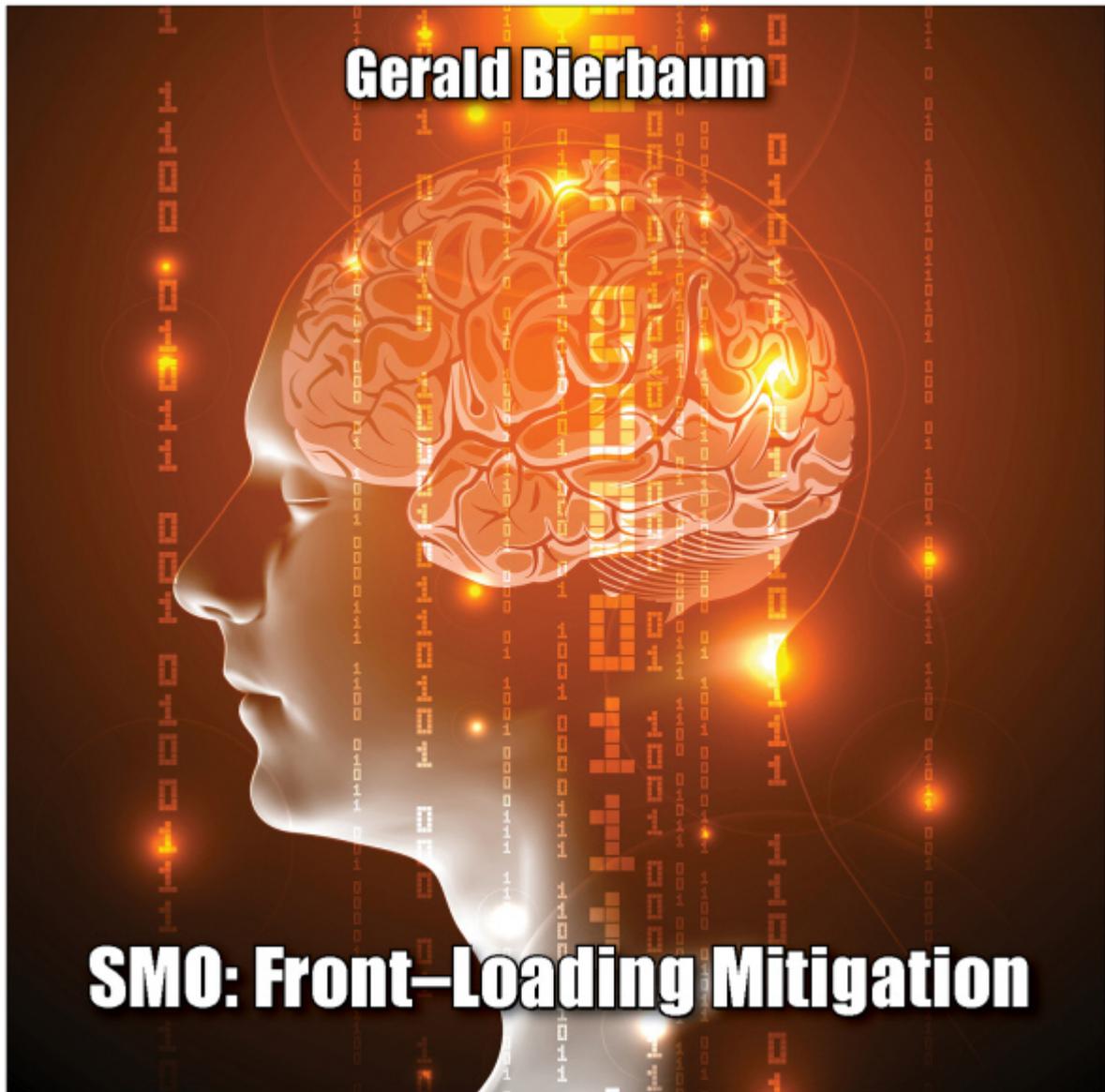


## SMO: Front-Loading Mitigation

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Friday, July 22nd, 2016



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*Empathy breeds proper judgment. . . . Empathy gives you an inside view. It doesn't say, ?If that was me . . .? Empathy says, ?That is me.?*

**?Final words of Ray Jasper before being**

Empathy frames choices about punishment. Empathy for the victim extends sentences; empathy for the defendant embraces mitigation. A couple of neurological studies exploring empathy reveal, without surprise, that a sense of fairness modulates the experience of empathy. However, the sense of fairness weighs heavier on the men than the women, which indicates men and women use different neural processes when exposed to potentially empathic evidence. These studies suggest that we may have to introduce mitigation early, "front load" mitigation to have any chance with male jurors.

Neuroscientists studying how the brain processes empathy asked subjects to play a game where they trade with a partner. Sometimes the partner trades fairly, sometimes unfairly. The subjects then sat in an fMRI machine and saw photographs of the partner in pain.<sup>1</sup> Generally, for both men and women, seeing a stranger in pain activates the brain regions of the right interior insula and the right anterior and cingulate cortex.<sup>2</sup> However, when the men saw an unfair game partner in pain, those brain regions showed either greatly diminished response or no response while the regions normally associated with reward responded.<sup>3</sup>

When women saw the unfair partner in pain, the normal empathetic regions showed somewhat muted activation but the reward centers showed no activity. Clearly, the neurological process for empathy varies between men and women when the defendant appears unfair. For men, the neurological process for empathy seems mostly altered and unavailable; for women, the process stands somewhat muted. A defendant must appear fair then, regardless of what he has done, before men will feel any significant empathy.

A related study showed different neural processing between men and women when asked to compare their own emotions to the emotions (not necessarily pain) of a person in a photograph.<sup>4</sup> Women, when making the comparison, showed activation in the right inferior frontal cortex and the right cerebellum, areas that usually involve the direct experience of emotion. Men showed an activation in the tempoparietal junction, which processes thoughts about the relation of self to others. In addition to processing empathy differently based upon fairness, men analyze the emotion of others differently than women. Merely showing the emotions a defendant experienced "frustration, sadness, or fear" and asking men to consider what the defendant's emotions meant will not compel male jurors to walk in the defendant's shoes.

Fairness is primal for promoting an empathetic response in men. To promote and protect fairness, we need to examine the factual details of the offense and introduce mitigating evidence as early as possible. For example, imagine the prosecutor accused the defendant of shooting a clerk during a robbery. During voir dire we can ask "Could anything compel a person to rob?" or "Is there a safe way to rob a stranger?" Both of these questions could potentially relate to defenses (such as duress, theft from person rather than robbery), but the questions may also suggest viewing the offense from both the victim's and the shooter's point of view.<sup>5</sup> Later, when a detective introduces the store video, we can ask about the poor condition of the shooter's clothing or shoes, if shooter drove or was on foot, or whether he seemed high, etc. If we have a live eyewitness, we can ask what the shooter smelled like, if he was dirty, and so forth. Further, somewhere in this process "when responding to an objection or prefacing a question" we can agree that no victim deserves to be killed and no defendant is entitled to rob or kill, but we introduce these facts only to help the jurors understand the whole incident. Seeing the shooter's desperation or deprivation, at the time of the offense, promotes both a universal version of the offense and reveals a shooter who is more than just mean.<sup>6</sup>

A shooter will never be completely fair. When we introduce these type details, we may even prompt the prosecutor to holler that no victim deserves to die and no one is entitled to rob and kill. But we should not cower. We cannot allow fairness to remain exclusively in the domain of the prosecution or the victim. We can build in fairness for the defendant, even if he proclaims his innocence, by carefully presenting the details of the offense and implanting mitigating themes during voir dire and during the introduction of the offense.

Introducing mitigating evidence prior to a sentencing hearing should not leave us speechless during the

sentencing hearing either. If the jury (or judge) arrives at sentencing seeing why the defendant committed the crime, then during sentencing we are free to discuss what happens now?e.g., how the defendant's problems can be corrected, how much the defendant should suffer given the universal view of the offense, and just what measures will ensure the safety of the survivors in the future. We are not required to save mitigating themes for the sentencing hearing to pursue a just and merciful sentence.

Mitigating evidence, introduced with the offense or during voir dire, can protect the fairness needed for male jurors to feel an empathetic (or mitigating) response during a sentencing hearing. Mitigating evidence can protect or promote a sense of fairness by describing the circumstances beyond the defendant's control that compelled him to be the person he is and to act the way he does, including committing the offense. When seeking empathy from male jurors, front-loading mitigation, or combining guilt and sentencing evidence, may be necessary for any lenient or merciful punishment.

## Notes

1. Tania Singer, Ben Seymour, John P. O'Doherty, Klaas E. Stephan, Raymond J. Dolan, and Chris D. Frith, *Empathic neural responses are modulated by the perceived fairness of others*, *Nature*, Jan 26; 439(7075): 466-469, (2006).
2. Boris C. Bernhardt and Tania Singer, *The Neural Basis of Empathy*, *Annual Review of Neuroscience* Vol. 35: 1-23 (July 2012).
3. Singer, *Empathic neural responses*.
4. Martin Schulte-Rüther, Hans J. Markowitsch, N. Jon Shah, Gereon R. Fink, and Martina Piefke, *Gender differences in brain networks supporting empathy*, *NeuroImage* 42, 393-403 (2008).
5. For a defendant's right to voir dire on defense, see Tex. Const. art. I, § 10 (? In all criminal prosecutions the accused . . . shall have the right of being heard by himself or counsel, or both. . . .?); *Jones v. State*, 223 S.W.3d 379, 381-82 (Tex.Crim.App. 2007)(holding denial of proper voir dire question is error of constitutional magnitude); *Rodriguez-Flores v. State*, 351 S.W.3d 612, 619 (Tex.App.?Austin 2011)(discussing voir dire regarding questions of duress). For capital cases, in *Morgan v. Illinois*, 504 U.S. 719, 729 (1992), the United States Supreme Court determined that jurors who could not give effect to mitigation evidence could be struck for cause, but the concepts here should not be limited to capital cases. Male jurors serve on non-capital as well as capital juries. We will often face male sentencing judges.
6. See *Blakely v. Washington*, 542 U.S. 296, 159 L.Ed.2d 403 (2004), where the United States Supreme Court refers to a lower court's parsing of a defendant's motives for committing the offense and the means of committing the offense to justify a specific punishment:

The defendant's motivation to commit kidnapping was complex, contributed to by his mental condition and personality disorders, the pressures of the divorce litigation, the impending trust litigation trial and anger over his troubled interpersonal relationships with his spouse and children. While he misguidedly intended to forcefully reunite his family, his attempt to do so was subservient to his desire to terminate lawsuits and modify title ownerships to his benefit.

The defendant's methods were more homogeneous than his motive. He used stealth and surprise, and took advantage of the victim's isolation. He immediately employed physical violence, restrained the victim with tape, and threatened her with injury and death to herself and others. He immediately coerced the victim into providing information by the threatening application of a knife. He violated a subsisting restraining order.

542 U.S. 301 (internal citation omitted).

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