹⁰ Clinical supervisors should encourage students to meet face-to-face with clients when it is practical. Not only may this result in more empathic communication, but it may also give students valuable practice in conveying difficult, but necessary, information that they may otherwise be tempted to deliver with the buffer of an ICT.

This is comparable to the training doctors receive to deliver bad news to patients.⁴⁹¹ For example, imagine you undergo a series of tests to diagnose the debilitating pains you have been having in your stomach. The tests reveal you have an aggressive form of stomach cancer that is almost certain to prove fatal. How would you feel if your doctor sent you the following text message: “Your test results are in. They show stomach cancer. I estimate you have 2 months to live. I’m sorry.”? That a doctor would deliver such news via text seems absurdly inappropriate; it shows no respect for the gravity of the information and it leaves you unsupported as you try to cope with it. The cursory “I’m sorry” likely does nothing to make you believe your doctor actually feels sorry, nor does it give you much comfort.

Now imagine how you would feel if your lawyer sent you this text: “The judge ruled—your spouse gets full custody of the kids. You get supervised visitation every other weekend. I’m sorry.” Though the second scenario does not involve death, it still seems like the kind of news that should be delivered in person, by someone ready to help you process the information and counsel you on your next steps. There is a reason an attorney is a “counselor at law”; part of the responsibility of counseling clients is truly engaging with them and presenting information to them in a forthright way. Clinical supervisors (and all legal educators) should emphasize for students the significant impact that involvement with the legal system can have on clients’ lives, and the resulting importance of communicating with clients in the way best suited to serving the clients’ needs, even if it is more difficult or less comfortable for the lawyers.

When face-to-face meetings are not practical, clinical supervisors should encourage students to speak with clients by phone or via videoconferencing, if the client is comfortable with that technology. Again, this is not suggesting that clinicians do not need to teach students how to communicate with clients over email (though there seems little benefit, and

⁴⁹⁰ There are certainly other places this training could happen, such as professional responsibility courses or skills classes. Clinical placements have the added benefit of actual clients, which makes the lesson much more real for the students.

⁴⁹¹ See generally, e.g., Andrew P. Jacques et al., *Educating the Delivery of Bad News in Medicine: Preceptorship Versus Simulation*, 1 INT’L J. CRITICAL ILLNESS & INJURY SCI. 121 (2011) (describing educational models for teaching delivery of bad news).

more potential risk, to client communication via text⁴⁹²). Clients—especially Digital Generation clients—will certainly want to communicate that way, and written communication can enhance understanding of issues that may seem more complex if explained verbally. Moreover, written communication may be more convenient for busy clients. But it is suggesting that clinicians push back against any tendency to make written communication the default means of interacting with others. It means encouraging students to hold an introductory meeting with their clients, rather than sending an introductory email. It means picking up the phone to share news—good or bad—rather than hiding behind a screen and not having to handle the client’s emotional reaction. It means teaching students how to make an assertive demand of opposing counsel face-to-face, without an ICT to lend bravery. In sum, it means teaching law students that, even though ICTs are staggeringly powerful and advanced, there are limits to what lawyers can accomplish while using them.

D. *Positive Technology Interventions*

Given the ubiquity of ICTs in the Digital Generation’s lives, doing away with their ICTs is an unrealistic response to this empathy decline. Moreover, it is not necessarily a good response, since it would mean losing all the benefits ICTs offer. But all is not lost. According to Konrath, declines in empathy appear to be changeable.⁴⁹³ In fact, initial research suggests that ICTs may be used as a tool to increase empathy. In recent years public health researchers have helped people improve their health by harnessing the power of mobile technology.⁴⁹⁴ Text messages encouraging people to manage their blood glucose better, quit smoking, or get more exercise have all been found to result in improvements in the recipients’ physical health.⁴⁹⁵ Konrath believes that text messages may also be used to increase people’s empathy.⁴⁹⁶ In this way, the pervasiveness of ICTs is beneficial in that it increases researchers’ ability to reach study participants: “Text messages are ideal

⁴⁹² See Newell, *supra* note 6, at 817–18 nn. 440–44 and accompanying text regarding the risks of communicating with clients via text message.

⁴⁹³ Konrath et al., *Dispositional Empathy*, *supra* note 14, at 191.

⁴⁹⁴ See Lam, *supra* note 325, at 185–86 (describing research regarding text message interventions employed by health professionals).

⁴⁹⁵ Konrath, *Kinder*, *supra* note 78, at 417 (citing studies).

⁴⁹⁶ Sara Konrath et al., *Can Text Messages Increase Empathy and Prosocial Behavior? The Development and Initial Validation of Text to Connect*, 10 PLOS ONE 1 (Sept. 10, 2015). For an overview of positive technologies and their potential uses, see Giuseppe Riva et al., *Positive Technology: Using Interactive Technologies to Promote Positive Functioning*, 15 CYBERPSYCHOL., BEHAV. & SOC. NETWORKING 69 (2012); see generally Konrath, *Kinder*, *supra* note 78, at 417.

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intervention tools. They are inexpensive, embedded within participants' everyday lives, and have broad dissemination power.⁴⁹⁷

Konrath's initial research into using text messages to build empathy is limited but promising. In a small 2014 study, Konrath's team sent ninety college students twelve daily text messages—six prompting either empathic concern, perspective taking, or prosocial behavior, and six asking them about their current feelings of social connection and mood—for a period of two weeks.⁴⁹⁸ They rated the participants on affective, cognitive, relational, and objective empathy measures prior to the text message intervention and shortly thereafter, and then twice more around six months after the intervention.⁴⁹⁹ The results were encouraging:

Participants who received the empathy-building text messages reported more other-oriented motives for volunteering . . . , less beliefs that aggression is an acceptable response (males), and more giving than receiving of social support (males). They also offered more hours of help and had lower feelings of personal distress when exposed to a needy person

In addition, participants in the empathy condition were rated by observers as higher in empathy, showed more emotional empathy in imagined scenarios . . . , and responded more prosocially to a stranger who sent them an unprovoked hostile text message six months after the intervention.⁵⁰⁰

However, the results were also mixed: Though nine of the fifteen measures of empathy character showed increases in empathy after the intervention, three showed no significant change, and three showed decreases

⁴⁹⁷ Konrath, *Kinder*, *supra* note 78, at 417.

⁴⁹⁸ *Id.* at 422–23. The initial sample (n= 90) had a mean age of twenty-one and was 60% female; the sample was ethnically diverse. *Id.* at 423.

⁴⁹⁹ *Id.* at 424. During the baseline (pre-intervention) and post-intervention (n= 83) sessions, the research team evaluated the participants' empathy using a variety of different measures utilized in other studies, including the IRI. *See id.* (describing the measures used). An average of 5.8 months after the baseline session, the research team, in the guise of an unknown person, sent participants a text message stating “stop txtng me u jerk” and coded the responses received from participants (n= 43) as either prosocial, neutral, or aggressive. *Id.* at 424. Finally, participants (n= 60) were asked to play an online prisoner's dilemma game an average of 6.2 months after the baseline session, and were re-evaluated then. *Id.*

⁵⁰⁰ *Id.* at 426.

in empathy.⁵⁰¹ Further, there was no change in the participants' cooperation with others in a prisoner's dilemma game⁵⁰² six months after the study, nor were there changes in compassionate feelings for a needy person or dispositional perspective taking.⁵⁰³ Konrath describes the evidence from this study as "intriguing for a study with this relatively small sample size," but "not perfectly clear," and she cautions that "[t]his work is only at the beginning stages . . . with many potential future directions."⁵⁰⁴

More research certainly needs to be done to determine the optimal way to stimulate increases in empathy using ICTs. For now, the initial idea of ICT interventions by law schools is promising. However, developing these protocols is highly resource- and time-intensive.⁵⁰⁵ It is likely beyond the capacity of most law schools to develop and monitor a program such as the one Konrath's team used. More realistically, law schools should monitor the progress made by social scientists in this area. If ICT empathy interventions become more mainstream, there will likely be a rush to develop empathy-boosting apps, much as there was such a rush to develop meditation apps after the benefits of meditation became popular knowledge.⁵⁰⁶

Assuming these ICT intervention programs or smartphone apps are developed, law schools should embrace them. Schools might utilize them (or at least recommend them) in connection with a class, such as first-year lawyering,⁵⁰⁷ professional responsibility, or dispute resolution, or as part of clinical education. Alternatively, a school may simply introduce students to these apps during first-year orientation and suggest that students pursue them themselves.

This is not to suggest that law schools measure or track student empathy levels in any formal way (though a school certainly could). The recommendation is a gentler one: law schools should be aware of the

⁵⁰¹ *Id.* The decreases came in the subjects' ratings of their own dispositional empathic concern and, in male subjects, in their own moral principle of care. *Id.* In imagined scenarios, they showed less practical empathy (offering to help a friend in need practical help) despite showing more emotional empathy. *Id.*

⁵⁰² See *supra* text accompanying note 214.

⁵⁰³ Konrath, *Kinder*, *supra* note 78, at 426.

⁵⁰⁴ *Id.* at 428, 430.

⁵⁰⁵ *Id.* at 425.

⁵⁰⁶ I recently searched "meditation" in the iPhone App Store. I stopped counting after one hundred meditation apps, but there were many more.

⁵⁰⁷ For instance, an empathy intervention would fit well in courses such as the University of Missouri School of Law's "Lawyering: Problem Solving and Dispute Resolution," which "provide[s] students in [sic] introduction to critical lawyering skills," "offer[s] students an understanding of the lawyer's role as a problem solver," and introduces students to topics such as interviewing, counseling, and dispute resolution. *Course Offerings: Law*, UNIVERSITY REGISTRAR: UNIVERSITY OF MISSOURI, <http://catalog.missouri.edu/courseofferings/law/> (last visited Jul. 12, 2018).

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importance of empathy in the practice of law and the historically poor job they have done to instill empathy in their graduates. With this knowledge, law schools should turn to ICT interventions, as and when appropriate, as a part of an overall effort to combat declining empathy among their Digital Generation graduates. This may mean nothing more than highlighting for students the importance of empathy in every aspect of legal practice and recommending to them resources to increase their empathy. Or schools, or individual instructors, may choose to engage with empathy interventions in more comprehensive ways, much as they do with law student stress.⁵⁰⁸ Regardless of how law schools choose to utilize ICT empathy interventions (to the extent these interventions may be developed in the future), they may prove to be valuable tools in law schools' effort to produce the best possible lawyers.

VIII. CONCLUSION

TERMINATOR: *Why do you cry?*

JOHN: *You mean people?*

TERMINATOR: *Yeah.*

JOHN: *I don't know. We just cry. You know. When it hurts.*

TERMINATOR: *Pain causes it?*

JOHN: *Uh-unh, no, it's different . . . It's when there's nothing wrong with you but you hurt anyway. You get it?*

TERMINATOR: *No.*⁵⁰⁹

Modern-day ICTs reflect truly marvelous scientific achievements of yet-unknown potential. They have brought great change to our society, and much of it good. And yet, just with any tool, there are limits to what ICTs can do, and limits to what we should do with them. Consider a technological advancement of another era: the microwave. After the microwave became a fixture in the kitchen, the days of firing up the stove to pop some popcorn were over for most people. The microwave can steam broccoli, reheat takeout, defrost frozen chicken, melt chocolate, toast nuts, dry herbs, bake a cake, and disinfect a sponge. And yet most people probably would not microwave a porterhouse steak. It would still be steak, but it would be unappetizing—

⁵⁰⁸ Law schools are offering optional, non-credit classes teaching students how to build a tool-kit of stress handling techniques. See Mary Dunnewold, *Handling Law School Stress Well*, ABA FOR LAW STUDENTS (Dec. 1, 2011), <http://abaforlawstudents.com/2011/12/01/handling-law-school-stress-well/>; see also Randee Fenner, *Stanford Law Professor Creates New Way to Help Students Deal with the Stress of It All*, STANFORD NEWS (Apr. 7, 2015), <http://news.stanford.edu/2015/04/07/bankman-law-anxiety-040715/>.

⁵⁰⁹ TERMINATOR 2: JUDGMENT DAY (Pacific Western 1991).

inferior to what could be produced on a grill or in a cast-iron skillet. This does not mean the microwave is not a useful tool; it simply means that it needs to be put to an appropriate use or the results will suffer.

ICTs are much like the microwave: functional tools that can make modern lives easier. But, just as one needs to know not to put a metal saucepan in the microwave, one needs to know the limitations and appropriate use of ICTs. ICTs can connect us with distant friends and loved ones and make it possible to work from anywhere (for better or worse). They can broaden our horizons and expose us to people and cultures far outside our realm. And yet, as the microwave makes a poor substitute for a charcoal grill, ICTs cannot replace in-person communication.

When it comes to the Digital Generation, the concern seems to be that they are using the microwave when they should be using the grill—that is, they are connecting virtually but failing to connect personally. It is not that the tool is bad so much as it is that the user needs some training in using it to its best advantage. To the extent the Digital Generation are not getting this training earlier in their educational careers, it is up to law schools to provide it—for the Digital Generation’s sake, and for the sake of the clients they will someday serve.

Perhaps additional research will discredit the notion that the Digital Generation have less dispositional empathy than generations past. Perhaps they are even more empathic than their predecessors, or exactly the same. What is important is not so much the Digital Generation’s relative level of empathy as is legal education’s commitment to the notion that empathy, as this Article defines it, is an important part of the practice of law. If empathy is on the decline, the legal profession has a great deal to worry about. Even if it is static, the profession cannot afford to sit back on its heels. The medical field has recognized how vital empathy is as a component of professional training and has taken action accordingly. The legal field must do likewise. Teaching empathy has not historically been seen as law schools’ great strength. Perhaps the Digital Generation, and the ICTs they hold so dear, will help to change that.