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Empathy and Reasoning in Context: Thinking About Anti-Gay Bullying

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Kris Franklin*

I.	INTRODUCTION	61
II.	EMPATHIZING <i>IS</i> REASONING	67
III.	JUDICIAL REASONING IN <i>PATTERSON V. HUDSON AREA SCHOOLS</i>	82
	<i>A. The Trial Court's Opinion</i>	91
	<i>B. The Appellate Majority</i>	94
	<i>C. The Appellate Dissent</i>	98
IV.	UNPACKING "DELIBERATE INDIFFERENCE"	103
V.	REGARDING CONTEXT	109

I. INTRODUCTION

In the wake of the 2009 confirmation hearings for Sonia Sotomayor's nomination to the United States Supreme Court, empathy in judicial thinking has become a liability: incorrect, dangerous, and politically loaded. Although then-candidate Barack Obama argued in 2007 that empathy was a valuable trait for a nominee to the Court,¹ and

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1. The candidate stated:

Justice Roberts said he saw himself just as an umpire[,] but the issues that come before the court are not sport, they're life and death. And we need somebody who's got the heart—the empathy—to recognize what it's like to be a young[,] teenage[d] mom. The empathy to understand what it's like to be poor or African-American or gay or disabled or old—and that's the criteria by which I'll be selecting my judges.

Senator Barack Obama, Address to Planned Parenthood Action Fund (July 17, 2007) (transcript archived at <http://perma.cc/082Nfgx7Pcv>). Announcing Justice Souter's resignation from the Supreme Court, President Obama commented on the qualities he would be seeking for his replacement, noting, "I view that quality of empathy, of understanding and identifying with people's hopes and struggles, as an essential ingredient for arriving at just decisions and outcomes." Remarks on the Retirement of Supreme Court Justice David Souter, 2009 DAILY COMP. PRES. DOC. 317 (May 1, 2009), available at <http://www.gpo.gov/fdsys/pkg/DCPD-200900317/pdf/DCPD-200900317.pdf>, archived at <http://perma.cc/Ry3Q-TYPG>.

Comments like these set off a firestorm of critique from the right before the nomination of Sonia Sotomayor was announced. See Major Garrett, *Obama Pushes for 'Empathetic' Supreme*

then later, as President, cited the fact that Sotomayor's "more varied experience" might make her particularly well-suited to the high court,² critics countered forcefully that empathy was simply antithetical to legal reasoning. Commentators insisted that empathy was "a poor tool for judicial decision-making" and that the President's desire for empathetic judges "raised red flags that we ignore at our peril."⁴ Senator Charles Grassley argued that applying empathy to a legal decision is equivalent to offering "special treatment" and stated, "No matter what you call it—empathy, compassion, personal bias, or favoritism—it can have no place in the decisionmaking process of a judge."⁵

For these detractors, empathy necessarily gives one side an unfair advantage.⁶ In trying to define the term, Senator Jeff Sessions made this belief explicit:

Whatever this new empathy standard is, it is not law. . . . What is empathy? Is [it] your personal feeling that you had a tough childhood or some prejudice that you have—you are a Protestant or a Catholic or your ethnicity or your race or some bias you brought with you to life and to the court? Is that what empathy is?⁷

Similarly, Senator Orrin Hatch claimed that empathy and judicial fairness are wholly incompatible: "America needs judges who are guided and controlled not by subjective empathy . . . but by objective law."⁸ Or, as Senator Sessions more pointedly clarified, empathy for one party must always equal prejudice against another.⁹

Court Justices, FOXNEWS.COM (May 1, 2009), <http://www.foxnews.com/politics/2009/05/01/obama-pushes-empathetic-supreme-court-justices>, archived at <http://perma.cc/4ML3-HQPW>.

2. Remarks on the Nomination of Sonia Sotomayor to be a Supreme Court Justice, 2009 DAILY COMP. PRES. DOC. 402 (May 26, 2009), <http://www.gpo.gov/fdsys/pkg/DCPD-200900402/pdf/DCPD-200900402.pdf>, archived at <http://perma.cc/T525-N2HJ>.

3. Ilya Somin, Op-Ed., *How Empathy Can Distort Judges' Thinking and Lead to Bad Decisions*, L.A. TIMES (May 28, 2009), <http://www.latimes.com/news/opinion/opinionla/la-oe-chemerinsky-somin28-2009may28,0,4921073.story>, archived at <http://perma.cc/3FXL-CAUF>.

4. Thomas Sowell, *Sotomayor: "Empathy" in Action*, TOWNHALL.COM (May 27, 2009), http://townhall.com/columnists/thomassowell/2009/05/27/sotomayor__empathy_in_action/page/full, archived at <http://perma.cc/X7VN-7EY3> (contrasting empathetic reasoning with the "rule of law").

5. 155 CONG. REC. 20,854 (2009).

6. Some go so far as to contend that judges exercising President Obama's notion of empathy would violate their oath of office. See, e.g., Jonah Goldberg, *Empathy vs. Impartiality*, NAT'L REV. ONLINE (May 27, 2009, 12:00 AM), <http://nationalreview.com/articles/227590/empathy-vs-impartiality/jonah-goldberg>, archived at <http://perma.cc/DSF5-2NVW>.

7. 155 CONG. REC. 16,867 (2009).

8. 155 CONG. REC. 20,829 (2009).

9. Jeff Sessions, Op-Ed., *Supreme Court Must Not Show Empathy in Rulings*, J. GAZETTE (July 21, 2009), <http://www.journalgazette.net/article/20090721/EDIT05/307219932>, archived at <http://perma.cc/8KXR-9Y6V> ("[W]hen a judge shows empathy toward one party in a

As the debate surrounding Sotomayor's nomination wore on, arguments from the political left contended that empathy in judges did not have to equal judicial bias. It could instead signal an ability to "be mindful of the consequences of their decisions on people's lives"¹⁰ and, in a phrase that was repeated frequently, to "put oneself in the shoes of others."¹¹ Nonetheless, "empathy" has increasingly been treated as a dirty word in the politics of judicial nomination and confirmation.¹² Less than a year later, a *New York Times* political reporter opened his story about judicial nominations by unequivocally declaring, "Empathy is out."¹³ Indeed, in the 2010 confirmation for President Obama's next Supreme Court nominee, Elena Kagan, discussion of her capacity for empathy, as either a positive or a negative attribute, was studiously avoided.¹⁴

What happened? I am certainly not alone in believing that Senate Republicans and other opponents of judicial empathy, whether unconsciously or deliberately, profoundly misread the meaning of judicial "empathy."¹⁵ For them, empathy is a kind of personal preference,

courtroom, do they not show prejudice against the other?"); see also 155 CONG. REC. 20,677 (2009) ("If you show empathy for one party, haven't you had a bias against the other?").

10. Erwin Chemerinsky, *Judging Demands Empathy, Even from Conservatives*, L.A. TIMES (May 28, 2009), <http://www.latimes.com/news/opinion/opinionla/la-oev-chemerinsky-somin28-2009may28,0,4921073.story>, archived at <http://perma.cc/3FXL-CAUF>.

11. George Lakoff, *Empathy, Sotomayor, and Democracy: The Conservative Stealth Strategy*, HUFFINGTON POST (May 30, 2009, 11:25 PM), http://www.huffingtonpost.com/george-lakoff/empathy-sotomayor-and-dem_b_209406.html, archived at <http://perma.cc/9BVX-NYCC> ("[Empathy is] the capacity to put oneself in the shoes of others [but also] extends well beyond feeling to understanding."); Editorial, *Commentary: The Empathy of Judges*, DAILY REC., July 16, 2009, available at 2009 WLNR 29891424 ("Empathy allows the judge to place himself or herself in the shoes of the litigants and better understand their concerns").

12. Or in the words of then-Republican National Committee Chair Michael Steele, "Crazy nonsense empathetic." Matt Corley, *Steele on Judges with 'Empathy': 'I'll Give You Empathy. Empathize Right on Your Behind!'*, THINKPROGRESS (May 8, 2009, 2:37 PM), <http://thinkprogress.org/politics/2009/05/08/39363/steele-empathize-behind/>, archived at <http://perma.cc/GYB6-S9ZR>.

13. Peter Baker, *In Court Nominees, Is Obama Looking for Empathy by Another Name?*, N.Y. TIMES, Apr. 26, 2010, at A12.

14. Neither the word nor any equivalent term makes an appearance in the remarks made by the President upon Kagan's nomination. Remarks by the President on the Nomination of Solicitor General Elena Kagan to be a Supreme Court Associate Justice, 2010 DAILY COMP. PRES. DOC. 360 (May 10, 2010), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201000360/pdf/DCPD-201000360.pdf>, archived at <http://perma.cc/3UFN-Y6GT> (emphasizing only Kagan's reputation as "one of the nation's foremost legal minds" who "won accolades from observers across the ideological spectrum for her well-reasoned arguments and commanding presence"). The nominee herself seemed to avoid discussing the possibility that anything but legal precedent would inform her decision-making process. See Paul Kane, *Sticking to the Law*, WASH. POST, June 30, 2010, at A06.

15. Richard Just declared that the concept of empathy was "battered, vilified, and badly distorted" in the Sotomayor hearings. Richard Just, *The Empathy War*, NEW REPUBLIC (July 14,

based on identity categories such as race, gender, or class. Senator Grassley's conflation of "empathy" and "compassion" with "personal bias" and "favoritism" is telling. For Grassley, empathy seems to equate to pity, which then becomes indistinguishable from personal bias and leads inevitably to favoritism. Because no reasonable person could argue that favoritism should have a place in the Supreme Court,¹⁶ empathy then opposes (or even negates) judicial reasoning. In creating these associations, conservative detractors¹⁷ succeeded in removing from public discourse any notion of judges as empathetic actors. Consequently, judicial empathy is now treated, at the very least, as difficult to discuss or examine directly and, generally, as an entirely problematic concept.

This Article seeks to conduct a more serious inquiry into judicial empathy. It explores the cognitive process of empathy, rather than its affective or emotional aspects, and conceives of intellectual empathy as comprising deeply contextual analysis.¹⁸ Ultimately, cognitive empathy is an intrinsic element of judicial decision making. Research in neurology shows that the brain processes the intellectual work of contextualizing, identifying with and coming to conclusions about situations and people different from ourselves (cognitive empathy) separately from the emotional work of generating feelings of solidarity, pity, or joy in reaction to the experiences of others (affective empathy).¹⁹ Thus, while cognitive empathy does not preclude emotion, standing back from one's

2009), <http://www.newrepublic.com/blog/the-plank/the-empathy-war>, archived at <http://perma.cc/L3F4-4W7S>. For well-developed examinations of judicial empathy in the legal academic literature, see Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944, 1960-91 (2012), arguing in favor of Barack Obama's call for judicial empathy, and Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1649-53 (1987), asserting that empathetic narrative is an integral component in legal discourse.

16. Commentators have certainly suggested that there is already empathy, and even favoritism, at work in Supreme Court decision-making but that when it favors the majority it remains invisible. See, e.g., Emily Bazelon, *Mysterious Justice*, N.Y. TIMES MAG. (Mar. 20, 2011), <http://www.nytimes.com/2011/03/20/magazine/mag-20Lede-t.html>, archived at <http://perma.cc/S7MF-QDK6> (suggesting that Justice Alito's empathy "for people who are a lot like him" went unremarked upon by conservatives).

17. Of course, President Obama's political opponents were not the sole critics of his notion of empathy. In his *New Yorker* essay, psychologist Paul Bloom took issue with President-Elect Obama's 2008 letter to a little girl that stated, "I believe we don't have enough empathy in our world today, and it is up to your generation to change that." For Bloom, empathy can lead to overidentification, resulting in compassion toward persons and circumstances only when we can personalize them. Bloom suggests that this effect can lead to poor policy and irrational allocations of scarce resources. Paul Bloom, *The Baby in the Well: The Case Against Empathy*, NEW YORKER, May 20, 2013, at 118-21.

18. In that way, this work is quite distinct from the theorizing of scholars in the emerging "law and emotion" field. See *infra* Part II.

19. See Mark H. Davis, *Measuring Individual Differences in Empathy: Evidence for a Multicultural Approach*, 44 J. PERSONALITY & SOC. PSYCHOL. 113, 123-25 (1983).

own context and stepping into someone else's is primarily an analytical function.

Drawing upon this methodological discussion, this Article demonstrates that cognitive empathy was a bedrock process for foundational legal decisions; that is, it embodies core principles of common law reasoning. The Article then turns to examples from an area of law that has recently become highly publicized—civil suits brought by children and their parents who claim that their rights under Title IX of the Education Amendments of 1972 have been violated by homophobic bullying in public schools.²⁰ I review a series of judicial opinions and consider whether, and in what ways, judicial thinking on all sides of the question evinces empathetic reasoning. Where it does, I consider carefully how, and with whom, the courts empathize.²¹

20. Antigay bullying gained significant national attention after a rash of well-publicized suicides by teenagers who were, or were believed to be, gay. See Jesse McKinley, *Several Recent Suicides Put Light on Pressures Facing Gay Teenagers*, N.Y. TIMES, Oct. 4, 2010, at A9. For example, one blogger claimed to have chronicled eleven suicides in September 2010 alone that he claimed were connected to homophobic harassment. David Badash, *Breaking: ELEVENTH September Anti-Gay Hate-Related Teen Suicide*, NEW CIV. RTS. MOVEMENT (Oct. 11, 2010, 2:41 PM), <http://thenewcivilrightsmovement.com/breaking=eleventh=september-anti-gay-hate-related-teen-suicide/bigotry-watch/2010/10/11/13606>, archived at <http://perma.cc/N3RS-B79L>. From these incidents sprang an explosion of media attention. In some instances, there were attempts to prosecute the alleged bullies, which naturally garnered further attention. See Susan Donaldson James, *Jamey Rodemeyer Suicide: Police Consider Criminal Bullying Charges*, ABC NEWS (Sept. 22, 2011), <http://abcnews.go.com/Health/jamey-rodemeyer-suicide-ny-police-open-criminal-investigation/story?id=14580832>, archived at <http://perma.cc/W3U8-SQ7S>. Most notable among these prosecutions was initiated following the death of Tyler Clementi, who jumped from the George Washington Bridge after being filmed having a sexual encounter with a man by his college roommate; Clementi's roommate was subsequently convicted and sentenced under New Jersey's bias intimidation law. Kate Zernike, *Jury Finds Spying in Rutgers Dorm Was a Hate Crime*, N.Y. TIMES, Mar. 17, 2012, at A1; Kate Zernike, *30-Day Term for Spying on Roommate at Rutgers*, N.Y. TIMES, May 22, 2012, at A1.

Attention to the difficulties faced by bullied gay teens prompted writer Dan Savage to found the *It Gets Better Project* in order to "inspire hope for young people facing harassment." *What Is the It Gets Better Project?*, IT GETS BETTER PROJECT, <http://www.itgetsbetter.org/pages/about-it-gets-better-project> (last visited Aug. 1, 2013), archived at <http://perma.cc/7HFP-RFRA>. Recently, the Project's Web site featured over 180 pages of video entries. In fact, public outcry over homophobic bullying has generated such intense concern that public figures can face significant criticism for not participating in the *It Gets Better Project*. See, e.g., Amanda Terkel, *Denver Broncos Respond to Petition for Team To Produce 'It Gets Better' Video*, HUFFPOST GAY VOICES (Dec. 20, 2011, 10:28 AM), http://www.huffingtonpost.com/2011/12/20/denver-broncos-tim-tebow-it-gets-better-video_n_1159101.html, archived at <http://perma.cc/C8LP-Q8XX>. Of course, incidents of teens being bullied for reasons other than being gay have also gained widespread media coverage. But homophobic bullying has been alleged in a disproportionate number of the cases generating national coverage, and these sorts of cases are the specific inquiry in this Article.

21. Of course, definitive empirical proof of any thesis requires data-driven analysis of samples reaching far beyond one example. Not only would such inquiry exceed the scope of this project, it would likely prove impossible: interpretation of courts' empathy is by definition

I focus in particular on a formative case, *Patterson v. Hudson Area Schools*,²² which provides an opportunity to contrast multiple judicial opinions governed by the same common facts. This is exactly the kind of case into which Senators Grassley and Sessions fear that bias, unfairness, or extrajudicial feelings will leak, camouflaged by the language of “empathy.”²³ These cases do provoke strong feelings, but they also reveal how a rejection of cognitive empathy²⁴ actually diminishes the richness and rigor of intellectual engagement with the law. Not incidentally, it also compromises the quality of judicial decision making and our ability to identify and counter the structures of homophobia that pervade American schools.

After first considering the neurological research on how cognitive empathy operates and its connections to definitions of legal reasoning, this Article turns to a discussion of a number of cases concerning

subjective and is hardly suitable for large-scale statistical regression. Nonetheless, the body of cases considered here is illustrative and was chosen because the cases pose a vexing and not easily resolved legal issue amid a topic of great social importance and generally agreed-upon concern. Reasonable minds of all legal and political persuasions are likely to be troubled by the repeated victimization of adolescents, even while vigorously disagreeing about whether their circumstances are governed by the application of Title IX.

22. 551 F.3d 438 (6th Cir. 2009).

23. This may also stem from a concern that members of subordinated groups are somehow more biased, particularly toward their own groups, than members of dominant groups might be. This sort of presumption appeared to be at work when proponents of California's Proposition 8 moved to vacate Judge Vaughn Walker's ruling granting a permanent injunction against enforcement of the act. After Judge Walker gave a newspaper interview in which he acknowledged having been in a long-term relationship with another man, defendant-intervenor in the *Perry* case sought to have his decision overturned on the grounds that he should have recused himself. True, the defendants' motion was carefully drawn to focus on the fact that, as a man in a gay relationship, Judge Walker might conceivably have benefitted from the outcome of the case or have a heightened interest in its outcome. For many, however, the very question seemed to suggest that a homosexual judge was suspect and potentially biased in the case, while a heterosexual judge would not be. See Richard Painter, *It Is Bias Against Judge Walker Not Bias of Judge Walker That Is at Issue Here*, LEGAL ETHICS F. (Apr. 12, 2011, 12:34 AM), <http://www.legalethicsforum.com/blog/2011/04/it-is-bias-against-judge-walker-not-bias-of-judge-walker-that-is-at-issue-here.html>, archived at <http://perma.cc/KTX4-ZS5P>. The federal courts resoundingly rejected that notion, concluding that it was “inconsistent with the general principles of constitutional adjudication,” and that all citizens “have an equal stake” in a case affecting the general public and determining the boundaries of a fundamental right. *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119, 1125-26 (N.D. Cal. 2011). Similar presumptions of bias may have been at the root of Fox News's widely publicized and resoundingly panned interview of Professor Reza Aslan, a religion scholar promoting his biography of Jesus, in which he was questioned for almost ten minutes about whether he, as a Muslim, was suited to write about Christianity. See Julie Bosman, *Odd Fox News Interview Lifts Reza Aslan's Biography on Jesus*, N.Y. TIMES (July 29, 2013), <http://www.nytimes.com/2013/07/30/business/media/odd-fox-news-interview-lifts-reza-aslans-biography-on-jesus.html>, archived at <http://perma.cc/9ZJM-2EA4>.

24. The ability to see a situation from multiple perspectives, both dominant and subordinate; the acknowledgment that current customs are not necessary or even salutary.

homophobic bullying in schools. It then considers the initial district court determination in *Patterson*, a circuit court majority opinion that overturned the district court and the dissenting opinion issued in conjunction with that circuit court decision. *Patterson* and the cases like it offer a window into the workings of judicial empathy in an emerging area of law, one in which the political stakes currently feel much higher than in canonical judicial opinions or well-settled areas of law.²⁵ I argue further that the same mechanisms of cognitive empathy should be in place in homophobic bullying cases and, indeed, that the cultural weight of homophobia itself is the major obstacle to the effective functioning of judicial reasoning.

II. EMPATHIZING *IS* REASONING

This Article seeks to rescue the concept of judicial empathy from the (mis)definition that has been foisted upon it. I argue here for the centrality of contextualization—of which empathy is a crucial and implicit part—to the practice of judicial reasoning.

Empathy is a comparatively new addition to the arsenal of judicial concepts. In popular understanding, empathy is an emotional response to another person's experience and is frequently conflated with possessing *feelings* of sympathy.²⁶ The word itself does not have an entry in *Black's Law Dictionary*.²⁷ Empathy does, however, appear in *A Dictionary of*

25. This Article uses the homophobic bullying cases as *examples* of the consequences of judicial empathy in action and accordingly is focused primarily on ameliorating that very significant problem. But other legal scholars have focused far more directly on finding tools to address serious and violent bullying in schools, and attention to the topic is rising rapidly. See Lisa C. Connolly, *Anti-Gay Bullying in Schools—Are Anti-Bullying Statutes the Solution?*, 87 N.Y.U. L. REV. 248, 273-82 (2012); Jon M. Philipson, *The Kids Are Not All Right: Mandating Peer Mediation as a Proactive Anti-Bullying Measure in Schools*, 14 CARDOZO J. CONFLICT RESOL. 81, 82 (2012); Yariv Pierce, *Put the Town on Notice: School District Liability and LGBT Bullying Notification Laws*, 46 U. MICH. J.L. REFORM 303, 312 (2012); Daniel B. Weddle, *You're on Your Own Kid . . . But You Shouldn't Be*, 44 VALPARAISO UNIV. L. REV. 1083, 1088-89 (2010).

26. This seems to be precisely the definition operating in critiques of judicial empathy that equate it with inappropriate emotional bias. The commonplace elision between the two terms may explain why those defending the notion of empathy in legal decision-making so frequently feel bound to explain the precise difference between the two. See, e.g., Editorial, *supra* note 11 ("A distinction must be made between empathy and sympathy. A judge may feel sympathy for a particular party but cannot let it color the judge's objectivity. Empathy that gives way to sympathy destroys impartiality . . .").

27. BLACK'S LAW DICTIONARY 601 (9th ed. 2009). In fact, it makes perfect sense that the word is omitted: legal dictionaries view their role as defining *legal* terms, not defining terms for the legal community. Even those who would include empathy as a component in legal thinking would be unlikely to consider the word as constituting a term of art in the legal sphere.

Modern Legal Usage (Dictionary),²⁸ and the definition in this text steers us toward the meaning of empathy that this Article embraces: “[T]he ability to imagine oneself in another person’s position and to experience all the sensations connected with it.”²⁹ In the same entry, the *Dictionary* juxtaposes empathy with “sympathy,” which it defines as “compassion for or commiseration with another.”³⁰ As such definitions show, empathy is not the same thing as benevolence or consolation. It is not “feeling bad” for someone, nor is it a personal preference for situations that feel familiar or that one has personally experienced. Instead, empathy is a mode of interpretation that recognizes that judicial reasoning does not emerge from a cultural vacuum.

This is not to say that there has been no discussion of empathy among legal scholars. Indeed, empathy has been a significant element of analyses in theories of lawyering. Susan Bandes, for example, has written about the role of empathy and reasoning in law as part of a growing body of work calling attention to emotion and law.³¹ And though Bandes has written extensively about law and emotion³² and is considered a leader of the field, she is hardly the only voice in a chorus that includes

28. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 312 (2d ed. 1995). Note that the legal usage dictionary and BLACK’S LAW DICTIONARY have the same author/editor yet define the term differently. See BLACK’S LAW DICTIONARY, *supra* note 27, at 601. This suggests that the difference in including the term is not merely idiosyncratic, but rather stems from differences in the projects of the two books. That is, empathy may not be a word *of* law, but this does not at all mean that it cannot be an important concept *for* law.

29. GARNER, *supra* note 28, at 312.

30. *Id.* Indeed, similar distinctions between sympathy and empathy are drawn by grammarians, see, e.g., *Sympathy vs. Empathy*, GRAMMARIST, <http://grammarist.com/usage/empathy-sympathy/> (last visited Nov. 21, 2013), *archived at* <http://perma.cc/SUX2-KCPE>, and psychological researchers, see Carl R. Rogers, *The Necessary and Sufficient Conditions of Therapeutic Personality Change*, 21 J. CONSULTING PSYCH. 95, 98 (1957).

31. Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 379 (1996). Bandes is generally encouraged by the conclusions of work acknowledging the role that “benign” concepts such as empathy and compassion have in law, but encourages scholars to examine the function of those concepts very carefully, lest we predicate too much decision making on personal identification, which, as Bandes points out, in the American legal system is most likely to privilege the privileged. *Id.* at 375-79. Bandes’ concerns echo those of social and psychological scientists who study the effects of the “affect heuristic,” which is a mental shortcut used to make rapid, efficient decisions influenced by contemporaneous emotional response. For a more complete discussion of affect heuristics, see Melissa L. Finucane, et al., *The Affect Heuristic in Judgments of Risks and Benefits*, 13 J. BEHAV. DECISION MAKING 1 (2000).

32. See, e.g., Susan A. Bandes & Jeremy A. Blumenthal, *Emotion and the Law*, 8 ANN. REV. L. & SOC. SCI. 161 (2012); Susan A. Bandes, *Foreword to Symposium—Emotions in Context: Exploring the Interaction Between Emotions and Legal Institutions*, 33 VT. L. REV. 387 (2009); Susan A. Bandes, *Emotions, Values, and the Construction of Risk*, 156 U. PA. L. REV. PENNUMBRA 421 (2008); Susan Bandes, *What’s Love Got to Do With It?*, 8 WM. & MARY J. WOMEN & L. 97 (2001) [hereinafter Bandes, *What’s Love*]; Bandes, *supra* note 31.

Charles Ogletree,³³ Eric Posner,³⁴ and Cass Sunstein,³⁵ as well as many others. No doubt this scholarship was spurred on by Supreme Court Justice William Brennan's plea for an examination of "reason and passion" in judicial thinking.³⁶ By 2006, in fact, the study of law and emotion had developed to such a degree that Terry Maroney proposed a taxonomy dividing scholarship into six approaches emerging in the discipline.³⁷

But while the work of Bandes, Maroney, and others is an invaluable contribution, it operates from a very different notion of empathy from the one with which I am working.³⁸ As Bandes observes, legal theory tends to eschew emotion as "variable, messy, interdisciplinary, soft and feminine, fact-based, difficult to categorize, and non-rational."³⁹ I tend to agree with the work of Bandes and others who suggest that emotion is relevant in law and vital to grapple with,⁴⁰ and I support Martha Nussbaum's conclusion that empathy and compassion must occupy a central place in the ways that judges and juries assess the facts before them.⁴¹ I also concede that it is possible that the emotional and intellectual components of empathy are so intertwined as to be impossible to fully isolate. However, I do not focus here on empathy as an emotional process. Instead, I am examining the intellectual processes

33. Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations To Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993).

34. Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977 (2001).

35. Cass R. Sunstein, *Some Effects of Moral Indignation on Law*, 33 VT. L. REV. 405 (2009); see also Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119 (2002) (reviewing PAUL SLOVIC, *THE PERCEPTION OF RISK* (2000)).

36. William J. Brennan, Jr., *Reason, Passion, and 'The Progress of Law'*, 10 CARDOZO L. REV. 3, 3 (1988).

37. Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 L. & HUM. BEHAV. 119 (2006).

38. Bandes, too, does not precisely equate empathy and emotion. Rather, she describes it as a *capacity* for understanding another person's situation. Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 CARDOZO L. REV. DE NOVO 133, 134 (2009).

39. Bandes, *What's Love*, *supra* note 32, at 101.

40. E.g., Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CAL. L. REV. 1485, 1490 (2011); Doni Gewirtzman, *Our Founding Feelings: Emotion, Commitment, and Imagination in Constitutional Culture*, 43 U. RICH. L. REV. 623, 626 (2009).

41. MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* 444-45 (2001). Similarly, I would embrace Andrea McArdle's thoughtful analysis of judicial empathy seen through narrative theory. Andrea McArdle, *Using a Narrative Lens To Understand Empathy and How It Matters in Judging*, 9 LEGAL COMM. & RHETORIC: JALWD 173, 205-06 (2012) (describing the "situation-centered" jurist as one who is "more likely to interpret and apply rules flexibly, in relation to facts" and likely to exercise empathy).

of empathizing in the sense of *conceptualizing* another's position, as compared to *sensing* it.⁴²

In fact, such a model of empathy is already imbedded in common parlance. *Merriam-Webster's Collegiate Dictionary*, for example, gestures toward this understanding when it defines empathy as "understanding, being aware of, being sensitive to, and vicariously experiencing the feelings, thoughts, and experience of another . . . without having [these] communicated in an objectively explicit manner."⁴³ Understanding, awareness, and sensitivity may be emotionally inflected experiences, but they also require a high level of analytical activity.

The notion that empathy is a function of intellect is even more solidly established among empathy scholars.⁴⁴ Researchers posit that what we think of as empathy actually comprises two distinct dimensions: the cognitive and the affective.⁴⁵ For neurobiologist Simon Baron-Cohen and his colleagues, the cognitive component in which one understands another's feelings and perspective may be even more significant and powerful than the affective component of responding emotionally to that perspective.⁴⁶ In his examination of the roots of human cruelty, Baron-

42. Although McArdle's recent analysis of Bandes' work suggests that Bandes herself has, over time, come to embrace a more multilayered process emphasizing perspective-taking as a central component of judicial empathy. McArdle, *supra* note 41, at 177-78 (citing Bandes, *supra* note 38, at 138-39).

43. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 408 (11th ed. 2008).

44. However, some researchers do contend that what others identify as cognitive empathy can more accurately be designated by other descriptions. Alternate names for related capacities include "perspective taking" or possessing a "theory of mind." Kimberley Rogers et al., *Who Cares? Revisiting Empathy in Asperger Syndrome*, 37 J. AUTISM & DEVELOPMENTAL DISORDERS 709, 710-11 (2007).

45. The division between intellectualized or cognitive empathy and the emotional components or affective empathy can be found as early as the 1929 work of Wolfgang Köhler and Jean Piaget and was elaborated on by many theorists and researchers working in a variety of psychological and neurological fields in the 1970s and 1980s. See, e.g., Martin Hoffman, *The Contribution of Empathy to Justice and Moral Judgment*, in EMPATHY AND ITS DEVELOPMENT 47 (Nancy Eisenberg & Janet Strayer eds., 1987).

46. Simon Baron-Cohen and his fellow neuroscience researchers specialize in studying the ways that cognitive disabilities such as autism and psychological/neurological conditions like psychopathy are both strongly characterized by an inability to empathize with others, yet lead to vastly different propensities for violence and psychopathology. See SIMON BARON-COHEN, *THE SCIENCE OF EVIL: ON EMPATHY AND THE ORIGINS OF CRUELTY* 43-123 (2011) [hereinafter BARON-COHEN, *THE SCIENCE OF EVIL*]. They link differing capacities for the two dimensions of empathy to these very different results, suggesting that people with autism lack primarily the cognitive aspects of empathy (hence may have notable affective empathy even while remaining confused by the motivations and emotions of those around them), *id.* at 100-23, while psychopaths, narcissists, and those with borderline personality disorder may possess intact cognitive empathy (and may therefore *comprehend* the emotions of those around them) even while remaining untouched by the emotions of others. *Id.* at 64-88.

Cohen, who deems empathy “the most valuable resource in our world,”⁴⁷ suggests that what distinguishes uniquely dangerous persons with distinct empathy-lacking personality disorders is their ability to manipulate others cruelly because of a *recognition* of their feelings (cognitive empathy) coupled with an inability to connect with their victims’ suffering (affective empathy).⁴⁸

Medical imaging specialist Dr. Simone Shamay-Tsoory offers a model in which cognitive empathy and affective empathy operate in two separate neuroanatomical systems and determines that they are processed in distinct areas of the brain.⁴⁹ Shamay-Tsoory and her colleagues compared brain scans of patients suffering from injuries in two distinct areas of the brain, as well as uninjured control subject, and found that those experiencing ventromedial prefrontal (VM) lesions showed far more significant deficits in cognitive empathy, while patients with inferior frontal gyrus (IFG) lesions exhibited more profound impairment in affective empathy.⁵⁰ From this study and the earlier work of other brain scientists, Shamay-Tsoory concluded that in uninjured brains, both cognitive and affective empathy are processed separately but simultaneously.⁵¹

Similar multidimensional conceptions of empathy can be found as well in the psychological literature. For example, Mark Davis draws a distinction between the “interpersonal” cognitive process of empathy and the more “intrapersonal” affective domain.⁵² Likewise, leading

Interestingly, Baron-Cohen also sees an inverse proportional relationship between empathizing, on the one hand, and what he deems “systemizing”—arranging facts and experiences into categories and seeing the world through a set of rules and systems—on the other. So, a cognitive focus on empathy tends to counter or counteract a perspective that understands rules as speaking for themselves. Here, Baron-Cohen’s work is much more controversial, particularly with respect to his claims about the relationship between empathizing, systemizing, and gender. Baron-Cohen sees a link between neurological patterns and gender identification, even going so far as to hypothesize that autism is a kind of limit-case of male brain patterns. SIMON BARON-COHEN, *THE ESSENTIAL DIFFERENCE* (2003) [hereinafter *BARON-COHEN, THE ESSENTIAL DIFFERENCE*]. This is also known as the “extreme-male-brain theory of autism.” *Id.* at 133-54. Many experts disagree. See, e.g., REBECCA M. JORDAN-YOUNG, *BRAIN STORM: THE FLAWS IN THE SCIENCE OF SEX DIFFERENCES* 85-86, 202-19 (2010).

47. *BARON-COHEN, THE SCIENCE OF EVIL*, *supra* note 46, at 153 (emphasis omitted).

48. *Id.* at 15-19. In this particular text, Baron-Cohen describes empathy’s components: “Empathy is our ability to identify what someone else is thinking or feeling *and* to respond to their thoughts and feelings with an appropriate emotion.” *Id.* at 16 (emphasis added).

49. See Simone G. Shamay-Tsoory et al., *Two Systems for Empathy: A Double Dissociation Between Emotional and Cognitive Empathy in Inferior Frontal Gyrus Versus Ventromedial Prefrontal Lesions*, 132 *BRAIN: J. NEUROLOGY* 617, 618 (2009).

50. *Id.* at 620.

51. Thus a distinction between the two processes becomes apparent only when one of those systems is interrupted, as was the case of her brain-injured study subjects. *Id.* at 623.

52. MARK H. DAVIS, *EMPATHY: A SOCIAL PSYCHOLOGICAL APPROACH* 15-21 (1996).

psychologist Paul Ekman conceives of empathy not as an emotion, but rather as a reaction to the emotions of others.⁵³ He considers this reaction to have three components: (1) cognitive empathy, the ability to comprehend the emotions of others; (2) emotional empathy, which entails actually feeling the emotions of others; and (3) compassionate empathy, which corresponds to a desire to help others deal with their circumstances.⁵⁴ Cognitive empathy, psychologists posit, “enables humans to understand and predict the behavior of others,”⁵⁵ which is, of course, necessary to interpersonal interaction and to understanding social behavior generally.

Taking other viewpoints into account requires more than just being able to “walk in the shoes” of another. Experience is the product of context; as Joan Scott has argued, “Experience is at once always already an interpretation *and* something that needs to be interpreted. What counts as experience is neither self-evident, nor straightforward; it is always contested and always therefore political.”⁵⁶ We understand our experiences (and often the experiences of others) through a preexisting worldview that is formed by any number of factors, including race, gender, class, national origin, political orientation, age, and region. However, individuals often consider their own context self-evident. In order to understand the experiences of others, we also need to acknowledge the unique context in which those experiences take place.

Regardless of its precise label and scope (which differs somewhat across fields and even among academics within fields⁵⁷), there is a

53. PAUL EKMAN, EMOTIONS REVEALED 179 (2003).

54. *Id.* at 180. Ekman goes on to observe that cognitive empathy is needed for either of the other two forms of empathy to occur but that emotional empathy was not necessarily required for compassionate empathy. In other words, it is possible to understand the situation of another and desire to help even without entangling oneself emotionally in that party's circumstances.

55. Adam Smith, *Cognitive Empathy and Emotional Empathy in Human Behavior and Evolution*, 56 PSYCH. REC. 3, 4 (2006).

56. Joan W. Scott, *The Evidence of Experience*, 17 CRITICAL INQUIRY 773, 797 (1991).

57. Empathy scholars both within the same field and across disciplines approach the topic quite differently. For just one example, Lian T. Rameson and Matthew D. Lieberman describe two strains of theoretical views that appear divergent in their field: a “simulation” theory of empathy (which emphasizes intuitive experiences of another using ourselves as a model and takes place in the mirror neurons in the brain) and what they term “theory-theory” (cognitive mindreading, which tends to take place in the brain's prefrontal cortex). Lian T. Rameson & Matthew D. Lieberman, *Empathy: A Social Cognitive Neuroscience Approach*, 3 SOC. & PERSONALITY PSYCH. COMPASS 94, 95 (2009); *see also* C. Daniel Batson, *These Things Called Empathy: Eight Related but Distinct Phenomena*, in THE SOCIAL NEUROSCIENCE OF EMPATHY 3, 4 (Jean Decety & William Ickes eds., 2009). Almost all researchers concur that there are both emotional and intellectual aspects of empathy. *But cf.* Doris Bischof-Köhler, *The Development of Empathy in Infants*, in INFANT DEVELOPMENT: PERSPECTIVES FROM GERMAN SPEAKING

consensus that there are cognitive or intellectual aspects of empathy and that it is not merely an emotive response. All definitions of the cognitive process of empathy focus on seeing a situation or set of facts from more than one perspective and being able to think through a number of possible modes of understanding. Does this not sound *precisely* like what law teachers mean when they instruct students to “think like a lawyer”?⁵⁸ Indeed, rather than leading to bias, prejudice, or favoritism, as Senators Grassley and Sessions insisted, empathy can actually militate against that kind of partiality because it necessitates intellectually occupying and understanding the perspective of a number of different subject positions.

Traditionally, when legal scholars and practitioners talk about the building blocks of legal reasoning, this kind of empathy does not appear on the list. Even though it may be implicitly understood that an ability to take multiple perspectives and to situate analysis in context is fundamental to legal reasoning, it is rarely articulated as one of the central things lawyers do or that novice lawyers must learn.⁵⁹ For example, in *The Five Types of Legal Argument*, Wilson Huhn enumerates text, intent, precedent, tradition, and policy as the crucial components to legal reasoning.⁶⁰ Huhn suggests that each element represents different ideas about what the law is and how it operates, and

COUNTRIES 245, 245-73 (Michael E. Lamb & Heidi Keller eds., 1991) (urging a careful distinction between empathy as it is broadly understood and purely emotional contagion).

58. In his remarks advising prospective law students about what they would learn, Jack Chorowsky makes this link explicit:

Thinking like a lawyer also means seeing both sides of an argument or situation, and understanding the strengths and weaknesses of every position. I’ve been amazed over the years—in law practice, politics, and business—by how many people aren’t capable of intellectual empathy, of seeing the other side’s point of view.

Jack Chorowsky, *Thinking Like a Lawyer*, 80 U. DET. MERCY L. REV. 463, 465 (2003). Of course, critical scholars have also described legal thinking in broader terms, yet none appear to disagree with such descriptions of multi-sided reasoning as a hallmark of traditional legal reasoning. See Larry O. Natt Gantt, II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413, 468 (2007) (including the skill of “seeing all sides” as but one component among many constitutive parts of legal reasoning). See generally Peggy Cooper Davis & Aderson Belgarde Francois, *Thinking Like a Lawyer*, 81 N.D.L. REV. 795 (2005) (arguing for the importance of intellectual versatility in legal thinking and training); David T. ButleRitchie, *Situating “Thinking Like a Lawyer” Within Legal Pedagogy*, 50 CLEV. ST. L. REV. 29, 45-56 (2003) (responding to earlier critics who contended that traditional conceptions of legal thinking were defined too narrowly by explaining the value of training lawyers to understand positions within the adversarial system of American law).

59. Although, at least one introductory legal methods text does extensively quote the writings of Holmes, Cardozo, Hand, Montesquieu, Blackstone, and others in a searching inquiry about empathy, passion, and reason in modern jurisprudence. See EVA H. HANKS, MICHAEL E. HERZ & STEVEN S. NEMERSON, *ELEMENTS OF LAW* 73-102 (2d ed. 2010).

60. WILSON HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* 13, 17-71 (2d ed. 2008).

together these elements are sufficient to form a comprehensive methodology for understanding and constructing legal arguments.⁶¹ Any number of other texts follow analogous schemes to teach students how to “think like a lawyer.” None lists “empathy” among its required attributes.⁶²

Indeed, strikingly, some of the introductory texts intended to familiarize beginning law students with the processes of legal thinking⁶³ appear to gloss over factual contexts as an essential part of building a legal argument. Though such texts may speak in detail about how to read a statute or legal rule,⁶⁴ synthesize cases,⁶⁵ touch briefly on the policy implications of legal reasoning,⁶⁶ and sometimes describe the ethical boundaries of lawyers’ arguments,⁶⁷ these analyses rarely talk in much detail about how lawyers actually go about engaging with the facts of their cases.⁶⁸ Perhaps such consideration is deemed too sophisticated or premature for beginning readers. Nevertheless, a consistent message emerges: the individual and/or social circumstances of cases are a distraction from the real work of understanding how legal reasoning is developed. Little wonder, then, that critics can read contextual consideration as nonlegal and therefore suspect.

Nonetheless, when we look at the ways legal education actually operates, this seems less and less to describe what actually happens in the discourse of legal training, where consideration of the nuances of cases’ contexts forms a central part of our “signature pedagogy.”⁶⁹ And though the consideration of factual frameworks is perhaps subterranean in some

61. See *id.* at 7-16.

62. See, e.g., PETER T. WENDEL, *DECONSTRUCTING LEGAL ANALYSIS: A 1L PRIMER* 18-19 (2009) (dividing legal analysis into the “rule plane” and the “factual plane”); PATRICK M. MCFADDEN, *A STUDENT’S GUIDE TO LEGAL ANALYSIS: THINKING LIKE A LAWYER* (2001) (focusing on the law and the facts); STEVEN J. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* (2d ed. 1995) (focusing on traditional logic as the basis of legal reasoning).

63. Analyzed here because, as tools for indoctrinating law students into the otherwise-hidden means of legal analysis, they seem to constitute the best sources available for understanding how the legal community expresses those processes *to itself* through its novices.

64. E.g., LISSA GRIFFIN & BENNETT L. GERSHMAN, *THE LAW SCHOOL EXPERIENCE: LAW, LEGAL REASONING, AND LAWYERING* 26-32 (2000).

65. WENDEL, *supra* note 62, at 149-54.

66. ALBERT J. MOORE & DAVID A. BINDER, *DEMISTIFYING THE FIRST YEAR OF LAW SCHOOL* 30-31 (2010).

67. JAMES E. MOLITERNO & FREDRIC I. LEDERER, *AN INTRODUCTION TO LAW, LAW STUDY, AND THE LAWYER’S ROLE* 7-11, 20-30 (2d ed. 2004).

68. Perhaps it is these reductions that the critical scholars seeking to expand the meaning of “thinking like a lawyer” are responding to? See sources cited *supra* note 58.

69. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 47-74* (2007) [hereinafter *CARNEGIE REPORT*] (providing a close analysis of sensitivity to factual reasoning in classrooms that use the Socratic Method).

descriptions of legal thinking, legal scholars still seem to agree that it is imperative. Most of the sources purporting to explain legal reasoning to entering law students contend that considering facts carefully is foundational to crafting legal arguments.⁷⁰ Moreover, a significant part of “considering facts carefully” is understanding the larger context in which they arise. Without context we cannot fully understand what a given set of facts means to either party to a dispute and consequently cannot develop the rich legal analysis to which beginning law students are urged to aspire. Indeed, context is what *makes* a factual narrative—without it the facts cannot be fully understood.

Thus, when we try to describe to novice lawyers what legal reasoning is and how they can successfully integrate it into their own thinking, facts play an enormous role. Even in the most basic building blocks of analytical and analogical reasoning, we cannot avoid the materiality of facts.⁷¹ Let us take that classic example of logical reasoning:⁷² All men are mortal, Socrates is a man, and therefore Socrates is mortal.⁷³ Texts for legal audiences generally portray deductions of this kind as emphasizing the interpretation of universal legal principles rather than the facts of given cases.⁷⁴ But such a depiction presupposes that we can all agree on the first two premises, at least one of which, Socrates is a man, is a matter of immediately provable fact.

But of course, not all deductive reasoning is based in such solid fact. Even in this allegedly simple illustration, there might be ways to question the facts of the supposedly universally understood premises on

70. See, e.g., WENDEL, *supra* note 62, at 18-19; MCFADDEN, *supra* note 62, at 98-108; BURTON, *supra* note 62, at 29-52. For an unusually detailed examination of factual analysis as a component of legal reasoning, see BRADLEY J. CHARLES, *APPLYING LAW* 3-11, 26-29, 33-35, 39-42, 50 (2011).

71. *Best Practices for Legal Education* encourages Socratic dialogue in the law classroom to follow a four-step process stemming from having students “state the case” under consideration as a predicate to engaging in a “FARF” analysis, in which the class will closely consider the “fact-and-rule-fit” of the case’s reasoning. ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION* 213-16 (2007) (drawing heavily from Peggy Cooper Davis & Elizabeth Ehrenfest Steinglass, *A Dialogue About Socratic Teaching*, 23 N.Y.U. REV. L. & SOC. CHANGE 249 (1997)).

72. “Analytical” here is distinguished from the other most common form of legal reasoning, “analogical” comparisons of similar facts, which should presumably lead to similar outcomes.

73. This syllogism can be found repeatedly in expositions of the process of legal reasoning, almost to the point of becoming clichéd. For one recent example, see TRACEY E. GEORGE & SUZANNA SHERRY, *WHAT EVERY LAW STUDENT REALLY NEEDS TO KNOW* 86-89 (2009).

74. See *id.* at 80-81. For a more nuanced examination of the constructedness of the initial premises in such a syllogism, see ROBERT K. MILLER, *THE INFORMED ARGUMENT: A MULTIDISCIPLINARY READER AND GUIDE* 25-31 (5th ed. 1998).

which the analysis is predicated: Socrates could be a hologram or an alien in disguise. The more complicated fact patterns become, the more dispute there may be about what the facts are and how we understand them. For example does "man" here mean "person" generally or "male person?" Once there can be debate about *any* of the facts upon which the premises to the syllogism rest, the outcome can be called into question. Of course, it is on precisely these factual disputes that much of lawyers' enterprise is centered (and not coincidentally, where things get most interesting for law teachers and law students), because cases may be won or lost on disputing such premises. So what we might, on casual investigation, presume to be rigorous analytical reasoning⁷⁵ is, in law, *inherently* fact-bound and fact-driven.

Turning to analogical reasoning the other most commonly defined prong of legal reasoning and analogical thinking,⁷⁶ we can easily conclude that it, too, is necessarily organized around context. If analytical thinking can be thought of as stressing rules (read: law) in its premises, analogical reasoning is its counterpoint. This form of induction necessarily takes the parameters of a legal rule as given and focuses instead on its applicability to the facts at hand. As one writer succinctly characterizes the process, reasoning by analogy in law has three essential steps: (1) state a concept in common between the two situations being compared, (2) explain the similarity or dissimilarity between the two circumstances, and (3) explain the significance of the comparison.⁷⁷ On the face of this description, the most significant work appears to take place in step three, in which the significance of the likeness is analyzed. But any litigator understands that the real action takes place in how the situations are framed in the first place.⁷⁸ If lawyers are to argue that a given case is in material ways comparable to or distinguishable from another case, they need fact-based judgments to get there. Are the facts of the cases different or similar? Are the contexts in which the facts operate analogous or discordant? And, ultimately, through what perspective can we comprehend the facts?

75. Meaning so universal as to be acontextual.

76. See GEORGE & SHERRY, *supra* note 73, at 80-89 (contrasting analytical and analogical reasoning as the two most basic forms of legal analysis); MILLER, *supra* note 74, at 22-25 (explaining how this form of reasoning differs from deduction).

77. CHARLES, *supra* note 70, at 61.

78. For an examination of the ways that lawyers can strategically work backwards to formulate effective premises for analogical arguments, see MILLER, *supra* note 74, at 28-30. It is worth noting that it may be exactly this legal framing paradigm that law and emotion scholars may be adeptly identifying and responding to. See *infra* notes 31-42 and accompanying text.

Thus, as I have suggested throughout this Part (and as is certainly considered noncontroversial among legal thinkers), legal reasoning simply cannot be understood without close analysis of the factual context of a given case—our processes of cognitive empathy function to foreground that context, after all. And “facts” cannot be understood in a cultural vacuum. To return to the example of Socrates, what seems like a transparent and self-evident argument makes sense only in the context of binary gender coupled with a recognition that, in English, “man” has long been used to identify human beings, not just male persons.⁷⁹ And in more recent days of increasingly complex notions of gender, how do we define who qualifies as a man? What if Socrates had begun life as female? What if he considers himself male but has not undergone sex reassignment surgery? What if his driver’s license indicates that he is currently male, but this does not accord with his birth certificate? In such cases, making that kind of factual determination is likely to be hotly contested in any ensuing litigation. Determining whether Socrates is or is not a man is absolutely necessary to the analytical syllogism needed for a judge to resolve the case. And the only way to get to that determination is through a careful consideration of the legal, psychological, biomedical, and factual contexts in which the question arises.

This kind of in-depth contextual analysis may not be required to resolve every conflict, but the model of reasoning from context has always been part of important legal decisions, so much so that it constitutes a significant part of the methodology of training each new cohort of lawyers. The work that law professors do to teach their students to “think like a lawyer” finds expression in the cases we assign, particularly in foundational first-year courses where much of the socialization to legal thinking is expected to take place.⁸⁰ An examination

79. Without this understanding, we end up with a logically coherent but nonsense syllogism like “all men are mortal, Diotima is a woman, hence we do not have sufficient information to determine whether or not Diotima is mortal.”

80. For example, the CARNEGIE REPORT, *supra* note 69, describes the case dialogue through Socratic questioning as the primary means of promoting the “cognitive apprenticeship” of lawyers and situates it primarily, though not exclusively, in the first year. CARNEGIE REPORT, *supra* note 69, at 48-84; *see also* LEAH M. CHRISTENSEN, “ONE L OF A YEAR” HOW TO MAXIMIZE YOUR SUCCESS IN LAW SCHOOL 5-8 (2012) (describing the Socratic Method as central to teaching law students how to think like a lawyer and situating the methodology as particularly pronounced in the first year); AUSTEN L. PARRISH & CRISTINA C. KNOLTON, *HARD-NOSED ADVICE FROM A CRANKY LAW PROFESSOR: HOW TO SUCCEED IN LAW SCHOOL* 8 (2010) (“Most first-year courses are structured to teach you how to do legal analysis . . .”).

of the kinds of cases that repeatedly turn up in first-year casebooks finds abundant examples of opinions that integrate contextual analysis.⁸¹

Consider the classic torts decision *The T.J. Hooper*,⁸² in which the United States Court of Appeals for the Second Circuit, in a majority decision written by Learned Hand, took for granted the context of technological change. The case itself depends upon questions of the seaworthiness of two tugboats and the coal barges they were pulling from Virginia up the Atlantic seaboard until run aground by storms just outside the Delaware breakwater.⁸³ Other boats had avoided the storm by listening in to weather reports on the radio, but the T.J. HOOPER and her sister tugboat the MONTROSE did not have working radios and did not know about the approaching storm.⁸⁴ At the time, radio receivers were fairly new and were not standard issue in tugboats, so the defendants argued that the general industry custom not to equip such boats with radios meant that they could not have breached a duty of care simply by failing to provide such radios to their crews.⁸⁵

However, Judge Hand recast the issue. By 1932, when the case was decided, radios were inexpensive and readily available. The court was well aware of this context. Ultimately, Judge Hand determined, although the “whole calling [of tugboat operators] may have unduly lagged in the adoption of new and available devices,”⁸⁶ it was not enough to point to shippers’ historical practice. Rather, all boats risk storms, and radios can

81. The examples given below are drawn from the most commonly taught first-semester civil law classes—torts and contracts. I chose these disciplines in part because they are so central to our images of foundational legal education, but also because they are ones in which the courts have the least stake in the outcome. That is, to avoid bias, in civil cases we presume that courts may empathize (and sympathize) equally with both parties in any given case. *Anyone* might conceivably become either a tortfeasor or an injured party; *any* contract can go awry. A typical judge’s personal identifications might seem different in, say, a criminal case. I have also selected cases written by some of our most respected jurists, Learned Hand and Benjamin N. Cardozo, because legal educators frequently point to their writings as examples of outstanding legal reasoning that beginning lawyers ought to strive to emulate.

82. “Classic” is not an overstatement: this case appears in virtually every Torts textbook. Of thirteen current Torts casebooks on my shelves only one does not include this case: HARRY SHULMAN ET AL., *THE LAW OF TORTS* (5th ed. 2010). And even in this textbook, *T.J. Hooper* is cited and discussed at length in a different included opinion, *La Sell v. Tri-State Theatre Corp.*, 11 N.W.2d 36, 178-83 (1946), and the textbook editors note in its Preface that they have made efforts to include longer versions of more recent cases, including those which discuss important earlier decisions. SHULMAN ET AL., *supra*, at iv. From this brief survey, it seems indisputable that *The T.J. Hooper* remains a touchstone for teaching the specific question of the role of custom in negligence cases.

83. *The T.J. Hooper In re E. Transp. Co. v. N. Barge Corp.*, 60 F.2d 737, 737 (2d Cir. 1932).

84. *Id.*

85. *Id.* at 739.

86. *Id.* at 740.

help prevent that risk turning into disaster so effectively that not to have them on board is, in effect, negligence. In Judge Hand's formulation, "[T]here are precautions so imperative that even their universal disregard will not excuse their omission."⁸⁷

This decision would have been nonsensical if the majority had not taken the larger technological and social context into account. As the decision points out, two of the crewmembers on board the T.J. HOOPER owned personal radios although those radios were not working at the time.⁸⁸ In other words, radios are a commonplace item that even a working-class crewmember would own.⁸⁹ Radios are not expensive, complicated nautical equipment, but small, cheap playthings that can also save lives and valuable cargo. Moreover, there were twice-daily weather updates issued by the United States Weather Bureau via radio that would have prevented the captains of these boats from proceeding. Most telling in this decision are the equation of having a working radio on board with "seaworthiness" and the majority's determination that "[t]he injury [to the coal companies whose cargo was lost] was a direct consequence of this unseaworthiness," placing liability for the injury squarely on the owners of the T.J. HOOPER and the MONTROSE.⁹⁰

Nowhere in the decision does the majority spell out any of this. Indeed, the decision is succinct, disposing of counter arguments in a few short phrases. The decision takes for granted that if tug boats are not using "new and available devices" like radios, then the common custom for tug boats cannot equate to reasonable prudence.⁹¹ Certainly, for thousands of years, ever since the inception of maritime travel, boats have taken the risk of going out to sea without being able to predict the weather. However, by 1932, the tugboat industry had not kept up with technological and market developments—not just the invention of the radio, but the pervasiveness of affordable radios in the marketplace. In a

87. *Id.*

88. *Id.* at 739.

89. Radio ownership in the 1930s approximated the level of television ownership today:

In its day, radio was easily as proportionally popular as is television today: in 1937, an estimated 24,500,000 families owned a radio, adding up to about 80,000,000 individual listeners. [Four million] families reported owning more than one radio in their homes, and about 4,500,000 automobiles were equipped with radios. When all the math is done, approximately 33,000,000 radios were in operation in 1937, about the same total number of automobiles and telephones combined.

America in the 1930s: The Structure of Advertising, U. VA., http://xroads.virginia.edu/~CLASS/am485_98/graham/structure.html (last visited Nov. 22, 2013), *archived at* <http://perma.cc/QFV5-LGTC>.

90. *The T.J. Hooper*, 60 F.2d at 738–40.

91. *Id.* at 740.

world in which radios were not available, or were prohibitively expensive, the court could not have come to this determination. But in 1932, the cost of not using a radio was so high compared to the price of the device, and the benefits were so great, that not installing radios in all tugboats could constitute a breach of duty on the part of the owners of the T.J. HOOPER. Context matters.

While a very different kind of case, *Jacob & Youngs, Inc. v. Kent* depends as heavily on context for its logic.⁹² A basic contracts case,⁹³ *Jacob & Youngs* addresses the fundamental question of how courts handle disputes over issues of defective performance, in this case a contractor installing the wrong kind of pipe in a plumbing system.⁹⁴ Once he learned of the mistake, the homeowner insisted that the contractor rip out the walls, remove the offending pipe, and replace it with the kind named in the contract—all at the contractor's expense.⁹⁵ Benjamin Cardozo, writing for the majority of the New York Court of Appeals in 1921, held that the contractor was not required to completely demolish and redo the work simply to fulfill the terms of the contract, for several reasons. First, the defect was likely insignificant in relation to the project as a whole, although the pipe that the subcontractor laid was slightly less expensive than the one for which the homeowner asked and had paid.⁹⁶ Second, "the cost of completion [was] grossly and unfairly out of proportion to the good to be attained."⁹⁷ Third, the rule of "compensation for defects of trivial or inappreciable importance[]" has been developed by the courts as an instrument of justice."⁹⁸

Cardozo's invocation of justice here signals the work of contextualization in the decision. Certainly, Mr. Kent did not get the pipe he wanted, and in a perfect world he would have. And the ideal of contract law is to return the parties to the position they would have been in had the contract been executed as agreed upon. However, that was not possible here without enormous effort and expense on the part of Jacob & Youngs; effort and expense that, in Cardozo's opinion, far outweighed

92. 230 N.Y. 239 (1921).

93. That is to say, taught to beginning lawyers with similar frequency to the *T.J. Hooper* case. A review of the most recent editions of fifteen commonly used Contracts casebooks found complete or edited versions of the *Jacob & Youngs* opinion reprinted in every single one.

94. The installation was "neither fraudulent nor willful. It was the result of the oversight and inattention of the plaintiff's subcontractor. . . . Even the defendant's architect, though he inspected the pipe upon arrival, failed to notice the discrepancy." *Jacob & Youngs*, 230 N.Y. at 241.

95. *Id.* at 240.

96. *Id.* at 241.

97. *Id.* at 244.

98. *Id.* at 245.

the breach of contract.⁹⁹ More importantly, there is a larger issue here. Not only would it be unjust to expect Jacob & Youngs to go to heroic efforts to undo their mistake, but requiring contractors to stop at nothing to keep to the letter of every element of a contract is unjust in a systemic way for two reasons. First, people occasionally make mistakes that are minimal in effect but so difficult to correct, that it is simply wrong to require the correction.¹⁰⁰ Second, the entire construction business depends upon the understanding that, on the one hand, contractors should do their best to fulfill the requirements of a contract and that, on the other, property owners should recognize the truth of the maxim “people make mistakes.”¹⁰¹ Without these understandings, the construction business might grind to a halt; contractors would have to factor into their costs the price and time of expensive and lengthy fixes of minor mistakes. Building contracts would, in effect, include insurance against repairing small but difficult-to-fix mistakes, thus passing the expense on to the customers who would not object to such errors to benefit those very few who would.

This seemingly minor issue, then, represents a larger attempt within contract law that tries to calculate the difference between the value of what a contract promises and the costs each party might have to pay in the wake of the contract being breached. Rather than just sympathizing with each party, Cardozo acknowledged the complexity of a construction contract and the multiple adjustments and compromises required in such a transaction. This is not simply a one-to-one exchange or even a contract for services to be rendered. It is a machine with many moving parts, any one of which could go wrong, but not all of which have equal weight or value. In a rapidly expanding state like New York at the beginning of the twentieth century, houses were going up all the time. Contractors worked with carpenters, electricians, plasterers, plumbers, and any number of other tradesmen, who sourced their materials from innumerable suppliers of mass-produced goods like tile, brick, pipe, and glass, each of which differs in major or minor ways. To reach the conclusion that he did, Justice Cardozo did not need an intimate knowledge of the building trades; however, he did need to recognize the context in which houses were built, the construction industry could thrive, and homeowners could afford to hire contractors.

99. *Id.*

100. *See* *Spence v. Ham*, 50 N.Y.S. 960, 963 (App. Div. 1898).

101. *See generally* 14 WILLISTON ON CONTRACTS § 42:4 (4th ed. 2013) (describing the contract law doctrine of substantial performance).

These are just two cases, of course, but the fact that they are both different from each other in content, historical period, and area of law while also being bedrock cases for legal analysis in contracts and torts allows them to suggest just how much context matters in legal decisions. We include these cases in textbooks and explicate them to our students so that they can learn this central fact. The genius of judges like Benjamin Cardozo and Learned Hand is analogous to the skill of a masterful cinematographer: they can move crisply and smoothly between foreground and background, individual actors and larger themes, taking into account the details of the case while, at the same time, taking in the panoramic sweep. This kind of contextual understanding is the primary factor of the cognitive empathy that is operating in both of these cases. Both Hand and Cardozo empathized not just with the plaintiff and the defendant, but also with larger legal and social systems: changing technologies, the business of building houses, future homeowners, and contractors.

III. JUDICIAL REASONING IN *PATTERSON V. HUDSON AREA SCHOOLS*

This model of facts and context clarifies why courts have come to such different conclusions in cases on homophobic bullying. While there is rarely disagreement on the basic facts of each case, the context in which these cases are adjudicated and the ability of judges to tap into the real-world circumstances of bullying—that is, their ability to tap into a contextualized, empathetic interpretation of the case—is inextricable from their understanding of the facts. We can see this tension in the collection of homophobic bullying cases I now turn to, especially in *Patterson*.

The facts in *Patterson* are no less disturbing for being straightforward and familiar. Dane Patterson¹⁰² underwent nearly continuous bullying at school from sixth grade until tenth grade, when he finally dropped out of Hudson High School and began taking classes at a local Catholic school before enrolling in college placement courses. His parents sued the school district, alleging that the bullying Dane experienced at school had effectively denied him a public education

102. To protect the then-minor plaintiff, the circuit court opinions observed the convention of referring to him by the initials D.P. *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 461 n.1 (2008). But because his last name was included in the initial opinion (through his parents as plaintiffs), his given name was used throughout the district court opinion and his full name is now a matter of public record. This Article therefore uses his full name throughout.

under Title IX.¹⁰³ The United States District Court for the Eastern District of Michigan found for the school district, and on appeal, a divided United States Court of Appeals for the Sixth Circuit determined that Dane's circumstances warranted a successful Title IX claim.¹⁰⁴

It is important to understand that Dane Patterson's case is hardly unusual. It is not necessarily even the most egregious example of homophobic bullying.¹⁰⁵ Most striking, in fact, is how similar it is in structure to so many other such cases around the country: in each, one child is singled out as the victim of repeated, ongoing harassment and physical violence, not just by one other child but by a whole cohort of other students. The child is either openly gay or perceived to be gay, and the bullying continues despite what can often be the best efforts of the school until that child either drops out of school or, in the most disturbing cases, commits suicide.¹⁰⁶

Courts, in these cases, have been split on whether they find for the school district or the child, specifically in how they interpret the Title IX regulations dealing with sexual harassment,¹⁰⁷ an issue I discuss in more detail in Part III of this Article. Regardless of the cases' outcomes, the

103. *Patterson v. Hudson Area Schs.*, No. 05-74439, 2007 WL 4201137, at *4-5 (E.D. Mich. Nov. 28, 2007).

104. *Patterson*, 551 F.3d at 450.

105. This dubious honor perhaps belongs to the plaintiff in the first case successfully holding that a school district may be liable for failing to curb repeated instances of antigay bullying. *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996). According to plaintiff's allegations in the case, Jamie Nabozny was frequently subjected to verbal abuse, held down by fellow students for a public simulated rape, punished for leaving school without permission after the mock rape, attacked multiple times in school bathrooms, and finally beaten in a public hallway so badly that he eventually collapsed from internal injuries, only to be laughed at when he complained by the assistant principal supposedly in charge of school discipline. *Id.* at 451-53.

106. *See id.*; *Doe v. Anoka-Hennepin Sch. Dist.* No. 11, No. 11-cv-01999-JNE-SER (D. Minn. Mar. 5, 2012) (copy of consent decree archived at <http://perma.cc/L83D-HZW4>); *Estate of Brown v. Ogletree*, No. 11-cv-1491, 2012 WL 591190 (S.D. Tex. Feb. 21, 2012); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135 (N.D.N.Y. 2011); *Martin v. Swartz Creek Cmty. Sch.*, 419 F. Supp. 2d 967 (E.D. Mich. 2006); *Theno v. Tonganoxie Unified Sch. Dist.*, 377 F. Supp. 2d 952 (D. Kan. 2005); *Doe v. Bellefonte Area Sch. Dist.*, No. 4:CV-01-1463, 2003 WL 23718302 (M.D. Pa. Sept. 29, 2003); *Donovan v. Poway Unified Sch. Dist.*, 84 Cal. Rptr. 3d 285 (2008); *L.W. v. Toms River Reg'l Sch. Bd. of Educ.*, 915 A.2d 535 (N.J. 2007); Hannah Bolt, *The Anoka-Hennepin Lawsuit: How Anti-Gay Bullying Was Sex-Based and 'Neutrality' Created a Hostile Environment*, 26 HARV. HUM. RTS. J. 265 (2013) (discussing *Anoka-Hennepin Sch. Dist.*); Sabrina Rubin Erdely, *One Town's War on Gay Teens*, ROLLING STONE, Feb. 12, 2012, at 50 (discussing *Anoka-Hennepin Sch. Dist.*); *see also* EMILY BAZELON, STICKS AND STONES: DEFEATING THE CULTURE OF BULLYING AND REDISCOVERING THE POWER OF CHARACTER AND EMPATHY 57-81, 143-66 (2013) (discussing the case of Jacob Lasher).

107. Title IX prohibits students' exclusion from any educational program or activity receiving federal financial assistance on the basis of sex. 20 U.S.C. § 1681 (2006). Because almost all public school districts receive at least some assistance from the federal government, the provision applies to virtually all public education in the country.

courts are applying the same legal rule: the schools in question may be liable for peer-to-peer bullying only where officials have demonstrated "deliberate indifference" to the plight of the bullied student.¹⁰⁸ When the harassment follows a specific pattern, in which the bullying is perpetrated by a series of students and in which the school takes immediate action against each individual student for each specific incident, the issue for the courts is whether the actions of school officials contributed to a denial of the child's access to public education.

The divide among courts addressing these cases is not necessarily evident beyond the opposite conclusions they reach.¹⁰⁹ However, when we bring the concept of judicial empathy into the analysis, this split makes a lot more sense. Just as the judicial empathy critics might predict, courts that find for the plaintiff, who alleges that the school inadequately handled bullying, appear to empathize with the plaintiff. That is, the decisions speak explicitly about what it means for a child to have to navigate a hostile environment in which harassment is a symptom of a larger pathology of victimization by a group. For these courts, schools that simply react to individual incidents of bullying when they appear to be part of a larger social context are indifferent to the actual circumstances of the plaintiff's situation.

By contrast, courts that find for the defendants, while often sympathizing¹¹⁰ with the plaintiffs and lamenting their experiences of harassment and violence, tend to analyze schools' reactions to bullying as appropriate responses to a series of isolated, unrelated incidents. If schools discipline perpetrators, organize antibullying workshops, or provide safe spaces for bullied students to eat lunch or do their homework, these courts consider those measures as more than adequate proof that school officials were working to help the child and counter harassment.¹¹¹ But such conclusions were not inevitable given the facts

108. A standard set forth by the United States Supreme Court. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

109. As will be discussed in Part III *infra*, the legal standard for relief in such cases requires a determination that school officials were "deliberately indifferent" to the plaintiffs' plight, so these decisions are necessarily quite fact-specific. But the facts alone do not seem to dictate whether courts will find complaints actionable under Title IX. Though the sample size we are working with is too small to generate reliable statistical evidence, drawing from these decisions anecdotally, the seriousness of the harassment alleged in bullying cases does not seem to correlate with the likelihood of courts' relief to the plaintiffs. Moreover, many of the cases analyzed in this Article were considering motions for summary judgment; as a result, the decisions necessarily view the facts in the light most favorable to the plaintiffs.

110. That is to say, following the *Dictionary of Modern Legal Usage* definition, feel compassion for the difficulties they face. See GARNER, *supra* note 28, at 312.

111. An excessive focus on individual actors as opposed to systemic problems underlies Nan Stein's critique of both zero-tolerance rules and the conflation of harassment with bullying.

of these cases. While both kinds of outcomes issue from the same body of law and even ask similar questions—that is, whether schools were doing an adequate job in addressing bullying and providing access to education in the way that Title IX requires—the framework with which the court contextualizes what is happening to the bullied child is inevitably the defining and deciding factor in all of these cases.

It is not immediately obvious what legal remedy is available for teens who are bullied or harassed by their peers. If appeals for assistance from school officials cannot halt the abuse, what recourse is available? Their fellow students are not state actors, and sexual orientation discrimination is not specifically prohibited under federal law or by many states.¹¹² But in the landmark decision of *Nabozny v. Podlesny*, the United States Court of Appeals for the Seventh Circuit found that a school district's egregious and knowing disregard of antigay bullying could be actionable on constitutional grounds.¹¹³

According to the facts alleged in his complaint,¹¹⁴ Jamie Nabozny, a middle school student in Ashland, Wisconsin, was continually verbally and physically harassed by classmates after he came out as gay in the seventh grade.¹¹⁵ Fellow students called him “faggot” and hit and spat at him.¹¹⁶ The school guidance counselor and principal (named defendant Mary Podlesny) promised to protect him, but did not follow through on this promise.¹¹⁷ In fact, shortly after that promise, Nabozny was grabbed by a fellow student who mimicked raping him as twenty other students watched and laughed.¹¹⁸ The abuse continued through eighth grade, until Nabozny attempted suicide.¹¹⁹

After being released from the hospital, he transferred to a local Catholic middle school.¹²⁰ Upon returning to public school in ninth

Nan Stein, *Bullying or Sexual Harassment? The Missing Discourse of Rights in an Era of Zero Tolerance*, 45 ARIZ. L. REV. 783, 799 (2003) (cautioning that framing bullying as individual “meanness” overemphasizes individual motivations and may dilute discrimination protections and undermine protections already afforded in law).

112. Currently, federal law and many state laws do not prohibit discrimination based on sexual orientation as a protected category. However, even in the absence of sexual-orientation-specific civil rights legislation, where such discrimination is implicated it can at the very least be subject to rational-basis review. *Ben-Shalom v. Marsh*, 881 F.2d 454, 463-65 (7th Cir. 1989).

113. 92 F.3d 446, 458 (7th Cir. 1996).

114. Taken by the Seventh Circuit as true for the purpose of determining whether summary judgment was properly granted by the District Court below. *Id.* at 450.

115. *Id.*

116. *Id.* at 451.

117. *Id.*

118. *Id.*

119. *Id.* at 451-52.

120. *Id.*

grade, Nabozny was physically assaulted and verbally harassed continually.¹²¹ The principal of the high school took no action against the various perpetrators, and within a few months, Nabozny had attempted suicide again.¹²² By tenth grade, the abuse had escalated so much that it culminated in a group of eight boys repeatedly kicking Nabozny in the stomach, leading to internal bleeding and another hospitalization.¹²³ After each episode, school officials promised to act but did nothing.¹²⁴ By the middle of eleventh grade, the school guidance counselor told Nabozny that school administrators were not willing to help him and he should just leave the school if he wanted to end the abuse.¹²⁵ Nabozny moved to Minneapolis, and, as well as seeking medical help, he hired a lawyer and sued the principals of both the middle school and high school in Ashland for gender discrimination.¹²⁶

When the case was first heard, the district court granted summary judgment to the defendants, determining that Nabozny had "failed to produce evidence to establish that the defendants either created or exacerbated the risk of harm" that the other students posed to him.¹²⁷ The Seventh Circuit reversed.¹²⁸ Citing 42 U.S.C. § 1983,¹²⁹ the court concluded that Nabozny had cognizable equal protection claims but dismissed his due process arguments.¹³⁰ Observing that it was "impossible" to imagine that school leaders would be equally cavalier if a girl in their care had been subjected to Nabozny's treatment, the court concluded that Nabozny could, therefore, claim gender-biased disparity in treatment by school officials.¹³¹ The *Nabozny* case was organized primarily around Fourteenth Amendment issues, but it served as notice that homophobic bullying in school settings could be analogized to male-on-female sexual harassment and that protections against such harassment might apply. Though many of the precise legal issues in this case differed from those in subsequent cases, two questions were settled:

121. *Id.*

122. Moreover, more than one teacher told Nabozny that this was the kind of treatment he could expect for being openly gay. *Id.* at 451-52.

123. *Id.* at 452.

124. *Id.*

125. *Id.*

126. *Id.* at 452-53.

127. *Id.* at 453.

128. *Id.* at 454.

129. Providing for a right of civil actions against persons or institutions for civil rights violations under the Constitution. *Id.* at 453.

130. *Id.* at 460-61.

131. *Id.* at 454-55.

(1) homophobic bullying is a civil rights issue and (2) failing to prevent that bullying might be an actionable offense.

Shortly after the *Nabozny* decision, in *Davis v. Monroe County Board of Education*, the Supreme Court decided that Title IX may require school officials to take steps to stop peer-to-peer sexual harassment.¹³² Though circuits had previously been split on whether Title IX covered student-to-student harassment as well as harassment by teachers or other school employees, the Court concluded that school officials' "deliberate indifference" to ongoing student harassment might be actionable under Title IX if the conduct were severe enough to effectively prevent the victim from receiving the benefit of a public education.¹³³

The *Davis* opinion opened the door to further Title IX claims alleging deliberate indifference in instances of repeated and uncontrolled peer aggression in the public schools, while *Nabozny* made space for victims of homophobic bullying in schools to sue school districts and school administrators by arguing gender discrimination even in states or municipalities lacking explicit civil rights protections on the basis of sexual orientation. Thus, in many recent lawsuits addressing homophobic bullying in school settings, plaintiffs asserted that the abuse they experienced constituted sexual harassment under Title IX.¹³⁴ These plaintiffs argue that even if sexual orientation is not itself protected under Title IX, harassment and discrimination claims connected to homophobia and sexual orientation may be asserted as occurring "on the basis of sex" when they intersect with gender—that is, if the victim was targeted in gendered terms or because he or she was perceived as violating the gender norms generally thought to accompany heterosexual identification.¹³⁵

132. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999).

133. *Id.*

134. However, some of those cases are also, or alternatively, predicated on state protections. See, e.g., *L.W. v. Toms River Reg'l Schs. Bd. of Educ.*, 915 A.2d 535, 539 (N.J. 2007) (regarding a bullied plaintiff seeking relief under New Jersey's Law Against Discrimination).

135. And they often are. Homophobic violence is frequently tinged with slurs about the victims' alleged violation of gender norms. Consider, for example, the kinds of comments Jacob Lasher reported from his classmates. Lasher was labeled with feminizing tags like "pussy" and "bitch" and was told by school administrators and other students to become more masculine in his appearance: "Lose the makeup, lift weights, lose the faggot voice . . ." BAZELON, *supra* note 106, at 59, 73. Or the many references to gender stereotypes catalogued in the Anoka Hennepin case. Bolt, *supra* note 106, at 270-71. Another example of the frequent slippage between targeting bullying victims for their supposed homosexuality and for their alleged gender hypersexuality or gender nonconformity may be found in *Vance v. Spencer County Public School District*, 231 F.3d 253 (2000), which deals with a female plaintiff who was alternately harassed by

When such student-on-student claims are brought, then, courts must now apply the deliberate indifference standard articulated by the Supreme Court in *Davis*. According to *Davis*, a prima facie case of peer sexual harassment must demonstrate:

(1) that the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school, (2) that the funding recipient [the school system] had actual knowledge of the sexual harassment, and (3) that the funding recipient was deliberately indifferent to the harassment.¹³⁶

As it happens, in *Patterson* and all the other cases discussed in this Article, the first two elements are not truly in dispute. It is generally assumed¹³⁷ that the harassment students suffered was “severe, pervasive, and objectively offensive,” and students and/or parents reported the abuse to school officials.¹³⁸ As I discuss below, the standard of “deliberate indifference” to the harassment is what is at issue, but deliberate indifference is difficult to prove because plaintiffs have to show that the reaction of a school administration was not just negligent, but *intentionally* so—that is, they have to prove that schools had the tools at their disposal to end the harassment but chose not to do so.¹³⁹

While the facts of *Nabozny* are deeply disturbing, they are hardly unique. Instead, they seem almost paradigmatic of subsequent decisions. In 2003, a Pennsylvania couple sued a school district after their son had been subjected to three years of being called “fairy,” “fag,” and “peter-eater.”¹⁴⁰ In 2008, Megan Donovan and Joseph Ramelli sued the Poway (California) United School District in response to four years of being verbally and physically harassed by classmates, including one incident where a student circled them and shouted, “Fucking fags, fuck you guys, stupid d[y]ke, stupid d[y]ke.”¹⁴¹ Both students left their school and enrolled in a home-school program.¹⁴² Jonathan Martin, a student in

being called “gay” and by being baited or propositioned in overtly sexually aggressive ways by male classmates. *Id.* at 256-57.

136. *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999) (citing *Davis*, 526 U.S. at 631-42).

137. Either because this has been established at trial, or because the pretrial summary judgment disposition of the case places an appellate court in the position of presuming petitioner’s complaints are true.

138. See, e.g., *Patterson v. Hudson Area Schs.*, No. 05-74439, 2007 WL 4201157, at *6 (E.D. Mich. Nov. 28, 2007).

139. See *id.* at *7-11.

140. *Doe v. Bellefonte Area Sch. Dist.*, No. 4:CV-02-1463, 2003 WL 2371802, at *1-5 (M.D. Pa. Sept. 29, 2012).

141. *Donovan v. Poway Unified Sch. Dist.*, 167 Cal. App. 4th 567, 582-84 (2008).

142. *Id.* at 583.

Michigan, was routinely insulted with homophobic slurs, physically assaulted, and subjected to ongoing vandalism of his locker and belongings.¹⁴³ Similarly, in Kansas, Dylan Theno sued the Tonganoxie Unified School District for its alleged indifference to the relentless name-calling, sexual harassment, and humiliation that he suffered over the course of four years, ending only when he stopped attending school and received his GED.¹⁴⁴ Asher Brown's parents sued his school in Texas in the wake of his suicide.¹⁴⁵ Asher had been harassed with homophobic and religious slurs, and his parents' suit listed numerous incidents in which students would run into him and simulate anal intercourse.¹⁴⁶

In many ways, then, Dane Patterson's case is quite typical. In sixth grade, classmates started a routine of name-calling and physical abuse, which escalated over the course of seventh grade.¹⁴⁷ Although his situation improved in eighth grade for reasons I will discuss below, once Dane entered high school, the harassment worsened.¹⁴⁸ Not only did he face an almost-daily barrage of insults and pushing and shoving, his belongings were defaced with slurs, and his gym locker was broken into and vandalized, as was his school locker.¹⁴⁹ In May 2005, Dane was physically assaulted by another student, who forced him into a corner and rubbed his penis and scrotum on Dane's face and neck.¹⁵⁰ Another student blocked the door so Dane could not leave.¹⁵¹ Shortly after this incident, Dane stopped attending classes at Hudson High School.¹⁵²

Dane and his parents complained regularly to school officials, and (with a few exceptions) the officials took swift and targeted action against the perpetrators of the harassment.¹⁵³ As soon as teachers and

143. *Martin v. Swartz Creek Cmty. Sch.*, 419 F. Supp. 2d 967, 968-71 (E.D. Mich. 2006) (recounting allegations that plaintiff was routinely taunted with sexually explicit comments, which escalated into defacement of his locker and physical confrontations).

144. *Theno v. Tonganoxie Unified Sch. Dist.*, 377 F. Supp. 2d 952, 954-61 (2005).

145. *Estate of Brown v. Ogletree*, No. 11-CV-1491, 2012 WL 591190, at *1 (S.D. Tex. Feb. 21, 2012).

146. *Id.* Brown's case may in fact have been complicated by the fact that he had been diagnosed with Asperger's syndrome three years before he died. *Id.* However, the harassment Asher experienced did not seem to focus on differences due to his disability, and instead were either sexualized ("gay," "faggot," "queer," "AsherAIDS,"), religion-based ("When Asher responded that he was Buddhist, the bullies would laugh at him and tell him he was going to hell"), or both (students "made sexually derogatory comments alluding to Asher having sexual intercourse with Buddha"). *Id.* at *1-2.

147. *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 439-40 (6th Cir. 2009).

148. *Id.* at 441-42.

149. *Id.* at 442.

150. *Id.*

151. *Id.*

152. *Id.* at 443.

153. *Id.* at 439-44.

administrators learned of an incident, they disciplined the responsible students, both counseling the perpetrators and, in the case of the vandalism and physical assault, suspending and even expelling responsible students.¹⁵⁴ In the summer between seventh and eighth grade, they worked with Dane to set up special education services for him and, in eighth grade, assigned him to work an hour per day with Ted Adams, a teacher who ran the school's resource room.¹⁵⁵ There, Dane could find respite from the abuse, work on his academics, and learn skills for dealing with his peers—an arrangement that, in large part, accounts for his success during eighth grade.¹⁵⁶ As each incident of bullying was reported, school officials took action against the alleged perpetrator, and the records generally show that those particular students did not bother Dane again (although other students quickly took their place).¹⁵⁷

Nonetheless, with the exception of eighth grade, Dane said the bullying was relentless. Rather than easing over time in response to school officials' clear opposition to this behavior, the harassment intensified and culminated in a serious and violent sexual assault.¹⁵⁸ Dane's parents sued the school under Title IX, claiming that Hudson Area Schools was "deliberately indifferent" to Dane's harassment at the hands of his classmates.¹⁵⁹ They argued that, although Dane's middle and high schools took individual action at each specific incident of harassment, the schools had done nothing to change the systematic pattern of bullying that Dane endured.¹⁶⁰ The schools responded that not only had they acted appropriately to Dane's specific situation, they had also worked to educate students about the destructive effects of bullying and cultivated a no-tolerance policy toward harassment.¹⁶¹

In this context, in which there are a number of cases on homophobic bullying, why focus on *Patterson*? First, this case has three separate and strongly written opinions: the district court decision, the circuit court decision, and the circuit court dissent. All three opinions use convincing and persuasive legal reasoning to come to their conclusions, and they all take the facts of the case and the dangers of

154. *Id.* at 441-43.

155. *Id.* at 441.

156. *Id.*

157. *Id.* at 444.

158. *Id.* at 442-43.

159. *Id.* at 443.

160. *Id.*

161. *Id.* The school's general efforts to combat peer harassment are discussed in further detail by the District Court. *Patterson v. Hudson Area Sch.*, No. 05-74439, 2007 WL 4201137, at *7-9 (E.D. Mich. Nov. 28, 2007).

bullying seriously. However, their very different approaches to the same facts lead to strikingly different analyses. Each opinion's way of understanding and framing the cultural context in which the undisputed events took place created diametrically opposed conclusions.

Second, each opinion understands the standard of "deliberate indifference" and its connection to school actions differently. The school administrators in *Patterson* were not as callous and victim-blaming as the principals and guidance counselors in *Nabozny*. They did not blame Dane Patterson for what happened to him, and they attempted to intervene. They made clear that he should not be bullied. But each *Patterson* decision very differently positions the court in relation to the parties involved.

A. *The Trial Court's Opinion*

Because this was a decision for or against summary judgment, the district court did not challenge the veracity of the narrative that the Pattersons presented.¹⁶² Rather, it moved immediately to evaluate the Pattersons' claim that Hudson Area Schools could be liable under the three-pronged analysis introduced in *Davis*: (1) a sustained pattern of harassment that denied the plaintiff access to public education, (2) the school district's knowledge of this pattern, and (3) the schools' deliberate indifference to this harassment.¹⁶³ The court handily determined that the harassment "could be considered severe, pervasive, and objectionably offensive," and the fact that Dane stopped attending school in tenth grade "constitute[d] sufficient evidence to create . . . a genuine issue of material fact as to whether his access to educational opportunities and benefits provided by the school was adversely impaired and/or denied," meeting the first prong.¹⁶⁴ The court found it similarly easy to conclude that plaintiffs alleged facts showing that the schools had sufficient knowledge of harassment to warrant liability, satisfying the second prong.¹⁶⁵

Thus, for the district court, the main issue to analyze was Patterson's claim of deliberate indifference. In response to this claim, the court observed, "[A]dministrators at Hudson Area Schools repeatedly took adequate and effective remedial action reasonably calculated to end harassment, eliminate the hostile environment and prevent harassment

162. *Patterson*, 2007 WL 4201137, at *4.

163. *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 258-59 (6th Cir. 2000).

164. *Patterson*, 2007 WL 4201137, at *6 (finding that ongoing harassment for two full school years in a three-year period was sufficient to qualify as severe, pervasive, and objectionably offensive).

165. *Id.* at *7.

from occurring again.”¹⁶⁶ The court took seriously the plaintiffs’ argument that Dane’s situation was not just a series of isolated incidents but was part of a larger homophobic and aggressive ethos among students.¹⁶⁷ The court took note of several affidavits from students, former students, teachers, and the guidance counselor affirming that “Hudson Area Schools had an environment of (a) profanity, (b) sexually derogatory treatment of students by other students, (c) jostling and pushing of students into lockers by other students, and (d) allowing certain students to be picked on and teased before and after school and between classes.”¹⁶⁸ Moreover, the court also recognized the severity of the treatment Dane endured and did not belittle the seriousness of homophobia in general.¹⁶⁹

Nonetheless, the court found for the defendants.¹⁷⁰ Throughout the opinion, the court looked at the phenomenon of sexualized harassment and homophobic bullying from the vantage point of the school district’s efforts to eradicate student-on-student harassment. Rather than focusing on Dane’s story in the “Analysis” section of its opinion,¹⁷¹ the court looked closely at the policy statements made by Hudson Area schools, the in-service trainings of teachers and administrators, the all-school assemblies and antibullying videos that students went through, and the specific disciplinary actions the schools took against the students who perpetrated the acts of harassment and violence against Dane.¹⁷²

The court detailed six specific steps that Hudson Area Schools took to address bullying. They adopted a written policy prohibiting all kinds of harassment, including sexual harassment.¹⁷³ While the principal did not adopt all the recommendations of the middle school’s guidance counselor, she did bring in outside speakers to talk to students and staff about bullying and participated in preexisting campaigns against harassment, including a program called “Positive Peers,” which “was a

166. *Id.* at *8.

167. The court notes that the slurs of “gay,” “fag,” and “queer” were part of the everyday discourse of children at the Hudson schools, and that “the other forms of poor and mean spirited behavior (pushing and shoving, teasing, etc.) also were directed at many students other than Dane.” *Id.* at *9 n.4.

168. *Id.* at *9.

169. *See id.* at *11.

170. *Id.* at *12.

171. Though Dane’s allegations regarding his experiences are described in the “Background” section of the opinion, *id.* at *1-4, the legal reasoning articulated in the “Analysis” section, *id.* at *4-11, perhaps due to the summary judgment posture, shifts almost entirely to a narrative of the school administrators’ actions.

172. *Id.* at *5-12.

173. *Id.* at *9.

mentoring service aimed at addressing kindness, bullying, peer pressure, and conflict resolution.”¹⁷⁴ Hudson Area Schools implemented policies that required that all public spaces be under adult supervision.¹⁷⁵ Students received a copy of the school’s code of conduct, which explicitly addressed bullying and harassment, and student conduct was an ongoing element of the middle school Health curriculum.¹⁷⁶ Finally, the school took disciplinary action against all students who were found harassing or attacking Dane.¹⁷⁷

Consequently, the court concluded, “While Defendants’ actions may not be exactly what Plaintiffs desired and while their actions may not have yielded the results Plaintiffs hoped for, applicable law provides that the Plaintiffs do not have a right to dictate the actions Defendants take.”¹⁷⁸ This statement is hardly exceptionable, but it reveals how the court contextualized the case. Throughout the decision, the court looked through the perspective of the school board; both implicitly and explicitly, the court asked what else a reasonable person could expect of Hudson Area Schools that it did not already do. Through the policies, trainings, videos, peer mediation programs, assemblies, and punishments, the school district exhausted its options for addressing Dane’s particular situation.

This approach is most clearly in evidence in the court’s response to the Pattersons’ claim that Dane was frequently told by administrators “that there was nothing that could be done about alleged sexual harassment unless names and proof of the perpetrators could be provided or determined.”¹⁷⁹ From the schools’ perspective, their hands were tied if they could not take direct action against specific perpetrators. Ultimately, the plaintiffs’ claim that the school was overrun with “ongoing pervasive harassment of children not in the ‘in-crowd’” was, in the court’s view, not only *not* ammunition for their argument that school administrators ignored their responsibility to Dane, but legally irrelevant and even potential evidence that the schools did what they could under the circumstances.¹⁸⁰ In this, the court seems to suggest that, because middle and high schools are breeding grounds for unkind and belittling behavior from popular children toward various outcasts, Dane Patterson could not expect Hudson Area Schools to be able to fully address the

174. *Id.*

175. *Id.* at *10.

176. *Id.*

177. *Id.* at *8-10.

178. *Id.* at *10.

179. *Id.* at *12.

180. *Id.*

problem. As long as it took *some* form of remedial action, the court concluded, the school had met its legal obligations.¹⁸¹

The question that pervades the court's analysis is, What would we want a school district to do in response to bullying, and to what extent did Hudson Area Schools do those things? The court focused on school policies, programs, and activities that address bullying and harassment. The court observed that even the plaintiffs acknowledged that "'everyone' who worked for Hudson Area Schools characterized the anti-harassment policy as a zero tolerance policy"¹⁸² and disagreed with the Pattersons' argument that "because every teacher deposed testified to knowledge of verbal sexual harassment occurring regularly within the schools, the cries of zero tolerance ring hollow."¹⁸³ Rather, the court took the school system at its word, arguing that such a policy cannot rid the schools of all harassment and can be expected only to respond to harassment as it occurs.¹⁸⁴

Most importantly, the district court decision did not really focus on Dane Patterson at all. Only one of the six measures the court highlighted had any connection to his particular situation, and the court did not even mention his name in its enumeration of the steps Hudson Area Schools took. Instead, the court concentrated more broadly on the efforts the school district was taking to eradicate harassment of all kinds, including sexual harassment, in order to benefit all children. The court contextualized the case from the perspective of school policymakers, empathizing with the role of the administrator rather than focusing on the situation of any particular child.¹⁸⁵

B. The Appellate Majority

When the plaintiffs appealed the summary dismissal of their claims, the circuit court did not dispute any of the district court's assertions about the efforts Hudson Area Schools made to combat harassment and bullying.¹⁸⁶ The circuit court recognized that the schools made attempts to address bullying and punished individuals who attacked Dane.¹⁸⁷ For the circuit court, though, these efforts were beside the point.¹⁸⁸

181. *Id.* at *10-11.

182. *Id.* at *11.

183. *Id.*

184. *See id.* at *11-12.

185. Of course, the sixth measure listed by the court is the disciplinary action taken against individual perpetrators of Dane's harassment. *Id.* at *10.

186. *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 439 (6th Cir. 2009).

187. *Id.* at 448-49.

188. *Id.* at 449.

The majority opinion contextualized the facts and issues in this case very differently from the trial judge below.¹⁸⁹ Rhetorically, the majority related the series of events in the case, not from the perspective of the school and its policies, but from what it imagined would be Dane's point of view. The court opened its narrative with a characterization of Dane as "distraught, anxious, and angry,"¹⁹⁰ cited his belief that the school-mandated apologies of various students were "not . . . sincere,"¹⁹¹ and described his feelings about no longer having access to the eighth grade resource room.¹⁹² Though much of the majority's analysis hinges on the appropriate legal standards to apply to summary judgment in this case,¹⁹³ by closely reading the way the court constructs the facts at hand, we can see the narrative it constructed. For the United States Court of Appeals for the Sixth Circuit, the question to ask seems not to be. What would we want a school to do about peer harassment? But, what was happening to Dane Patterson in this school district, and how could officials have attempted to alleviate Dane's (alleged) abuse?

In this context, the schools' piecemeal approach to stopping bullying by punishing individual students was not just ineffective, but also willfully ignored the way that bullying operated in this case and the effect of this harassment on Dane Patterson. The court averred, "We cannot say that, as a matter of law, a school district is shielded from liability if that school district knows that its methods of response to harassment, though effective against an individual harasser, are ineffective against persistent harassment against a single student."¹⁹⁴ Approvingly quoting the discussion in *Theno*, the court agreed that the bullying in this case did not consist of "discrete incidents of harassment," but instead consisted of "severe and persistent harassment that lasted for years, with other students engaging in the same form of harassment after those who were counseled had stopped."¹⁹⁵ As in *Theno*, the court observed that the steps Hudson Area Schools took to combat the bullying of actual children were not productive—they were too generalized in some ways, speaking only to vague ideas of "kindness" and "respect," and too targeted in other ways, punishing individual bullies without

189. See *id.* at 439-44.

190. *Id.* at 440.

191. *Id.* at 442.

192. *Id.* at 441.

193. And a fair amount of it is devoted to extended footnotes explaining in some detail just how wrong it believes that dissenting opinion is in characterizing those standards. *Id.* at 445 n.6, 447 n.7.

194. *Id.* at 448.

195. *Id.* at 446-47.

addressing the consensus that Dane Patterson was an appropriate victim of harassment and violence from any student who was inclined to persecute him.¹⁹⁶

The appellate majority did not give nearly the same amount of attention or credit that the district court did to Hudson Area Schools' generalized efforts to combat harassment.¹⁹⁷ For the circuit court, the fact that none of these measures had any effect in actually stopping the persecution of Dane Patterson demonstrated that their efficacy was limited. Given its insistent focus on the specific narrative of Dane's harassment, the court appears to have concluded that the existence of these various policies failed to prove that the schools were not deliberately indifferent. Indeed, these policies seemed to be operating on a wholly different register from what was taking place on the ground in the schools themselves, and reasoning otherwise would be naive.¹⁹⁸

The court seized on the word "pervasive" as central to its analysis.¹⁹⁹ Instead of viewing the incidents of Dane's abuse *seriatim*, as did the district court, the circuit court saw them as functioning collectively. The majority insisted that Hudson Area Schools should have recognized that simply disciplining individual perpetrators was "not stopping the overall harassment of [Dane Patterson]; it is undisputed that [Dane] continued to have problems with other students, even after some were reprimanded or even disciplined."²⁰⁰ Therefore, continued the court, "Hudson's isolated success with individual perpetrators cannot shield Hudson from liability as a matter of law."²⁰¹

Significantly, the court noted, the one effective measure that Hudson took to counteract the bullying as well as help Dane both emotionally and academically—assigning Dane to work daily with Mr. Adams in the resource room in eighth grade—was no longer available once Dane entered high school.²⁰² Even though the Pattersons "begged" the principal to reassign Dane to the resource room (which was in the middle school wing of the same building that housed Hudson High School),²⁰³ the school allowed him to meet with Mr. Adams for only

196. *Id.* at 447-48.

197. In fact it barely discusses these measures, which is legally appropriate given that the procedural posture in the case requires courts to consider plaintiff's allegations in the most favorable possible light. *Id.* at 447 n.7.

198. *Id.* at 449 n.9.

199. *Id.* at 448.

200. *Id.*

201. *Id.* at 449.

202. *Id.*

203. *Id.* at 441.

twenty to thirty minutes per week and returned to “the same kind of verbal reprimands that it had used unsuccessfully in response to the sixth- and seventh-grade harassment.”²⁰⁴ For the majority, this may have been a sign of deliberate indifference: the schools had found a solution that worked, but because of bureaucratic inflexibility, abandoned it as soon as Dane moved into high school.

While the crux of Hudson’s defense was that it took immediate action against specific students; for the majority, this argument “misse[d] the point.”²⁰⁵ It responded directly to the dissent’s claim that Hudson was “100% effective” in responding to the harassment²⁰⁶ by asserting, “One can make such a statement only if he ignores the realities of [Dane’s] situation.”²⁰⁷

By putting “the realities of [Dane’s] situation” at the heart of its analysis, the appellate majority directly countered the orientation of the district court’s opinion. Through its insistence that the only way to accurately evaluate this case was to comprehend Dane’s circumstances, the court defined the harassment primarily as an experience undergone by the *victim*, rather than a difficult set of conditions for a *school system* to handle. Once the court made this move toward empathizing with Dane, its decision became wholly logical. That is, if the court could see things from Dane’s point of view, Hudson Area Schools should have been able to do that, too. The fact that they chose not to, the court concluded, could be found by a jury to constitute deliberate indifference.²⁰⁸

In overruling the district court, the circuit court majority was not so much disputing the lower court’s interpretation of Title IX as it was reorienting the focus of the inquiry. In the eyes of the majority, the school was responsible not just for its policies, but for the well-being of all of its students. While the district court argued that one cannot expect a school system to eradicate bullying (a not unreasonable defense, given how entwined structures of social power are in middle and high schools), the circuit court countered that Hudson could be expected to recognize that Dane’s suffering was not reduced by any of their policies or programs. Rather than seeing the success of Dane’s experience in the eighth-grade resource room as an asset to the school’s argument that they took advantage of the resources available to them, the court instead asserted that Hudson prioritized separation between middle and high

204. *Id.* at 449.

205. *Id.*

206. *Id.* at 452 (Vinson, J., dissenting).

207. *Id.* at 449 n.9 (majority opinion).

208. *Id.* at 450.

school teachers and facilities above Dane Patterson's ability to thrive in school. This kind of bureaucratic rigidity was, for the circuit court majority, a symptom of Hudson Area Schools' single-minded investment in a set of ineffective strategies.

C. *The Appellate Dissent*

The dissent, authored by Judge Vinson (sitting by designation from the United States District Court for the Northern District of Florida), was also organized around the legal standard of deliberate indifference.²⁰⁹ It noted at the outset the very high legal standard which must be met for relief under Title IX. Observing that "a school district is not deliberately indifferent unless it knows of and disregards an excessive risk to the student's health and safety,"²¹⁰ the dissent cited cases in which courts set specific standards for Title IX violations, cases in which schools refused to take any action or made no effort whatsoever,²¹¹ in which deliberate indifference was characterized by a situation where "school officials [were] aware of the misconduct *but did nothing to stop it*."²¹²

These citations clue us into the dissent's direction. Judge Vinson expressed sympathy with Dane, observing that "this is a sad case," but arguing, "[T]he plaintiffs have clearly not met the high legal standard for deliberate indifference."²¹³ To support this stance, he enumerated every single instance of harassment in which Dane complained to school officials and the steps taken to respond to each incident. Because no individual student was reported to have harassed Dane again, Judge Vinson asserted, "[T]he only reasonable conclusion from the undisputed facts in the record is that the school's actions, with respect to those offenders, were 100% effective."²¹⁴

A detail of the case that, for the majority, was a telling symptom of the school's deliberate indifference to Dane's suffering—his removal

209. *Id.* at 451 (Vinson, J., dissenting).

210. *Id.* (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)). The dissent's reliance on *Farmer* is questionable. While the decision does use this description to characterize the deliberate indifference standard, it does so in the context of the Eighth Amendment standards for humane conditions in imprisonment, not in the context of Title IX. *Farmer*, 511 U.S. at 837. The Court's decision in *Farmer* likens Eighth Amendment deliberate indifference to recklessness and goes on to adopt a subjective test for determining recklessness in that specific context. It is not automatically apparent that the same standards are at work in Title IX harassment cases outside of the Sixth Circuit. *But see Patterson*, 551 F.3d at 451 n.1.

211. *Patterson*, 551 F.3d at 451 (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1998)).

212. *Homer v. Ky. High Sch. Athletic Ass'n*, 206 F.3d 685, 692 (6th Cir. 2000).

213. *Patterson*, 551 F.3d at 451 (Vinson, J., dissenting).

214. *Id.* at 452.

from the eighth grade resource room once he reached high school—was an insignificant detail for the dissent. Judge Vinson resolved that “the undisputed facts do not support [the] inference” that daily access to the resource room was a major factor in the improvement in Dane’s situation in his last year of middle school.²¹⁵ For the dissent, because Dane characterized his time in the resource room as a place to meet with Mr. Adams and “just kind of wind my day down with him, do my homework,” the resource room was “the equivalent of study hall.”²¹⁶ Since much of the bullying happened during the day in hallways, locker areas, and the lunch room, “it simply [did] not follow that a study hall for an hour each day could have reduced the harassment to an appreciable degree.”²¹⁷ Judge Vinson saw no real value in the daily use of the resource room and instead concluded that the changes Dane experienced in eighth grade must have been due instead to his interactions with Ted Adams.²¹⁸ While meeting with Mr. Adams daily was not available to Dane once he was in high school, the dissent determined that a half an hour per week for Mr. Adams to “meet and counsel him” at the very least indicated a good faith effort by Hudson to find a solution to a structural problem.²¹⁹

The dissent characterized the majority’s contextualizing of the case from Dane’s perspective as placing an unreasonable burden on Hudson Area Schools. Like the majority, the dissent looks to *Davis’s* determination that deliberate indifference is “not a mere ‘reasonableness’ standard.”²²⁰

[W]here a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it

215. *Id.* at 454.

216. *Id.*

217. *Id.*

218. *Id.* (observing that Dane himself could not account for the dramatic reduction in bullying during his eighth grade year and concluding from this that because Dane did not highlight the resource room as an important factor, it could not have played that role). That the dissent sees important connection between the loss of the resource room and daily access to Mr. Adams and the major uptick in harassment suggests that Judge Vinson is concerned less with redressing the “realities of Dane’s situation” and more with enumerating mechanistically the steps that the school district took in Dane’s case.

219. *Id.*

220. *Id.* at 456 (quoting *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000)).

continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.²²¹

The dissent insists that the majority “glosses over” the high standards of deliberate indifference and in essence expects Hudson Area Schools to single-handedly wipe out all harassment. “The majority seems to interpret these two sentences to mean that even if the school district takes disciplinary action in response to all known harassment, and even if that action is 100% effective against the individual harassers, it may be liable if there is subsequent harassment by new offenders.”²²²

The dissent’s repetition of the phrase “100% effective” is crucial. According to the dissent, the school’s responsibility was to respond to each individual act of harassment committed against Dane Patterson. Hudson could not be expected to act against students whom Dane does not identify by name, nor to anticipate acts of harassment that have not yet happened. For example, because Dane could not identify the children who had vandalized his locker and the school’s investigation unearthed no names, no one was punished.²²³ In the dissent’s opinion, the school did all that it could: it took Dane’s complaint seriously, and investigated it as soon as it could. Unfortunately, despite its best efforts, the school was not able to discipline the offenders.²²⁴

The distance between the dissent’s framing of this case from the majority’s contextualization of it can be found in a footnote that may appear at first glance to be a throwaway observation. The dissent raised the majority’s assertion that

[Dane] was teased, called names, and pushed and shoved “on a daily basis” while he was in the sixth grade. . . . Despite the daily nature of this harassment, [Dane] admit[ted] that he made only a “total of a couple of reports regarding [the] incidents that took place” during that school year.²²⁵

This, for the dissent, was proof that the Pattersons had unreasonable expectations of what the school was capable of and that Dane was not actively pursuing an end to the harassment. If he was teased and bullied daily, why was he not reporting these incidents to teachers every day? Why were there only a few reports over the course of the year rather than the hundreds that would reflect the severity of the abuse? If Dane did not report these incidents, how could the school be expected to act upon them? Or as the dissenting opinion puts it, “The school district is not

221. *Id.*

222. *Id.*

223. *Id.* at 452 n.4.

224. *Id.* at 452-53.

225. *Id.* at 452 n.3 (citation to majority opinion omitted).

responsible for failing to stop harassment of which it was not made aware, nor can it be held responsible for failing to punish harassment by unknown individuals.”²²⁶

These two opinions display radically different ways of contextualizing this case in particular and homophobic bullying in general. Their approaches are best exemplified by the language to which each opinion returns more than once in explaining what happened in Hudson. For the majority, the defining phrase in the case is “pervasive harassment.” The treatment that Dane Patterson faced was not a series of discrete events that could be responded to and disposed of one by one. For the majority, Dane’s experience was totalizing—he underwent daily abuse, sometimes extreme and violent, at other times lower in intensity and mostly comprising verbal insults and teasing. However, the majority opinion contended that harassment shaped Dane’s time at school; from the moment he walked in the door of school to the moment he left at the end of the day, he lived in anticipation of another insult, another attack.

For the dissent, however, the quality of life that Dane experienced on a daily basis was not, and could not be, the concern of Hudson. The schools recognized the problem and took action. Not only did they hold various consciousness-raising events about bullying and disrespect, they were, in the phrase that defines the dissent’s approach, “100% effective” in responding to all the incidents of harassment about which they knew.²²⁷ The dissent used this exact phrase four separate times in its opinion in order to point out that Hudson was the opposite of deliberately indifferent.²²⁸ Not only did the schools act in the wake of every incident, they were “100% effective” in making sure that specific offenders never harassed Dane again.²²⁹ The dissent then recounted a number of cases similar to *Patterson* in which schools responded directly to individual cases of harassment, and even though the abuse continued, courts found that schools were not deliberately indifferent.²³⁰

The dissent allowed that a school cannot “avoid liability merely by taking some action, however minor, in response to known harassment The pertinent inquiry is whether the response was appropriate under the particular circumstances.”²³¹ As we have seen, the

226. *Id.* at 452.

227. One which was introduced by the district court below, but invoked as a talisman by the appellate dissent.

228. *Patterson*, 551 F.3d at 452, 456-57, 460.

229. *Id.* at 452.

230. *Id.* at 457-60 (citing *Doe v. Bellefonte Area Sch. Dist.*, No. 4-CV-02-1463, 2003 WL 23718302 (M.D. Penn. Sept. 29, 2003); *S.S. v. E. Ky. Univ.*, 532 F.3d 455 (6th Cir. 2008)).

231. *Id.* at 460.

dissent had already addressed this question: because Hudson officials were "100% effective" in responding to reported incidents of harassment, how could their actions be anything but appropriate? In the dissent's words, "A school acts appropriately if it investigates what has already occurred, reasonably tries to end any harassment still ongoing by the offenders, and seeks to prevent the offenders from engaging in such conduct again."²³²

The dissent expressed sympathy for Dane's "sad case," but if it was empathizing at all, it was only with the day-to-day work of Hudson officials. For the dissent, effectiveness was instrumental, even scripted. The school's responsibility was to respond to specific offenses and to make sure that every individual perpetrator of harassment did not commit further offenses. None of the harassers bothered Dane again, so the school was "100% effective" in preventing more abuse by those students. After all, no school can (or should) predict which students would offend in the future; the best they could do was make clear that bullying was not tolerated by Hudson and discipline students on a case-by-case basis.

While I cannot agree with the dissent's perspective, I also cannot fault it for being unreasonable.²³³ Like the district court, the dissent asked an important question: What can we expect schools to do about harassment that, even despite what feels like their best efforts, will not end? The majority's use of the phrase "pervasive harassment" points us toward an answer, which the next section explores. Explicitly, the majority was talking about the experience of harassment that pervaded Dane Patterson's life. Here, "pervasive" means constant, never-ending, and daily. But this harassment was not just experientially pervasive for Dane; it was communally pervasive for Hudson Area Schools. That is, the idea that Dane Patterson's role was the victim of homophobic bullying pervaded his school. There was an unspoken understanding that he was an open target for any and all children inclined to pick on him, which is why punishing each individual incident of harassment was so useless. In essence, the entire "in-group"²³⁴ at the school functioned in

232. *Id.*

233. See *infra* note 210. A fair reading of the precedent might suggest that the dissent's interpretation of the relevant legal standard was at best cramped, if not perhaps disingenuously narrow.

234. This follows the conceptions of sociological thinkers who suggest that one important way that groups develop cohesion and a sense of self-definition is by identifying and distinguishing themselves from those perceived as outliers. Through this process of setting boundaries the group cements its notion of just who belongs within the group while bonding those within it by their shared denigration of outsiders. See, e.g., KAI T. ERIKSON, WAYWARD

tandem, casually harassing any children who seemed to be outliers but focusing their energies in particular on Dane. Once we understand this context, we can get much further in understanding how this kind of harassment works, what schools might do about it, and how courts can respond to it.

IV. UNPACKING “DELIBERATE INDIFFERENCE”

One reason the bullying cases examined here all seem so similar is that homophobia is a pervasive bias in U.S. culture. Moreover, homophobia is intimately connected to the enforcement of gender norms, so that children and adults who violate those norms are often interpreted as gay or lesbian. The language of homophobia and the language of gender conformity can be indistinguishable: “faggot” can mean “gay man” and/or “feminine man”; “dyke” can mean “lesbian” and/or “masculine woman.” And of course, preteen and teenage children, who absorb and reproduce homophobic attitudes and language while also being deeply concerned with social hierarchies and who fits where on the ladder of popularity, are primary enforcers of homophobia and gender conformity. Given all of this, we should not be surprised that homophobic bullying in schools is so predictable, brutal, cruel, and relentless.

This insight, while hardly original, can help us understand not just the raft of cases discussed here, but also the ways in which various courts’ contextualization of the situations they are evaluating and on which they are ruling play out. In short, if courts recognize that homophobic harassment is not just experientially pervasive but communally accepted, they are more likely to find for the plaintiffs in bullying cases. I will work through the mechanics of this kind of bullying in a holistic way; that is, in a way that sees homophobic harassment as a symptom of a larger set of social processes that identify victimhood as an existential phenomenon and the practice of that harassment as a routinized element in the social life of a school.²³⁵ Once

PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE (1966) (building on the work of earlier sociologist Emile Durkheim and criminal records from seventeenth century Massachusetts Puritans to show that behavior outside of group norms helps build coherent social order); *see also* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963) (discussing labeling and the discrediting of outsider groups such as homosexuals as a common function of human society).

235. Which at least some scholars argue is consistent with the direction of more recent attempts to legislate against antigay bullying. James Maguire argues that the 2010 Massachusetts bullying legislation moves away from a “robust notion of individual agency” towards a “contagion model” of broader social conditions. James Maguire, “*Everyone Does It to*

schools have a meaningful analysis of the problem of homophobic bullying that recognizes it as systemic, systematic, and a process that generalizes homophobic abuse even as it particularizes its victims, both schools and the courts will have better conceptual tools to understand what “pervasive harassment” really means.

Of course, bullying may be grounded in gender differences²³⁶ or race,²³⁷ or may simply be specific to the child singled out regardless of minority. Even within the narrower context of homophobic bullying, not all children victimized are gay²³⁸ and not all openly gay children are victimized.²³⁹ Indeed, it is entirely possible that in some of these cases there were openly or semi-openly gay children who escaped the routine abuse suffered by the various plaintiffs. We can imagine a Venn diagram of “kids who are (perceived to be) gay” and “kids who are bullied,” in which the overlap designates “kids who are (perceived to be) gay who are bullied.” Sometimes the victim falls into other derogated groups that further single the child out from his or her classmates; the child may be

Everyone”: An Epidemic of Bullying and the Legislation of Transgression in American Schools, 16 NEW CRIM. L. REV. 413, 448 (2013). For more extensive examination of antibullying legislative efforts across the country, see Samantha Neiman, Brandon Robers & Simone Robers, *Bullying: A State of Affairs*, 41 J.L. & EDUC. 603, 619-39 (2012).

236. As is demonstrated in the many opposite sex (usually male to female) peer sexual harassment cases brought under Title IX, including *Davis* and *Vance*, see *infra* notes 133-135 and accompanying text.

237. For a few egregious recent examples of race-baiting bullying, see *Williams v. Port Huron School District*, 455 F. App'x 612, 614-18 (6th Cir. 2012) (examining a case in which African Americans in a school district fraught with racial tensions were subjected repeatedly to racial epithets, taunts, anonymous distribution of white supremacist literature and a widely distributed “hit list” featuring a noose and target list of students of color); and *Zeno v. Pine Plains Central School District*, 702 F.3d 655, 666-68 (2d Cir. 2012) (discussing the case of a student subjected to racist name-calling, vandalism, and threats of physical violence including lynching).

238. See, e.g., *Tyrell v. Seaford Union Free Sch. Dist.*, 792 F. Supp. 2d 601 (E.D.N.Y. 2011) (concerning high school student who allegedly suffered years of harassment and homophobic slurs following a drunken incident in which another girl allegedly engaged in sexual conduct with her).

239. Studies reveal an enormous amount of antigay harassment in American schools. In the 2009 school climate study by Gay, Lesbian, Straight Education Network (GLSEN), for example, 84.6% of lesbian, gay, bisexual, or transgender students surveyed reported experiencing verbal harassment within the past year, and 61.1% said that they felt unsafe at school as a result of their sexual orientation and/or gender expression. GLSEN, THE 2009 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 22-26 (2009), available at <http://glsen.org/sites/default/files/2009%20National%20School%20Climate%20Survey%20Full%20Report.pdf>, archived at <http://perma.cc/H6PF-TUTP> (showing a positive trend in decreasing antigay epithets over time, and a correlation between antibullying efforts and gay-straight alliances with decreases in homophobic harassment). Even with such staggering statistics, however, the increasing prevalence of self-identified gay, lesbian, or bisexual children in primary grades means that at least some of those children escape all or at least the most serious forms of homophobic harassment from peers.

overweight,²⁴⁰ have a learning disability,²⁴¹ be economically disadvantaged,²⁴² belong to a minority religion,²⁴³ be new to the school,²⁴⁴ or have already been the subject of sexualized rumors.²⁴⁵

Occasionally, the children in these cases are openly gay (as in *Nabozny*,²⁴⁶ *Martin*,²⁴⁷ and *Donovan*²⁴⁸), but while the victim's coming out might have been the catalyst to the abuse, most of the subjects of harassment are not identified as *actually* gay either in their own narratives or in the court decisions. Moreover, even those who are actively pursuing heterosexual relationships may nevertheless be targeted by their fellow students as "gay."²⁴⁹ Most important here, though, is the fact that the victims of homophobic bullying are perceived to be not just gay but also "faggots" or "dykes"—that is, outside the boundaries of human society and hence appropriate subjects of abuse and shame.²⁵⁰

We might call this person the "kid who is bullied," but his or her²⁵¹ status within the school is the person whom others are entitled to harass.²⁵² This status requires a kind of social consensus among the other students, a microculture of bullying that might expand casually to include

240. *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 440 (6th Cir. 2009); *see also* *Estate of Brown v. Ogletree*, No. 11-CV-1491, 2012 WL 591190, at *1, *17 (S.D. Tex. Feb. 21, 2012). Brown was allegedly called "fat pig" by his peers, despite the fact that the court indicates that he was of "slight build." *Id.*

241. 2012 WL 591190, at *1 (noting that Brown had been diagnosed with Asperger's Syndrome and "displayed some of the more common side effects" of the disability).

242. 2012 WL 23718302, at *2. According to the plaintiff's complaint, a classmate said publicly that Doe's "family is poor and [his] mom's a whore." Note, however, that Doe may not otherwise have stood out from his peers. The court takes pains to note that Doe possessed a black belt in karate and was attempting to complete requirements to become an Eagle Scout. *Id.*

243. 2012 WL 591190, at *2 (detailing Brown's teasing for being Buddhist among his Christian peers in Texas).

244. *Id.* at *16.

245. 377 F. Supp. 2d at 954-61.

246. 92 F.3d at 451.

247. 419 F. Supp. 2d at 968.

248. At least with respect to the named plaintiff. *Donovan v. Poway Unified Sch. Dist.*, 167 Cal. App. 4th 567, 583 (Ct. App. 2008). The record about the sexuality of Donovan's coplaintiffs is not clear. *Id.*

249. *See, e.g., RYAN'S STORY*, <http://www.ryanpatrickhalligan.org/> (last visited Feb. 5, 2014), *archived at* <http://perma.cc/8NE-MGRC>.

250. As hip hop artist Eminem observed in attempting to explain why his repeated use of the word "faggot" was not in itself homophobic: "The lowest degrading thing you can say to a man . . . is to call him a faggot and try to take away his manhood . . . 'Faggot' to me doesn't necessarily mean gay people." Richard Kim, *Eminem—Bad Rap?*, *THE NATION*, Mar. 5, 2001, at 5, *available at* <http://www.thenation.com/article/eminem-bad-rap>, *archived at* <http://perma.cc/JJ92-C3AJ>.

251. A few of these cases, most notably *Donovan*, include victims who are girls. However, the overwhelming majority deal with homophobic bullying of boys.

252. *See* George W. Smith, *The Ideology of "Fag": The School Experience of Gay Students*, 39 Soc. Q. 309, 327-28 (1998).

other victims, but is focused on a single subject. In all these cases, the offenders seemed fungible; as we saw in *Patterson*, when one perpetrator was identified and disciplined and ceased participating in the harassment, others soon stepped up to take his or her place. In this context, homophobic bullying is not a series of abusive incidents, but a social dynamic that is self-perpetuating and self-reinforcing.²⁵³

The structural realities of this kind of bullying require more than just targeted responses to discrete incidents. As the circuit court in *Patterson* recognized, homophobic harassment is “pervasive” and constructs its own set of realities. The ongoing cultural acceptability of homophobia in the United States contributes significantly to this phenomenon, even if the characteristics that the perpetrators focus on have little to do with sexual orientation.²⁵⁴

In these cases, “empathy” requires a set of cognitive processes that allow schools, judges, and ideally fellow students to not just feel bad for children like Dane Patterson, but to recognize several interconnected phenomena: (1) that the operative word in “homophobic bullying” is “homophobic”; (2) that homophobic bullying is concerned with both victimizing and shaming its victims, because to be called a “faggot” is to be considered less than fully human; (3) that homophobia pervades our culture and, by extension, our schools; (4) that in this context, homophobic bullying is a project undertaken within a microculture as large as a whole school or as small as a sixth grade class; (5) that homophobic bullying constitutes not just a set of offenses but the threat of harassment at any moment for any length of time; and (6) that the experience of the victim of homophobic harassment is totalizing—his or her day is spent either anticipating, dealing with, or recovering from harassment, and managing the shame of being the designated “kid who is bullied.” Meaningful empathy requires an intellectual *and* affective

253. For example, if Dane Patterson did not report the abuse, then his bullies could act with impunity. But if he did report it, he was breaking the microcultural consensus that he was the outsider, which might subject him to further bullying.

254. *Estate of Brown v. Ogletree*, No. 11-cv-1419, 2012 WL 591190 (S.D. Tex. Feb. 21, 2012), provides a clear example of this. The victim’s disability, weight, and Buddhist religion amid a Christian-majority community all contributed to his targeting as “the kid who is bullied.” *Id.* at *1-3. However, the terms in which he was harassed were primarily about his presumed homosexuality. The anti-Buddhist harassment was framed in sexual terms, in which students made sexually derogatory comments alluding to Asher having sexual intercourse with Buddha. *Id.* at *2. Asher was a social misfit in many ways: he “had poor social skills, horrible handwriting, was awkward and clumsy, and had a hard time understanding nuance. In addition, Asher was short for his age, of slight build, and not athletically inclined. He spoke with a lisp and preferred choir to gym class.” *Id.* at *1. As a sixth grader, it is unlikely that Asher expressed much in the way of sexual preference for other boys; rather, his inability to enact a standardized masculinity, and his social and athletic awkwardness defined him as “the kid who is bullied.”

appreciation of (1) the mechanisms of homophobic harassment on a structural level and (2) the lived experience of victimization for the subjects of that harassment.

How would the deployment of this kind of contextualized empathy work in the schools and the courts? Certainly, schools cannot abrogate their responsibility to discipline students participating in harassment and violence toward other children, but they must also educate the broader school community about bullying and homophobia (among any number of discriminatory attitudes).²⁵⁵ However, contextualized empathy requires schools to work actively to counter homophobia *as such* and to see homophobic harassment as more than certain students behaving badly toward other students. Seeing the experience of a child like Dane Patterson in context means seeing this kind of harassment as a form of psychic terrorism that polices the entire community by punishing those students who stand out in one way or another, and by designating one child as the sacrificial lamb to the homophobic and gender-normed rules that control all students.

In many ways, it is easy to speculate how courts could take a contextualized view of homophobic harassment cases that privileges cognitive empathy with the plaintiffs. *Patterson* provides one model of this, although the circuit court focused more on empathizing with Dane's experience as "the kid who is bullied" than on contextualizing the operations of homophobia and gender-norming at Hudson Area Schools. The court recognized the most important element of this phenomenon, however: that homophobic bullying is a cumulative, microcultural expression of interchangeable actors against a single object and must be dealt with as such. In those terms, the *Patterson* dissent does not make sense: from the majority's perspective, to argue that Hudson punished perpetrators and told students to be more respectful toward each other, and hence were not deliberately indifferent, manifests a lack of understanding that borders on purposeful ignorance. The kind of instrumentalist approach the dissent in *Patterson* took is then easily dismantled by the majority.

255. A good amount of scholarship suggests that such education is effective. See DAN OLWEUS, *BULLYING AT SCHOOL: WHAT WE KNOW AND WHAT WE CAN DO* (1993); BAZELON, *supra* note 106, at 193-293; HUMAN RIGHTS CAMPAIGN FOUND., *AN INTRODUCTION TO WELCOMING SCHOOLS* (2009), available at http://www.hrc.org/files/images/general/An_Introduction_to_Welcoming_Schools.pdf, archived at <http://perma.cc/Z7AQ-UECS> (offering empirical support for the effectiveness of its antibullying program). For recommendations for more comprehensive legal and legislative responses that can combat antigay bullying, see R. Kent Piacenti, *Toward a Meaningful Response to the Problems of Anti-Gay Bullying in American Public Schools*, 19 VA. J. OF SOC. POL'Y & L. 58 (2011).

The question of whether it is genuinely wrong for a court to find for the schools in these kinds of cases is actually more complicated. Does contextualizing this kind of harassment in terms of the culture of homophobia preordain outcomes for plaintiffs? Not necessarily, although it does alter the balance of power (no small thing, since most of the courts in the homophobic bullying cases adjudicated so far did, in fact, find for the defendants). The use of contextualized empathy toward the victims of homophobic bullying might not change the outcome of any individual case, but it does put a thumb on the scales in favor of the plaintiffs by taking their experiences seriously and naming the power of homophobia. This is a significant difference from existing decisions, even ones that find for plaintiffs, and it requires using a different analytical framework.

In *Patterson*, the district court's opinion that Hudson did all it could by instituting policies and guidelines to counter bullying is not unreasonable.²⁵⁶ But even that argument would look different if it treated Dane Patterson's situation as part of a larger syndrome that manifested itself within the microculture of Hudson Area Schools, especially if this analysis were contextualized by the half-dozen other cases that followed the same trajectory (or ended even more tragically) and the hundreds that never made it to the courts.

More to the point, if the district court took homophobia into account, how different would its decision look? The district court could still make a number of the same arguments. After all, acknowledging that there is homophobia in the world is not the same thing as eradicating it. Understanding harassment in the context of widespread homophobia shows us what an immense task it is just to counter bias in the classroom, hallways, and lunchrooms. Schools are hardly equipped to make this kind of widespread social change, especially in an era of shrinking resources. A school district's obligation is to educate; it is unreasonable to make them responsible for eradicating homophobia in their schools and undoing the antisocial behavior in which preteen and teenage

256. For extensive recommendations of what schools can actually do to decrease the likelihood of bullying, see Dan B. Weddle's, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMPLE L. REV. 641, 699-703 (2004); see also Michael J. Ritter, *Teaching Tolerance: A Harvey Milk Day Would Do a Student Body Good*, 19 TEX. J. WOMEN & L. 59, 72-79 (2009); cf. Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMPLE L. REV. 385, 438-42 (2012) (defining homophobic bullying as a serious social problem to be addressed but arguing against criminalization of bullying or cyberbullying).

children so often participate.²⁵⁷ A fully contextualized analysis can only take schools so far toward effectively putting a stop to homophobic harassment.

Still, we can imagine an approach that differs from the one the trial court adopted while maintaining the same sympathies and even the same conclusion. In this alternate-universe decision where cultural homophobia is acknowledged and homophobic victimization is seen as a fairly common force that must nonetheless be challenged with every possible effort to ensure that it does not infest the school's culture or coerce any particular student, a court could still legitimately conclude that individual school systems had satisfied their legal obligations toward bullied plaintiffs. Rather than enumerating the various antibullying programs in which the school system participated and the policies they implemented, the district court would ask what efforts the schools took to counteract the microculture of victimization in which a boy like Dane Patterson becomes "the kid who is bullied." That is, the court would analyze how Hudson worked to disrupt the social status gained by other children for victimizing Dane, while taking seriously the limits on a school district's ability to change wide-ranging and strongly held biases against sexual and gender minorities. Such a decision would start from a position of genuine empathy for both Hudson Area Schools and Dane Patterson, while recognizing that it is profoundly difficult to reconcile the two.

V. REGARDING CONTEXT

This discussion raises an important question: *Can* a court have a fully contextualized understanding of homophobic bullying and still find for the schools in cases like *Patterson*? Certainly, reasonable people can differ on the extent of a school's responsibility. It is possible for a school to do all it can to foreground the destructive power of homophobia and discipline individual students without the student at issue finding relief. To be frank, however, this is unlikely. In none of the cases reviewed for this Article was the word "homophobia" even mentioned, even though every single one of the male plaintiffs was called "faggot," "queer," and/or "homo" and associated with acts of masturbation and oral and

257. Or as the court concludes in *Davis*, and the Patterson majority approvingly quotes, the legal standard under Title IX "does not mean that [schools] can avoid liability only by purging the schools of actionable school harassment." *Davis*, 526 U.S. at 648, *cited in* *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 456 (6th Cir. 2009).

anal sex with other men and boys.²⁵⁸ The children in these schools were surrounded by homophobia—it was essentially in the air that they were breathing—but the courts could not see how powerfully that context affected every single student, whether they were gay, victimized, or not.

A contextualized view of homophobic bullying cases takes into account what Judith Butler calls a “livable life.”²⁵⁹ The “kid who is bullied” is denied the possibility of a livable life in the context of the school environment; he or she is reduced to a singular identity: object of the abuse of others. Only by empathizing with that subject position in context—that is, analyzing how homophobia operates, recognizing that it dehumanizes, and understanding the microcultural consensus that constructs these victims—can a court accurately evaluate homophobic bullying cases.

Given how many of these cases exist, and assuming that courts are at least sympathetic to the plight of victims of homophobic bullying, why is this kind of contextualized empathy so hard to find in the case law? Why do courts that acknowledge the seriousness, pervasiveness, and violence of the treatment many of these children experience still rule in favor of school systems? That is, why can they not recognize the systemic nature of homophobic bullying and the social context in which it thrives in schools?

Maybe it does not even occur to courts that they are permitted to consider perspectives outside of what they define strictly as “the facts” and “the law.” That is not to say that the courts’ points of view are separate from any kind of context. Nor are they without contextualized empathy. With few exceptions, the courts’ empathy here lies with administrative systems, in line with a worldview that believes in the power of public policy and disciplinary systems to fix discrete problems. Because this worldview is so common—indeed, it is pretty much a requirement for a career in the law—it is invisible to the courts. For the *Patterson* district court opinion and circuit court dissent, the facts of the case were structured by a series of unspoken assumptions about the relationship of individuals to institutions and the centrality of policy and rules in shaping people’s lives and experiences. These opinions were shaped by a sense that systems, like schools, operate appropriately from

258. It could be argued that this is due to the strictures of Title IX, which requires sexual harassment on the basis of gender, and which does not have room for discussions of sexual orientation. However that would fail to take into account the fact that sexual orientation discrimination may be protected insofar as it overlaps gender discrimination. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79-80 (1998).

259. See JUDITH BUTLER, *UNDOING GENDER* 25-27 (2004) (describing a “livable life” as one in which a person feels recognized by others as deserving of human dignity).

the top down and that as long as the necessary measures are taken, institutions are not liable for the quality of the lives of those who populate those institutions.

Courts that find for schools in homophobic bullying cases are rarely callous or explicitly biased against LGBT plaintiffs. But they are often structurally incapable not just of empathizing with the world in which the plaintiffs live, but with recognizing that their contextualization of the case leads them to see the facts in a predetermined way. Taking lived experience into account is empathic not merely in affective ways: it is a cognitive, intellectual process that is inextricable from legal reasoning. One might argue, in fact, that contextualized reasoning requires a level of intellectual activity that decontextualized reasoning does not. It necessitates stepping back from one's own intuitive understanding of the facts of the case and reorienting those facts from a different, subordinated perspective. Acknowledging the pervasiveness of homophobia is a significant intellectual exercise for those judges (indeed, those people) not directly marginalized by it.

Does integrating empathy into legal reasoning mean that courts will always find for plaintiffs in these cases? is not actually the correct inquiry. Contextualized reasoning in law means manifesting empathy for *all* perspectives: school systems, school administrators, bullied students, and even the bullies themselves. Only by being able to enter into the reasoning of each party involved can we have a fully formed understanding of the facts.

As we have seen throughout this Article, what qualifies as a "fact" depends on context. In legal reasoning, the facts lead us to apply certain rules to specific situations. However, all the cases I have discussed above, from *T.J. Hooper* to *Patterson*, demand of the reader a richer, more complex definition of "facts" that cannot be disentangled from the world that brought them into being.

Of course, after all this contextualized reasoning, one must find a perspective to give the most credence. However, a meaningful understanding of homophobia, for example, would be less likely to lead to unconscious reinforcement of homophobic beliefs or the assumption that homophobic bullying is simply a form of unkindness. Understanding homophobia means recognizing how micro- and macrocultures of marginalization form, as well as recognizing how the enforcement of sexual and gendered norms have immense and damaging power. Finally, it means acknowledging that LGBT people have to grapple with these norms in ways that shape their lives on a daily basis, which, in the absence of empathy, is simply invisible to nongay people.

This is the kind of empathy that Sonia Sotomayor was talking about and that Senators Jeff Sessions and Lindsey Graham seemed incapable of comprehending. Sotomayor was arguing that her experience with marginalization gave her the opportunity to contextualize facts in a way that her wealthy, white, male counterparts could not. She was making a complex argument about the centrality of context: that it profoundly shapes her view of the facts even if it does not necessarily determine judicial outcomes. Senators Sessions and Graham heard that analysis as indicating bias—that is, they argued that what Sotomayor was claiming as a plurality of “empathy” was in fact a singularity of “sympathy.”

It is not. In fact, equating empathy with sympathy works toward promulgating bias of a different kind, preserving the dominant narrative and erasing the perspectives of the marginalized. It can be argued instead that Senators Graham and Sessions believed that integrating a variety of perspectives into legal reasoning is tantamount to bias because they failed to recognize their own single-minded empathy toward dominant context, which, of course, is, itself, a form of bias.²⁶⁰ They see the world from a limited point of view and, unlike Justice Sotomayor, have proven themselves incapable of looking at the question of empathetic legal reasoning empathetically (that is, taking all perspectives seriously).

A contextualized, empathic, culturally aware approach toward a case like *Patterson* does not guarantee that the court will always find for a plaintiff and that Dane Patterson will always win, but without this approach, we can almost guarantee that he *never* will.

260. See, e.g., Mary Anne Franks, *Lies, Damned Lies, and Judicial Empathy*, 51 WASHBURN L.J. 61 (2011).