

## **Juror Empathy and Race (Tennessee Law Review) (excerpt)**

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### **B. Empathy in the Courtroom**

Empathy has an enormous impact on trial outcomes, but it is an impact not easily measured. Juries and judges either do not explain their decisions at all, or because of professional expectations, they offer explanations that leave unstated the influence of empathy on their decisions. When judges explain rulings and sentences, they usually limit their explanations to statutes and case law, even when sympathy for a party or a victim may have influenced their decisions. Judges know that if they admit that empathy played a significant role in their decisions, they invite the scrutiny of appellate courts. Juries, of course, generally reveal even less of their thinking. Only in the rare “jury nullification” cases is the dominant role of empathy in jury decisions apparent, and even then, it is usually possible to interpret an acquittal as a matter of “reasonable doubt.”

Although the influence of empathy on trial outcomes cannot be easily quantified, it is possible to identify several factors that tend to either increase or decrease the influence of empathy. These factors include: the degree of similarity between jurors and other trial participants with whom they might empathize; the types of opportunities that jurors have to observe or learn about other trial participants; and the empathetic socialization of the various jurors.

Similarities between jurors and other trial participants increase the likelihood of empathetic reactions that could determine trial outcomes. In general, the more a person shares common experiences, values, language, behavior, age, or appearance with an observer, the more likely it is that the person will produce a strong empathetic response in the observer. For example, a juror considering the case against a college-age defendant on a charge of marijuana possession would be likely to experience empathy if the juror also had a college-age son or daughter, especially one with a known history of drug use. In such a case, it is possible; even likely, that the juror will experience a stronger empathetic response to the emotional discomfort of the defendant's parent than to the emotional discomfort of the defendant himself. If the parent is of the same race as the juror, the odds of a powerful empathetic response increase further.

Empathy is also more likely when a courtroom decision-maker observes distress, rather than merely imagines it. Personal cues play an important role in provoking the conditioning, association, and mimicry that are part of strong empathetic reactions. Jurors who observe a quadriplegic victim of a criminal assault usually have a more intense empathetic reaction than appellate judges who know of the victim's quadriplegia only through a written record. The power to imagine holds the power to produce empathy, but the resulting empathetic reaction is normally weak compared to the reaction associated with direct observation of a victim.

The importance of empathetic socialization in determining the overall role that empathy plays in a courtroom is recognized by trial attorneys. Trial attorneys know that some jurors are more empathetic than others. When possible, attorneys who see themselves as representing sympathetic clients will seek out empathetic jurors. Attorneys who lack a sympathetic client but see “the law on their side” will generally prefer less empathetic jurors.

### **C. Assessing the Impact of Juror Empathy**

It has been widely assumed that jury verdicts are often influenced by empathy. Professors Kalven and Zeisel, in their classic study of the American jury, concluded that “in many instances the jury reaction goes well beyond” rational sentiments “and rests on empathy of one human being to another.” Texts on trial techniques contain advice to lawyers such as “weave in situations from your life and your client's life that identify with the jurors' experience, and “[c]reate a sense of commonality.” Clarence Darrow argued that “[t]he main work of a trial lawyer is to make a jury like his client, or, at least to feel sympathy for him.”

Kalven and Zeisel's University of Chicago jury study found that judges who disagreed with jury verdicts frequently attributed their disagreement to jury empathy. Judges often concluded that juries acted against the weight of the evidence because a either defendant, witness, or victim appeared emotionally distressed or physically handicapped. Kalven and Zeisel cited numerous instances where judges identified the sympathetic distress of jurors as a cause for acquittals in criminal cases that the judges believed warranted guilty verdicts. In one case, for example, a judge noted:

"[The] [d]efendant came into the court with crutches. He was a crippled polio victim. He cried on the stand and obtained the jury's sympathy." In another case, a judge reported that a jury exercised "the power of pardon" when it acquitted an alleged tax evader who, during the years in question, lost his home to fire, suffered through the death of his son, lost a leg, endured his wife's serious illness, and had born prematurely to him a blind and spastic child. Often the jurors' empathy went not to the defendants, but to their spouses. One judge attributed his disagreement with a jury's decision to the defendant's "very sympathetic" wife, adding that "[t]ears came to [the] wife's eyes on [the] witness stand and four of the jurors cried with her." In another case, a judge reported that a jury was moved to mistakenly acquit a defendant whose wife "seemed extremely agitated and concerned" and who "lost control of [her] emotions in a quiet and inoffensive manner."

Kalven and Zeisel boldly attempted to quantify the effect of jury sympathy on verdict disagreement between judges and juries. They calculated that sympathy for the defendant causes a jury to disagree with a judge about 22% of the time. Kalven and Zeisel estimated that jury sympathy had an effect on disagreement in roughly twice as many cases. They also found that juries are roughly four times more likely to acquit a defendant than a judge would have convicted when the judge categorizes the defendant as "sympathetic" rather than "unattractive." The beneficiaries of jury sympathy were most often females, whites, juveniles, and the elderly.

The Kalven and Zeisel data present several problems for anyone trying to assess the impact of jury empathy on trial verdicts. First, the study identified only instances where judges believed their disagreement with the juries' verdict was the result of the juries' sentiments toward the defendant or another trial participant, when the actual source of disagreement, for example, could have related to the jury's view of the evidence. Second, Kalven and Zeisel acknowledged the difficulty of distinguishing cases of true jury empathy from cases where the jury drew conclusions about the credibility of a witness from his emotional state, dress, or experience.

Third, judge-jury disagreement with respect to verdicts may be influenced by a combination of factors, including jury empathy, which cannot be sorted out and ranked according to the relative contribution of each. Finally, judges are themselves empathetic beings and it is likely that their own perceptions and verdicts are shaped in ways they may not readily acknowledge. Despite these shortcomings, the Kalven and Zeisel data support the view that empathy matters very much in the courtroom and affects a substantial number of verdicts.

However, juror empathy may figure less prominently in trial outcomes today than it did a few decades ago. The Kalven and Zeisel jury study remains the most important source of data about jury behavior even though it is nearly thirty years old. Jurors today are more likely to come from broken homes where the traditional patterns for empathetic socialization are absent. They are also more likely to have reduced sensitivity for the emotions of others because of repeated exposure to violence and emotional trauma in the media.

## II. THE RELATIONSHIP BETWEEN RACE AND EMPATHY

Racial bias in trial outcomes may have its roots in empathy. Empathy with a defendant can move a jury toward leniency; empathy with a victim or a victim's family can move a jury toward harshness. Vicariously identifying with another's feelings, volitions, or ideas is most often accomplished with respect to a person whose experiences, values, and appearance are similar to one's own. So long as race remains an important part of individual identity, empathetic

reactions will be more common and more intense between members of the same racial group than between members of different racial groups. It is not surprising, given the relevance of race to empathy that the race of a defendant or a victim may influence trial outcomes.

Those who find it necessary to rein in empathetic behavior believe it is necessary to do so because they believe that empathetic behavior is the handmaiden of discrimination. Because people empathize most readily with those who are most like themselves in appearance and social condition, empathy is seen by some researchers as the source of racism and other forms of discrimination. The favorable treatment that empathy induces toward similarly situated individuals is not likely to be as intense toward those who are different. Empathy may even produce hostility to persons outside one's own group.

The link between empathy and discriminatory jury verdicts has long been suspected. An author of a legal treatise published in 1929 noted:

[T]he juror is aware of something subtly different from himself in the person of alien race. A juror of a witness's [sic] own nationality may not particularly like him, and may even dislike him, but he feels that he understands him, and he instinctively sympathizes with what is said in his behalf. A Jew will almost always favor a Jew, an Irishman an Irishman; and-shall I say it-an Elk an Elk.

More recently, Professor Derrick Bell has argued that "the lack of similarity between the attitudes of criminal defendants and those of other participants in the criminal justice system may be the most influential factor in the treatment of black defendants." Several researchers have examined the relationship between juror and defendant characteristics in mock trial settings. In general, these studies showed that the more similar a defendant is to a juror, the more likely it is that the defendant will receive favorable treatment. Dissimilarity causes "a shift toward harshness." Mock jury studies are open to criticism; however, as it is impossible to replicate the pressures that come from judging real people who suffer real consequences from the collective decision of jurors.

The tendency of white jurors to treat black defendants more harshly than white defendants is well documented. Racial prejudice, of course, accounts for the harsh treatment received by some black defendants. In other cases, it is the inability of whites to understand the language and culture of urban blacks, and not overt prejudice that dooms defense efforts on behalf of black defendants. The low probability that white jurors will empathize with African-American defendants is not simply a function of race, but also of the linguistic, cultural, experiential, and economic differences that divide whites and blacks in America.

The race of the victim appears to affect trial outcomes at least as much as the race of the defendant. A study of jury verdicts in capital cases in Georgia indicated that a defendant accused of killing whites was over four times more likely to receive a death verdict than a defendant accused of killing blacks. Presumably, the mostly white Georgia jurors empathized more with the relatives and friends of white victims than those of black victims, and acted accordingly in the jury room. By contrast, the study found that black defendants were actually less likely to receive death verdicts than white defendants, largely because they disproportionately killed black victims who were less likely than white victims to engender jury empathy.

#### A. Race, Empathy, and Jury Selection

Risky jurors, as seen by trial attorneys, are jurors who have characteristics, experience, or knowledge that make their influence on deliberations potentially important, yet difficult to predict. Stubbornness, eccentricity, special knowledge of facts in dispute, intelligence, and high socio-economic status are examples of juror risk factors. The opinions of a juror with special knowledge of facts or high socio-economic status might carry extra clout with fellow jurors. Stubborn or eccentric jurors may be more likely than most people to hang a jury. Highly empathetic jurors also can be viewed as risky jurors. A juror who feels deep sympathy for a defendant or a crime victim, for example, may not be easily persuaded by fact-oriented arguments of fellow jurors.

Most people, including most trial attorneys, are risk-averse. Jurors without risk factors are usually preferred over jurors with risk factors, unless it is clear to an attorney that the risk factor in question poses substantially more risk to the opposing side than it does to her own. As a result, persons who are intelligent, eccentric, stubborn, possess specialized knowledge, or are of high socio-economic status tend to be under-represented on juries. They are the persons against whom peremptory challenges are exercised disproportionately.

The odds that being highly empathetic will get someone excluded from a jury are probably greater than for many other risk factors. More than a stubborn juror or a juror of high socio-economic status, a juror possessing a great capacity for empathy is likely to present a clear threat to one side or the other. Attorneys generally can anticipate which persons connected with a case are most likely to engender empathy. In some cases, it might be the loving and sympathetic family of a victim. In others, it might be the attractive, but down-and-out defendant. In a lawsuit, the attorney who feels most threatened by foreseeable empathetic reactions will normally consider using a peremptory challenge against a potentially empathetic juror.

Of course, many empathetic jurors do sit on criminal juries. Attorneys often fail to discover that a potential juror is unusually empathetic. The sorts of questions typically asked during voir dire often do not reveal evidence of a high empathetic capacity. As a result, a juror who sits pokerfaced during voir dire may be the same juror who, upon listening to trial testimony, suffers severe sympathetic distress. Empathetic jurors are not unrepresented on juries. However, they are underrepresented.

Racial differences between jurors and defendants increase the likelihood that highly empathetic jurors will be excluded. Race becomes an especially crucial factor in trials where the defendant and the crime victim are of different races. Of the shared characteristics or experiences that increase the only 1.1 times more likely to receive a death sentence as other defendants. Plaintiffs challenging the death penalty contended that the disparity proved violations of the Equal Protection Clause and the Eighth Amendment.

The pattern of disparity with respect to the race of the victim, not the defendant, may be attributable in part to the seriousness with which jurors treat questions of life and death. Jurors are likely to consider the race of a defendant, but they may try to exclude the defendant's race as a factor in their decision. In many instances, such as in a murder trial, the race of the victim is not directly before the jury. Jurors may not be aware of the role that the victim's race plays in their decision; therefore, jurors may make no effort to counteract its effect. Although jurors undoubtedly sympathize with most dead victims and their families, regardless of race, it may take an especially intense sympathy to condemn a defendant to death. The ability of white jurors to empathize more easily with white victims than black victims contributes to race-of-victim disparities, and is not an expression of racial hostility so much as it is an emotional fact of interracial relations.

In *McCleskey*, the U.S. Supreme Court was not persuaded that the racial disparities identified by the plaintiff, *McCleskey*, justified overturning his death sentence. The Court noted that jurors may discriminate in many ways that have nothing to do with race. Just as jurors empathize readily with the families of white murder victims, they may also empathize readily with articulate, attractive, or personable trial participants. If the Georgia capital punishment study proved that juries sometimes-albeit often unconsciously-discriminate, it is because the possibility of discrimination is inherent in any system that gives jurors discretion. The Court described "[a]pparent disparities in sentencing ... [an] inevitable part of our criminal justice system." Efforts to reduce disparities, according to the Court, would threaten the jury's function of making the "difficult and uniquely human judgments that defy codification" and that build equity into the system.

The *McCleskey* Court's decision upholding Georgia's capital punishment scheme and the empathetic jury behavior that it tolerates means that racial disparities in trial outcomes must be narrowed 'through education. With education, a group of people may learn to view another group as more like themselves. Thus, they may empathize more readily with the group. Undoubtedly, empathetic reactions between persons of different races are more common than they once

were. Whites are far more likely to empathize with African-Americans than they were a century or two ago. Increased social and occupational interaction between races, as well as more frequent observation of people of different races in popular culture, has increased the likelihood of interracial empathy. By leaving intact the power of the jury to unconsciously discriminate, the Supreme Court in *McCleskey* encouraged trial attorneys to battle, in their own self interest, against racial bias. For example, after *McCleskey*, a district attorney who is prosecuting a person accused of killing a black victim should understand the importance of reminding jurors of the principle that the lives of black victims are as valuable as lives of white victims.<sup>184</sup> A prosecutor should also now understand the importance of attempting to increase the empathy felt by jurors for black victims and their families. Prosecutors might, for example, use closing arguments to tell the stories of black victims in such a way as to emphasize points of commonality with white jurors. The equal availability of death penalty services to all, regardless of race, is an idea that most law enforcement personnel and prosecutors may be willing to support.

The jury discretion that allows for empathetic responses and for discrimination also encourages efforts directed at education and social improvement. Discretion provides the opportunity to shape a world that more closely reflects the visions, values, and biases of the imperfect people who wield that discretion. Juries with discretionary power to act upon their empathy will not always produce the results that liberals want, but neither will they produce the results sought by the generally more conservative legal professionals who would otherwise inherit their power....

### [Jury Course](#)