

Compassion and the rule of law

Susan A. Bandes*

Abstract

Compassion poses difficult challenges for the rule of law. The compassionate response is often cast as a deviation from settled law rather than a principled application of it. Compassion so understood is troubling, most obviously because it poses a challenge to overall fairness, notice and consistency. Although compassion is usually approached as a factor influencing substantive outcomes, I argue to the contrary that compassion cannot serve as a reliable indicator of who should prevail in legal debates. Whether compassion should inform substance is a normative question that must be answered in light of the purposes of the tribunal and the principles it seeks to advance. I propose instead that compassion's importance lies in its ability to aid decision-makers in understanding what is at stake for the litigant. In this sense, compassion is closely tied to humility: both are reminders of human fallibility and of the limits of individual understanding.

I. Introduction

Can compassion co-exist with the rule of law? For some, to oppose compassion is akin to opposing kindness or virtue. If compassion connotes an ethic of care and concern, who could be against it? For others, the notion of compassion seems anathema to the rule of law. If the rule of law safeguards against arbitrary decisions, promotes predictability and elevates the supremacy of law above the whims of individuals (Fallon, 1997), then compassion may threaten all these ideals. It may pull law in unforeseen, arbitrary directions based on surges of fellow-feeling or other unpredictable emotions. The argument is complicated by the fact that neither 'compassion' nor 'the rule of law' is self-defining. Whether compassion is consistent with the rule of law depends on whether compassion is only an attitude, or also a call to action. It also depends on whether the rule of law is promoted by sometimes deviating from or even flouting the law on the books (see e.g. Martin Luther King's famous argument for violating the law to increase respect for the law in his Letter from Birmingham Jail 1963).

These tensions and ambiguities were recently captured in a controversy at Brandeis Law School at the University of Louisville. The law school decided it wanted to partner with a citywide campaign called 'Compassionate Louisville', by declaring itself 'the nation's first compassionate law school' (Duncan, 2016). I suspect that, in their wildest dreams, the dean and the provost did not imagine that branding their school as a compassionate institution would be a controversial stance, but in fact it led to a firestorm. At least one law professor took exception to his school's effort to associate itself with compassion, arguing publicly that it threatened the institution's non-partisan, non-ideological stance on legal issues (Milligan, 2016). One of the professor's former students wrote a passionate response, saying that compassion means sympathy for those having a rough time, and a desire to help the less fortunate (*ibid.*). He argued that essentially the 'compassionate' label recognised the importance of advocating for social justice, and that of course the law school

* Centennial Distinguished Professor of Law, DePaul University College of Law, US. E-mail: sbandes@depaul.edu. The author thanks both Dermot Feenan and Jeffrie Murphy for invaluable comments on an earlier draft of this paper. She also thanks Dermot Feenan for lead organisation of the superb conference at which this essay was first presented.

should be in favour of social justice. The professor disagreed, saying that law ought not choose sides in advance of knowing the facts in the particular dispute.

I appreciated this debate enormously. These are not easy questions, but they are precisely the sorts of questions we ought to be exploring when we talk about law and compassion.

I am going to argue that there are indeed reasons to be wary of compassion in the legal realm. In other places, like a family or a therapist's office or a religious institution, compassion might be an unalloyed good. But in law, we are always making choices about which emotions advance legal goals. Broad labels like positive and negative emotions are not very helpful. So-called positive emotions like empathy or compassion do not always advance legal goals; so-called negative emotions like anger or fear do not always impede them. It depends on the context.

I contend that we need to distinguish two separate roles for compassion. The usual debate about law and compassion focuses on only one of these roles: compassion as a factor in reaching a substantive conclusion as to who should prevail on a contested issue of law (Zipursky, 1990). This conception of compassion raises many of the hardest questions about how compassion can be reconciled with the rule of law, and I will return to it in a moment. The second possible role, and the one I will argue is compassion's most important contribution, is as a way of understanding what is at stake for others. Compassion in this sense involves taking to heart the interests that others have in their legal claims – or, to put it another way, seeing the rights of others from the inside, as they experience them. This meaning of compassion overlaps considerably with the concept of empathy.

A few words about definition, because emotion terminology is always slippery. These terms – compassion, empathy, sympathy, pity – have no fixed meaning and, as Martha Nussbaum observed, are the source of 'more than the usual degree of verbal confusion in the English language' (2001, p. 301). Their meanings have changed over time (e.g. what Adam Smith (1790) called sympathy in the eighteenth century is now called empathy); their meanings vary across disciplines (e.g. psychology, philosophy and anthropology) and even within disciplines (e.g. the term 'empathy' has numerous recognised meanings in the field of psychology alone (Batson, 2011)) and much nuance may be lost in translation from other languages (Nussbaum, 2001, p. 303). The best one can do is to announce the meanings one is using for the sake of clarity. So let me distinguish empathy, as I am using it, from compassion, as I am using it.

Empathy is a capacity for understanding the desires, goals and intentions of others. It requires a desire to see things from the vantage point of another, but it is really about perspective-taking.¹ It does not require the empathetic person to take sides among competing viewpoints, and it does not require any actions to aid a particular target in achieving her goals. Thus, a judge may – and I would argue should – feel empathy for all the litigants before her. It is her job to try to understand what is at stake for the parties. Once she has done so, she must make a legal determination about which side prevails.

Compassion is 'the feeling that arises in witnessing another's suffering and that motivates a subsequent desire to help' (Cuff *et al.*, 2016, p. 145). The compassionate person must not only perceive suffering; she must also 'care about that suffering and desire its alleviation' (Blum, 1980, p. 511). Thus, compassion includes a call to action that is not an inherent component of empathy. This command to act on the sufferer's behalf suggests another important difference between empathy and compassion. In the Aristotelian account, an essential element of compassion is its implicit judgment that the sufferer does not deserve his suffering. Nussbaum's prominent account

1 One ambiguity about empathy centres on whether it is purely cognitive or has an affective dimension. As Lawrence Blum (1980) notes, one may seek to understand another's perspective out of intellectual curiosity or even malice. Some definitions of empathy incorporate an element of caring: the empathetic person puts herself in another's shoes out of care and concern. Affective empathy is thus like compassion in the sense that both are motivated by concern for the other. Nevertheless, most definitions of empathy do not incorporate a desire to act on the other's behalf.

of compassion's cognitive structure also includes this element (Nussbaum, 2001, pp. 314–315). A judge's compassion towards a litigant, in this account, would need to rest on a judgment that the litigant is not at fault, at least in a moral sense, if not in a legal one. In contrast, a judge may feel empathy for a litigant who is the agent of his own misfortune. The judge may also feel empathy for the opposing party. This understanding does not require a judgment of fault or blame.

To illustrate how these distinctions play out in the legal realm, consider the following examples from US law.

In *Safford Unified School District v. Redding*,² the United States Supreme Court considered whether it violates the Fourth Amendment to the US Constitution for a school principal to have a thirteen-year-old girl strip-searched based on a report that she had drugs on her person. Consider these snippets from the oral argument before the Supreme Court: First, here is Justice Souter, exercising empathy for the school principal.

First, here is Justice Souter, exercising empathy for the school principal:

'I've got suspicion that some drug is on this kid's person. My thought process is I would rather have the kid embarrassed by a strip search, if we can't find anything short of that, than to have some other kids dead because the stuff is distributed at lunchtime and things go awry.'³

Second, here is Justice Breyer, struggling to understand the student's perspective:

'I'm trying to work out why is this a major thing to say strip down to your underclothes, which children do when they change for gym, they do fairly frequently, not to – you know, and there are only two women there. Is – how bad is this, underclothes? That's what I'm trying to get at. I'm asking because I don't know.'⁴

As it happens, Justice Ginsburg helps Justice Breyer to see that strip-searching a thirteen-year-old in the principal's office is not just like a group of teammates suiting up in a locker room,⁵ and several amicus briefs address the humiliation and indignity of a strip search as well.⁶ In the resulting opinion, the Court fully grasps this difference. It acknowledges the impact of the strip search.⁷ Its efforts to understand how such a search would feel to a thirteen-year-old help it weigh the nature of the intrusion upon the student against the nature of the school's interest in keeping its students safe – the balancing process the Fourth Amendment requires. But notably, although the Court does find the search unconstitutional, it notes that the indignity of the search does not in itself make it unconstitutional.⁸ In other words, the fact that the Court understands and sympathises with the student's trauma does not mean the student wins. It needs to make its best effort to understand both competing viewpoints, and then apply the legal framework – which in this constitutional context requires weighing the intrusion against the government's interest.

2 *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364 (2009).

3 *Ibid.*, Oral Arg. Tr. 48:18, 21 April 2009.

4 *Ibid.*, Oral Arg. Tr. 45:9, 21 April 2009.

5 *Ibid.*, Oral Arg. Tr. 45:17, 21 April 2009.

6 Brief of *Amici Curiae* the Nat'l Ass'n Of Soc. Workers and Its Arizona Chapter, the Nat'l Edu. Ass'n, the Nat'l Ass'n of Sch. Psychologists, the American Soc'y for Adolescent Psychiatry, and the American Prof'l Soc'y on the Abuse of Children in Support of Respondent April Redding; Brief of the Urban Justice Ctr., Asian American Legal Def. and Edu. Fund, Advocates for Children of NY, and the Nat'l Youth Rights Ass'n, *Amici Curiae* in Support of Respondent; Brief of *Amici Curiae* the Rutherford Inst., Goldwater Inst., and Cato Inst. In Support of Respondent.

7 *Safford*, 557 U.S. 364 (2009), p. 375.

8 *Ibid.*, p. 378.

And this is the concern about compassion, as I understand the term. Empathy allows us to put ourselves in the shoes of others – it allows a judge to see the perspective of all the litigants. But compassion commands us to help. Compassion for the student in this case would not have been the appropriate tool for decision-making. Every litigant deserves to have her viewpoint taken seriously. The fact that a young vulnerable girl is up against a school administrator cannot in itself drive the outcome of the case in favour of the more sympathetic party.

II. Compassion and substance

In order to consider the relationship between compassion and the rule of law, it is useful to distinguish several ways in which compassion could influence legal decision-making. First of all, we might have a statute that explicitly permits the use of compassion as part of the exercise of allowable discretion. A prison parole scheme might permit compassionate release, for example if the prisoner has terminal cancer. Immigration laws might take compassion into account in granting asylum. In these situations, compassion does not pose a special challenge to the rule of law because there is advance notice that it will be employed as a factor, and there are guidelines for its use, and there is a body of precedent. Indeed, it is not even clear whether compassion is the appropriate term for what these statutes take into account. Although those arguing for exceptions may seek to elicit compassion as a way of driving home their arguments, that grant of compassion often has to meet prescribed criteria. For example, federal sentencing guidelines may take into account the fact that the defendant has young children, but the standard there is the best interests of the children,⁹ rather than compassion for the prisoner. Asylum is granted where the applicant shows a ‘well-founded fear of persecution’ on certain specific grounds.¹⁰ In other words, these criteria are announced in advance, and they require factual support. If compassion is a feeling, it is not really in play here – these are legal arguments like any other legal arguments.

Of course, pre-prescribed factors may be misused or used inconsistently, but that problem can occur with the application of any legal factor. The pardon power and the clemency power present a more difficult case for the rule of law and compassion. They permit the exercise of compassion in a less constrained context, because the discretion to grant a pardon or executive clemency is so broad.¹¹ Each case is *sui generis*. Decisions may be based on compassion, or they may be based on raw politics. And there may be no way of knowing the actual grounds, if the executive is not required to explain them. Yet, because the discretion is so broad, no decisions exceed it. In that kind of legal regime, you cannot score points by pointing out that a particular decision lacks consistency or predictability – because clemency and pardon do not generally require consistency or predictability. Yet, to say these decisions are lawless is not precisely accurate – they are decisions taken in a field of immensely broad discretion.

A more serious rule-of-law problem is posed when compassion is used to make unauthorised exceptions to a rule. Decisions applying the US federal sentencing guidelines illustrate both of these possibilities – determining where in the allowable range a decision falls, and impermissibly exceeding the range. A judge may use compassion to arrive at a sentence at the low end of the allowable range. But the guidelines impose mandatory minimum sentences that have shocked the conscience of many judges – decades in prison for a first time, low-level drug offence, for example.¹² Here is where compassion’s role becomes complicated. The guidelines were meant to

9 *United States v. Dugalic* (2012, CA6 Ky) 2012 FED App. 739N.

10 *INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S. Ct. 1207 (1987).

11 USCS Const. Art. II, § 2, Cl 1.

12 *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004); *United States v. Reingold*, 731 F.3d 204 (2d Cir. 2013).

regularise sentencing and avoid some of the glaring differences in sentence caused by the personalities or proclivities of individual judges. Sentencing, it was argued, should not depend on the luck of the judicial draw, or whether the judge is in a punitive mood on the particular day, or whether the defendant's plight triggers something in the judge based on his own experience or those of his family.

The sentencing guidelines eventually came to be viewed by many as a cure that was worse than the disease. A handful of judges felt they simply could not abide by them in good conscience. At least one federal judge resigned his life tenured position.¹³ Others just refused to comply in cases where they believed the sentence would be exceptionally unjust. Judge Jack Weinstein, for example, a federal judge from New York well known for his creativity and courage, has defied the guidelines, arguing that judges have a duty not to impose unfair sentences, a duty to expose injustice and a duty to interpret law with humanity.¹⁴ Many believe he is quite correct in his assessment of the injustice of the guidelines. What follows from this? If defendants are lucky enough to draw Judge Weinstein, a powerful, iconoclastic, deeply moral judge, they will receive more compassionate sentences (albeit sentences that will soon be reversed by a higher court). The rule-of-law problems here are obvious – lack of notice or predictability, unequal treatment depending on the luck of the draw, arbitrariness.

But there is also the greater problem that, if we permit a few courageous judges to act as a safety valve, we miss the larger problem – the guidelines themselves are problematic. Arguably, the entire scheme reflects a failure to take compassion into proper account. And perhaps that state of affairs will continue – an unfair statute mitigated by individual acts of judicial non-compliance – so long as we let a handful of individual judges make exceptions in some egregious cases. But that cannot be considered a victory for compassion – or for the rule of law. A greater victory would be a sentencing scheme that was premised on compassion¹⁵ – for example, a sentencing scheme that recognises that people make mistakes and that one bad choice should not derail a person's life, or a legal regime that creates effective alternatives to incarceration, giving people the skills and resources they need to lead a more productive life.

In all the examples above, compassion acts as a factor, or a stopgap, or a deviation, in a regulatory scheme. For the remainder of my remarks, I will not be focusing on compassion as a stopgap, a safety valve, an impetus to make exceptions to general rules. I will not be focusing on compassion as a means of determining where in a discretionary framework a particular decision should fall. Instead, I want to think about whether compassion can help frame the principles and rules themselves, and about whether compassion can help flag principles and rules that need to be revisited.

The United States Supreme Court has actually weighed in on the question of compassion's role in legal reasoning. In *DeShaney v. Winnebago County Department of Social Services*,¹⁶ in 1988, the Court, in a five-to-four decision, came out against compassion as a factor in judicial decision-making. In that case, the question was whether the state of Wisconsin had violated the constitutional rights of

13 'Criticizing Sentencing Rules, U.S. Judge Resigns', *New York Times*, 30 September 1990. Available at <www.nytimes.com/1990/09/30/us/criticizing-sentencing-rules-us-judge-resigns.html> (accessed 6 March 2017).

14 *United States v. C.R.*, 972 F. Supp. 2d 457, 458 (E.D.N.Y. 2013).

15 Or, as Jeffrie Murphy argues (letter from Jeffrie Murphy to Susan Bandes, 24 April 2016, on file with author), perhaps the problem with an unfair sentencing regime should be diagnosed not as insufficient compassion, but as a failure to mete out just sentences – sentences that properly individuate among offenders and that are proportional. I resist this argument because I believe that even fair and just sentencing regimes can reflect a range of attitudes towards second chances and towards preferable punishment options. Nevertheless, it is a powerful argument.

16 *DeShaney v. Winnebago Cty. Dep't of Soc. Services*, 489 U.S. 189, 109 S. Ct. 998 (1989).

Joshua DeShaney, aged four. Joshua's entire short life had been a nightmarish one, in which he was consistently beaten and brutalised by his father. This behaviour had been repeatedly reported to the Wisconsin Department of Social Services, the agency charged by state statute with protecting him. The state had violated its statutory obligation by failing to offer that protection right up until the day that Joshua was beaten so brutally that he spent the rest of his life institutionalised with irreparable brain damage. (Joshua died in November 2015, at the age of thirty-six, in an institution.) The question the case presented was whether the state, in violating its statutory obligation to protect Joshua, had also violated Joshua's federal constitutional right to due process of law. The Court called the facts of the case undeniably tragic, and observed that:

'... judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua's father.'¹⁷

Sympathy, or compassion, is portrayed as a human impulse that must be avoided by judges – an interference with rational deliberation. In this portrayal, we can see some common and deeply rooted assumptions about emotion: that it is impulsive, that it has no helpful cognitive content, that it interferes with logical analysis. Indeed, *DeShaney* was a famous catalyst in US jurisprudential scholarship, helping to spawn a re-examination of the role of compassion in particular and emotion in general (Brennan, 1988; Minow and Spelman, 1988). At the time, I wrote that it was an important step in the right direction to debate the role of compassion and other emotions. But I also cautioned against a tendency to uncritically embrace compassion, sympathy and empathy as soft, merciful and therefore a welcome antidote to the hardness of law. I argued then that whether any particular emotion is beneficial to legal analysis depends on the context. Compassion and sympathy can lead us astray just as they can lead us in the right direction. It depends on who is seeking our compassion, and for what legal purpose (Bandes, 1996).

Using the *DeShaney* case as an example, a judge ought to seek to understand the suffering of Joshua DeShaney, but also the concerns of the Wisconsin Department of Social Services. In the opinion, it was clear that the Court did a very thorough job of understanding the state agency's concerns – the difficult balancing act faced by child welfare agencies that risk liability when they take children away from their biological parents as well as when they leave children with those parents for too long. Is the problem that they did not fully understand the suffering undergone by four-year-old Joshua DeShaney? It would be hard to make that argument. The fact is that it is not that difficult to comprehend the tragedy of a four-year-old child who has lived his entire short life terrorised by his father, and is then consigned to a lifetime of institutionalisation as a result of violence and neglect. In some ways, this is the easiest kind of compassion. The suffering is serious and entirely undeserved. The sufferer is a small, defenceless child. Compassion for that sort of suffering, as the Court observed, is fairly universal. The harder question is who should take responsibility for alleviating it or preventing it.

The famous dissent by Justice Blackmun¹⁸ charged the Court with too little sympathy, or too little compassion. It was famous largely because of its emotional register. It contained a phrase – or actually a bit of punctuation – that seemed to violate the protocols of judicial opinion writing: 'Poor Joshua!' (exclamation point):

¹⁷ *Ibid.*, p. 202.

¹⁸ *DeShaney*, 489 U.S., p. 212 (Blackmun H., dissenting).

'Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by (the social service agency), who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, "dutifully recorded these incidents in [their] files".'¹⁹

Justice Blackmun's charge is not that the Court failed to understand Joshua's suffering; it is that the Court failed to respond to it correctly. If compassion requires a judge not only to understand, but also to move to alleviate, then it is a problematic emotion for judges – one that raises serious rule-of-law issues, because compassion is not – at least on its own – a reliable indicator of who ought to prevail in a legal dispute.

Judges or jurors may feel compassion for all sorts of reasons – not all of them admirable. The litigant may be weak or flawed or prejudiced in ways that resonate with a particular fact-finder – like the Texas judge who declined to sentence a young man for a vicious hate crime against a gay man, because the defendant imagined his own son in the role of the attacker and noted that he would want his son, or any virile young man, to act just as this defendant had acted.²⁰ We might feel compassion most readily towards those we understand – those with whom we identify. Consider a prosecutor with nearly unfettered discretion about whom to charge, or what charges to bring. Compassion might make her a wiser prosecutor, or she might find her compassion leading her to give a break to those she instinctively understands, sympathises with, identifies with. In the US and elsewhere, this kind of compassion may be selectively doled out based on racial bias and class bias, unconscious or otherwise.

Compassion cannot resolve competing claims. We must determine whether it is a compassion that the law is willing to condone or encourage. In addition, compassion may privilege certain types of litigants for the wrong reasons – the tenant over the landlord, the attractive and likable individual over the remote corporation. Perhaps the landlord or the corporation should lose in the particular case, but not unless we can articulate reasons that go beyond compassion for the plight of the little guy.

But what I have said thus far does not convey the full import of the argument that Justice Blackmun was advancing in dissent, or of the powerful dissent of Justice Brennan²¹ in the *DeShaney* case. Justice Brennan's dissent has proved more influential, perhaps because it is written in a more legally familiar style. And it may be that this is more than simply a stylistic or semantic difference; it may be that it reveals an important limitation of compassion as a tool for reaching substantive results.

One of the most confounding questions about compassion is what actions it leads to. The *DeShaney* majority did not believe it was ignoring the plight of Joshua DeShaney. It simply believed that his problem did not require a governmental solution. The question is not whether a private compassionate response is called for in the individual case; it is whether there is an injustice by the government that needs to be righted.

And so Justice Brennan's argument was not so different from Justice Blackmun's – except that it was not styled as an argument about what we ought to feel for Joshua, an individual. It was an argument about governmental obligation. The majority in *DeShaney* says, in essence: the government did nothing wrong here. It did not act at all. This was a private infliction of harm by a father on his son. The Court said that governmental social services are a choice, not an

¹⁹ *Ibid.*, p. 213.

²⁰ State Commission on Judicial Conduct, *Order of Public Censure of Morris Jackson Hampton, Judge*, 238 *Judicial District Court, Dallas, Texas* (1989).

²¹ *DeShaney*, 489 U.S., p. 203 (Brennan J., dissenting).

obligation. It would have been beneficent of the state of Wisconsin to step in, and yes, maybe Wisconsin violated its own statutes, but Joshua was not deprived of any constitutionally protected liberty (Bandes, 1990). Justice Brennan responded that the government promised protection, undertook protection, affirmatively placed Joshua in his father's home when his parents divorced, effectively made itself the sole guarantor of Joshua's safety, and so it did act to deprive him of his liberty.²² One can feel compassion for a plight that one has had no hand in creating. That is a feeling that speaks well for the compassionate soul. But when one has helped create the plight, the feeling ought to be something more than compassion, a merciful but optional act – it ought to be a duty, a legally enforceable obligation.

The difference in tone and in framing can be illustrated by considering the iconic US case of rights-recognition: *Brown v. Board of Education*.²³ As I will argue shortly, compassion likely played an important role in revealing the true nature of the injustice to Black children educated in segregated, all-Black schools. But it sounds strange and even offensive to our modern-day sensibilities to say that segregated schools were outlawed out of compassion for Black children. We do not rest on compassion as a reason to enforce the guarantees of equal protection of law and due process of law. That formulation sounds uncomfortably in charity, condescension and pity (Garber, 2004). 'We' do not bestow equal and integrated schools on 'them' out of the kindness of our hearts, as a charitable act that we perform despite our lack of culpability for the situation. The question to be answered is whether there is a right that has been violated, whether an unjust caste system has been perpetuated under colour of law, whether there should be a 'we' and a 'they' at all.²⁴ Once we begin talking in terms of an obligation to fix an unjust caste system, the term 'compassion' begins to sound out of place.

The problem with 'compassion' is not only the way it seems to let the giver off the hook for inaction. It is not only the way it seems to bathe the giver in a warm glow to reward her act of charity (Berlant, 2004; Spelman, 1998). The term is also problematic for the way it portrays the recipient – as a passive sufferer who is lucky to be on the receiving end of good will. With racial equality, as with gender equality and gay rights, nothing has ever been given out of the kindness of anyone's heart. Every recognition of rights has been hard-fought. I do not think it is usually compassion that impels the correction of injustice. A more relevant emotion is moral outrage by and on behalf of the victims of injustice (Bandes, 2011).

III. Compassion and understanding

I now want to turn to the important contribution that compassion makes to the recognition of legal rights – and that is the way in which compassion illuminates suffering. At this point, the distinction between empathy and compassion, and the ambiguities in both concepts, become especially thorny. Empathy helps judges understand what is at stake for litigants. Although empathy is often assumed to flow only from the strong to the weak, I have long argued that this is a mistaken assumption (Bandes, 1996). A judge may feel empathy for the Department of Social Services just as it feels empathy for Joshua DeShaney; for the school administration just as it does for the strip-searched student; for the Board of Education just as it does for Ms Brown. In part, this is because empathy has a strong cognitive component – it calls for understanding the goals and intentions of others,

²² *Ibid.*, pp. 207–210 (Brennan J., dissenting).

²³ See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²⁴ However, Lawrence Blum might argue that this sort of condescension is characteristic of pity but not of compassion. He argues that compassion requires a sense of shared humanity, whereas pity is characterised by the impulse to hold oneself apart from the sufferer (Blum, 1980, p. 512).

and that does not require feeling. But even the affective component – the capacity to feel ‘with’ another – does not render empathy something that flows only towards the powerless or the disenfranchised. So a judge might have empathy for a corporate or governmental litigant and, moreover, a judge might have empathy for all the litigants before him. If empathy does not require him to act on behalf of any particular litigant, this is not problematic. The problems arise from selective empathy and from empathic inaccuracy (Bandes, 2009). For judges, these are acute problems, because judges are encouraged to believe in their own omniscience. It is a real occupational hazard – the lack of reminders that their perspective is partial; that they have blind spots and prejudices.

Compassion raises similar concerns, especially if it not only involves taking the plight of others to heart, but also involves a desire to alleviate that plight. Empathy may be inaccurate – an unsuccessful attempt to infer the thoughts and desires of the target (Ickes, 2011). Likewise, compassion can rest on inaccurate perceptions. Indeed, the concerns about inaccuracy are even more acute for compassion than for empathy. The essence of empathy is the effort to accurately understand another’s perspective. Compassion is not about feeling *with* the object of one’s compassion; it is about feeling *for* that person. It might be possible to feel for another’s suffering without understanding what the sufferer wants or needs (Blum, 1980, p. 516). One can feel compassion based on mistaken assumptions about the needs or desires of the recipient; one can be impelled to act to help someone who does not want help, or that kind of help (Carr, 1999). Compassion can involve a misinterpretation of the pain of others. The capacity to understand others is educable. As in the example of the *Safford* case above, it can be educated by exposure to the viewpoints and experiences of others from varying backgrounds.²⁵ But one essential precondition to this sort of education is self-awareness. It requires recognition that one’s own viewpoint is necessarily partial – that the viewpoints of others need to be considered to gain a fuller picture.

More than that, it requires recognition that we see one another through our own lenses, and that our own blind spots and misconceptions may cloud our ability to see others clearly. Because of this, an essential component of true compassion must be humility. As Murphy (2017) recently wrote, there are several strands to the concept of humility. One is this ability for self-criticism – a willingness to examine one’s own faults and prejudices to the extent they may interfere with the ability to exercise compassion for others. Another is a tendency to underestimate the role that luck and undeserved good fortune have played in one’s own success, thus creating a sense of smugness and superiority towards others.

The philosopher Richard Peters, in his lectures on reason and compassion (Peters, 1973), made a compelling argument that compassion is one of a constellation of passions that are essential to reason. The reasonable person, he argued, possesses ‘the feeling of humility which is necessary to the wholehearted acceptance of the possibility that one may be in error’ as well as ‘the respect due to another who may have a point of view worth considering’ (Peters, 1973, p. 79).

Consider this well-known example of a failure of empathy – which is also a lack of humility. Justice Kennedy in the *Carhart v. Gonzales* case²⁶ (often known as the partial birth abortion case) considers the emotional effects of abortion on the woman who has chosen the abortion – and of late-term abortion in particular. He makes an assumption that he admits is unsupported by any evidence, but that to him seems unexceptional, or a matter of common sense:

25 The affective capacity to ‘feel with’ others is also trainable. One fascinating study found that both empathy training and compassion training led not only to behavioural differences, but also to the modulation of neural responses. Moreover, it found that increased empathy towards those in pain led to a decrease in the subject’s well-being, whereas increased compassion was experienced as positive and other-oriented. (Singer and Klimecki, 2014).

26 *Gonzales v. Carhart*, 550 U.S. 124 (2007).

'It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.'²⁷

As it happens, there is substantial evidence contradicting the idea that grief and regret are a common reaction to elective abortion; and yet Justice Kennedy relies on his own belief about what women must feel in order to protect them from making a choice that would lead to those feelings (Guthrie, 2008).

The compassionate person, to avoid this trap, must be cautious and open and curious about how others feel, what others need and what others need from us. And this knowledge is tied to an understanding of our own fallibility and our own vulnerability. Ultimately, it may lead not just to a reorientation of the individual relationship, but to a more expansive notion of shared humanity and responsibility.

Let me illustrate the power of compassion in this regard with an example from a sentencing case. I will then move to my main point about the appropriate role of compassion – its role in alerting us to the limits of current legal frameworks and to the need for legal reform.

3.1 Judge Alex Kozinski's story

Alex Kozinski is a federal judge in California – another courageous iconoclast, but one very different from Judge Weinstein, whom I mentioned earlier. Most notably, he is nobody's idea of a bleeding-heart liberal. He supports the death penalty and has little compunction about handing down long prison sentences. He tells a moving story about the time he was asked to sentence a young woman named Catherine Ponce – a woman with no criminal record who stupidly agreed to arrange a drug deal for a man who turned out to be an undercover drug-enforcement agent (Kozinski, 1997). No mandatory sentencing guidelines were in effect at the time, and so the field was wide open – she could be sentenced to probation, life in prison or anything in between. Judge Kozinski recounts that, as he was pondering her sentence, a seemingly unrelated thought crept into his mind:

'About a week earlier, I had been at home absorbed in work when I heard the doorbell ring. When I went to the front door, I found it wide open, and a young couple was standing there holding a toddler – my young son Clayton. I was a little surprised, as I thought Clayton was playing in the house. [The couple had been] driving down my street . . . and found the child sitting in the middle of the road. Apparently, I forgot to close the door, and Clayton [. . .] made his way outside and into traffic.' (Kozinski, 1997, p. 1219)

As Judge Kozinski pondered Catherine Ponce's sentence, it hit him viscerally that Ponce was

'not the only one in the courtroom who had made a big mistake. Only a week earlier I, too, had made a big mistake, and, as a consequence, put my young son's life in danger Something inside me made a connection between the two events and told me that I would not go wrong if I, too, erred on the side of forgiveness.' (Kozinski, 1997, p. 1219)

²⁷ *Ibid.*, pp. 159–160.

As Judge Kozinski himself observed, this story is not without its difficulties. He did not have to violate any guidelines because none were in place at the time – that would have presented a harder issue. But still, he worried about basing a decision on the happenstance of personal experience. And the worry itself is an important part of the story. Personal experience, identification, compassion that flows for all sorts of reasons, articulated or unarticulated, will always influence decision-making. To the extent we can articulate our compassionate impulses, we can also examine and evaluate them and determine whether they are relevant. In this story, Judge Kozinski captures the most powerful aspect of compassion – the understanding of shared human fallibility. He was right to be concerned about the vagaries and fortuities of his reasoning process in this case. The happenstance of the recent incident involving his own toddler; whatever it was about Catherine Ponce that triggered his visceral identification; these do not seem like firm foundations for a sentencing jurisprudence. What makes this story powerful is his self-awareness. It plays two roles. It instructs him to err on the side of giving second chances to others, because we all make mistakes. It also reminds him that he may be making a mistake in this very case, and that he needs to be hyper-vigilant about what factors affect his sentencing decisions.

This is my argument about the role of compassion in law. It cannot resolve contests between competing viewpoints, but it does offer a way of taking the viewpoint of others, with understanding and humility. It may even offer a way of understanding the values and tensions that underlie constitutional interpretation.

How do judges reflect upon the values and ideals of documents like the US Constitution or other founding texts that require interpretation in light of changing conditions and changing values? How do they seek to understand what those ideals would require in the practical world they confront? How do judges give content to spacious indeterminate language like ‘equal protection’ and ‘due process’, and how do they resolve the inevitable tensions between principles like liberty and equality, privacy and security? People do not begin with abstract principles. They begin with moral intuitions that grow from their own experience and take shape within their own social worlds (Johnson, 1994), and those intuitions prove pretty unshakeable under most circumstances. Most of us are not very good at re-examining our moral intuitions under our own steam. For people to re-examine their moral intuitions, or to try to expand their moral universe, usually requires interchange with others who hold different perspectives (Bloom, 2004). At the very least, it requires the openness and humility to admit that other perspectives are worthy of respect.

This possibility takes us to a deeper problem with the *DeShaney* opinion, which is also a deeper point about compassion. Because the majority opinion assumes that the government is not required to do anything to protect its citizens, only to refrain from doing them harm, its reasoning turns on this question of who actually created the situation leading to Joshua’s injuries. This is a debate about the meaning of due process of law. If, indeed, we have only the right to be left alone – if government’s only role is to refrain from directly harming us – then any protection we receive from government might be portrayed as a gift, a compassionate exercise. But there is an alternative view, that due process creates affirmative duties flowing from the government to the people – not just the freedom to be left alone, but the freedom to survive and thrive: the right to be protected from private violence as well as government violence. Justice Brennan’s conception of governmental responsibility under the US Constitution is very different from that of the *DeShaney* majority. In the watershed Supreme Court case of *Goldberg v. Kelly*,²⁸ involving the due process protections due to welfare recipients, Justice Brennan reflected on the purpose of government, observing that ‘[f]rom its founding the Nation’s basic commitment has been to foster

28 397 U.S. 254 (1970).

the dignity and well-being of all persons within its borders'.²⁹ Therefore, he reasoned, public assistance 'is not mere charity, but a means to (in the words of the Preamble to the U.S. Constitution) "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity".'³⁰

IV. Conclusion

The government's duty to protect is arguably its most basic function. For Hobbes, the very point of giving up autonomy to a powerful state is the state's promise to protect its citizens from the conditions that prevail in the state of nature: for those who live in fear of violence, life is 'solitary, poor, nasty, brutish and short' (Hobbes, 1651, Section XIII.9). The US Supreme Court's notion of a 'negative constitution' (Bandes, 1990) is based on interpretative choices that are not compelled by text or history. Affirmative duties to protect are increasingly protected by international law. For example, the European Court of Human Rights, enforcing the European Convention on Human Rights, has imposed affirmative obligations on Member States to prevent violations of Convention rights by private parties.³¹ The European Court's interpretation of the Convention draws on contemporary moral values and the evolving nature of modern society (Schriwer, 1999).³²

The deepest constitutional question is what we ought to be able to expect from government, and this question is part of a larger debate about what kind of polity we want to create and perpetuate. And, at this level, the question of compassion cannot be avoided. It becomes part of the larger question – is freedom purely about autonomy, or does it bind us together in a web of care, concern and obligation? (Bandes, 1990). And the question for the legal system is: what role should our laws and our courts and our legal institutions play in helping us achieve those goals?

References

- BANDES, S.A. (1990) 'The Negative Constitution: A Critique', *Michigan Law Review* 88: 2271–2347.
- BANDES, S.A. (1996) 'Empathy, Narrative, and Victim Impact Statements', *University of Chicago Law Review* 63: 361–412.
- BANDES, S.A. (2009) 'Empathetic Judging and the Rule of Law', *Cardozo Law Review de Novo*: 133–148.
- BANDES, S.A. (2011) 'Moral Imagination in Judging', *Washburn Law Review* 51: 1–24.
- BATSON, C.D. (2011) 'These Things Called Empathy: Eight Related but Distinct Phenomena', in J. Decety and W. Ickes (eds) *The Social Neuroscience of Empathy*. Boston: MIT Press, 3–16.
- BERLANT, L. (2004) 'Introduction: Compassion (and Withholding)', in L. Berlant (ed.) *Compassion: The Culture and Politics of an Emotion*. New York, NY: Routledge, 1–13.
- BLOOM, P. (2004) *Descartes' Baby: How the Science of Child Development Explains What Makes Us Human*. New York: Basic Books.
- BLUM, L. (1980), 'Compassion', in A.O. Rorty (ed.) *Explaining Emotions*. Berkeley: University of California Press, 507–517.
- BRENNAN, W.J. (1988) 'Reason, Passion, and "The Progress of the Law"', *Cardozo Law Review* 10: 3–24.
- CARR, B. (1999) 'Pity and Compassion as Social Virtues', *Philosophy* 74(3): 411–429.

29 397 U.S., pp. 264–265.

30 *Ibid.*, pp. 264–265.

31 *Marckx v. Belgium*, 13 June 1979. Available at: <<http://hudoc.echr.coe.int/eng?i=001-57534>> (accessed 6 March 2017).

32 Similarly, the Inter-American Court of Human Rights held that Mexico had violated its citizens' human rights when it failed to prevent and investigate violence against women. Inter-American Court of Human Rights. 2009. *Case of Gonzalez et al. ('Cotton Field') v. Mexico*. Judgment of 16 November 2009.

- CUFF, M.P., BROWN, S.J., TAYLOR, L. and HOWAT, D.J. (2016) 'Empathy: A Review of the Concept', *Emotion Review* 8(2): 144–153.
- DUNCAN, S. (2016) 'Brandeis School of Law Faculty Vote to Adopt Compassion Resolution', University of Louisville. Available at: <www.louisville.edu/law/news/brandeis-school-of-law-faculty-adopt-compassion-resolution> (accessed 6 March 2017).
- FALLON, R.H. Jr (1997) "'The Rule of Law" as a Concept in Constitutional Discourse', *Columbia Law Review* 97: 1–56.
- GARBER, M. (2004) 'Compassion', in L. Berlant (ed.) *Compassion: The Culture and Politics of an Emotion*. New York, NY: Routledge, 15–27.
- GUTHRIE, C. (2008) 'Carhart, Constitutional Rights, and the Psychology of Regret', *Southern California Law Review* 81: 877–903.
- HOBBS, T. (1651/2010) *Leviathan: Or the Matter, Forme, and Power of a Common-Wealth Ecclesiasticall and Civill*, XIII, ed. I. Shapiro. New Haven: Yale University Press.
- ICKES, W. (2011) 'Empathic Accuracy: Its Links to Clinical, Cognitive, Developmental, Social, and Physiological Psychology', in J. Decety and W. Ickes (eds) *The Social Neuroscience of Empathy*. Boston: MIT Press, 57–70.
- JOHNSON, M. (1994) *Moral Imagination: Implications of Cognitive Science for Ethics*. Chicago: University of Chicago Press.
- KOZINSKI, A. (1997) 'Teetering on the High Wire', *University of Colorado Law Review* 68: 1217–1229.
- MILLIGAN, L. (2016) 'Commentary: UofL Law School Is No Longer Neutral', *Courier Journal*, 17 January 2016. Available at: <www.courier-journal.com/story/opinion/2016/01/13/commentary-uofl-law-school-no-longer-neutral/78655014/> (accessed 6 March 2017).
- MINOW, M.L. and SPELMAN, E.V. (1988) 'Passion for Justice', *Cardozo Law Review* 10: 37–76.
- MURPHY, J.G. (2017) 'Humility as a Moral Virtue', in E. Worthington Jr, D.E. Davis and J. Hook (eds) *Handbook of Humility: Theory, Research, and Application*. New York: Routledge (forthcoming).
- NUSSBAUM, M.C. (2001) *Upheavals of Thought: The Intelligence of Emotions*. New York: Cambridge University Press.
- PETERS, R.S. (1973) *Reason and Compassion*. New York: Routledge & Kegan Paul.
- SCHRIWER, T. (1999) 'Establishing an Affirmative Governmental Duty to Protect Children's Rights: The European Court of Human Rights as a Model for the United States Supreme Court', *University of San Francisco Law Review* 34: 379–408.
- SINGER, T. and KLIMECKI, O.M. (2014) 'Empathy and Compassion', *Current Biology* 24: 875–878.
- SMITH, A. (1790/2005) *The Theory of Moral Sentiments*, ed. M.M. Soares. MetaLibri. Available at: <metalibri.wikidot.com> (accessed 6 March 2017).
- SPELMAN, E.V. (1998) *The Fruits of Sorrow: Framing Attention to Human Suffering*. Boston: Beacon Press.
- ZIPURSKY, B. (1990) 'DeShaney and the Jurisprudence of Compassion', *New York University Law Review* 65: 1101–1147.