BOOK REVIEW

Some Pitfalls of Empathic Lawyering

Against Empathy: The Case for Rational Compassion
Paul Bloom (Ecco 2016), 304 pages

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> **Attorney:** What's the next thing that happened after the conversation with your manager on Monday?
> **Client:** Well, I was supposed to go to work on Tuesday.
> **Attorney:** Did you go to work on Tuesday?
> **Client:** No, I didn't.
> **Attorney:** Why not?
> **Client:** I had to attend my mother's funeral.
> **Attorney:** Ok, what happened next?

Good lawyering requires empathy. When someone tells you they lost their mother, you don't say, "What happened next?" You say, "I'm very sorry to hear about your loss." You do this not as a matter of interviewing technique. You do it because you feel your client's pain.

According to the seminal text *Essential Lawyering Skills*,[1] "Empathy is invaluable in interviewing, counseling, and negotiating." Experiencing "what it's like to be in [the client's] shoes" helps lawyers connect to clients and can empower clients to "feel stronger and more capable." When lawyers and clients can't connect face-to-face, as they often can't during the COVID pandemic,[2] empathizing with client suffering becomes even more critical to the attorney-client relationship.[3]

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1 Stefan H. Krieger & Richard K. Neumann Jr., Essential Lawyering Skills 51 (4th ed. 2011).

2 Am. Bar Ass'n, *How to Navigate Working from Home During the Time of COVID*, YourABA, (May 2020), https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-may-2020/working-from-home-during-covid/ ("For lawyers, that shift has included the loss of face-to-face meetings with clients . . . .").

3 Some commentators have argued that emotional skills, such as empathetic interaction, could grow in importance in future job markets because they may prove difficult to replace with artificial intelligence. Kai-Fu Lee, *Ten Jobs That Are Safe in*

All this seems uncontroversial. Good lawyering requires empathy. The only question is how to help lawyers empathize more.

Yale psychologist Paul Bloom, however, would disagree. The title of Bloom's book, *Against Empathy: The Case for Rational Compassion*,[4] suggests provocative clickbait more than thoughtful analysis. But he, in fact, levels three serious challenges to the view that empathy helps people help others.

First, empathy can stoke bias because people often identify with the feelings of those most like them. Bloom illustrates the point by juxtaposing the flood of American news coverage of Natalee Holloway, an American student who went missing on vacation, with the minimal airtime devoted to the genocide in Darfur at the same time. This mismatch, according to Bloom, "doesn't reflect an assessment of the extent of suffering, of [the] global importance, or of the extent to which it's possible for us to help. Rather, it reflects our natural biases . . . [favoring] those who look like us and come from our community."[5]

Second, empathy can exacerbate the identifiable victim problem. The "spotlight" of empathy shines on individuals whose feelings one can vicariously experience. By contrast, empathy tends not to focus people on helping large, unindividuated groups. Bloom highlights studies showing people donate more money to help feed one named child than to help feed eight times as many anonymous ones.[6]

Third, empathy can overwhelm the empathizer, defeating the person's ability to help those in need. For example, directly experiencing a patient's fear and pain might disable, rather than promote, a doctor's ability to effectively provide treatment. As Bloom suggests, the patient might much prefer the doctor's unemotional deployment of technical expertise to the sharing of feelings.[7]

Bloom's broadside appears to apply forcefully to the legal context.[8] Lawyers choosing to represent only those clients with whom they

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an AI World, MEDIUM (Oct. 1, 2018), https://kaifulee.medium.com/10-jobs-that-are-safe-in-an-ai-world-ec4c45523f4f ("AI cannot, unlike humans, feel or interact with empathy and compassion; therefore, it is unlikely that humans would opt for interacting with an apathetic robot for traditional communication services.").

4 PAUL BLOOM, AGAINST EMPATHY: THE CASE FOR RATIONAL COMPASSION (2016).

5 *Id.* at 90.

6 *Id.* at 88.

7 *See id.* at 142–45.

8 Although beyond the scope of this essay, law teaching, as well as law practice, could fall within the ambit of Bloom's attack on empathy. For example, Bloom contends that parental empathy could contribute to overparenting. Uncontrolled empathy for students might similarly spur teachers to try to insulate students from uncomfortable, but ultimately valuable, educational experiences. It might also contribute to burnout in legal writing communities. Toni M. Fine, *Legal Writers Writing: Scholarship and the Demarginalization of Legal Writing Instructors*, 5 LEGAL WRITING 225, 228 (1999) (describing experience of "exhaustion from the enormous workload and intensive, nearly continuous, student contact").

empathize could put lawyers' personal biases in the driver's seat. Empathy could inadvertently contribute to clients looking even more like their lawyers. Such a funneling of legal services not into communities that need them, but into communities that mirror the demographics of lawyers themselves, would frustrate the cause of equal access to justice.[9] Likewise, empathy could pose problematic conflicts. For example, empathy could heighten a class action lawyer's preference for the interest of a named plaintiff—at the expense of a putative class's interests.[10] Finally, lawyers have attested that emotional identification with clients can lead to exhaustion and burnout.[11] These emotional impacts could exacerbate the high level of mental health challenges lawyers already face in their work.

On the other hand, wholesale condemnation of empathy in lawyering runs severe risks. Rather than contributing to exhaustion, empathy might energize some lawyers to keep fighting. Cause lawyers, for example, who cannot empathize with their clients might lack the emotional fuel to endure professional setbacks and disappointments.[12] And instead of promoting bias, empathic client selection might open the door to legal services for clients typically excluded by lack of social or economic power. Moreover, recall the lawyer whose response to his client's mother's death was "what happened next." The pure technician, experiencing no empathy, might lack the ability to provide even a baseline of helpful, humane service.[13]

This apparent deadlock over empathy, however, might rest on an ambiguity. Bloom distinguishes compassion from empathy. Bloom largely approves of compassion, which he defines as caring for the well-being of others, but without experiencing the feelings of others, as a moral guide. And compassionate lawyering—caring for your clients but without

9 The concern about empathy's impact on access to justice echoes problems raised by screening clients on the basis of each individual lawyer's subjective moral views. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 Am. B. Found. Res. J. 613, 617 (1986) ("[F]or the lawyer to have a moral obligation to refuse to facilitate that which the lawyer believes to be immoral, is to substitute lawyers' beliefs for individual autonomy and diversity.").

10 Further, commentators have examined the "dominance of client interests in the practical activities of lawyers" and its negative impacts on independent professional judgment. Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 Stan. L. Rev. 503, 505 (1985). If a lawyer truly feels a client's pain, this might increase existing pressures to accomplish client goals, even morally dubious ones.

11 *See* Marina Zaloznaya & Laura Beth Nielsen, *Mechanisms and Consequences of Professional Marginality: The Case of Poverty Lawyers Revisited*, 36 Law & Soc. Inquiry 919, 931 (2011) ("[O]ur interviewees agreed that too much empathy can also be debilitating for lawyers. Several shared stories about their colleagues who got so caught up in caring for their clients that they could no longer do their best as attorneys.").

12 *Id.* at 937 (observing that legal aid attorneys "held onto the idea of making a positive difference in the world riddled with inequalities. [They frame] the importance of legal aid in terms of helping specific individuals rather than bring about abstract socio-economic justice.").

13 Judith L. Maute, *Balanced Lives in a Stressful Profession: An Impossible Dream?*, 21 Cap. U. L. Rev. 797, 798–99 (1992) ("Many lawyers today function like machines. They hear a problem and immediately begin identifying an appropriate course of action. They frequently insulate themselves from emotional matters with clients, associates, and family. Safely sheltered in their legal cocoons, they have little comprehension of their client's ultimate concerns with the legal problem at hand.").

feeling their feelings—might thread the needle of energetic representation without moral myopia. Indeed, when commentators lionize empathy, they may really mean what Bloom denominates compassion, i.e., caring without vicarious feeling. In other words, Bloom's challenge may amount to heckling a strawman.

But such a view, I think, would discount Bloom's perspective too much. *Against Empathy* raises important challenges to empathy as an absolute good, in legal practice or otherwise. Identifying strongly with a client's feelings, in some circumstances, can counterbalance the heartless, robotic lawyering represented by the lawyer-client exchange at the outset of this essay. But, at other times, the "spotlight" of empathy might serve neither lawyer nor client—where, for example, a lawyer has duties to unidentified class members or shoulders a backlog of emotional exhaustion. Ultimately, a balanced view might acknowledge empathy as a valid emotional response, but one warranting neither blind maximization, nor unqualified criticism.