EMPATHY, LITERATURE AND THE LAW

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1. Introduction

Let us begin with a story. You land exhausted at the airport. The flight has been delayed, your bags are the very last ones to arrive. The children are screaming. Eventually you find the car rental, but the car you wanted is not available and a highly unsuitable one is all that is left. You are, by now, running very late. The car hire company hand you a lengthy form to sign with pages of tiny writing. Exhausted, you sign and finally drive off. But when you return the car you find you have been charged for many unexpected extras. Your attempts to complain about these and the unsuitable car fall on deaf ears. In the form you signed the extra charges were detailed and you had agreed to accept the alternative car. You don't have a legal leg to stand on.

Of course, if you were to speak to your friend they would be completely sympathetic. How, with screaming children, exhausted after a long journey, does the law expect you to read all the details in the form? Anyone with an ounce of empathy can see that's impossible. But you and your friend, even with no legal training, would know what the law would say. The law is hardnosed. The judge would look sternly at you and say, "you signed the contract…tough". Or, if they were trying to show off, might even intone "Caveat Subscriptor": let the signer beware. There are strict regulations governing contracts, many of which are only understood by lawyers. The law is not there to provide hugs or empathy. It is there to apply the rules. That is just what law is like. If you want empathy you should be turning to literature not the court room.

Or so you might think….

In this paper we want to challenge that image of law. We start by seeking to understand what empathy is, drawing on literature and law. We then suggest that, properly understood, the law can be empathetic and there is much of it that is and rightly so. But there are limits too and dangers a plenty. So, perhaps the best we can do is to claim that the law can and should be a bit empathetic…. sometimes….

2. Definitions of empathy

In recent years, empathy has become a much-discussed, if somewhat fashionable topic. Empathy should, as social scientists claim, increasingly be considered as a basis for political and social action. In *The Empathic Civilization*, Jeremy Rifkin[1] suggested that Americans should exchange their myth of the 'American Dream' for a new self-image and become an empathetic civilization. This challenge is yet to be met, but social theorists and economists like Rifkin regard empathy as a highly important social resource in a world faced with the trials of globalization and the limitations of an endangered eco-system. Scientists in evolutionary anthropology like Michael Tomasello[2] even argue that empathy, the capability to 'think in the mind of another', to anticipate the reactions of another human being and to interact with their views, is a central factor in cognitive development and the process of evolution from primates to humans.

Empathy, as these two examples already show, evokes many interdisciplinary intersections and provides a productive encounter between politics, anthropology, history, law, medicine, philosophy, but also literature and the arts. But before exploring these themes further, we need to address a primary question: What is empathy?

Heidi Maibom[3] captures the essence of the word:

> The term "empathy" denotes a range of emotional responses we have to what others feel or the situation they are in, such as sympathy, empathic anger, or compassion, in addition to some form of appreciation of their psychological state.

But clearly more needs to be said. The rich array of definitional approaches that relate to empathy involve questions such as "Does empathy rely more on an emotional response or on cognitive understanding?"; "Is empathy an innate faculty, or can it be learned?"; "Is empathy in real life, law and history different from empathy in literature and the arts?"

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[1] Jeremy Rifkin, *The Empathic Civilization.* Cambridge: Polity Press. 2009.
[2] Michael Tomasello, *Why We Co-Operate.* Cambridge: MIT Press. 2009.
[3] Heidi Maibom, 'Introduction: (Almost) Everything You Ever Wanted to Know about Empathy' In: *Empathy and Morality*, ed. Heidi L. Maibom. Oxford: Oxford University Press, 2014. 1.

Empathy, hence, denotes multiple concepts and practices in which we come to terms with intersubjectivity and alterity. In literature and the arts, for instance, various literary genres such as poetry, narrative and drama present to us complex situations that shape our responses. They create scenes in which the observation of another character can trigger an imaginative reaction and result in the vicarious adoption of their perspective. Our account will be based on the assumption that empathy relies on the imagination which is inspired in literature and the arts.

Having already been framed by the Greek *eleos* or the Latin *misericordia* or *compassio*, 'empathy', sometimes also conceived as 'sympathy' became relevant to enlightenment thought. Early on, the economist and philosopher in the Scottish Enlightenment Adam Smith defined what he then called "sympathy" as 'imaginative perspective-taking': "As we have no immediate experience of what other men feel, we can form no idea of the manner in which they are affected, but by conceiving what we ourselves should feel in the like situation"; Smith wrote in 1759.[4] "It is by the imagination only that we can form any conceptions" of what another is experiencing:

> By the imagination we place ourselves in his situation, […] we enter as it were into his body, and become in some measure the same person with him, and thence form some idea of his sensations, and even feel something which, though weaker in degree, is not altogether unlike them.[5]

The empathetic imagination also has a historical dimension as cultural studies scholar Alison Landsberg notes: "The experience of empathy requires an act of imagination – one must leave oneself and attempt to imagine what it was like for that other person given what he or she went through".[6]

More recently and more generally, philosopher Martha Nussbaum defines empathy as a morally neutral stance:

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[4] Adam Smith, *The Theory of Moral Sentiments*, ed. Knud Haakonssen. Cambridge: CUP, 2002; 11.
[5] Adam Smith, *The Theory of Moral Sentiments*, ed. Knud Haakonssen. Cambridge: CUP, 2002; 12.
[6] Alison Landsberg, 'Memory, Empathy and the Politics of Identification' In: *International Journal of Politics, Culture, and Society* 22 (2009) 221–229, 223.

> "[E]mpathy" is simply an imaginative reconstruction of another person's experience, whether that experience is happy or sad, pleasant or painful or neutral, and whether the imaginer thinks the other person's situation is good, bad, or indifferent.[7]

Underlying empathy is an understanding of the difference between the self and the other. The self is not the default position or blueprint for the imagination, but one needs to make an effort to imagine oneself in the other's place and, as Aleida Assmann has pointed out, "learn[ ]to share the perspective and understanding of the others while at the same time recognizing the differences".[8] Alison Landsberg likewise regards 'contemplation and distance as central to empathy'.[9] In empathy, we simultaneously adopt the perspective of the other while maintaining our own independent sense of self. In other words, empathy is putting oneself in the place of the other while remaining oneself.

It involves, however, both a contemplation and an emotional reaction. Slote believes an emotion is required, writing "empathy involves having the feelings of another (involuntarily) aroused in ourselves, as when we see another person in pain. It is as if their pain invades us".[10] That said, it would not be right to suggest that a profound understanding is required. A toddler who runs over and gives their friend a hug when they fall over is being empathetic even though they might struggle to articulate their understanding well. So, perhaps, empathy requires there to be at least a degree of understanding of the other's feeling and an emotional response to that.

Empathy, therefore, is not identification. Empathy is not merely experiencing what the other is experiencing but a way of knowing the other's experience, it is a form of cognition. As historian Thomas Kohut recently defines it: "empathy […] recognizes and appreciates difference, even while attempting to know and understand it".[11] On the part of the historian, Kohut continues: "Empathy conceived as identification, then, can lead to the erasure of the victim's experience in favor of the pathos of the identifying historian".[12] "Empathy […]

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[7] Martha Nussbaum, *Upheavals of Thought. The Intelligence of Emotions*, Cambridge: CUP. 2001. 302.

[8] Aleida Assmann, 'Introduction' In: *Empathy and its Limits*, ed. Aleida Assmann and Ines Detmers. Basingstroke: Palgrave Macmillan, 2016. 11.; Alison Landsberg, 'Memory, Empathy and the Politics of Identification' In: *International Journal of Politics, Culture, and Society* 22 (2009) 221–229.

[9] Ibid., 223.

[10] Michael Slote *The Ethics of Care and Empathy*. Abingdon: Routledge, 2007. 13.

[11] Thomas Kohut, *Empathy and the Historical Understanding of the Human Past*. Abingdon: Routledge, 2020. 41.

[12] Ibid.

involves", as also historian Mark Roseman notes, "the very maintenance of the observing self. Its loss is identification, not empathy".[13] Hence, an empathetic reaction need not match the emotion felt by the other. If a friend is angry it is not clear whether to be empathic we should become angry alongside them, especially if their anger is inappropriate. Perhaps we might say that empathy requires some appropriate emotional response to the emotion of the other, which may be a matching emotion, but need not be.

There is some debate over the role of judgement in empathy. Martha Nussbaum takes the view that judgement has no role, explaining that the "imaginative reconstruction of another person's experience" in empathy takes place "without any particular evaluation of that experience".[14] Righteous anger at an injustice may be seen as a good thing; anger caused through embarrassment is not. While empathy will recognise that the other is feeling anger, and attempt a kind response, it seems impossible to avoid a moral assessment being made in some cases. Generally, with emotions, we expect there to be a moral warrant for the emotion if it is to be valued as good. A virtuous person should judge whether anger is an appropriate response before acting on their emotion. Similarly, with empathy, there should be some form of judgement over the emotion the other is feeling in order to determine the morally appropriate response to that emotion. Of course, there will be many cases where we cannot make that assessment. We might come across a friend in distress and not be able to ascertain its cause, but an empathetic comforting response might well be appropriate.

Empathy also has to be distinguished from sympathy, even though early theoreticians like Smith did not make a clear-cut difference between the two. In empathy, I attempt to understand an other and adopt their subjective position. In sympathy, I maintain my own subjective position. As Thomas Kohut writes: "When I experience sympathy, I maintain my own subjective position – I do not adopt the position of the person with whom I sympathize. […] My feelings of sympathy are *my* feelings for someone else."[15]

Alison Landsberg, once again, stresses the element of distance in empathy, which separates it from sympathy:

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[13] Ibid. 42 [Personal Communication].
[14] Martha Nussbaum, *Upheavals of Thought. The Intelligence of Emotions*. CUP, 2001. 302.
[15] Thomas Kohut, *Empathy and the Historical Understanding of the Human Past*. Abingdon: Routledge, 2020. 47.

> Empathy, unlike sympathy, requires mental, cognitive activity, it entails an intellectual engagement with the plight of the other; when one talks about empathy one is not talking simply about emotion, but about contemplation as well. Contemplation and distance, two elements central to empathy, are not present in sympathy.[16]

The idea of empathy is related to the notion of resemblance and similarity between human beings, and from the beginning has been part of both philosophical and legal discourse. As Lynn Hunt[17] has argued, the consciousness of empathy was at the heart of the development of the notion of human rights in Europe, between 1689 and 1776, as the idea that all people, not just members of a particular group, have universal, natural and equal rights, which in the latter half of the eighteenth century were seen to be "self-evident". Learning to empathize, Hunt writes "opened the path to human rights"[18] . But before developing this further, and discussing the role of empathy in the law, there are important lessons for empathy from Shakespeare.

3. Shakespeare and the empathic imagination

While generally perceived to be a positive emotion, empathy can also be harmful. It can be used to manipulate, to defeat and destroy people. It is used by demagogues and criminals. Empathy can be a means of gaining power over another, of exploiting and instrumentalising them.

Shakespeare, to whom we now turn, was fascinated by the ways in which people operate, the ways in which they use their language and their sparkling wit, and engage in acts of humility and kindness, but also by people who are brilliant in an appalling way, who profess the worst forms of policy, and wilfully sacrifice the lives of others for their own self-interest.

Shakespeare's plays show us a rich array of modes in which empathy can function, yet their investigation into characters and their thoughts is always accompanied by the question whether the interior of a person is a coherent whole and whether it can ever be accessible at all.

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[16] Alison Landsberg, 'Memory, Empathy and the Politics of Identification' In: *International Journal of Politics, Culture, and Society* 22 (2009) 221–229, 223.
[17] Lynn Hunt, *Inventing Human Rights: A History*. New York: W. W. Norton and Co., 2008.
[18] Ibid. 68.

Let us first consider one of Shakespeare's most illustrious, ambivalent and charismatic characters: Richard III.[19]

In *Richard III* (1592–1593) critics have traditionally pointed to the providential design of the play as a whole – as an unfolding of divine nemesis against an arch-villain, which, at the end, leaves the audience comfortably reassured of their moral superiority, and, indeed, in Woolton's catalogue of the most monstrous and ungodly figures, Richard III ranges closely only after Caligula and Nero.[20]

Yet, Richard is, as we would like to argue, also one of Shakespeare's most empathic characters. He makes the audience privy to his aims and means from the start, and they become his conspirators. We know that he will dominate the events of the play and our reaction to them.

Richard does not share the scepticism about appearances that Hamlet or Macbeth display, but he emphatically adopts theatricality to create himself and to direct others. He comments on its own performative stance and uses features of earlier morality plays as component parts of the identity he is about to assume. Richard plays with the theatre's distinct mediality and creates an awareness of the gap between a character and his roles. He thereby promotes a theatrical understanding of empathy.

From its very beginning, *Richard III* invokes the notion of play and performance in Richard's sardonic determination to "prove the villain" (1, 1, 30). This intentional act is a conscious inner consequence, which deliberately both elicits and undermines the providential pattern of prophecy and fulfilment from the start and resolves it by the protagonist wilfully accepting the role that is assigned to him. 'To prove a villain' hence for Richard becomes a dramatic necessity. He is aware of playing a role and plays it all the more skilfully for that awareness.

Richard, after all, is so powerful and attractive to the audience because of his malice, and not in spite of it.

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[19] All citations from William Shakespeare's *Richard III* are taken from the New Cambridge edition edited by Janis Lull (2009).

[20] "The castell of Christians and fortresse of the faithfull: besieged, and defended, now almost sixe thowsand years. VVritten by Iohn VVolton, one Catheral Church in Exetor". Cf. also Claudia Olk, "Performing Conscience in *Richard III*", *Anglia* (2012), 1-18.

Remember the early scenes of the play: Act one scene three for instance: two coffins followed by a mourning woman appear on stage. Richard is responsible for both of the deaths: Lady Anne's father-in-law Henry VI, and her husband, Prince Edward.

Anne sees Richard, and curses him, wishes wolves, spiders, toads on him and calls him the devil himself. Richard, however, in a virtuoso demonstration of his persuasive powers, empathises with Anne, sees through her weakness, flatters her in claiming that he was prompted to these deeds by her beauty, and spectacularly succeeds in winning her over. After Lady Anne has left the stage, Richard turns to the audience and sardonically informs them: "I'll have her, but I will not keep her long" (1, 2, 233).

Richard III also presents the workings of a society, which, like Richard himself is intrinsically divided, in which almost anything is possible, and where it is impossible to differentiate between sincerity and theatrical roles, or, generally, to fathom the inside of a character. In this Hobbesian world, hardly anybody is innocent: The King is presented as promiscuous and dangerously gullible, Anne as self-righteous, vain and susceptible to flattery and Margaret and Clarence have both been involved in homicide and treason.

Empathy, in *Richard III*, works on three levels: Richard empathises with what makes a villain and acts out his role. Secondly, he senses what drives those around him, he uses their naïveté, flatters their narcissism, incites and satisfies their ambition, gives them what they want for as long as he deems them useful. Therefore, it is not surprising that he never commits any of the murders himself, but always finds other people to murder for him.

On a third level, to us, as an audience, the history of the play is mediated through Richard's perspective. From the start, which is unique for a protagonist in Shakespeare's plays, he adopts the a-moral directness of a vice-figure, and makes the audience immediately empathic with him. Unlike his victims, we know about his intentions and schemes from the beginning, and while we may be shocked by his methods, we also cannot help being attracted by this intelligent, ironic and unscrupulous villain. In fact, our empathy in and with Richard III reaches a limit and verges on sympathy with him.

Role play, the act of self-projection into the lives of others, is rendered even more complex in our second example: *Hamlet*.[21]

[21] All citations from William Shakespeare's *Hamlet* are taken from the New Cambridge edition edited by Philip Edwards (1985).

In view of the overall topic of this book, "Law and literature", *Hamlet*, from a legal perspective, has often been classified as a revenge tragedy,[22] which traditionally displays the conflict between the code of honour and the code of law. It circles around a central crisis in which the justice of the state proves unable or unwilling to satisfy an individual's demand for retribution. The action of the play then seeks to define the limits which secular and spiritual orders must put upon the more archaic variant of blood-revenge if society is to survive.

The opponents in this struggle are the tyrant or usurper and the revenger. Hamlet, the latter, returns to Denmark from his studies at Wittenberg to mourn for his father's sudden death. During an eerie scene early in the play, the ghost of his father appears, returning from purgatory and tells young Hamlet that King Hamlet has been murdered during his sleep by his brother Claudius and implores Hamlet to revenge his death. Claudius, once his brother was pronounced dead, did not waste any time, and swiftly married his sister-in-law, Gertrude, his crime remaining concealed. To the Elizabethan audience around 1600 with an heirless and ageing Queen, the figure of the usurping tyrant must have presented the nightmare of a feudal society in such an uncomfortable transition.

After all, through his usurpation of the Danish throne, Claudius has deprived Hamlet of his rightful inheritance, the patrilinear succession to the Danish crown has come to an end. Hamlet's personal crisis is also a crisis of the kingdom, and it furthermore carries biblical weight. Claudius himself alludes to this larger frame of reference when he identifies his crime with the Genesis myth: 'It hath the primal eldest curse upon't, /A brother's murder' (3, 3, 37–8).

Hamlet, as we know, throughout the play is profoundly shaken. Whom is he to trust? Even if he did succumb to the ghost's command, and executes revenge, where would that leave him? His knowledge torments him. Denmark to him has become a prison. Neither this world nor the next, hold any comforting promise any more.

The solution to bring out the truth about the crime to him lies in acting and the theatre. Prompted by a group of actors arriving in Elsinore, he is taken by the way in which an actor simulates genuine passion, and by enacting the appearance of passion persuades its audience of its reality.

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[22] Fredson Bowers, *Elizabethan Revenge Tragedy, 1587–1642*. Princeton: Princeton UP, 1940. Michael Neill, 'Remembrance and Revenge: *Hamlet*, *Macbeth* and *The Tempest*' In: *Jonson and Shakespeare*, ed. Ian Donaldson. London: Macmillan, 1983. 35–56.

Hamlet asks the players to tell the story of the Fall of Troy that Aeneas told to Dido, which has: “One speech in’t I chiefly lov’d ‘twas Aeneas’ tale to Dido, and thereabout of it especially when he speaks of Priam’s slaughter” (2, 2, 404–406) – the violent death of the king. As Michael Neill and others have argued this tale “‘lives’ in Hamlet’s memory partly because it contains in Priam, [the king of Troy,] an avatar of his murdered father, in Hecuba [the Queen,] an idealised image of his bereaved mother [Gertrude], and in the avenging Pyrrhus a model for himself”. [23]

Like Hamlet, however, when he comes upon the defenceless Claudius in the prayer scene and is unable to commit murder, Pyrrhus, before he lets his sword descend on Priam, pauses:

> So, as a painted tyrant, Pyrrhus stood,
> [And] like a neutral to his will and matter,
> Did nothing (2, 2, 480–482)

The First Player then continues and delivers a magnificent speech in which he makes us privy to the fall of Priam as only Priam’s wife Hecuba and the gods witnessed it:

> But if the gods themselves did see her then,
> When she saw Pyrrhus make malicious sport
> In mincing with his sword her [husband’s] limbs,
> The instant burst of clamour that she made,
> Unless things mortal move them not at all,
> Would have made milch the burning eyes of heaven,
> And passion in the gods. (2, 2, 470–475)

The First Player’s speech addresses several imagined observers: The gods perhaps seeing Hecuba, Hecuba witnessing the murder of her husband Priam, Hamlet and Polonius watching the player describe the scene and us watching them see the description enacted. The speech, hence, multiplies its audiences making the scene and our reactions to it more complex. It presents us with spectators and their possible responses, with what might have happened or

[23] Michael Neill, ‘Remembrance and Revenge: *Hamlet*, *Macbeth* and *The Tempest*’ In: *Jonson and Shakespeare*, ed. Ian Donaldson. London: Macmillan, 1983. 35–56, 44.

could have happened, deflecting attention away from Hecuba who is the one who suffers directly.

The speech is framed with reference to the anthropomorphic Gods, who, if they saw what happened, would be likely to be moved and the burning eyes of heaven would have wept milk rather than tears.

In many adaptations of the matter of Troy, such as Jean Paul Sartre *Les Troyennes*[24] Hecuba has become to symbolise the fate of women in war, seized and occupied, and ultimately destroyed. Hecuba also embodies the city, and both its civil and domestic areas.

The rendition of the event is overwhelming to its audience in *Hamlet*. Polonius bids the first player to stop and exclaims that he has "turned his colour, and has tears in's eyes. Prithee no more" (2, 2, 477–478). Hamlet likewise is unsettled by the player's art who can weep and feel for someone he does not know as someone he is not. How can it be, he asks himself, that an actor who has no personal relation to the events he describes be so intensely emotionally involved in them, whereas he who has every reason to mourn and proclaim the murder of his father and Claudius's usurpation of the throne that has deprived him of his kingdom, cannot express his grief. Hamlet can feel for the actor as the actor can feel for Hecuba, and as we can feel for Hamlet. Empathy is at work here, it is incited by the performance, while the reality of Hamlet's predicament does not cause any emotional effect in Hamlet.

Rather than through direct representation and immediate exposure, Hamlet, and to an extent also Polonius is troubled, stirred emotionally by art, which possesses more effective power to move. The actor describes the action rather than perform it on stage. It is through this sequence of frames within frames that language takes us to the distant events that are recounted. It is not necessary to stage the scene and it is not necessary to perform that which is described, rather the power of words creates the scene for its audiences.

Hamlet is confused about the cause of emotion and its rendition in performance, and he reprimands himself for being "dull" and "unpregnant of his cause":

> O what a rogue and peasant slave am I!
> Is it not monstrous that this player here,
> But in a fiction, in a dream of passion,

[24] Jean Paul Sartre, *Les Troyennes.* Paris: Théâtre National Populaire, 1965.

Could force his soul so to his own conceit
That from her working all his visage wanned,
Tears in his eyes, distraction in's aspect,
A broken voice, and his whole function suiting
Which forms to his conceit? And all for nothing?
For Hecuba!
What's Hecuba to him, or he to [Hecuba]
That he should weep for her? (2, 2, 502–512)

What would he do,
Had he the motive and [the cue] for passion
That I have? He would drown the stage with tears,
And cleave the general ear with horrid speech,
Make mad the guilty, and appal the free,
Confound the ignorant, and amaze indeed
The very faculties of eyes and ears.
(2, 2, 512–519)

"Make mad the guilty" – Hamlet then gains the idea that the players could equally move Claudius to react and reveal his guilt: "The play's the thing/Wherein I'll catch the conscience of the King" (2, 2, 557–558). He decides to work on a play "The murder of Gonzago" or "The Mousetrap" which is to stage the murder of his father: "I'll have these players/Play something like the murder of my father/Before mine uncle. I'll observe his looks,/I'll tent him to the quick. If a do blench,/I know my course (2, 2, 547–551)

Hamlet's plan works out, partly. Claudius upon seeing on stage what resembles his own deed is shocked and upset and has to be removed from the theatre. Not only are words, is the theatre more powerful to move than reality, but to Hamlet they also have the power to bring out the truth, or, at least to an extent. There is no certainty in and for Hamlet. Appearances cannot be trusted, and even Claudius' outward reaction cannot be taken as a guarantee for his inward guilt, and Hamlet, as a consequence, has to remain sceptical.

The play investigates into its own status as a play, an appearance which comments on reality. *Hamlet* establishes a structure in which the plays it mentions create an internal network of correspondences. There are four plays altogether, the "Death of Priam", "The Murder of Gonzago", the Pantomime preceding the play and Shakespeare's play *Hamlet*. They present variations on the theme of regicide and comment on each other's plots. Character, actor and spectator change places and present ways in which drama can release action and evoke emotion. Yet it also shows that the performance of an emotion is not the same thing as experiencing emotion. The performance of an emotion, however, is not necessarily an index of inner feeling, but the kind of theatrical empathy we encounter in Shakespeare makes it possible to experience the emotions evoked by the theatre without becoming part of the violence.

Hamlet calls the actors the "abstract and brief chronicles of the time" (2, 2, 481–482) and yet they articulate problems that exceed their immediate historical context and gain further relevance and urgency in later times. Hamlet tries to exert his revenge through the theatre. He is watching Claudius watching a re-enactment of his alleged crime. In other words, Hamlet is trying to break dissimulation by means of dissimulation in leading Claudius to identify with what he sees on stage. Caught in a world of appearances, for Hamlet, there is no way of finding the truth. Yet what about the law, what about justice?

Even if Old Hamlet's death, one could argue, according to a received notion of Old Testament logic is revenged by the death of Claudius and by almost all the other characters as well, the play does not leave us with a comfortable feeling of justice being served. Rosencrantz and Guildenstern have died in vain as have the 20,000 soldiers who fought about a useless piece of land. As Ewan Fernie remarks: "justice of the last act remains finally undecidable".[25]

Before he utters his last words, Hamlet urges the survivor, his friend Horatio, to continue retelling his fate "[a]bsent thee from felicity awhile,/And in this harsh world draw thy breath in pain/To tell my story" (5, 2, 325–327). He envisions his story to be told and Horatio's retelling is to make others relate to him, to understand his plight and to create a kind of empathy that is linked to cultural memory, which, after all, led particularly us Germans to making *Hamlet* our own.

Turning now to the theme of law and empathy, we will separate two key questions:

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[25] Ewan Fernie, *Spiritual Shakespeares.* London: Routledge, 2005. 207.

1. Should the law encourage or enable empathy in people?
2. Should the law itself be empathetic? Should judges be empathetic in making judgements?

4. Encouraging empathy through the law

Exploring about whether the law should encourage empathy, we start by explaining why it is futile to use the law to compel empathy, but the law can have a role in encouraging empathy.

4.1 The impossibility of using the law to compelling empathy

It need hardly be said that the law cannot compel people to be empathetic, but it is worth explaining briefly why. First, it would be counterproductive. Not only does it seem implausible that a person will exercise empathy when they would not without the legal intervention. Indeed, it is not clear what a person who is not experiencing empathy is meant to do if the law requires them to. It might lead to people to feeling compelled artificially to ~~artificially~~ express an empathy they do not have which is clearly undesirable.

Second, the law does not normally require good behaviour, but rather is designed to prevent harmful behaviour. In short, the law's primary goal is to stop us being little devils, not making us little angels. Tort law does not require us to live up to the highest standards, only the standards of the reasonable person. Criminal law does not (generally) require us to assist those in need – only not to harm people. It does not seem that lacking empathy in itself creates the kind of harm which justifies the intervention of the law.

Third, it seems that the concept of empathy is too vague to satisfy the requirements of the Rule of Law. If the law is going to require individuals to act in a particular way, then citizens are entitled to know in advance what the law requires of them. A good citizen is entitled to demand to know in advance what they must do to comply with the law. The difficulty is that the concept of empathy is insufficiently clearly defined to provide precise guidance. As we have seen the definition of empathy is debated and it would be hard to explain precisely what would be required of them

Fourthly, legal regulation must be enforced by the courts. The law must deal with things that are provable by evidence in a court room. At least unless our neurotechnology gets frighteningly better, it will be impossible to prove in a court whether a person was or was not feeling empathy. So, it seems clear the law cannot enforce empathy.

4.2 Fostering empathy

Just because the law cannot enforce empathy, it does not mean that the law should have nothing to do with empathy.[26] Rather the law can encourage, reward and foster empathy. At the very least it can seek to remove any barriers that inhibit people being empathetic. It is important, in considering this, to remember that law does most of its work outside the court room. To take a trivial example, the law on illegal parking impacts a far larger range of people than simply those who receive parking fines. Criminal law is designed, in large part, to deter people from committing crime. Contract law is designed to deter people from breaching a contract or guide parties as to how to (extra-judicially) resolve disputes if a breach has taken place.

The impact of the law is not limited to "the threats of law" but the law can send powerful messages that can impact people's attitudes. For example, family law indicates what kinds of relationships are approved of and why – hence the intense debates over, for example, same-sex marriage. Another very practical way would be the law dealing with how children with lacking mental capacity will be treated. It sends a reasonably clear message that decision-makers should seek to promote the best interests of the person lacking capacity in making decisions on their behalf. While the legal enforcement of this is very limited (save in cases where serious harm is done) the general obligation is a significant guiding principle for those who care for children and adults lacking capacity.

There is much that could be said in this regard, but we will focus on three points.

First, the law itself can demonstrate empathy and this can send the message that the law encourages and values empathy. We will explore that later.

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[26] Jonathan Herring, 'Compassion ethics of care and legal rights, *International Journal of Law in Context* 13, (2017), 158–171.

Second, the law can remove barriers to empathy. A good example may be family law. Until very recently if an English spouse were to consult a lawyer wanting a divorce, the first thing the lawyer would do, after, of course, explaining their fees, would be to ask the client to list all the worst things that the other spouse had done to them, for these to be typed up into a draft divorce petition and sent to the other spouse. It is hard to think of a system that is more likely to encourage bitterness and exacerbate conflict, rather than encouraging co-operation and empathy. There has been wide spread criticism of this fault-based divorce and it has been recently replaced with a system that does not require allegations of misconduct to be made.[27] The hope is that without the unpleasantness of having to allege fault, the parties will find it easier to empathetically work together to find solutions to their disputes for their mutual benefit.

Third, the law could incentivise empathy. An example may be in "caring professions". Crawford *et al.*[28] have claimed that, although nurses may enter the profession with considerable empathy, organisation and professional limits hinder their exercise of empathy and compassion. Health-care systems with their emphasis on marketisation, and command-and-control models, can restrict compassionate care and are often fostered by a rigorous litigious regime. It would be possible for legal regulation to focus on marks that indicate empathy: seeking feedback from patients; ensuring staff feel valued and cared for and safe; identifying and celebrating compassionate care practices; integrating caring conversation into job descriptions.[29] This approach recognises that, rather than blaming individual practitioners for lacking empathy (which involves many of the difficulties outlined above), we look at the health-care environment and processes that might facilitate or reward empathetic caring relationships.[30] So, to conclude on this section, it is manifestly absurd for the law to try to compel empathy, but there is room for it to foster and encourage empathy.

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[27] Divorce, Dissolution and Separation Act 2020.

[28] Paul Crawford, Brian Brown, Marit Kvangarsnes, and Paul Gilbert, 'The Design of Compassionate Care', *Journal of Clinical Nursing* 23, (2014): 3589–3599.

[29] Belinda, Dewar, Elizabeth Adamson, Stepehen Smith, Joyce Surfleet and Linda King. 'Clarifying Misconceptions about Compassionate Care' In: *Journal of Clinical Nursing* 23 (2014), 3489–3599.

[30] Paul Crawford, Brian Brown, Marit Kvangarsnes, and Paul Gilbert, The Design of Compassionate Care, *Journal of Clinical Nursing* 23, (2014): 3589–3599.

5. Empathetic law

Could the law itself be empathetic? At first sight, as indicated in the introduction the possibility for this seems limited. There are several reasons which seem to strongly mitigate against the law itself being empathetic

First, the law in its nature has rules whose application is predictable. This is often seen as part of the rule of law. A citizen is entitled to know what the law is and what the legal position will be. For example, a citizen is entitled to know whether they will be committing a crime if they act in a particular way. Whether buying a house, signing a will or getting married a person is entitled to know the legal consequences of their actions. Yet this cannot be done if the law seeks to assess each case by considering the particular situation that an individual found themselves in. From such a perspective the importance of the rule, mentioned at the start of this paper about being bound if you sign the contract makes sense. Indeed, the whole point of contracts is that once the legal formalities have been performed they are binding, unless some very strong reason otherwise.

Second, it is seen as a fundamental principle that "like cases are treated alike". That is seen as at the heart of fairness. A case should not turn on the extent to which the judge can empathise with one of the parties. As Justice Delaney wrote, in a judgement on sentencing in a homicide case:

> God has blessed me with two children and graciously spared me the loss of a child or grandchild. I am saddened by the tragic loss of life this case presents and sympathize with the families of all involved. But, when I put on the robe as judge, I must not let my feelings, my emotions, much less public opinion, influence my review and application of the law. [31]

Third, generally, legal cases involve a dispute between two parties. In most hard cases it will be understandable that each person will believe themselves to have fairness on their side. Expecting the law to be empathetic to both sides might well, therefore, be no guide to finding a solution to the dispute.

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[31] *States v Cutts*, No 2008CA000079, 2009 WL 2170687 (Ohio App 5 Dist, 22 July 2009) (Delaney J concurring).

Fourth, the law is famous for "translating" personal problems and turning them into legal disputes, which may have little to do with the real emotions at play. A very good example of how the law might be said to lack empathy is to be found in the example of disputes over inheritance. Disputes, particularly between siblings over parental estates, are common and there are complex fixed rules that apply to these, with some relatively complex case law on them. However, much of these disputes have complex emotional backgrounds.[32] The legal arguments are presented in terms of the statutory provision and the dicta of judges, but these probably have no bearing on what the dispute is "really about": grief, long standing family disagreement, personal issues. The legal outcome may end up providing a division of testamentary assets, but fail to deal with the emotional issues behind the debates.

Fifth, the law is based on a highly individualised understanding of the self. The common law is based on the assumption that we are competent, detached, independent people who are entitled to have our rights of self-determination and autonomy fiercely protected. Under this approach, freedom is the most highly valued goal and the primary aim of legal intervention is to keep us free from others.[33] This seems to work against empathy with a focus on self-sufficiency and individualised autonomy. Feminist commentators have been quick to criticise this image of the self, arguing that we are ignorant in important ways, vulnerable, interdependent individuals, whose strength and reality are not in our autonomy, but in our relationships with others. Without caring relationships, the burden that would fall onto the state would be impossible to bear. And empathy is crucial to care. It is not just that empathy will lead to care, but to an appreciation of the other person's emotions and a connection to them is necessary for good care to be provided. It seeks a legal remedy designed to uphold and maintain networks of caring relationships, rather than protecting individual rights. Much more would need to be said about what such a legal system would look like. It would however be one that recognised and stressed the importance of empathy and the care that flows from that.[34]

These are powerful points and explain, somewhat, why there are many cases where the law cannot be empathetic. But it would be quite wrong to conclude that it is not possible for the

[32] John Stannard and Heather Conway *Becoming Like Solomon: Towards an Emotionally Intelligent Legal System*. Oxford: Bloomsbury, 2016.
[33] Jonathan Herring, *Law and The Relational Self.* Cambridge: CUP, 2020.
[34] Ibid.

law to be empathetic. I would like to mention three circumstances in which quite considerable empathy is possible.

6. When the law does express empathy

We will start by setting out examples of cases where the law does express empathy, before considering the correct place for empathy in legal responses.

6.1 The lLaw and bBest interests

A good example of an empathetic application of the law concerns the many cases where a person lacks mental capacity to make decisions for themselves, be that a child or an adult with mental capacity issues. In such a case, the court must make a decision based on their best interests. In recent years, the courts have emphasised how the judge must consider the issue from the point of view of the particular individual in question and not from an abstracted point of view. Baroness Hale in *Aintree v James* has explained:[35]

> …[I]n considering the best interests of this particular patient at this particular time, decision makers must look at his welfare in the widest sense, not just medical but social and psychological; they must consider what the outcome of that treatment for the patient is likely to be; they must try and put themselves in the place of the individual patient and ask what his attitude to the treatment is or would be likely to be; and they must consult others who are looking after him or are interested in his welfare, in particular for their view of what his attitude would be.

The courts go to considerable lengths to understand the issue from the patient's perspective. To illustrate how the courts go about this I will use the case of *Wye Valley v B*.[36] The case concerned a 73-year-old man whose leg was infected. The doctors determined that he would die within a few days unless his leg was amputated, in which case he would live a few years. Mr B refused to consent. He was assessed as not having capacity to make the decision. Indeed, he had a mental condition which meant that he had lack capacity to make decisions

[35] [2013] UKSC 67, para 39.
[36] [2015] EWCOP 60.

for much of his life. As he lacked capacity the court had to decide whether the operation would be in his best interests.

To do this the judge, Mr Justice Peter Jackson, having heard some legal arguments and expert evidence, visited Mr B. His conclusion was the amputation should not take place (unless he were to change his mind). He emphasised the need for a judge to put themselves into the position of the individual and decide what would be best for them. That did not mean, he emphasised, automatically following the wishes of the individual, but it did mean these would be given great importance. As he explained:

> To state the obvious, the wishes and feelings, beliefs and values of people with a mental disability are as important to them as they are to anyone else, and may even be more important. It would therefore be wrong in principle to apply any automatic discount to their point of view.[37]

The case was complicated as Mr B's views were based on hearing "angelic voices". Although he was not a member of a formal religious group, Mr B had always followed guidance from angels, the Virgin Mary, fairies and spirits. They were, he told the court, clear, in saying he should not have the amputation. The judge went on to explain that these beliefs were key in what was a highly personalised assessment:

> I do not find it helpful to see the person as if he were a person in good health who has been afflicted by illness. It is more real and more respectful to recognise him for who he is: a person with his own intrinsic beliefs and values. It is no more meaningful to think of Mr B without his illnesses and idiosyncratic beliefs than it is to speak of an unmusical Mozart.[38]

For Mr B, given that "his core quality is his 'fierce independence'" it was in the best interest of a person with his beliefs to receive the treatment. You may or may not agree with the outcome of the case, but there is no denying the judge's attempt to empathise and understand Mr B; to come alongside and make the decision he could not make himself.

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[37] Para 11.
[38] Para 13.

6.2 Empathetic defences in criminal law

A second example of empathy can be found in criminal law in defences, which enable a defendant to escape from what would otherwise be a criminal conviction. Some of these are cases where the defendant simply did the right thing (a justification in the legal terminology). In other cases, defences are "concessions to human frailty": an acknowledgement that humans cannot be expected to behave perfectly all of the time. These are often an expression of empathy: we can understand the emotions the defendant was overwhelmed with at the time. An example in English law is the defence of loss of control or provocation as was previously known, where it is acknowledged that a killing in the heat of anger can sometimes justify an acquittal for murder.[39] I will use the case of *DPP v Camplin*[40] to illustrate the issues. In that case, a fifteen-year-old boy killed a middle-aged man with a Chipati pan. He had been sexually abused by the man, who then laughed at him. This caused Camplin to lose self-control and attack the victim. He was charged with murder but raised the defence of provocation. The case went to the House of Lords, where the key question was whether the jury should consider whether Camplin had behaved as a reasonable person might have done in these circumstances or as a reasonable "fifteen year old boy". The court quoted Tindal C.J comment in *Hayward's* Case (1833) 6 C. & P. 157 that the defence of provocation was "the law's compassion to human infirmity". The House of Lords explained that the reasonable person test needed to provide a compromise. On the one hand, a person could not rely on their own "exceptional pugnacity or excitability" to justify their loss of control. On the other hand, the law recognised that even reasonable people could sometimes lose their control in the face of provocation. The law could expect people to be "possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today." They emphasised the importance of understanding the situation from the defendant's perspective:

> the gravity of verbal provocation may well depend upon the particular characteristics or circumstances of the person to whom a taunt or insult is addressed. To taunt a person because of his race, his physical infirmities or some shameful incident in his past may well be

[39] Although in English law a conviction for manslaughter can follow.
[40] [1978] AC 705.

> considered by the jury to be more offensive to the person addressed, however equable his temperament, if the facts on which the taunt is founded.[41]

6.3 Family law post-scripts

In several cases recently, we have seen judges in family courts undertake a traditional legal judgment, but end their findings with some comments specifically addressing the parents. For example, in *Re K and H (children)*[42] Pauffley J., in deciding that children removed from their parents after child protection concerns, could not live with the grandparents said:

> I express my profound sadness that the outcome of this court process has been to deny the grandparents and parents their heartfelt wish. If I had believed there was a sufficient basis to be optimistic about the children's future with the [grandparents], I should not have decided as I have. The tragedy is that the prospects of such a placement would involve enormous risks which, on behalf of these two very vulnerable children, I simply could not take[43]

Here, we see the judge understanding that the decision made is not just an application of rules, but will have a deep emotional impact. She expresses her sympathy for them and seeks to explain in simple, non-legal, terminology the basis for the decision.
Similarly, in *Re HB*[44], the MacFarlane P, in resolving a dispute over whether two children [J and K] should have contact with their father following separation, the court concluded they would not order contact but then wrote:

> **I** urge the parents, the mother in particular, to think very carefully about everything we have said, not only in these judgments but also during the hearing of the appeal, when each of them was present in court. Unless they can, as they must, even at this late stage, sort things out and restore the father's relationship with **J** and K, the future for all of them is bleak. There will be no winners here; all will be losers.

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[41] At 715.
[42] [2013**]** EWHC 165 (Fam).
[43] Para 57.
[44] [2015] EWCA Civ 389.

> **J** and K have an image of their father which, however it has come about, is distorted and profoundly damaging to them. But it is unrealistic for anyone, the mother included, to imagine that this state of affairs will continue indefinitely. Sooner or later, and it may be much sooner than the mother believes or would wish, the children will come to discover the full story of their parents' failures. Sooner or later, and it may be much sooner than the mother believes or would wish, the children will demand to see the court papers and to read the judgments. What will they think? How will they react? In particular, what will the children think, how will they react, when they discover, as one day they will, that their father is not the man they currently believe him to be? Will they then turn against their mother? Will they reject both parents? The mother needs to ponder these questions and think hard about what the answers might be.[45]

Two things in particular are notable about these comments. First, the judge is seeking to understand why the parents are acting in the way they are. She realises that traditional legal intervention is not going to affect the behaviour of the parents. She is showing empathetic care in seeking to articulate principles that will be of meaning and value to the particular parents before the court, rather than using legal doctrine. Second, these arguments are designed to promote the compassionate care by the parents. They recognise that parents care deeply about their children and indeed that is why family disputes can become so acrimonious. The judges in these cases are seeking to encourage the parents to exercise their empathetic care to achieve the result. There may be questions over whether or not the judiciary should be encouraging parental contact in these cases, but that is a debate for elsewhere.[46] What is notable is that the judge in these cases is both exercising empathy and seeking to encourage empathetic care.

7. When should the law be empathetic? And when should it not?

So, we have found examples of when the law can be empathetic, and examples of when it is not. Is there a way of making sense of this? I would suggest much can be made on a

[45] Para 80 and 81.
[46] Jonathan Herring, *Domestic Abuse and Human Rights*. Amsterdam: Intersentia, 2020, chapter 6.

distinction drawn by Ira Ellman and developed by John Eekelaar[47] between instrumental law and retrospective law. Instrumental law is "designed to affect people's behaviour in some way that policymakers believe desirable". Retrospective law is one, when the law is less concerned with influencing future behaviour "than with changing the consequences of what has already happened to make the outcome more fair".

Family law, for example, operates largely retrospectively: people do not seek legal advice nor, sadly, read family law textbooks[48] before making love; moving together; nor even marrying. The lawyers are brought in when it all goes wrongs and the law is seeking to find a way ahead.

By contrast people are very unlikely to seek to create a trust, sign a will, or purchase land without involving law. Indeed, for the latter kind of transactions the instrumental element is key. If, for example, you are buying a house you are not interested too much in the content of the law, but rather its enforceability. In other words, you are not too concerned whether the law requires you to sing ten bits of paper; chant some Latin words or dance a special dance, as long as you know once you have done that the transaction is legally effective and you have purchased the land. By contrast, certainty and predictability are not important in retrospective law, achieving a fair result is by the most important. Empathy has little role to play in such decisions because the value of the instrumental law lies in its certainty and formalising requirements. There will be a clear record of the transaction that can be objectively proved with evidence (such as a signed contract). People can determine for themselves if the transaction is valid and rely on it for organising their life.

By contrast, with the retrospective law no one will be acting in reliance on the law. The couple cannot agree the way forward and the court will need to determine the best answer. Importantly this is the best way forward for the parties to the decision. What solution will work will depend on the character, personality and history of the individuals. This can only be ascertained with empathy. This is particularly evidence in family law in disputes over children. The English judges in these cases have been determined not to set down rules or even presumptions in these cases emphasising the need to find a solution that works for the

[47] John Eekelaar, 'Family Law and Love', *Child and Family Law Quarterly* 26 (2016) 289–304.
[48] Not even, astonishingly, Jonathan Herring, *Family Law*. London: Pearson, 10th ed 2020.

particular child and family before it. In *Re B* ***(A*** *Child)*[49], the Supreme Court rejected the use of presumptions about what generally works for children, on the basis that this provided the court with little guidance on what would promote the welfare of the particular child at the centre of the case.

8. Empathy and Judges

In light of what has just been said it is surprising that there is a fierce debate over whether or not judges need to be empathetic. The law requires judges to be empathetic in order to apply many areas of the law, as we have just seen. However, let me explain the debate first.

Contemporary debates on judicial empathy start by noting the issue came to the political fore when President Obama in explaining that the Supreme Court needed empathetic judges who understood that:

> justice isn't about some abstract legal theory [but also] about how our laws affect the daily realities of people's lives and who are capable of understanding and identifying with people's hopes and struggles as an essential ingredient for arriving at just decisions and outcomes.[50]

These remarks generated quite some opposition. It was seen as "empathy" was equated for a "compassion for the poor" and a support for higher taxes. Empathy was seen as a justification for prejudice.[51] A "war on empathy" was announced. So much so that when Justice Sotomayor in her confirmation hearing was quick to distance herself saying "... I can only explain what I think judges should do, which is judges can't rely on what's in their heart . . . It's not the heart that compels conclusions in cases. It's the law."[52]

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[49] [2013] UKSC 33.
[50] Quoted and discussed in Martin Hoffman, 'Empathy, Justice, and Social Change'. In: Heidi Maibom (ed). *Empathy and Morality*. Oxford: Oxford University Press 2014, 71–96, 71.
[51] Brison, Susan J. 'On Empathy as a Necessary, but Not Sufficient, Foundation for Justice (A Response to Slote)' In: Amalia Amaya and Ho Hock Lai (eds) *Law, Virtue and Justice*. Oxford: Hart Publishing, 2013. 303–310.
[52] Amy Kind, 'Empathy, Imagination and the Law'. In: Amalia Maya and Maksymilian Del Mar (eds). *Virtue, Emotion and Imagination in Law and Legal Reasoning*. Oxford: Hart Publishing, 2020.

These discussions often lack nuance. First, as we have seen there are plenty of cases where judges need to be empathetic. As we have seen, cases for substituted decision making require considerable empathy. If there is a debate it is about when it is appropriate for the judge to express empathy, rather than when the judge should be empathetic.

Second, ignoring emotions does not accord with the reality of human life. The love that goes on caring, and the grief, disappointment, frustration, anger and despair, which are all part of life, find no place in an emotion-free rationality. The law often struggles to respond to issues that are not readily reducible to an economic value nor expressed in terms of individualised rights. **If** the law is to respond to real people, it must respond in a way that recognises the importance of emotion.

Third, if the law is about righting wrongs, then the wrongs need to be understood. In an American decision *Safford Unified School District v. Redding,*[53] the Supreme Court was called upon to determine "whether a 13-year-old student's Fourth Amendment right was violated when she was subjected to a search of her bra and underpants **by** school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school." The law required the judge to balance the governmental interests in keeping drugs out of schools and the individual privacy issues. Justice Ruth Bader Ginsburg sat on the case, but later expressed concern that she was the only woman on the bench. She explained of the other judges: "They have never been a 13-year-old girl, It's a very sensitive age for a girl. I didn't think that my colleagues, some of them, quite understood." Although she was eventually able to persuade the majority of her colleagues to find for the girl, the case shows how even something as apparently abstract as weighing state and individual interests requires empathy.

That all said, there are real dangers with empathy. It is easiest to be empathetic to those who are most like to and share your experiences of life. Those who are "other" people may be less empathetic too.[54] [55] As Susan Brison writes:

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[53] 557 US 364 (2009).

[54] Susan J Brison, 'On Empathy as a Necessary, but Not Sufficient, Foundation for Justice (A Response to Slote)' In: Amalia Maya and Ho Hock Lai (eds). *Law, Virtue and Justice*. Oxford: Hart Publishing, 2013. 303–310. 307.

> We have a tendency to empathise more readily and more strongly with those who are similar to us – even when, as in the case of ethnicity, for example, the similarity is not morally or legally relevant. A judge who experienced – and then made decisions based on – greater empathy for members of her own ethnic group than for other similarly-situated persons of different ethnicities would not be acting justly. Sometimes, greater empathy for certain others leads us morally astray.

A good example may be the *R (McDonald) v Royal Borough of Kensington and Chelsea*.[56] To the majority the case was presented as whether the allocation of a local authority's budget to deny overnight care for a woman with mobility problems fell within the legal requirements. They noted carefully the way the local authority had considered the competing claims on its limited budget and concluded the decision-making process was fair. It seems the majority were happy looking at the issue in terms of committee meetings, budgets and policies and finding these appropriate. For Lady Hale, issuing a dissenting judgement, the question was whether the care needs of Elaine McDonald were met. She explains:

> Everyone needs to urinate and defecate. People who can control their bladder and/or bowels need a safe and hygienic place in which to do so. People who cannot control their bladder and/or bowels need equipment designed to cater for the fact that they cannot avoid performing these natural functions in the wrong place. The former group of people do not need the latter equipment although they may need help in getting to the safe place. Once the need is accurately identified, the most efficient and economical way of meeting it can be chosen. Just as any parent has to choose whether to use disposable or reusable nappies (to take an obvious example), a local authority can choose the most efficient and economical equipment to meet the need. Likewise, if the need is for help to use the lavatory or commode, there may be all sorts of choices available – as to when, how or even where to offer the service.[57]

Lady Hale's empathy was with the woman in the heart of the case. This led to a completely different reframing of the issues at hand. Famously in that case Lord Walker found "it rather

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[55] Obleth Hansberg, 'Empathy and Negative Intimacy' In: Amalia Maya and Maksymilian Del Mar (eds) *Virtue, Emotion and Imagination in Law and Legal Reasoning*. Oxford: Hart Publishing. 2020, 157–178.
[56] [2011] UKSC 33.
[57] Para 74.

regrettable that Lady Hale's judgment makes so many references to defecation."[58] One can imagine a response that regretted that Lord Walker's judgement made so many references to accountancy.

9. Conclusion

In this paper we have explored the relationship between the law and empathy. We started by looking at the nature of empathy. In particular we explored it through Shakespeare and the ways that literature can evoke empathy: as both an emotional and intellectual response. While there are some good reasons why certainty is paramount in some areas of the law, such as creating a trust or purchasing land, and there is little room for taking an empathetic approach to any dispute. There are other cases which are forward looking, trying to resolve a disrupted relationship. In such cases empathy is key. The solution must be tailored to the needs and characteristics of the particular parties. Further, that to understand the nature of harms and wrong, empathy is required and a failure to do that will mean the law is selective in which wrongs it recognises. Empathy is therefore central to justice in many cases.

Before closing, we should note, we may have been too harsh on the judges in the care hire cases mentioned in the introduction. In a case on similar facts before a Canadian Court,[59] Justice Charles Dubin noted that the care hire company knew their customers had no time to read all the small print of the contracts. They could not claim they reasonably believed the clients had consented to the terms by signing them. Particularly where there are unusual terms there was a duty on car hire companies to make sure the clients were aware of them before signing. So even there, empathy won the day.

[58] Para 32.
[59] *Tilden Rent-A-Car Co. v. Clendenning* (1978), 83 DLR (3d) 400.