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Building Fierce Empathy

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BUILDING FIERCE EMPATHY

*Binny Miller**

ABSTRACT

In this Article I explore the process of building and sustaining empathy with clients in the context of representing juvenile lifers—people convicted of serious crimes as children and sentenced to life or sentences that ensure that they spend most of their lives in prison—in a law school clinic. Before turning to my own lawyering experiences and those of my clinic students, I ground the discussion of empathy in the competing theories of Charles Ogletree and Abbe Smith about the value of empathic lawyering for public defenders. These theories, together with the contributions of other scholars, provide a springboard for exploring the affective and cognitive dimensions of empathy.

Clinic student reflections—about the role of race and identity in the practice of empathy, the close connection with clients that empathy makes possible but also the risk of emotional entanglements, the value of proximity, and the ability of empathy to reawaken the humanity that is sometimes overlooked in the law school experiences—are the heart of this Article. Through the process of representing juvenile lifers, clinic students built fierce empathy in all of its forms: showing compassion, bridging difference, and displaying defiance. But they also struggled, as I have, with the question of boundaries in empathetic lawyering. I conclude with an unlikely symbol of hope—a poem about Eric Garner, a Black man who died by police violence.

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I. INTRODUCTION

Empathy is a key lawyering theme that I explore in teaching the seminar and fieldwork components of a criminal defense clinic. Last semester clinic students and I explored the idea of empathy and lawyering by discussing a draft of my now published essay, *George Floyd and Empathy Stories*.¹ That essay explores how the value of proximity—a value rooted in physical connection, witnessing, and connection to place—both arises out of a commitment to empathy and allows empathy to flourish.² I use the term “fierce empathy” to describe a form of empathy that is “rooted in compassion and a desire to bridge the differences among us but is also defined by courage and defiance.”³

The *Empathy Stories* essay focused on what it means for lawyers to tell empathy stories on behalf of clients; in this Article, I explore the role of empathy more generally in the context of people charged with crimes who are represented by public defenders. I begin by discussing two influential articles about empathy in this context, Charles Ogletree’s *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*⁴ and Abbe Smith’s *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*.⁵ Ogletree offers an impassioned case for the importance of empathy for public defenders,⁶ while Smith points to the dangers of burnout for public defenders who have “too much heart and not enough heat.”⁷

1. See generally Binny Miller, *George Floyd and Empathy Stories*, 28 CLINICAL L. REV. 281 (2021). Other scholars advocate teaching empathy in clinics and elsewhere in the law school curriculum. *Id.* at 282–83 n.10 (citations omitted).

2. My discussion of proximity builds heavily on Bryan Stevenson’s idea of proximity, as reflected in his classic book, *Just Mercy*. See *id.* at 295–97.

3. *Id.* at 293. My formulation of “fierce” empathy invokes Michelle Obama’s powerful speech at the 2020 Democratic Convention as well as Harriet Tubman. See *id.* at 291, 293–94.

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

5. Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203 (2004).

6. Ogletree, *supra* note 4, at 1271–75.

7. Smith, *supra* note 5.

I then explore these themes in the context of representing “juvenile lifers,” individuals serving life sentences—or sentences that ensure that they will spend most of their lives in prison—for offenses committed as youth.⁸ Although the term “juvenile lifers” can appear reductionist and stereotyping, I use it because my clients embrace the term that now is commonplace in the literature describing children charged, convicted, and sentenced in the adult system to excessive sentences.⁹ I use examples from my own teaching and lawyering to ground my analysis of empathy and proximity, including my students’ views on the reach and meaning of empathy gained from representing juvenile lifers this past year. They represented clients in their capacity as student attorneys authorized to practice law under my supervision.

Many of my students came of age in the Obama and Trump eras, whose administrations offered polar opposite views of empathy.¹⁰ As law students, they also watched the murder of George Floyd—the aftermath was described as a “smoldering moment”¹¹—and saw it spark a “racial justice reckoning.”¹² Clinic student reflections reveal that empathy as a frame for lawyering resonated deeply with their experience representing clients. They embraced the aspect of empathy grounded in close connections with clients, and appreciated how proximity to clients on prison visits allowed this empathy to flourish. They also recognized that understanding can be difficult to achieve across lines of difference and noted the risk of practicing a more emotionally entangled version of empathy. Their representation of juvenile lifers gave them the space to grapple with the risks and rewards of empathic lawyering in a deep and meaningful way after only a few months of representing clients.

8. See *Federal Court Clears Way for Juvenile Lifers’ Challenge to Maryland Parole System*, ACLU MD. (Feb. 6, 2017), <https://www.aclu-md.org/en/press-releases/federal-court-clears-way-juvenile-lifers-challenge-maryland-parole-system> [<https://perma.cc/7JFW-A5S9>].

9. See *id.*; Robert Johnson & Margaret R. Leigey, *The Life-Course of Juvenile Lifers: Understanding Maturation and Development as Miller and Its Progeny Guide Juvenile Life Sentence Release Decisions*, 3 J. CRIM. JUST. & LAW 22 (2020).

10. See Miller, *supra* note 1, at 283, 291.

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

12. Miller, *supra* note 1, at 288.

II. THE VIEWS OF CHARLES OGLETREE AND ABBE SMITH

Ogletree views empathy as a crucial sustaining motivation for public defender work. He defines empathy as "a particular style of representation, a degree of involvement in the client's life that transcends the conventional scope of criminal representation."¹³ As a public defender, Ogletree answered calls from clients and their family members at all hours of the day and night; he attended the weddings of clients and the funerals of their family members.¹⁴ He explains that through this kind of relationship, a public defender can "perceive[] a shared humanity" with her client.¹⁵

Ogletree's commitment to empathic relationships with clients withstood the grief he felt after his beloved sister Barbara was murdered.¹⁶ In a powerful personal narrative, Ogletree explores the impact of her death on his approach to clients.¹⁷ Ogletree was close to Barbara, and respected her choice to pursue a career as a police officer, despite the fact that her career choice differed from his own.¹⁸ Barbara was murdered in her home in California, and the person who murdered her was never identified or prosecuted.¹⁹ After Barbara's murder, Ogletree worried that he might not be able to zealously represent clients who were charged with committing brutal, violent crimes.²⁰

Ogletree's self-doubt came to a head shortly after Barbara's murder when he was assigned to represent a client who was charged with rape and murder.²¹ But despite his misgivings, Ogletree zealously represented his client.²² Empathy provided him with the means to take action in the face of his grief.²³ He worked night and day on the case, seeking any and every avenue for an acquittal.²⁴ Ogletree held out hope that his

13. Ogletree, *supra* note 4, at 1243.

14. *Id.* at 1272.

15. *Id.* at 1243.

16. *Id.* at 1260-67.

17. *Id.*

18. *Id.* at 1260.

19. *Id.* at 1260-61.

20. *Id.* at 1262-63.

21. *Id.* at 1263-67.

22. *Id.*

23. *See id.*

24. *Id.* at 1265.

client might be acquitted, and was devastated when his client was found guilty on all counts.²⁵

Smith takes a different stance on empathy.²⁶ She tells a cautionary tale about empathy using composite characters to represent former clinic students.²⁷ These students and others like them eagerly embarked on careers as public defenders but left those jobs for law firms less than two years later.²⁸ They were “burned out, worn out, emotionally spent,”²⁹ although it is difficult to assess their actual experience because they are not actual people.³⁰ Smith suggests that a major reason why her former students—and other public defenders like them—leave public defender work is “because of empathy (they both cared a lot about their clients, sometimes blurring the line between lawyer and ‘friend’).”³¹ She contrasts Ogletree’s paradigm of empathy as motivating and sustaining public defenders, with her “three-pronged model of respect, craft, and a sense of outrage.”³²

I offer a few thoughts on Smith’s response to Ogletree. First, her critique seems to rest on a concern about the “feelings” aspect of empathy, not the other aspects of empathy (understanding and action) described by legal scholars.³³ In her foundational work on the clash between legality and empathy, Lynne Henderson explains that the experience of feeling the emotion of another person is one form of three types of empathy.³⁴ The second is “understanding the experience or situation of another [person], both affectively and cognitively.”³⁵ The third is the action taken in response

25. *Id.* at 1266.

26. Smith, *supra* note 5, at 1208.

27. *Id.* at 1204 n.2. Smith names the students Erin and Zeke, but because they are composites, I don’t refer to them by name. *Id.* They are not actual students and while the story that Smith tells about them is as Smith says likely not “unique,” the experience that Smith attributes to them is not real. *Id.*

28. *Id.* at 1205.

29. *Id.*

30. For a discussion of the advantages and disadvantages of using composites, see Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1 (2000).

31. Smith, *supra* note 5, at 1207–08 (citations omitted).

32. *Id.* at 1208.

33. *See id.* at 1228–29.

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

35. *Id.*; see also Jean Decety, *Empathy in Medicine: What it is, and How Much We Really Need It*, 133 AM. J. MED. 561, 563 (2020) (“Empathy is a broad construct that

to seeing the distress of another person.³⁶ Both Ogletree and Smith cite Henderson,³⁷ but do not parse her definitional framework.

Utilizing Henderson's framework, it seems that Smith's concern is with the first form of empathy (feeling the emotion of a client).³⁸ Mental health professionals would describe this form of empathy as affective empathy—defined as “the sensations and feelings we get in response to others’ emotions.”³⁹ With respect to understanding while Smith might have some concern with the emotional component of understanding, she would likely embrace the importance of the cognitive component of understanding a client's experience of the world.⁴⁰ And taking action to address a client's distress would appear to be at the heart of a “sense of outrage,” a view that Smith espouses.⁴¹ At its core, Smith's concern is about boundaries, about being able to keep enough distance between her own life and her client's lives, so as not to be swallowed up by the very real distress her clients' experience.⁴²

While Henderson's framework is useful in parsing Smith's response to Ogletree, aspects of Henderson's theory may bear revisiting. At the outset, action taken to relieve another person's distress (the third form of empathy) seems not to be a kind of empathy, but rather an action taken *because of* empathic feeling. Henderson's idea about empathy as understanding the experience or situation of another person (the second form of empathy) is amplified by mental health professionals' ideas about “theory of mind”—“the understanding that others have intentions, desires, beliefs, perceptions, and emotions different from one's own. . . .”⁴³ The aspect of theory of mind

“refers to the ability to sense other people's emotions...”).

36. Henderson, *supra* note 34, at 1579; see Decety, *supra* note 35, at 563 (noting that empathy includes the ability to imagine what someone else might be thinking or feeling); see also GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 101 (Westview Press 1992) (“Empathy can reawaken one's own sense of hurt, wrong, and outrage, all of which, in turn, can fuel a search for possible solutions, legal or ‘extra-legal.’”).

37. Ogletree, *supra* note 4, at 1272 n.135; Smith, *supra* note 5, at 1220 n.101.

38. See Smith, *supra* note 5, at 1221; see also Henderson, *supra* note 34, at 1579.

39. *What is Empathy?*, GREATER GOOD MAG., <https://greatergood.berkeley.edu/topic/empathy/definition> [<https://perma.cc/K8BX-YFZZ>].

40. See Smith, *supra* note 5, at 1221.

41. *Id.* at 1259–64.

42. *Id.* at 1220–38.

43. *Theory of Mind*, AM. PSYCH. ASS'N: APA DICTIONARY, PSYCH., <https://dictionary.apa.org/theory-of-mind> [<https://perma.cc/T5X5-EY75>]. The definition

that is about understanding emotion is also captured by the idea of cognitive empathy or perspective taking—which refers to the ability to identify and understand other people’s emotions.⁴⁴

Despite some misgivings about the specifics of Henderson’s framework, her theory of empathy has much to offer and remains influential. I employ much of her terminology in this Article because it is the scaffolding on which writing about empathy and lawyering is built.⁴⁵ Henderson’s second form of empathy, particularly its cognitive form, is a cornerstone of client-centered lawyering theory.⁴⁶ A leading text on clinical pedagogy defines empathy as “the capacity to see the world through the eyes of another”⁴⁷ and notes that “the capacity to think about the world from the perspective of another and to imagine how another person experiences the world” is a basic attribute of the lawyer-client relationship.⁴⁸ A lawyer who can understand and appreciate the perspective of a client can create a stronger rapport with that client. That lawyer can also better counsel a client about the available choices because that lawyer has a better understanding of why a client might make those choices, even if the lawyer might not choose that same course of action. But clinical theory recognizes the possibility that lawyers who adopt the perspectives of their clients may lose the professional distance and detachment that is essential to effective lawyering.⁴⁹

When empathy is channeled towards understanding not only clients but the perspectives of other actors, it is a valuable tool. Effective advocacy requires taking the perspective of the audience, whether it is a prosecutor, a judge, or a jury.⁵⁰ In describing his defense of an Air Force major in a court martial with a jury of military officers, Michael Tigar provides a memorable example of framing an argument to appeal to the perspective of the

goes on to explain that this understanding of differing perspectives also encompasses an understanding that these perspectives affect “actions and behavior.” *Id.*

44. *What is Empathy?*, *supra* note 39.

45. *See* Henderson, *supra* note 34, at 1579.

46. *See id.*

47. SUSAN BRYANT, ELLIOTT S. MILSTEIN & ANN C. SHALLECK, *TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY* 78 (Carolina Acad. Press 2014).

48. *Id.* at 183–84.

49. *Id.* at 16, 60, 356.

50. *See* MICHAEL E. TIGAR, *PERSUASION: THE LITIGATOR’S ART* 17 (Am. Bar Ass’n 1999).

decisionmaker.⁵¹ The major was charged with sodomy and conduct unbecoming an officer.⁵² A female civilian claimed that she and the major, also a woman, had had a sexual relationship and that the major had assaulted her.⁵³ Tigar understood “that a gay rights approach” would be unavailing with the military jury, but that the jury “would agree that privacy in sexual matters deserves respect.”⁵⁴ Tigar attacked the accuser’s credibility to support the theme of an “ill-motivated civilian accuser” who could destroy an officer’s military career with allegations that would be difficult to disprove.⁵⁵ These themes would resonate with a jury of military officers who could imagine themselves in the major’s situation.

Second, another aspect of Smith’s critique of empathy is pragmatic, and also rooted in her view of empathy as “feelings.” She argues that the kind of involvement that Ogletree had in his clients’ lives is difficult to achieve in a high volume criminal defense practice.⁵⁶ This point is acknowledged by Ogletree when he describes his experience representing clients at the Public Defender Service for the District of Columbia (PDS).⁵⁷ PDS is a well-resourced public defender office, where lawyers have low caseloads compared to lawyers in other public defender offices.⁵⁸ Smith is right that lawyers in high volume practices cannot have the kind of empathic relationships that Ogletree describes having with his clients — there simply is not the time or space to form these relationships.⁵⁹

Third, is the burnout that Smith describes more likely caused by secondary trauma or stress rather than an excess of empathy? The concept of trauma was not widely discussed in legal settings in 2003, the year that Smith published her article,⁶⁰ but today public defenders and other lawyers now understand that their clients have experienced trauma. This

51. *Id.* at 16–35.

52. *Id.* at 16.

53. *Id.*

54. *Id.* at 17.

55. *Id.* at 21.

56. Smith, *supra* note 5, at 1208.

57. Ogletree, *supra* note 4, at 1266.

58. *Id.* at 1286–87.

59. See Smith, *supra* note 5, at 1208.

60. The DSM-5 includes a category of trauma and stressor-related disorders. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 265–91 (5th ed. 2013).

understanding spans public defender work generally,⁶¹ juvenile defense,⁶² capital defense,⁶³ immigration,⁶⁴ family law,⁶⁵ and many other practice areas. Trauma-informed lawyering is required to effectively represent clients.⁶⁶ Lawyers and other professionals who work with clients who have experienced trauma can also experience trauma themselves by being exposed to the stories of others' trauma.⁶⁷ This type of trauma is commonly referred to as secondary or vicarious trauma, and in its lesser manifestation, secondary traumatic stress.⁶⁸

In her classic article *Buffering Burnout*, Brittany Stringfellow Otey emphasizes the need to address stress, burnout, and other issues of well-being in the legal profession.⁶⁹ Otey cites the “converging trends of the current technological era and the ‘digital native’ Millennial students filling today’s law school classrooms” as creating new challenges for lawyers.⁷⁰ Indeed, one description of the symptoms of secondary stress— “[c]ompassion fatigue, . . . burnout, feeling disengaged and resistant to continual efforts at work”⁷¹—sounds much like how Smith describes her former students.⁷²

61. Andrew P. Levin & Scott Greisberg, *Vicarious Trauma in Attorneys*, 24 PACE L. REV. 245, 245 (2003).

62. Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 AM. CRIM. L. REV. 641, 641 (2016).

63. Sheri Lynn Johnson et al., *When Empathy Bites Back: Cautionary Tales from Neuroscience for Capital Sentencing*, 85 FORDHAM L. REV. 573, 573 (2016).

64. Line Ronning et al., *Vicarious Traumatization in Lawyers Working with Traumatized Asylum Seekers: A Pilot Study*, 27 PSYCHIATRY, PSYCH. & L., 665, 665 (2020).

65. Jennifer Brobst, *The Impact of Secondary Traumatic Stress Among Family Attorneys Working with Trauma-Exposed Clients: Implications for Practice and Professional Responsibility*, 10 J. HEALTH & BIOMEDICAL L. 1, 1 (2014).

66. Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. 359, 359 (2016).

67. Levin & Greisberg, *supra* note 61, at 250.

68. *Id.* at 245–46.

69. Brittany Stringfellow Otey, *Buffering Burnout: Preparing the Online Generation for the Occupational Hazards of the Legal Profession*, 24 S. CAL. INTERDISC. L.J. 147, 150 (2014).

70. *Id.* at 150.

71. Brobst, *supra* note 65, at 15. One of the factors that Jennifer Brobst describes as a symptom—unduly absorbing the emotional responses of clients—appears not be a symptom but rather a cause of secondary stress. *Id.*

72. Compare *id.*, with Smith, *supra* note 5, at 1205.

Not surprisingly, higher caseloads correlate with a higher likelihood of burnout.⁷³ Thus it would appear that the kind of high-volume practices that Smith argues preclude empathy are the cause of burnout, regardless of the empathic stance of lawyers.⁷⁴ A study that compared the experiences of attorneys working with clients who experienced trauma with mental health professionals working with the same population showed that attorneys worked with a larger number of traumatized clients than did the mental health professionals and experienced more symptoms of stress and burnout.⁷⁵ This result may be because the attorneys were exposed to more trauma, or it may be that the training of attorneys left them less well-equipped to deal with the trauma that they encountered.⁷⁶

Fourth, the views expressed by Smith about Ogletree might in part be a reflection of her personal preferences in lawyering rather than a broad statement about whether the kind of empathic lawyering that Ogletree practiced is possible to sustain. Is empathy something that individuals are more or less inclined to; are some people more capable of empathy than others? Studies have shown that “trait empathy is an individual’s natural ability to empathize with other people”⁷⁷ and can be measured using personality scales. Ogletree and Smith’s different identities—race, gender and perhaps other identities—impacted their perspectives on lawyering.⁷⁸ Ogletree is a Black man; Smith is a white woman who is Jewish⁷⁹ who describes herself as a feminist lawyer.⁸⁰ Ogletree writes that as a Black man “my experiences growing up enabled me to empathize with criminal defendants.”⁸¹ Smith explains that, “[t]he fact that I am a feminist is interwoven into the way I practice criminal law and how I think about it.”⁸²

73. Levin & Greisberg, *supra* note 61, at 250.

74. *See id.*

75. *Id.* at 250–51.

76. Otey, *supra* note 69, at 162–67.

77. Johnson et al., *supra* note 63, at 579. In contrast, state empathy applies to a specific situation. *Id.*

78. *See* Smith, *supra* note 5; Ogletree, *supra* note 4.

79. Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 453 (1999) (describing Smith as a “secular Jew with a strong ethnic identity”).

80. *See* Abbe Smith, *Can You Be a Feminist and a Criminal Defense Lawyer?*, 57 AM. CRIM. L. REV. 1569, 1569 (2020) [hereinafter *Can You Be a Feminist and a Criminal Defense Lawyer?*].

81. Ogletree, *supra* note 4, at 1282.

82. *Can You Be a Feminist and a Criminal Defense Lawyer?*, *supra* note 80, at 1570.

They reveal only a glimpse of how their identities shaped their views on lawyering; not a full picture about how identity shaped their perspectives.⁸³

III. REFORMULATING EMPATHY: FIERCE EMPATHY AND PROXIMITY

Whether or not empathy is a good thing for criminal defense attorneys likely depends on many factors, not just how empathy is defined: the personal history and capacity of the lawyer, the nature of the criminal defense practice, the connection between the lawyer and the client, and other factors. My experiences teaching and lawyering in clinic, as well as those of my students, reveal the complexity of practicing empathy.

I strive to be an empathic person and an empathic lawyer, and connecting with clients and helping them to achieve their goals in an unjust system has always been an important part of why I do this work. Of the five motivations that Barbara Babcock describes for representing clients in the criminal legal system, the social worker and political activist motivations have always resonated with me.⁸⁴ The political activist motivation focuses on remedying the injustice that clients experience, many of whom are Black.⁸⁵ The social worker's emphasis is slightly different; the focus is on rehabilitation and helping clients and their communities.⁸⁶

Unlike Ogletree and Smith, I am an “accidental” criminal defense attorney.⁸⁷ I am now in my thirty-third year of clinical teaching in the Criminal Justice Clinic at American University's Washington College of Law. I did not practice criminal law before teaching the clinic that I now co-direct, but I had a passion for clinical teaching and leapt at the opportunity to teach a criminal defense clinic. Representing people charged with crimes who use the legal services system is now what I do as a lawyer, but my approach to lawyering is influenced by my roots in civil legal services and civil rights.⁸⁸

83. See *id.*; see also Ogletree, *supra* note 4, at 1282.

84. Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 177–78 (1983).

85. *Id.* at 178.

86. *Id.*

87. See Binny Miller, *Accidental Scholar: Navigating Academia as a Clinician and Reflecting on Intergenerational Change*, 26 CLINICAL L. REV. 329 (2019) (describing my experience in practice and transition to clinical teaching) [hereinafter *Accidental Scholar*].

88. As a law student in clinic, I practiced civil law—poverty law, government benefits, special education, and employment discrimination—in federal and state courts

My teaching and practice have influenced my outlook on empathy and lawyering. As much as I admire Ogletree's empathic stance on lawyering, I do not take calls from clients at all hours of the night, or with few exceptions, attend family events. As a clinical teacher, I am not on the "front line" of clinic representation, that's the role that students play. My role influences the degree to which I am directly involved with clients. But I have experienced the pull of clients' needs, struggled with the question of boundaries, and faced the question of when to stop working on clients' cases, in the face of the needs of other clients, the need to parent, and the need to spend time with my family and friends.

For most of my clinical teaching career, my students and I have represented people charged with misdemeanor and "minor" felonies, both adults and children.⁸⁹ Six years ago, I started representing juvenile lifers—clients convicted as children and prosecuted, convicted, and sentenced as in the adult system either to life sentences or sentences that were so lengthy that they were tantamount to life in prison. These clients were convicted of murder or attempted murder and were the first children I represented who were charged as adults.

Based on these lawyering experiences, I have come to view empathy as "rooted in compassion and a desire to bridge the differences among us" but also grounded in "courage and defiance."⁹⁰ This concept of fierce empathy borrows from scholars such as Ogletree, Smith, and Henderson, but also invokes Harriet Tubman and Michelle Obama.⁹¹ Fierce empathy realizes its full potential when linked with Bryan Stevenson's idea of proximity.⁹² Stevenson cites his grandmother's advice: "You can't understand most of the important things from a distance. You have to get close."⁹³ In the *Empathy*

and before federal administrative agencies. After law school, I clerked for a federal judge where I worked exclusively on civil cases (at that time the federal criminal dockets were quite small), and then worked as a civil rights attorney at the United States Department of Justice doing voting rights litigation. My experience as a voting rights attorney led to the publication of my first law review article. See Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105 (1992).

89. No felony is minor in terms of its impact on the person charged, particularly in Maryland where both misdemeanors and felonies can involve substantial jail time, but our felony representation has been limited to nonviolent felonies.

90. Miller, *supra* note 1, at 293.

91. *Id.* at 290–94.

92. *See id.* at 295–96.

93. *Id.* at 295. For a powerful account of the impact of watching and rewatching the

Stories essay I argue that “[P]roximity is rooted in physical presence and closeness” and makes possible empathy that “has the capacity to be more genuine and more long-lasting.”⁹⁴

In my misdemeanor practice, I empathized with clients’ lives and legal situations, but it was often at a distance and through the eyes of my students. Our clinic practices a model of supervision in which students have the primary responsibility for lawyering and conducting most meetings with clients and family members.⁹⁵ I typically met clients only once or twice before their cases were resolved, and often did not interact with clients’ family members until court appearances. For the most part, my relationships with clients—and the relationship my students had with clients—lasted for less than a semester, and often for only five or six weeks. Clients’ cases were resolved quickly, and while some clients were placed on probation and we continued to stay in touch if the circumstances warranted it, many clients were ready to move on to a different phase of their lives.⁹⁶

My first experience with long haul lawyering⁹⁷—representing people in different matters over many years—was in complex juvenile delinquency cases. With these clients, empathy and proximity came together for me in a way that was different than I had experienced representing adults and children in cases that began and ended quickly.⁹⁸ I also was more directly involved with these clients than in other cases because I worked on their cases over semester breaks and summers during times when students were not involved. I got to know clients’ family members, visited their schools, met their teachers, appeared in court on multiple occasions, and visited them

murder of George Floyd on video, see Kim Taylor-Thompson, *Reckoning with Race*, ASS’N AM. L. SCHS. SECTION ON LEADERSHIP (Nov. 2020), <https://sectiononleadership.org/2020/11/13/reckoning-with-race/> [<https://perma.cc/QA5K-GPRX>].

94. *Id.* at 296.

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

96. It is our practice to seek expungements for eligible clients. For the critical role of expungements in the criminal legal system, see MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE A. LOGAN, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY AND PRACTICE* (Thomson Reuters 2021).

97. I borrow this term from my colleague Susan Bennett. Susan D. Bennett, *On Long-Haul Lawyering*, 25 FORDHAM URB. L.J. 771, 773 (1998).

98. For a thoughtful reflection in the unique nature of representing children in delinquency proceedings, see Angela J. Davis, *There but for the Grace of God Go I*, in *HOW CAN YOU REPRESENT THOSE PEOPLE?* 49–53 (Abbe Smith & Monroe H. Freedman eds., 2013).

in detention, group homes, and other residential placements.⁹⁹ Many clients experienced heart-breaking trauma in their childhoods, had emotional, and mental health challenges,¹⁰⁰ and the juvenile court intervened over a longer span of time. I represented one client for four years as he moved in and out of group homes and residential treatment facilities, including an out-of-state facility, where he was arrested on a misdemeanor charge after he turned 18 and was incarcerated in solitary confinement in an adult jail.¹⁰¹ I saw the kind of adversity clients had faced since early childhood. This proximity gave me a window into their lives and we formed a strong connection.

For me, feeling and understanding came together to fuel action—the kind of fierce empathy that I describe in the *Empathy Stories* essay.¹⁰² While the line between social work and lawyering is not entirely clear,¹⁰³ for one teenager I stepped in when a social worker refused to do her job. Our client lived in a group home a long distance from his home. In anticipation of his release, his student attorneys worked tirelessly to find a nonpublic school that could better address his trauma, a cognitive impairment, and an emotional disability. When he neared his release date, we found a well-regarded nonpublic school that wanted to interview our client in-person to see if he was a good fit for the school. Our client's social worker said that she did not have time to transport him. The student attorneys had graduated, so I decided to provide transportation so that bureaucratic complacency did not prevent our client from receiving an education.

I drove to pick up our client at his group home, took him to the interview, and drove him back to the group home that same day. During the drive, we talked about his family and his experiences living in the group home. We listened to music on the car radio, and talked about why he did not like school, why he liked cleaning buildings with a supervisor at the group home, and whatever else he wanted to talk about. When he asked me if he could change the station to listen to music that he liked (not classic rock,

99. For an excellent description of out-of-home placements for children, see Yael Zakai Cannon, *There's No Place Like Home: Realizing the Vision of Community-Based Mental Health Treatment for Children*, 61 DEPAUL L. REV. 1049 (2012).

100. See KRISTIN HENNING, *THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH* 254–55 (Pantheon 2021) (describing the prevalence of mental health problems among incarcerated youth).

101. Our representation is described in more detail in *Accidental Scholar*, *supra* note 87, at 351.

102. Miller, *supra* note 1, at 291–92.

103. See Jane Aiken & Stephen Wizner, *Law as Social Work*, 11 WASH. U. J.L. & POL'Y 63 (2003).

apparently), I said, “sure,” and for the rest of the drive we listened to rap. During the car ride I saw an empathic side of our client that I had not seen before, and one that teenagers often do not easily reveal—an openness and vulnerability, and a concern for what I wanted, in the small but telling realm of music preferences.

Fierce empathy led to my decision to drive the client round-trip from Baltimore that day to visit the school. The car ride created the conditions for proximity, and also allowed me to accompany the client in a setting where lawyers are all too rarely present. After his interview, the school accepted our client and the school district—surprisingly—agreed to fund the placement.

In representing youth, even those whose cases were resolved more quickly, my circle of empathy was larger than was typical for adult clients. My empathy extended not just to clients, but to their parents, and their extended families. Parents—in most cases, mothers—were raising children in incredibly challenging situations. Their families lived in poverty and had experienced trauma, and their children attended schools that lacked the resources to address that trauma. Parenting children who have experienced trauma is incredibly demanding, demands that are exacerbated when parents lack access to resources to address their children’s needs. As a parent, I could see how insurmountable the challenges of parenting in this environment were.

Through doing this work, I came to learn that there is a risk that an empathic public defender will also feel empathy for others, whether victims, parents or, others—and that identification with these individuals might impair the ability of a public defender to zealously advocate for her clients. In the context of death penalty litigation, jurors who are generally empathic can empathize with victims as well as with defendants, making empathy complicated to navigate.¹⁰⁴ The challenge for an empathic public defender is to use her understanding of victims and others to fight for the interests of her clients in spite of the real pain experienced by victims.¹⁰⁵

In representing children, I channeled my empathy for parents—and my own experiences as a parent and a foster caregiver¹⁰⁶—as tools to help me

104. Johnson et al., *supra* note 63, at 594.

105. See JAMES S. KUNEN, “HOW CAN YOU DEFEND THOSE PEOPLE?” THE MAKING OF A CRIMINAL LAWYER (Random House 1983).

106. I discuss my experiences as a foster caregiver in Binny Miller & Maya Coleman, “*Everything You Need is in Here*”: Missing Elements in a Trauma-Sensitive, Multiracial Framework for Foster Parenting, 6 IND. J.L. & SOC. EQUAL. 112 (2018).

advocate for my clients with their families. When a parent no longer wanted her child living in her home, I worked with that parent to see if we could set up the resources she needed to parent the child at home. When a parent wanted to tell the Department of Juvenile Services to put my client in an out-of-home placement, I explained that these placements did not help clients heal from trauma or address behavioral concerns. My clients almost always wanted to live with their families, and as a client-centered attorney, I understood that my job was to help clients achieve this goal.

IV. CLINIC REFLECTIONS ON REPRESENTING JUVENILE LIFERS

In my experience, lawyering on behalf of clients in the criminal legal system is challenging. It is made more challenging when the lawyering responsibility is joined with the responsibility of providing law students with a meaningful clinical experience. But nothing quite prepared me—or my students—for long-haul lawyering with juvenile lifer clients.

This year, my students represented juvenile lifers on resentencing motions and in the parole process. While as student attorneys they were not themselves engaged in long-haul lawyering, their representation built on my work and the work of many former student attorneys. During the course of this work, all of the clients that we represented are Black, with the exception of one white client.

Although the clinic accepted two new clients last year, we have represented many of our clients since we first sought new sentencing hearings nearly six years ago. We had little success at the beginning of our representation; the trial courts denied all of our motions filed after the *Miller-Graham-Montgomery* trilogy of cases¹⁰⁷ opened the door to argue that in the Maryland parole system our clients' life sentences were tantamount to life without parole. When these rulings were appealed, in *Carter v. State*, the Maryland Court of Appeals¹⁰⁸ closed the door on the "life equals life without parole" argument. The one bright spot was the *Carter* ruling on "term of years sentences" that persuaded a judge to vacate the sentence of our client who had been sentenced to 90 years for an attempted murder.¹⁰⁹

When constitutional arguments were no longer viable, we turned to the parole process as an alternate remedy to bring our clients home. Two of our

107. *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Montgomery v. Louisiana*, 577 U.S. 190 (2016).

108. *Carter v. State*, 192 A.3d 695, 702 (Md. 2018).

109. *See id.* at 736.

clients have been released on parole at the age of 71; one served 45 years in prison and the other served 48 years in prison. One of these clients is our lone client who was convicted as an adult whose only remedy was parole. We represented him in a parole proceeding which was his tenth effort (in a long line of attempts without legal representation) to be paroled from a felony murder conviction.

Not only has the clinic been practicing long-haul lawyering; our clients have also been seeking legal remedies for most of their lives. This year my students (based on a law that went into effect on October 1, 2021) sought new sentencing hearings for other clients who were convicted as juveniles and have served more than 20 years in the adult system.¹¹⁰ In essence, the Maryland legislature, in passing this law, provided an avenue for resentencing for juvenile lifers denied by the court in *Carter*.

Representing juvenile lifers is incredibly rewarding, but even as an experienced lawyer, I have found this work to be emotionally demanding. I have formed close relationships with clients in situations where the stakes are very high and outcomes are unpredictable, and through my experience representing children (and as the parent of a teenager), I can picture my clients when they were children. They, like my clients in the delinquency system, experienced trauma, poverty, failing schools, and the brutality of a harsh criminal legal system that targets Black and Brown youth. I fervently work for their release and hope for positive results.

My students were newer to the work of representing juvenile lifers, but they too experienced the emotional demands of this type of lawyering. With that in mind, I believed that the concepts of empathy and proximity would be helpful to them in reflecting on their relationships with their clients. Near the end of their first semester in clinic, I asked them to read my *Empathy Stories* essay (then in draft form) and to write a short reflection about the different formulations of empathy and the idea of proximity.¹¹¹ We then discussed their reflections in class. Clinic students can find that seminar assignments detract from the compelling work of representing actual clients¹¹² (a view not shared by their professors). But the *Empathy Stories* essay struck a chord with this group of students—so much so that I reimagined this Article to include their observations.

110. MD. CODE ANN., CRIM. PROC. § 8-110 (2021).

111. See generally Miller, *supra* note 1.

112. See *Can You Be a Feminist and a Criminal Defense Lawyer?*, *supra* note 80, at 1569 (describing law students' concerns about the length of assigned reading).

My students' observations in large part reflect their experiences in clinic but in a few instances they are based on their legal experiences prior to enrolling in clinic. All of my students are women; the group includes one or more students who identify as mixed White/Asian American, Black mixed race, White, LGBTQ+, and neurodiverse. Their names appear in the acknowledgements; their names and excerpted reflections are used with their permission. However, the authors of each specific reflection are not identified. Many of their reflections are deeply personal and discuss their views of current clients so it seemed important to honor student voices while at the same time protecting confidentiality and privacy.

At the outset, students found it useful to have a framework for the relationship between empathy and lawyering. Despite the prevalence of the idea of empathy in the world at large,¹¹³ many students had not encountered a legal framework for thinking about empathy. Students found Henderson's three-part formulation (feeling, understanding, and action) easily accessible and understandable.¹¹⁴ Several students noted their natural proclivity for the "feeling" type of empathy (referring to a "naturally empathic nature," in one reflection).¹¹⁵ A student wrote that the "heart part of [lawyering is] easy"; another noted that her father calls her a "bleeding heart."

Students embraced the opportunity to think about and explore empathy in the larger context of its connection to proximity. Proximity is possible on street corners, in prisons, and in courtrooms. One student wrote: "Bryan Stevenson's call to get proximate was one of the driving forces for me to go to law school," and noted that the clinical program at American University was compelling because it "provided a unique opportunity to work in such a proximate setting." She discovered that "there is another layer to empathizing with [a client] truly seeing them, that comes from being in the room together" and "seeing him visibly express . . . his emotions, and noticing how his body is aging and the toll prison has taken."

Another student echoed a similar theme after she drove from Washington, D.C. to Baltimore to meet an elderly client and take him to transitional housing. In this trial by fire moment during the first week of the semester,¹¹⁶ she met her client on a street corner where he was left after being

113. Miller, *supra* note 1, at 283.

114. See Henderson, *supra* note 34.

115. For a discussion of trait empathy, see Johnson et al., *supra* note 63, at 579.

116. The clinic represented this client the year before in parole proceedings, and he was released unexpectedly at the beginning of this year when the clinic utilized an unusual procedural mechanism to obtain his release.

released on parole after serving more than 45 years in prison. This is where the Maryland Department of Corrections drops off individuals after their release—even elderly prisoners like our client who had limited mobility and walked with a cane. Being the “first person to see him when he came home from decades of incarceration” at such a “vulnerable” time in his life meant that she felt “immediately connected” to her client.

In another example grounded in physical proximity, a student described sitting beside her supervisor’s client (who was “clearly uncomfortable and on edge”) in court this past summer while the supervisor huddled with opposing counsel, and the client’s wife (the opposing party) sat nearby. The client “vent[ed] in hushed whispers” to the student which created a bond between them for future conversations where the client talked more openly about personal challenges impacting his legal case.

Gerald Lopez argues that deep connections can create empathy which “can reawaken one’s own sense of hurt, wrong, and outrage, all of which, in turn, can fuel a search for possible solutions, legal or ‘extra-legal.’”¹¹⁷ For this form of empathy rooted in action, a student stated that her client’s childhood trauma “fuel[s] [her] desire to see him free from prison and out in the world.” Another student is motivated to act even more zealously on behalf of her client because “the empathy I feel has made me so angry that he has spent over double the number of years behind bars” than he spent living with his family before he was incarcerated.

Deep connections with clients are not without complications. The affective form of empathy can involve emotional contagion, a “form of emotional reaction, intuitively (and possibly unknowingly) picking up on and emulating the emotion of another”¹¹⁸ or “sharing another’s feelings.”¹¹⁹ A student noted: “I have always become overly involved in my clients’ life stories.” A student who expressed a strong belief in the importance of boundaries explained that she does not practice an “emotionally entangled” version of empathy, but instead observes boundaries, in an approach which may be “more sustainable” in the long run. Professionals who absorb the

117. LOPEZ, *supra* note 36, at 101.

118. Chalen Westaby & Emma Jones, *Empathy: An Essential Element of Legal Practice or “Never the Twain Shall Meet?”*, 25 INT’L J. LEGAL PRO. 107, 109 (2018). These commentators refer to this form of empathy as a lower form of empathy; it is unclear why this is the case.

119. Johnson et al., *supra* note 63, at 578.

emotional responses of clients can experience compassion fatigue,¹²⁰ a view shared by one student.

Lawyers who experience strong feelings might also find it difficult to navigate the question of empathy for who—client, victim, or other actors in the system? In describing a divorce case that she worked on before she became a student attorney, a student found her client's situation "difficult to grapple with emotionally"; her client was financially vulnerable and faced immigration consequences. But when the client's husband unexpectedly died by suicide, "It was hard not to feel" for him and "hard not to feel heartbroken for his family" in subsequent litigation over the disposition of the husband's estate.

Navigating empathy conflict is particularly difficult for individuals who have a history of adverse experiences or deal with current trauma symptoms, as one student's reflection revealed. They face a difficult task in seeking a connection with clients who have hurt others, one that is made more difficult if the lawyer's trauma resembles the pain that a client has inflicted on others.

Students also embraced Henderson's "understanding" prong of empathy which supports a central insight of client-centered lawyering, namely that empathy is a critical aspect of lawyering.¹²¹ As one student described, the "empathy that I have fostered through visiting our clients allows me to create a more complete and accurate motion" to file in court. Another student noted that with respect to a case that she worked on prior to enrolling in clinic, proximity and empathy helped "mold motions and contempt orders to be more passionate" and persuasive. Empathy can similarly be employed to "contemplate counter-arguments" and thus respond more effectively to arguments made by opposing counsel.

In reading student reflections, I was reminded of Lopez's insight that "[E]mpathy can also reduce the distance between those in a law office and the client, in part by helping transport legal workers to the dimension in which the client actually lives when bringing a painful problem to some unknown professional for help."¹²² But, norm theory cautions that "[in] all its guises, empathy seems to operate most effectively in recognizable situations and with other persons that are like us, familiar and easily

120. Brobst, *supra* note 65, at 15.

121. See discussion *supra* notes 46–49.

122. LOPEZ, *supra* note 36, at 101.

knowable.”¹²³ For example, some scientific studies demonstrate that individuals respond more strongly to the pain of individuals with whom they share the same race than to those who are of a different race.¹²⁴ One student expressed her sadness that George Floyd needed to be “humanized” by the prosecution to gain Derek Chauvin’s conviction. She noted that Mr. Floyd “is, after all, a human.”

Students recognized the dangers of lawyers assuming that they can understand a client’s experiences, especially when the lawyer’s identity—on the basis of race, gender, class, sexuality or some other measure—differs from that of the client. Telling a client “I know how you feel” (or thinking that you know how a client feels) can be dangerous in the lawyer-client relationship. A student noted, “How can I say that I truly vicariously experience the experiences of a [client] especially when I have experienced such privilege in my life?” Others saw a bigger role for empathy that does not arise from shared experience. One student noted that while she did not “share the same experiences” as her client, the experience of trauma was familiar. A student felt empathy for her client “although [she could not] personally relate to, or even imagine in some ways, the childhood trauma [her client] faced.” As one student described, “I can never claim to walk in the shoes of others” because “[I am] always aware of how much I can’t understand of someone else’s life circumstances, but I can always strive to see, accept and help.”

Students grappled with the degree to which true understanding is possible across racial lines, even where they might share other important life experiences with a client, such as growing up in poverty or in a family experiencing generational trauma. While understanding can be attained across racial lines—a white female student wrote about a Black male client: “I could think about myself as a fourteen-year-old and then imagine being locked up in prison for over thirty years”—it can be easier to achieve between lawyers and clients from the same racial demographic. A white student wrote that in representing a white client there was no “race gap and fewer differences to bridge” in contrast to her legal experience before clinic, representing Black clients.

Finally, students noted that in the “buzz” that currently surrounds the concept of empathy, we should be wary of false or performative empathy.

123. Richard Delgado & Jean Stefancic, *Do Judges Cry? An Essay on Empathy and Fellow-Feeling*, 70 CASE W. RES. L. REV. 23, 26 (2019).

124. Johnson et al., *supra* note 63, at 584.

One noted that even “principle-based empathy” is broadened in the process of getting to know a client.

I gained several insights in reading the students’ reflections on empathy and during the class discussion that followed. The first is that law school can pose barriers to students’ sense of connection and shared humanity with others. One student noted that she felt “adrift and disillusioned” after her first year of law school, where doctrinal courses can “pull you away from empathizing with the people we read about in casebooks.” This is a well-documented experience of law students at many law schools,¹²⁵ and I am happy that the opportunity to represent clients and then reflect on those experiences after reading about empathy could help students revisit the “human” instincts that motivated them to enroll in law school.

The second insight is that the experience of representing a client—even over a short period of time—can provoke deep and meaningful reflections on the meaning of lawyers’ relationships with clients. This insight is hardly novel,¹²⁶ but empathy may be an especially good vehicle for personal, honest, and open conversations where students make themselves vulnerable.

We can also expect that my students’ views on empathy will change over time, as mine have. That is the hallmark of reflective lawyering. Charles Ogletree, Abbe Smith and I were teaching in law school clinics, not working as public defenders when we wrote about empathy. Professors who teach in law school clinics have a different vantage point than do lawyers who practice in the trenches every day. No doubt Ogletree and Smith’s views on empathic lawyering have shifted—at least to some degree—since they wrote their articles many years ago.¹²⁷ In the same vein, Smith’s critique of empathy as a sustaining motivation for criminal defense practice may be best applied to look at her former students’ careers in the long run, not in the two year time frame that she writes about in her article.¹²⁸

Ogletree published his article nearly 30 years ago, after he became a Harvard law professor, and three years after leaving PDS, where he practiced for eight years, including as the agency’s deputy director.¹²⁹ His

125. See WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 141 (Jossey-Bass 2007).

126. BRYANT, MILSTEIN & SHALLECK, *supra* note 47, at 15.

127. See Ogletree, *supra* note 4, Smith, *supra* note 5.

128. Smith, *supra* note 5.

129. Liz Mineo, *Honoring Charles Ogletree*, HARV. GAZETTE (Oct. 3, 2017), <https://news.harvard.edu/gazette/story/2017/10/600-gather-to-celebrate-life-legacy-of->

achievements during his academic career were legendary. He wrote books about race and social justice, founded the Criminal Justice Institute and the Charles Hamilton Houston Institute for Race and Justice, and mentored thousands of students.¹³⁰ While at Harvard Law, Ogletree continued to practice law, representing Anita Hill, Tupac Shakur, and the survivors of the Tulsa massacre, among others, but he was not practicing law day to day in a public defender practice.¹³¹ Had he continued to practice law as a public defender, Ogletree might have viewed empathic lawyering in a different way.

My third insight is that the clients that my students represented—juvenile lifers convicted at a young age (as young as 14)—are particularly easy clients with whom to feel an empathic connection. They have been incarcerated for decades, have experienced trauma before they were incarcerated, and continue to endure the traumatic experience of prison, but still have embraced rehabilitation and shown remorse for the harm they have caused. This makes the stakes in representing juvenile lifers even higher—and the possibility of despair even greater—if we are not successful in obtaining these clients’ releases or in reducing their sentences from life to something shorter. Ogletree formed a strong empathic connection with a client who, as a repeat sexual offender was convicted of a horrific crime and who, as Ogletree implies, was likely guilty.¹³² Ogletree was crushed when his client was convicted¹³³—how much harder is it to lose a case for a client for whom it is easier to feel empathy? Public defenders should fight as hard for those clients who may be guilty as they would for those who may be innocent and fight as hard for those clients who have not shown remorse as those who have. But some clients have a special place in their lawyers’ hearts.

V. CONCLUSION

Empathy and proximity are powerful means for lawyers to forge deep connections with their clients and to advocate forcefully on behalf of their clients. I value my students’ ability to connect with their clients, and trust that empathy will continue to be an important motivation for their

charles-ogletree-influential-law-professor/ [https://perma.cc/H382-PE38].

130. *Id.*

131. *Id.*

132. *See* Ogletree, *supra* note 4, at 1264.

133. Ogletree does not state his views on his client’s guilt or innocence—as an ethical lawyer he would not do this—but his description of the crime suggests that the client was guilty. *Id.* at 1264–66.

lawyering—whether they choose to pursue public defender work or a different kind of practice. As I have argued elsewhere, “Proximity may be a necessary condition for empathy to flourish....”¹³⁴ But in any event, empathy will be more genuine, more authentic, and more long-lasting when linked with proximity.

In thinking about my clients, I am reminded also of a poem on the door of a colleague’s office, mostly closed during the period when so many of us worked remotely. That poem, entitled *A Small Needful Fact*,¹³⁵ about Eric Garner, a Black man who was killed by a Staten Island police officer, powerfully invokes empathy and proximity as only narrative can. Here is the poem:

A Small Needful Fact
Is that Eric Garner worked
for some time for the Parks and Rec.
Horticultural Department, which means,
perhaps, that with his very large hands,
perhaps, in all likelihood,
he put gently into the earth
some plants which, most likely,
some of them, in all likelihood,
continue to grow, continue
to do what such plants do, like house
and feed small and necessary creatures,
like being pleasant to touch and smell,
like converting sunlight
into food, like making it easier
for us to breathe.¹³⁶

The author explains that rather than focusing on the violence of Garner’s death, the poem invokes his “beautiful life, which is both the sorrow and the thing that needs to be loved.”¹³⁷ The poem, although it describes the victim of a crime, reminds me of our juvenile lifer clients—of the harm and loss of life they caused as children, of remorse and of lives wasted in prison, and of the families left behind. For my clients, the poem

134. Miller, *supra* note 1, at 300.

135. Corinne Segal, *A Detail You May Not Have Known About Eric Garner Blossoms in Poem*, PBS (July 20, 2015), [https://pbs.org/newshour/arts\(poetry/small-needful-fact-eric-garner\)](https://pbs.org/newshour/arts(poetry/small-needful-fact-eric-garner)) [<https://perma.cc/3THN-WK6L>].

136. *Id.*

137. *Id.*

evokes their redemption and the hope that they can soon live their lives outside of prison walls.

