

A Compassion for the Law

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Date : February 24, 2017

Susan Bandes, *Compassion and the Rule of Law*, 13 *Intl. J. Law in Context* (forthcoming 2017), available at [SSRN](#).

U.S. Supreme Court Justice Sonia Sotomayor faced a roadblock to confirmation because she had once said in a speech, “I would hope that a wise Latina woman, with the richness of her experiences, would more often than not reach a better conclusion than a white male who hasn’t lived that life.” The statement was read by supporters in concert with President Obama’s well-known view that empathy is an important requirement for judges. Her opponents put a different spin on the statement, arguing that this kind of view meant she would be biased in interpreting the law.

[Professor Susan Bandes](#)’s fascinating article, *Compassion and the Rule of Law*, deals well with a closely related topic. Her examples are drawn mostly from constitutional law, but the analysis has broader implications. (Bandes has authored prominent books and articles on the role of passion and emotions in the law.)

Bandes’s initial premise is that the “rule of law” should prevent arbitrary decision-making based on unpredictable emotions. Compassion *is* problematic—if it incorrectly distorts substantive legal rulings. But she says it can also serve a different purpose. Compassion’s “most important contribution, is as a way of understanding what is at stake for others. Or to put it another way, seeing the rights of others from the inside; as they experience them.” (P. 3.)

She acknowledges that empathy is a similar concept, that scholars disagree on the meaning of these concepts, and that these meanings have evolved over time. Nonetheless, she argues that the core of empathy is just placing oneself in another’s situation. Empathy has a large cognitive component. By contrast, “Compassion is ‘the feeling that arises in witnessing another’s suffering and that motivates a subsequent desire to help.’” (P. 5.) Bandes elaborates that compassion entails the “call to action that is not an inherent component to empathy.” (P. 5.) Perhaps that is why we say that a person “shows” compassion but “is” empathetic. Bandes further references Martha Nussbaum’s reliance on Aristotle for the proposition that a judge’s compassion should be based to some extent on the view that the “litigant is not at fault.” (P. 5.)

She then discusses several constitutional decisions where compassion was relevant. Her analysis of [DeShaney v. Winnebago County Department of Social Services](#) is especially prominent. She also discusses [Brown v. Board of Education](#) and [Safford Unified School District v. Redding](#). In *Safford*, a Fourth Amendment decision, she shows that Justice Ruth Bader Ginsburg helped her colleagues on the Court see how humiliating it would feel for a teenage girl to be strip searched. She also discusses compassion in the context of draconian federal sentencing rules, as well as the pardon power.

In *DeShaney*, the Court ruled formalistically that Wisconsin Social Services could not be liable for a father beating his young son, Joshua, into a coma as it was the father’s fault. Though the agency had intervened previously, and even briefly removed Joshua, the Court said the agency had no constitutional duty to protect, even if this exists in some foreign countries. She then argued that though Justice Blackmun’s famous reference in his dissent to “Poor Joshua!” is emotional and compassionate, Justice Brennan’s dissent is actually more powerful. The Brennan dissent more clearly shows how the Department’s prior involvement with the father and son placed a traditional legal duty on the agency not to be grossly negligent or reckless. Blackmun’s compassion alone, she argues, cannot be central to who should win, because it is not a sufficient, or sufficiently powerful, legal reason. And Bandes points out that the facts of the *DeShaney* case did not pull on the heartstrings of the dissenting justices alone. Chief Justice Rehnquist’s majority opinion showed a compassionate attitude in parts, even though the Court ruled against Joshua’s mother.

Bandes is particularly good in focusing on the nuances and difficulties that may not always be evident from a simplistic treatment of compassion, let alone its relationship to law. She points out that any reliance on compassion by a judge must look at both sides of the case. She also makes the important point that nobody can look into a judge's heart, and that all judges have "blind spots and prejudices" that may not be apparent. (P. 19.) She adds that compassion can actually be based on inaccurate understandings (P. 19), though the same can be said for the rule of law (which itself has multiple possible meanings). She argues that *Gonzales v. Carhart* is a case where Justice Kennedy mistakenly assumed he was being compassionate or empathetic in asserting, without solid evidence, that women may frequently later regret abortions. She calls for judicial humility, openness, caution, and an awareness of what litigants need. (P. 21.)

She concludes by giving a fascinating example of Judge Kozinski from the U.S. Court of Appeals for the Ninth Circuit. Kozinski was examining a case that unexpectedly hit him like a brick when he realized the criminal defendant had made a poor life decision, but that he too had made a huge mistake just one week earlier putting his toddler at risk. Bandes says what makes this powerful is Judge Kozinski's self-awareness.

This is an insightful article and a continuation of Professor Bandes' excellent exploration of the aspects of legal decision-making that don't fit into the easy categories of reason or logic. It leaves some open questions, but that adds to its impact.

At a recent federal sentencing forum at Drake Law School, one of the federal judges announced that he used the "least restrictive alternative" when imposing a sentence. This is very different from those judge who talk tough about law and order. I took his point to mean that judges should try to put themselves into the situation of the accused or guilty person, as well as others such as their family, rather than treat the matter with blunt indifference to the humanity involved. In my view, Bandes has made a persuasive case that a legal system made up of judges with compassion would certainly be good for society and for the rule of law. As Martha Nussbaum has said, compassion is "crucial for motivating and sustaining altruistic action and egalitarian institutions..." in a way that no other emotion can really match.

Cite as: Mark Kende, *A Compassion for the Law*, JOTWELL (February 24, 2017) (reviewing Susan Bandes, *Compassion and the Rule of Law*, 13 *Intl. J. Law in Context* (forthcoming 2017), available at SSRN), <http://conlaw.jotwell.com/a-compassion-for-the-law/>.