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ARTICLE

READING CASES FOR EMPATHY

JENNIFER L. CORNELL*

The only effect I ardently long to produce by my writings, is that those who read them should be better able to imagine and to feel the pains and the joys of those who differ from them in everything but the broad fact of being struggling erring human creatures.

— George Eliot¹

Anyone who cried when Beth died in *Little Women*, or cheered when Harry Potter exacted his revenge on Voldemort, has experienced the transporive power of literary fiction. When we read, we become one with the story's protagonists, experiencing their thoughts and emotions firsthand. Reading fiction "gives us the ability to feel empathy for people we've never met, living lives we couldn't possibly experience for ourselves, because the book puts us inside the character's skin," says author Ann Patchett.² Cognitive psychologists have confirmed these empathetic effects.³ Character-based stories improve our understanding of others and underscore our shared humanity.

Reading legal cases can have similar effects. Although judicial opinions are less emotionally intense than literary fiction, they can evoke empathy in the same way. Opinions that focus on human "characters" use literary techniques to frame cases from their perspectives. Especially in cases involving criminal and constitutional law, human stories are central to the courts' narratives. Like literature, these opinions expand readers' experiences, putting them "in the skin" of others.

The importance of empathy in the legal profession is now widely recognized.⁴ A lawyer who can view an issue from multiple perspectives is a

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1. Rebecca Mead, *George Eliot and the Secret of Motherhood*, NEW YORKER (May 8, 2014), <https://www.newyorker.com/news/daily-comment/george-eliot-and-the-secret-of-motherhood> (quoting George Eliot).

2. Ann Patchett, *The Triumph of the Readers*, WALL ST. J. (Jan. 17, 2009), <https://www.wsj.com/articles/SB123214794600191819>.

3. See *infra* Part II.

4. Lauren A. Newell, *Rebooting Empathy for the Digital Generation*, 34 OHIO ST. J. ON DISP. RESOL. 1, 24–48 (2019); Ian Gallacher, *Thinking Like Nonlawyers: Why Empathy Is a Core*

more effective counselor, advocate, negotiator, writer, and adjudicator.⁵ Empathy training complements analytic training as a critical component of the law school curriculum.⁶ Empathy and analytics merge when students read legal cases. Judicial opinions—the primary tool for teaching legal analysis—can also foster empathy. As students read opinions to identify issues, understand rules, and solve legal problems, they simultaneously gain valuable “perspective taking” skills.

I. THE IMPORTANCE OF EMPATHY

The term “empathy” originally described a kinesthetic connection with a work of art,⁷ but by the early twentieth century, psychologists began to view empathy as a way to understand interpersonal relationships.⁸ Contemporary neuroscientists have validated this meaning through neuroimaging studies.⁹ They have shown that during empathy-inducing encounters, we activate the same neural circuits as others while simultaneously understanding what they are going through on an intellectual level.¹⁰ Thus empathy has both emotional (affective) and cognitive (thinking) components.¹¹ Dr. Helen Riess, a professor of psychiatry at Harvard Medical School and director of the Empathy and Relational Science Program at Massachusetts General Hospital, writes that empathy is an “exercise in perspective taking.”¹² Even if we do not feel the exact same emotion as someone else, we are empathetic if we are able to access a similar experience cognitively through imagination.¹³

Viewed in this broad “perspective taking” sense, empathy is generally (but not always)¹⁴ a desirable trait. Empathy plays a critical social role for humans, “enabling sharing of experiences, needs, and desires between indi-

Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance, LEGAL COMM. & RHETORIC: JALWD 109, 112 (2011); Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the “Heart” of Lawyering*, 87 NEB. L. REV. 1, 15–19 (2008).

5. Newell, *supra* note 4, at 24–48.

6. Gallacher, *supra* note 4, at 146–48.

7. HELEN RIESS, *THE EMPATHY EFFECT: SEVEN NEUROSCIENCE-BASED KEYS FOR TRANSFORMING THE WAY WE LIVE, LOVE, WORK, AND CONNECT ACROSS DIFFERENCES* 12 (2018).

8. *Id.* at 13.

9. *Id.* at 15.

10. *Id.*

11. *Id.* at 11.

12. *Id.* Riess argues that together with the emotional and cognitive components, “empathetic concern,” or the compassionate response to others, is the third facet of empathy. *Id.* at 24. However, this definition of empathy has not been universally accepted. For example, in *BETTER ANGELS OF OUR NATURE*, *infra* note 31, at 574, Steven Pinker argues that an altruistic concern for others “cannot be equated with the ability to think what they are thinking or feel what they are feeling.” I use “empathy” in the emotional and cognitive senses in this article. While empathy is usually associated with compassion, as discussed below, that is not part of its definition.

13. RIESS, *supra* note 7, at 11.

14. For a critique of empathy as a moral guide, see PAUL BLOOM, *AGAINST EMPATHY: THE CASE FOR RATIONAL COMPASSION* (2016).

viduals and providing an emotional bridge that promotes prosocial behavior.”¹⁵ It results in everyday sensitivity toward others, as well as “longer term, more deliberate prosocial behaviors,” like volunteerism and charitable donations.¹⁶ In today’s polarized society, empathy is an antidote to tribalism—“a psychological ‘superglue’ that connects people and undergirds cooperation and kindness.”¹⁷

For lawyers in particular, empathy is the “cornerstone” of the profession.¹⁸ President Obama famously applied an “empathy litmus test” in his search for a Supreme Court justice in 2009, declaring empathy “an essential ingredient for arriving at just decisions and outcomes.”¹⁹ Empathy inhabits nearly every aspect of legal practice, including client counseling, legal writing, advocacy, and negotiation.²⁰ Empathetic lawyers understand their clients’ goals and concerns to provide good counsel.²¹ They look at disputes from the perspectives of opposing counsel, judges, and juries to develop persuasive arguments and counterarguments.²² They write effectively because they “anticipate what the reader will be thinking and [provide] the information the reader seeks precisely when the reader needs it.”²³ Professor Kristin Gerdy compares the role of a lawyer to that of a “translator”:

As such, she needs to be able to empathize with the other side in order to translate that point of view for her client during settlement negotiations. She also needs to empathize with what opposing counsel is experiencing in order to relate effectively with her. She needs to empathize with the judge or the jury in order to know their concerns and address them as she conveys information to her client and as she makes her own strategic judgments.²⁴

15. Helen Riess, *The Science of Empathy*, 4 J. PATIENT EXPERIENCE 74, 74 (2017), <https://journals.sagepub.com/doi/full/10.1177/2374373517699267>.

16. Newell, *supra* note 4, at 23 (citing Sara Konrath, *Can Text Messages Make People Kinder?*, in CHARACTER: NEW DIRECTIONS FROM PHILOSOPHY, PSYCHOLOGY, AND THEOLOGY 412, 415 (Christian B. Miller et al. eds., 2015)).

17. *How to Increase Empathy and Unite Society*, ECONOMIST (June 7, 2019), <https://www.economist.com/open-future/2019/06/07/how-to-increase-empathy-and-unite-society> (interview with Jamil Zaki).

18. Gerdy, *supra* note 4, at 17.

19. Peter Slevin, *In Filling Vacancy, Obama Looks for a Jurist with Empathy*, WASH. POST (May 13, 2009), <https://www.washingtonpost.com/wp-dyn/content/article/2009/05/12/AR2009051203515.html>. President Obama’s remarks sparked a heated debate about the proper role of empathy for judges. Much of the controversy, however, may be due to differing definitions of empathy. Those who argue against empathy in judging may view it mostly in emotional terms. Few would dispute that empathy—in the broad “perspective taking” sense—is a desirable trait for judges. See Newell, *supra* note 4, at 45–46.

20. Newell, *supra* note 4, at 24–48 (summarizing empathy’s role in each of these areas).

21. Newell, *supra* note 4, at 25–31.

22. Newell, *supra* note 4, at 35–36.

23. Ian Gallacher, *Do RoboMemos Dream of Electric Nouns?: A Search for the Soul of Legal Writing*, 4 CASE W. RESV. J.L. TECH. & INTERNET 41, 53 (2012).

24. Gerdy, *supra* note 4, at 18–19.

In short, a lawyer's ability to "project him or herself into the thoughts of another" is of "extraordinary value."²⁵

Although some people are naturally more empathetic than others, psychologists believe that empathy can be learned and practiced. Paul Anderson and Sara Konrath compare it to "a muscle capable of growth, atrophy, disability, and even regeneration (think Scrooge)."²⁶ There are several proven techniques for increasing empathy, including communication training (especially in nonverbal techniques such as eye contact, facial expressions, posture, tone of voice, and active listening), role-playing, mindful meditation, exposure to varied cultures and people, and transportive experiences through art, film, theater, and print.²⁷ Reading literary fiction in particular seems to build a capacity to understand what others are thinking and feeling.²⁸

II. THE EMPATHETIC EFFECTS OF READING LITERARY FICTION

Writers, moral philosophers, and social psychologists have long extolled the virtues of reading literature.²⁹ "Empathy is at the heart of the novel," writes Azar Nafisi in *Reading Lolita in Tehran*.³⁰ Philosopher Martha Nussbaum agrees: "Novels . . . speak to an implicit reader who shares with the characters certain hopes, fears, and general human concerns, and who for that reason is able to form bonds of identification and sympathy with them."³¹ Psychologist Steven Pinker calls fiction "empathy technology" that "encourages one to step outside the parochial constraints of one's birth and station, to consider hypothetical worlds, and to reflect back on the habits, impulses, and institutions that govern one's beliefs and values."³² These scholars speak in dramatic terms about literature's social value. Reading, they contend, builds bridges of understanding among people.

25. Gallacher, *supra* note 4, at 112.

26. Newell, *supra* note 4, at 65 (quoting Paul Anderson & Sara Konrath, "Why Should We Care?"—What to Do About Declining Student Empathy, CHRON. HIGHER EDUC. (July 31, 2011), <https://www.chronicle.com/article/why-should-we-care-what-to-do-about-declining-student-empathy/>).

27. See RIESS, *supra* note 7, at 43–58, 125–145; ROMAN KRZANARIC, EMPATHY: WHY IT MATTERS, AND HOW TO GET IT 164–65 (2014); Newell, *supra* note 4, at 65.

28. RIESS, *supra* note 7, at 133.

29. For a historical survey of social attitudes toward reading fiction, see SUZANNE KEEN, EMPATHY AND THE NOVEL 37–64 (2007). Professor Keen herself is skeptical about fiction's empathetic effects. While she acknowledges that fictional characters often *invite* empathy, she argues that not all characters *evoke* empathy. *Id.* at xii. Further, she questions the link between reading fiction and real-world compassion. *Id.* at 145–68.

30. AZAR NAFISI, READING LOLITA IN TEHRAN 111 (2003).

31. MARTHA NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE 7 (1995).

32. STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE 477–78 (2012). The "empathy technology" Pinker refers to includes all forms of fiction, not just literature.

Cognitive psychologists have now confirmed these empathetic effects. In a pioneering study, Dutch psychologist Jèmeljan Hakemulder found less reflexive acceptance of rigid gender roles in Algeria among people who read part of a novel about experiences of an Algerian woman.³³ Subsequently, psychologist Raymond Mar found a significant association between reading fiction and high scores on the “Mind in the Eyes Test,” which measures how well people can identify others’ emotional states through facial expressions.³⁴ Building upon Mar’s “Mind in the Eyes Test” as an index of empathy, psychologists David Kidd and Emanuele Castano independently confirmed higher empathy scores among people who regularly read literary fiction than among those who read nonfiction, popular fiction, or nothing at all.³⁵

Psychologist Keith Oatley cites evidence that shows the association between literature and empathy is causal, not merely correlational.³⁶ He posits that both the *process* of reading literary fiction and the *content* of literary fiction promote empathy.³⁷ One type of process is inference; reading requires us to understand characters using inferences about what people mean and what kinds of people they are.³⁸ Another type of process is transportation.³⁹ Higher immersion in a vivid story leads to higher empathetic responses toward both fictional characters and real people.⁴⁰ The content of literary fiction—complex characters who differ from us—also fosters empathy.⁴¹ Oatley calls this “pluralism.”⁴² Fiction, he writes, “invites us to engage in many circumstances and to experience many emotions in relation to many kinds of people.”⁴³

III. THE SIMILARITIES BETWEEN LITERARY FICTION AND LEGAL CASES

A legal case is obviously not fiction, and reading a judicial opinion does not generally elicit the same intensity of emotional response as reading a short story or a novel. The emotional power of a judicial opinion is necessarily constrained by its form and function—to interpret the law and apply

33. Keith Oatley, *Fiction: Simulation of Social Worlds*, 20 *TRENDS COGNITIVE SCIS.* 618, 619 (2016) (citing JÈMELJAN HAKEMULDER, *THE MORAL LABORATORY: EXPERIMENTS EXAMINING THE EFFECTS OF READING LITERATURE ON SOCIAL PERCEPTION AND MORAL SELF-CONCEPT* (2000)).

34. *Id.* (citing Raymond A. Mar et al., *Exploring the Link Between Reading Fiction and Empathy: Ruling Out Individual Differences and Examining Outcomes*, 34 *COMMUNIS* 407–29 (2009)).

35. David Comer Kidd & Emanuele Castano, *Reading Literary Fiction Improves Theory of Mind*, 342 *SCIENCE* 377, 377 (2013).

36. Oatley, *supra* note 32, at 620.

37. Oatley, *supra* note 32, at 621.

38. Oatley, *supra* note 32, at 621.

39. Oatley, *supra* note 32, at 621.

40. Oatley, *supra* note 32, at 621.

41. Oatley, *supra* note 32, at 622–24.

42. Oatley, *supra* note 32, at 624.

43. Oatley, *supra* note 32, at 624.

it to the facts of a particular case. Opinions are written to resolve disputes, not to entertain.⁴⁴ Nevertheless, judicial opinions and literature have much in common. As Judge Richard Posner points out, the fundamental elements of the two forms are the same:

maintaining awareness of audience, building to a punch line, maintaining a degree of suspense (so that the reader will read attentively to the end and the opinion won't seem merely a rationalization of preexisting decision), selecting the essential facts to include in the narrative and arranging them clearly and consecutively, and telling the story in a narrative voice that conveys authority and credibility.⁴⁵

Indeed, an entire field of study uses narrative theory to analyze the “stories” embedded in the law.⁴⁶ Competing stories are the essence of legal disputes; the court must interpret and assemble these stories into “seamless webs of argument and narrative” in a judicial opinion.⁴⁷ The stories the court tells can take many forms: the story of the human conflict that gave rise to the legal dispute, the story of the lower court proceedings, the story of what did not happen or what could happen in the future, the story of comparable past cases, or the story of legal or social change.⁴⁸ A single opinion may contain many stories.⁴⁹ Within constraints, the authoring judge can choose which stories to emphasize and how to tell them.⁵⁰

At the appellate level, where the court's primary function is to interpret the law rather than to determine facts, broader legal considerations often subsume the individual stories underlying a particular dispute. In fact, some appellate opinions have been criticized for “de-humanizing” the parties.⁵¹ But human stories are central to some of the seminal opinions featured in the first-year law school curriculum, especially those in criminal and constitutional law. The facts of the case and the human interests at stake feature prominently in the court's overall narrative. Although the

44. Although some judicial opinions are, in fact, entertaining. *See generally*, CORPUS JURIS HUMOROUS (John B. McClay & Wendy L. Matthews eds., 1991) (compilation of humorous judicial opinions).

45. RICHARD A. POSNER, *LAW & LITERATURE* 350 (3d ed. 2009).

46. *See* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds., 1996).

47. Peter Brooks, *The Law as Narrative and Rhetoric*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW*, *id.* at 21.

48. John Leubsdorf, *The Structure of Judicial Opinions*, 86 *MINN. L. REV.* 447, 448 (2001).

49. *Id.*

50. *Id.* at 452.

51. *See* JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF MASKS* (2002) (arguing that many famous opinions disregard and consciously avoid the details about the humans involved). Judge Noonan's own appellate opinions focused on the human interests at stake. Julie A. Oseid, *I See You: Judge John T. Noonan, Jr., Writing with Empathy to Prove That the Human Person Is Central to the Law*, *see infra* 952.

“characters” lack the depth of their literary counterparts,⁵² they evoke empathy in much the same way. Like literary fiction, these judicial opinions use character inferences, vivid imagery, and pluralism to put the reader “in the skin” of their “characters.” Three famous Supreme Court opinions exemplify these techniques.

A. *Character Inferences in Graham v. Florida*

Perhaps the most empathy-inducing legal cases are criminal ones. Even in appellate cases involving questions of law, individual stories are at the core of criminal judicial opinions. Complex, sometimes tragic, defendants are the main characters in the statements of fact. Like protagonists in literary fiction, they require the reader to make inferences about their character.

Terrance Graham is one such figure. His juvenile sentence of life in prison without parole for a nonhomicide crime was the subject of the Supreme Court’s opinion in *Graham v. Florida*.⁵³ Justice Kennedy wrote the majority opinion, holding that the sentence was disproportional to the crime and thus violated the Cruel and Unusual Punishments Clause of the Eighth Amendment.⁵⁴ The opinion begins with background about Graham’s childhood:

He was born on January 6, 1987. Graham’s parents were addicted to crack cocaine, and their drug use persisted in his early years. Graham was diagnosed with attention deficit hyperactivity disorder in elementary school. He began drinking alcohol and using tobacco at age 9 and smoked marijuana at age 13.⁵⁵

It then describes Graham’s first run-in with the law:

In July 2003, when Graham was age 16, he and three other school-age youths attempted to rob a barbecue restaurant in Jacksonville, Florida. One youth, who worked at the restaurant, left the back door unlocked just before closing time. Graham and another youth, wearing masks, entered through the unlocked door. Graham’s masked accomplice twice struck the restaurant manager in the back of the head with a metal bar. When the manager started yelling at the assailant and Graham, the two youths ran out and escaped in a car driven by the third accomplice. The restaurant manager required stitches for his head injury. No money was taken. . . .

On December 18, 2003, Graham pleaded guilty to [two charges] under a plea agreement. Graham wrote a letter to the trial court. After reciting “this is my first and last time getting in trouble,” he

52. Leubsdorf, *supra* note 48, at 462–63.

53. 560 U.S. 48 (2010).

54. *Id.* at 82.

55. *Id.* at 53.

continued, “I’ve decided to turn my life around.” . . . Graham said, “I made a promise to God and myself that if I get a second chance, I’m going to do whatever it takes to get to the [National Football League].”⁵⁶

The opinion then portrays Graham’s rapid downward spiral. “Less than six months later,” he was arrested for an alleged home invasion robbery, an attempted second robbery, and possession of a firearm:⁵⁷

As Graham drove away, a police sergeant signaled him to stop. Graham continued at a high speed but crashed into a telephone pole. He tried to flee on foot but was apprehended. Three handguns were found in his car.

When detectives interviewed Graham, he denied involvement in the crimes. He said he encountered [the two accomplices] only after [one accomplice] had been shot. One of the detectives told Graham that the victims of the home invasion had identified him. He asked Graham, “Aside from the two robberies tonight how many more were you involved in?” Graham responded, “Two to three before tonight.” . . . The night that Graham allegedly committed the robbery, he was 34 days short of his 18th birthday.⁵⁸

Finally, the opinion includes statements from the trial judge as he sentenced Graham to the maximum sentence authorized by law on each charge—life imprisonment for the armed burglary and fifteen years for the attempted armed robbery, without parole:⁵⁹

“Mr. Graham, as I look back on your case, yours is really candidly a sad situation. You had, as far as I can tell, you have quite a family structure. You had a lot of people who wanted to try and help you get your life turned around including the court system, and you had a judge who took the step to try and give you direction through his probation order to give you a chance to get back onto track. And at the time you seemed through your letters that that is exactly what you wanted to do. And I don’t know why it is that you threw your life away. I don’t know why. . . .

“. . . The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you.”⁶⁰

The reader of the opinion infers the Court’s conflicting assessment of Graham as both a perpetrator and a victim of his circumstances and of a criminal justice system that abandoned him. Furthermore, through inference, the reader can almost feel the conflicting voices driving Graham’s

56. *Id.* at 53–54.

57. *Id.*

58. *Id.* at 54–55.

59. *Graham v. Florida*, 560 U.S. 48, 57 (2010).

60. *Id.* at 56–57.

impulsive, hardened, and yet tragic behavior. This process of making inferences about characters promotes empathy.⁶¹ The reader of *Graham* attains a deeper understanding of the defendant through Justice Kennedy's detailed statement of facts.

B. Vivid Imagery in Justice Alito's Dissent in Snyder v. Phelps

Human stories are also central to many constitutional law cases, especially those involving individual rights. Deeply personal issues can produce emotional judicial opinions. Justice Alito's dissent in *Snyder v. Phelps* is one example.⁶² The issue in the case was whether picketing outside a dead soldier's funeral service was protected conduct under the First Amendment.⁶³ The jarring facts of the case are recounted in vivid detail in Justice Alito's dissent:

Petitioner Albert Snyder is not a public figure. He is simply a parent whose son, Marine Lance Corporal Matthew Snyder, was killed in Iraq. Mr. Snyder wanted what is surely the right of any parent who experiences such an incalculable loss: to bury his son in peace. But respondents, members of the Westboro Baptist Church, deprived him of that elementary right. They first issued a press release and thus turned Matthew's funeral into a tumultuous media event. They then appeared at the church, approached as closely as they could without trespassing, and launched a malevolent verbal attack on Matthew and his family at a time of acute emotional vulnerability. . . .

On the day of the funeral, respondents, true to their word, displayed placards that conveyed the message promised in their press release. Signs stating "God Hates You" and "Thank God for Dead Soldiers" reiterated the message that God had caused Matthew's death in retribution for his sins. . . . Others, stating "You're Going to Hell" and "Not Blessed Just Cursed," conveyed the message that Matthew was "in Hell—sine die." . . .

Other signs would most naturally have been understood as suggesting—falsely—that Matthew was gay. Homosexuality was the theme of many of the signs. There were signs reading "God Hates Fags," "Semper Fi Fags," "Fags Doom Nations," and "Fag Troops."⁶⁴

The visceral details of the protest immerse the reader in a moving story about a father's grief. Justice Alito does not merely summarize the picketers' messages; he includes every shocking word. Vivid imagery during reading has been found to improve transportation and to increase empa-

61. Oatley, *supra* note 32, at 621.

62. 562 U.S. 443, 463 (2011) (Alito, J., dissenting).

63. *Id.* at 447. The majority held that the conduct was constitutionally protected. *Id.* at 463.

64. *Id.* at 463–69 (Alito, J., dissenting).

thy.⁶⁵ The reader of the dissent in *Snyder* actually feels the wrenching pain of a father who wants “to bury his son in peace” amid a vulgar protest.

C. *Pluralism in Obergefell v. Hodges*

In another emotionally charged case, the Supreme Court took up the issue of same-sex marriage in *Obergefell v. Hodges*.⁶⁶ Holding that there is a constitutional right to marry, the majority opinion, authored by Justice Kennedy, includes stories about three of the petitioners:

Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur’s death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems “hurtful for the rest of time.” . . .

April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relation in 2007. They both work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they welcomed another son into their family. The new baby, born prematurely and abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special needs joined their family. Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives.

Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before

65. Oatley, *supra* note 32, at 621.

66. 576 U.S. 644 (2015).

leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden.⁶⁷

These moving stories allow the reader to experience the case from three different couples' perspectives. Pluralism promotes empathy by expanding the reader's range of experience.⁶⁸ The *Obergefell* opinion puts the reader "in the lives" of James Obergefell, John Arthur, April DeBoer, Jayne Rowse, Ijpe DeKoe, and Thomas Kostura to feel their pain and longing.

IV. READING CASES FOR EMPATHY IN LAW SCHOOL

Empathy has rightfully assumed a place alongside legal analysis as a "core lawyering skill."⁶⁹ Many law schools now offer specific empathy training, either as part of the first-year curriculum or through upper-level electives.⁷⁰ Mentor relationships with local attorneys can powerfully introduce students to the kind of empathetic behavior they should emulate in practice.⁷¹ Supervised clinical courses allow students to observe and practice empathy skills with real clients.⁷² Client counseling, negotiation, and alternative dispute resolution courses offer similar experiences through simulation.⁷³ Others, like "Serving Clients Well" at the University of St. Thomas, incorporate the science of psychology to teach empathetic communication and decision-making skills.⁷⁴ These classes emphasize the interpersonal skills that are at the "heart" of effective lawyering.⁷⁵

Other courses use literary fiction itself as a means of stimulating empathy, drawing upon the work of Keith Oatley and others. Martha Nussbaum,

67. *Id.* at 658–59.

68. Oatley, *supra* note 32, at 624.

69. Gallacher, *supra* note 4, at 110.

70. Newell, *supra* note 4, at 73 n.381 (sample of course offerings at American and international law schools).

71. Gerdy, *supra* note 4, at 58. The acclaimed mentor externship program at the University of St. Thomas is an example of this type of empathy modeling.

72. Philip M. Genty, *Clients Don't Take Sabbaticals: The Indispensable In-House Clinic and the Teaching of Empathy*, 7 *CLINICAL L. REV.* 273, 275 (2000) ("[E]mpathy skills can be taught only with actual clients and only in an in-house model in which we are working directly with the students and clients.").

73. Newell, *supra* note 4, at 74–77.

74. The "Serving Clients Well" course includes excerpts from JENNIFER K. ROBBENOLT & JEAN R. STERLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* (2012) and PAUL BREST & LINDA HAMILTON KRIEGER, *PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICY MAKERS* (2010).

75. Gerdy, *supra* note 4, at 3.

a pioneer in the “law and literature” field, writes that literature gives students “the ability to think what it might be like to be in the shoes of a person different from oneself, to be an intelligent reader of that person’s story, and to understand the emotions, wishes and desires that someone so placed might have.”⁷⁶ The main thesis of her book *Poetic Justice* is that reading works by authors such as Dickens, Whitman, and Wright arouses empathy, which in turn leads to better legal judgment.⁷⁷ Professor Kristin Gerdy suggests that, in addition to full-length novels, law schools could incorporate short stories or poems into their curricula.⁷⁸ Other scholars, particularly those in fields of feminist and critical race law, have expanded the list of recommended reading to include a wider range of empathy-inducing “voices.”⁷⁹

A related method of empathy training exposes students to “the human side of lawyering” through “case stories” about real lawyers and clients.⁸⁰ These stories give students a fuller picture of the facts in real cases to better empathize with the people involved.⁸¹ For example, the *Trial Stories* book features in-depth descriptions of nine iconic trials, including the Aaron Burr trial and the Vioxx litigation.⁸² As a supplement to traditional casebooks, “case stories” highlight the real human implications of court decisions.⁸³

These methods all teach empathy as separate from—and even as opposed to⁸⁴—legal analysis. But students may also acquire some empathy skills in conjunction with learning analytic skills. In contrast to the didactic textbooks used to teach subjects like engineering and physics, legal casebooks teach substantive law through real cases about real people. Judicial opinions that focus on human stories evoke empathy in the same way as literary fiction—through character inferences, vivid imagery, and pluralism. When students learn about proportionality of criminal punishments in *Graham v. Florida*, they encounter a complex, tragic young defendant. When they learn about freedom of speech in *Snyder v. Phelps*, they feel the pain

76. Martha C. Nussbaum, *Cultivating Humanity in Legal Education*, 70 U. CHI. L. REV. 265, 270 (2003).

77. Amnon Reichman, *Law, Literature, and Empathy: Between Withholding and Reserving Judgment*, 56 J. LEGAL EDUC. 296, 303 (2006) (reviewing Martha Nussbaum’s *POETIC JUSTICE*, *supra* note 30, on its tenth anniversary).

78. Gerdy, *supra* note 4, at 44, 55.

79. Michael Pantazakos, *Ad Humanitatem Pertinent: A Personal Reflection on the History and Purpose of the Law and Literature Movement*, 7 CARDOZO STUD. L. & LITERATURE 31, 41–42 (1995).

80. Gerdy, *supra* note 4, at 55.

81. Gerdy, *supra* note 4, at 55.

82. MICHAEL E. TIGAR & ANGELA J. DAVIS, *TRIAL STORIES* (2008).

83. *Id.*

84. Professor Ian Gallacher believes that first-year doctrinal classes may actually *reduce* students’ empathy. Gallacher, *supra* note 4, at 116 (“[T]he empathetic response is systematically trained out of [students] in a first-year curriculum in which most, if not all, their doctrinal classes share the common attribute of changing the way students think, from intelligent laypeople to ‘lawyers.’”).

of a grief-stricken father mourning his son. When they learn about the constitutional right to marry in *Obergefell v. Hodges*, they are drawn into the lives of three couples yearning for its privileges and responsibilities.

Reading cases is certainly not a substitute for other methods of empathy training in law school. A judicial opinion typically does not arouse the same degree of empathy as a novel, a short story, or a “case story.” And reading is not nearly as impactful as *practicing* empathy through real or simulated client interactions.⁸⁵ But the “perspective taking” effects of reading judicial opinions that include human stories may at least contribute to students’ empathetic development. It “may be more than a coincidence that the English novel arose during the same period as English judicial opinions with developed statements of facts.”⁸⁶ Both kinds of stories broaden our understanding of people—the essence of being an effective lawyer. Reading, whether literature or cases, is an inherently empathetic act.

85. Joshua D. Rosenberg, *Teaching Empathy in Law School*, 36 U.S.F. L. REV. 621, 637 (2002) (“[T]he ability to empathize is a behavioral skill, rather than a cognitive process.”).

86. Leubsdorf, *supra* note 47, at 463.