

THE COMPASSIONATE JUDGE

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Abstract

'Out of touch' dispassionate decisions often invite public outcry, but the weak 'too lenient' judge is also open to criticism. In this paper I examine the role which compassion plays in legal judgment, how compassion is exercised and the limits of compassion. I argue that not only does compassion have a role to play in legal judgment but that, to the extent that judges exercise compassion, compassion enhances the openness and transparency of the law.

Introduction

There is something fundamental and profoundly uncontroversial about compassion. Both Eastern and Western religions trumpet it as a basic tenet. Both the right and left of politics make claim to compassion in every important campaign. Every school in Australia is encouraged to hang a poster listing 'Values We Share' with compassion heading the list.²

In the legal sphere it is no different. The terms 'good judge' and 'compassionate judge' are often used interchangeably. Critically, however, these appraisals of compassion in legal circles are only made when it is left a vague fuzzy ideal – something about our 'shared humanity' and caring when others are in trouble. Talk of compassion having any specific impact and applicability in the courtroom draws a blank. Because of its heightened status as some supreme virtue it even draws a laugh. Worse, however, we will often see reception to the once glowing term turn icy. Compassion, it is claimed, is too

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² Australian Government Department of Education Science and Training, *Values Education for Australian Schooling* (2005) <<http://www.valueseducation.edu.au/values/>> at 24 May 2006.

emotional to be reasonable; too subjective to be objective; too impulsive to be trusted and ultimately requires a judge get too close to afford her the distance that she needs.

There is a void in our understanding here and when cries for compassion in the courtroom are made in the general public or in the legal community they get lost in this void. What does compassion really mean? How can it have any workable application? What of these claims of compassion's fundamentality? What of these claims of compassion's corruptive hold on the judge?

This paper is an attempt to fill this void. I believe there is validity to these claims of compassion's fundamentality in the legal sphere and shall argue that a compassionate perspective is a better fit for the judicial role than a dispassionate one. We tend to view the dispassionate judge as a clean slate or an empty canvas but I believe it is the compassionate judge with a better claim to judicial neutrality.

In order to demonstrate this I must scrutinise compassion and see how it may serve a judge in specific and pragmatic ways. In Part I, I shall define compassion's workings in terms of the distance between spectator and sufferer and assert the virtues compassion entails that would be invaluable in the judicial role. Part II shall sharpen this latter claim and through close case analysis give us a practical detailed appreciation of how compassion can (and already does) serve the judge greatly in some of their most challenging pursuits. In Part III, I shall address some objections my analysis might arouse and conclude on what might be gained by a more open appreciation of compassion's place in the courtroom.

I. DEFINING COMPASSION

Emotion, Reason and Law

Before I begin I must immediately confront an archaic notion deeply rooted in legal thought that pits emotion in sharp opposition to reason. Emotion, this old wisdom claims,

distorts reason and analysis and clouds one's judgment.³ Whilst reason is based on beliefs that reflect the outer world and are capable of being proven, emotion, on the other hand, is considered specifically unreflective of anything outside an individual's mind.⁴ Thus, our emotions are beyond scrutiny: unintelligible, unpredictable and profoundly subjective – a recipe for disaster if they were to be embraced in the courtroom. How could something so unruly possibly be tethered to the rule of law?

This simple separation of reason and emotion, however, cannot stand up to closer scrutiny. Psychologists, philosophers, neurobiologists and the like have made clear that such binary separations of emotion and reason are specious and dangerously misleading⁵. This ground is so well covered that Nussbaum now calls claims of a distinction between the two 'weak' and 'uninteresting'.⁶ Because of this, and because I could never do their diverse and multi-faceted analyses justice in any small space, I will not get bogged down on this point here. For our purposes one need only understand how this dichotomous view entirely disregards the complex nature of emotional states. Our emotions *are* based on beliefs and *are* reflective of the outside world. If a woman walks in on her husband's infidelity she will likely feel angry. This emotional reaction is hardly unintelligible. Rather, it is based on specific beliefs about what she has witnessed:⁷ that this act has broken their vow of monogamy; that the damage done was serious and intentional as well as a range of other beliefs. We can similarly find a range of beliefs and reflections imbued in all our emotional states: panic, shame, joy, disgust. So, as Nussbaum notes, our:

emotions are not just mindless; they embody thoughts. Therefore we cannot dismiss them from judicial reasoning and writing just by opposing them in an unreflective way to reasoning and thought.⁸

³ See discussion in Benjamin Zipursky, 'Deshaney and the Jurisprudence of Compassion' (1990) 65 *New York University Law Review* 1101, 1130.

⁴ *Ibid.*

⁵ See, generally, Martha C Nussbaum, 'Emotion in the Language of Judging' (1996) 70 *St. John's Law Review* 23.

⁶ *Ibid* 24.

⁷ *Ibid*, 25

⁸ *Ibid.* On the other end of the supposed spectrum, serious doubt has been cast that our mental states, including what we consider our 'reason', is *ever* free of emotional content. Indeed, Moldoveneanu and Nohria believe the 'workings of what we now call reason spring from a primitive emotion – our anxiety at

As Bandes notes in *The Passions of Law*, a founding text in law and emotion studies, the ‘development of law – of its content, its structures, its actors, and the dynamics among them – has been harmed and stunted by the failure to heed the lessons learned in every discipline that has studied emotions’.⁹ She goes on:

These fields generally portray emotion and cognition as acting in concert to shape our perceptions and reactions. But more than that, they assume that it is not only impossible but *undesirable* to factor emotion out of the reasoning process. By this account, emotion in concert with cognition leads to truer perceptions and ultimately, to better (more accurate, more moral, more just) decisions.¹⁰

Thus, the question is no longer: how does a judge free themselves of their emotions when judging? That is not possible and was never possible.¹¹ Nor, as Bandes points out, is such a deluded endeavour desirable. Rather, we must ask how a judge can gauge and engage with their own emotional responses and which of these emotional responses belong in which legal contexts?¹²

As I shall argue compassion is an emotional attitude that, when harnessed correctly ‘in concert with cognition’ and utilised in specific legal contexts for specific purposes, can be of invaluable service in judicial discovery. In taking on this argument this paper, like all in emotion and law studies, serves as a sustained rejection of the law’s traditional separation of passionate and dispassionate judging. With this firmly in mind, and with our appreciation that compassion, like all emotional states, is capable of scrutiny, let us begin by scrutinising it.

being alive and thrust toward an end past which we cannot see with any of our senses’. See Mihnea Moldoveneanu and Nitin Nohria, *Master Passions* (2002), xi.

⁹ Susan A Bandes, *The Passions of Law* (1999), 7.

¹⁰ *Ibid.*

¹¹ Nor is this particularly surprising. Reason, as it is narrowly understood, could never in itself fulfil the judge’s purposes. Martha L Minow and Elizabeth V Spelman, ‘Passion for Justice’ (1988) 10 *Cardozo Law Review* 37, 41-45.

¹² Bandes, above n 9, 7.

Defining Compassion

A useful starting point is to describe compassion as an emotional response that sensitises one to the suffering of another. In the remainder of this Part, I shall define what compassion entails for those who feel it and argue that approaching a stranger's suffering with compassion provides one with a better perspective to appreciate that suffering than if one approaches it dispassionately or with some other emotional response (such as pity, for instance). This is because the compassionate spectator appreciates the sufferer as an equal in a fundamental sense despite the distance and differences that separate them. Stemming from this the spectator has a genuine concern for the sufferer's wellbeing. Further, to be able to glean the insights that a compassionate perspective provides and ensure as best as one can their reliability the spectator must scrutinise and inform their compassionate responses to this suffering. Lastly, we must broaden our appreciation of compassion as not merely a response to an individual or singular group but as a general attitude with which one approaches all human beings. Let me examine each of these claims further.

Distance and Equality

At its heart, compassion is a relationship between spectator and sufferer that denotes distance and difference: 'the sufferer is *over there*'.¹³ These distinctions can be extreme. We can feel compassion for the most foreign of situations, and for people with lives extremely unlike our own. More acutely, however, there is a specific kind of distance implicated by compassion, that is, privilege. The very reason the spectator is in a position to be the giver of compassion rather than the troubled recipient is because they are so fortunately removed from the scene of suffering.

But whilst compassion implies some degree of distance and privilege one must firmly grasp that to come to another with compassion is to appreciate that other as an equal and as a fellow human being. This might seem trite and particularly unreflective – of course

¹³ Lauren Berlant, *Compassion: The Culture and Politics of an Emotion* (2004), 10.

the other is a human being – but it carries a critical edge.¹⁴ It is the fundamental factor that distinguishes compassion from its ‘cruel sister pity’.¹⁵ According to philosopher Lawrence Blum, whilst compassion involves a sense of shared humanity and a recognition of commonality between the spectator and the sufferer, pity involves holding oneself apart from the sufferer and ‘thinking of (their suffering) as something that defines that person as fundamentally different from oneself’.¹⁶ Allow me to illustrate this point by way of example.

In her 1861 autobiographical work *Incidents in the Life of a Slave Girl*, African-American Linda Brent was attempting to ‘kindle a flame of compassion’ in her northern white readership for her ‘sisters still in bondage’ in the south by relaying her own experiences as a slave.¹⁷ In doing so she needed to make clear the powerlessness and seriousness of the position she was in. But to stop there would too easily invite the white reader to regard her as ‘an unfortunate inferior, rather than as an outraged and insulted equal’.¹⁸ Simply put, she would incite pity, not compassion.¹⁹

To counter this danger Brent makes a sustained attempt in her work to remind the reader of her humanity in all its complexity. She writes of feelings of pride, guilt, hate and love (platonic and romantic). To balance out any simplistic portrayal as the passive victim, she details her moments of moral judgement and her sophisticated abilities as an assertive and authoritative agent in her own life’s direction.

¹⁴ Minow and Spelman make an identical statement in regard to the importance of appreciating judges as human beings: Minow and Spelman, above n 11, 75.

¹⁵ Elizabeth V Spelman, “The Heady Political Life of Compassion” in Lyndon-Shanley Mary and Narayan Uma (eds), *Reconstructing Political Theory: Feminist Perspectives* (1997), 131.

¹⁶ Lawrence Blum, “Compassion” in Rorty Amelie (ed), *Explaining Emotion* (1980), 509.

¹⁷ Harriet Jacobs, *Incidents in the Life of a Slave Girl, Written By Herself* (1861), 6. Here, I am greatly indebted to Spelman’s analysis of this American classic: above n 15, 128.

¹⁸ Letter (VII) from Angelina Grimke to Catharine Beecher in Ceplair Larry (ed) *The Public Years of Sarah and Angelina Grimke. Selected Writings 1835-1839* (1989).

¹⁹ Spelman details how the incitement of pity (as opposed to compassion) may have serious political consequences. If white people viewed Brent merely as an ‘unfortunate inferior’ then they are not relinquishing in their minds (or in any subsequent actions) their presumed place as superiors to black Americans. Even if they do come to her aid pity merely invites a victim/saviour dynamic that dangerously ‘reflects and reinforces the master/slave relationship’. Assistance would be seen as something African-Americans should be grateful for, rather than something that they deserved, and the potential for African-Americans to have any authoritative say on the terms of their emancipation is depleted: Spelman, above n 15, 129.

Importantly, when it comes to the white people in her narrative and the white people in her readership, Brent demonstrates a sophisticated ability to recognize *their* humanity in all its complexity. She writes of the generosity and bravery of the white people who helped her escape to the north, the callousness of her master, and her various opinions, praises and criticisms, of all of the white people who play a part in her story. She also remarks openly on the limitations of her white readership to appreciate her story. This compounds her status as an equal by reciprocating the act they, the white reader, are engaged in – as they assess her, she can, does and is *just as entitled* to assess them. Further, by morally critiquing ‘them’ she is highlighting and reminding the white spectator of their own humanity. They are not superior to her but are also flawed, limited by their experiences and vulnerable to (her) criticism. And it is on this level that she wants them to appreciate her experience. Here we get a sense of what Blum means by the notion of ‘shared humanity’. For our compassion to be true it must simultaneously draw out the humanity in both the sufferer and spectator.

So, to broaden this point beyond the trappings of the 1800s slavery debate, we see that the spectator’s privileged status is superficial. It does not mean that one is ‘better than’ or ‘superior to’ the sufferer but more that one is merely ‘luckier’. To approach another as a ‘fellow human being’ is to acknowledge in a fundamental sense that we are all fallible and can be victim to our world, our peers, our circumstances and even ourselves – and this no more compromises a sufferer’s claim to dignity, agency and personal authority than it does our own.

So here we see the paradox that compassion presents. To approach someone with compassion is to approach them ‘as an outraged and insulted equal’.²⁰ In this sense they are on the same level as us. But to even *need* to approach someone with compassion

²⁰ Of course, sometimes the cause of one’s suffering that incites our compassion is something that does not ‘insult’ us in a specific sense, for that suffering was not the result of our treatment by others. It might be a natural disaster, for instance, and not the treatment of human beings. But this is irrelevant for the purposes of our discussion. I am talking about compassion in the context of the courtroom, where it is by and large a problem where one human being or groups of human beings has caused harm to another human being or group of human beings.

means they are in a position of *inequality*; they are suffering, at a disadvantage, at a low point in their life. So, when expressing our compassion for a fellow human being we acknowledge that the distance is there but in the same breath acknowledge that it *shouldn't* be there. Thus, when it comes to grasping the weight and impact of another's plight compassion is a means of overcoming distance between spectator and sufferer to recognise the situation for what it is.

Compassion as Empowered Perspective

Let me examine further this notion of compassion overcoming distance. Firstly, it might seem a fine distinction, but it is important to note that when one feels compassion one does not *abolish* these differences and distance. Pervasive romantic notions of compassion, however, see it doing just this – that the pain of the other becomes *your* pain. Indeed the literal Latin interpretation of compassion (*com* means 'together'; and *pati*, 'to suffer') encourages this view.²¹

There are clear problems with this hazy formulation. For one, claiming to *know* another's identical pain simply by your feelings of sympathy for them is, frankly, offensive. Consider the white readers of *Incidents*. Whilst they may certainly have felt compassion for Brent's plight, they certainly cannot claim to know what it felt *like*.

But there is a further problem with the notion of being stricken with another's pain – it gets completely backwards the source of compassion's clarity and superiority of perspective on another's experiences. Rather than abolishing distance, compassion's strength lies *in* this distance and the fact that the spectator is a distinct entity specifically removed from the scene of suffering.

All other passionate and dispassionate responses in some way judge the suffering of another in relation to their own standing, objectives or interests.²² Thus, those that approach without compassion will inevitably have their perspective tainted. If you come

²¹ Hannah Arendt, for one, was a subscriber to this formulation of compassion. Arendt Hannah, *On Revolution* (1977).

²² The pitfalls of dispassionate responses to another's suffering will be discussed in detail in Part III.

to another with pity, for instance, you see that sufferer as an inferior. You have judged them in relation to yourself and declared them in some comparative manner lesser or deficient. A spectator with an obligation to the sufferer, like a mother to her child, absorbs the scene as someone with something at stake and so is not in this sense detached.

The compassionate spectator, however, does not assess the suffering in terms of how it affects, reflects or relates to them. Because they have no distinct relation to the scene of suffering or the actors within it, their standing is impartial and detached from any specific familial or similar concern. Because they see the sufferer as an equal in a fundamental sense any artificial judgment in relation to personal standing is neutralised. And on this point, because the compassionate spectator recognises the other as a vulnerable dignified equal who has been cut down in some way, such as we all can, they care about the sufferer and are sensitive to the situation they have endured. Thus, the compassionate spectator has the unique and invaluable perspective of a person both engaged with and detached from the suffering they witness.

The Judge as Compassionate Spectator

By mapping out compassion in this way, we can see some abstract but substantial links between compassion's demands on the caring spectator and the law's demands on the judicious decision-maker – both must formulate adequate responses to another's loss or suffering.

The compassionate spectator must overcome the obstacles difference, distance and privilege will undoubtedly present to ensure they recognise the sufferer as an equal. An identical demand is placed on judges. There is clearly distance in the courtroom: the judge is specifically someone impartial who has nothing to do with the scene of suffering that must be assessed.²³ Further, with their (more or less) clean legal record, the judge has no first-hand appreciation of what it is like to be on 'the other side of the law'. They are privileged in a particularly substantial sense – the judge is in a place of authority and high

²³ We will look further into this distance later in Part II.

standing. The judge exists not merely to appreciate the scene of suffering but to pass judgment on it with serious consequences to those players in the scene.

But ultimately the judge and parties are equals and the judge must understand the parties as such. To be authorised to hear the case in the first place, the judge and parties must all be bound, at least for the purposes of this case, to the same set of laws and be within the same jurisdiction. A judge cannot hold the parties to a higher or lower standard than the law demands of her.

If we accept this link between the judge and the compassionate spectator – and it is a link I will develop as this paper progresses²⁴ – then this means that the empowered perspective of the compassionate spectator is available to the (compassionate) judge.

Trusting and Capitalising on Compassion

How reliable are one's feelings of compassion?²⁵ Stemming from this, how does a spectator (or, more to the point, a judge) capitalise on this empowered vantage point that compassion gives them?

To answer these related questions we must appreciate how, as the reader already knows, compassion can wash over us in an instant. When a tragic newspaper headline catches our eye, for example, our heart will immediately go out to someone on the other side of the globe. Thus, this distance has (seemingly) been overcome in a matter of moments. But, in itself, this impulsive and fleeting upsurge of sympathy cannot be trusted. Let me illustrate this with an example.

I may glimpse a homeless man on the street and instantly feel compassion for him. But this compassion may be ill-informed and will be based on rough conceptions of the man's plight. However, if I sat down and talked to the man and listened to his story my compassion might be refined and deepened. Alternatively, my talking to him may make

²⁴ I will deal with specific possible objections to such a link in Part III.

²⁵ For many, questions of the reliability of compassion are tethered to a question of the subjectivity of compassion. I will deal with this concern in Part III.

me realise my compassion was ill-founded. His supposed plight might not be serious at all or he may be perfectly happy on the street. Alternatively again, on further inspection I might realise I am not, in fact, feeling compassion. Scenes of suffering can elicit a variety of subtly different but related responses. My initial emotional response, for instance, might not have been compassion but pity, or mercy, or guilt – and as Brent demonstrates these seemingly subtle differences in perspective have real consequence.

This is why Bandes advocates that our emotions be utilised ‘in concert with cognition’. For us to be able to gain insight from our compassionate vantage point and to rely on these insights our compassion must be scrutinised, fine-tuned and informed. We can not rely on the simple feeling-state itself to present us with any clear insight for then we are just reacting to whim (whether they be *compassionate* whims or not). These feelings must be mined for reflective value and simultaneously filtered. Thus, compassion is a means of understanding that can itself be enlightened.²⁶

The ‘Tools’ of Compassion

How does one inform one’s own compassion? This enlightenment may come from book knowledge. My compassion for the starving children in Bangladesh might be informed and deepened by reading up on the specifics of their plight. Studying their culture would be a useful way of overcoming the dilemmas that distance might present. But compassion asks us to appreciate the human meaning of the experience of a particular person in a particular situation; to gauge their emotional, psychological and even spiritual scars. Such things can rarely be grasped from merely ‘cold’ studies. Thus, there is an element of imaginative reconstruction embodied in compassion to illuminate these types of ‘invisible’ suffering.

As seen from the work of Brent and my homeless man example, one way we can gain a potent appreciation of the human meaning of another’s suffering is through storytelling. Obviously to appreciate another’s experience one would find great benefit in listening to the sufferer themselves. Further, soaking in these personal narratives works to ensure we

²⁶ Spelman, above n 15, 136.

never lose sight of the fact that ‘violent events belong to those who experience them’.²⁷ Whilst storytelling can be a wonderfully direct way to gain insight into another’s suffering one must remember there are many in need of compassionate understanding who may not be able to articulate their own experiences: children, people with intellectual disabilities and people who speak a different language to name a few. Further the usefulness and reliability of these stories can only be partial. The sufferer may be lying or exaggerating. They may not grasp their own suffering, and might have complicated reactions to it – denial or shame for instance – that makes their stories not the transparent window into their experiences we might hope them to be.

Another means of making sense of another’s situation is through empathetic imagining. Empathy is a process of thought experimentation that asks one to imaginatively dwell in the situation of another, to stand in another’s shoes and see the world from their perspective. Indeed, many have considered it a critical component of compassion.²⁸

Often, one cannot fully grasp what motivated someone to behave in a certain manner unless one can imagine being in that person’s situation ... Empathy allows one to understand how another person feels. This is often relevant to understanding what has occurred in that person’s life, or what has been done to her. Empathy thus becomes a requirement for grasping a wide range of social and normative concepts.²⁹

In engaging in empathetic imagining one is not merely gauging how they would react in the other’s specific position. The spectator must imaginatively embody, to the best of their ability, that person in every relevant detail that had some bearing on their experience.

²⁷ Gail Mason ‘Recognition and Reformulation: Difference, Sexuality and Violence’ (2001) 13 *Current Issues in Criminal Justice* 251 at 251. Brent was particularly attuned to the importance of asserting authorship over her own suffering in a time where great debates raged over the political and moral significance and meaning of the slaves’ plight: Spelman, above n 14, 128-129.

²⁸ Zipursky, above n 3, 1134.

²⁹ Ibid.

There are other means of gleaning what another has experienced. Drawing analogies between the sufferer's experiences and the spectator's own might help.³⁰ One might also find great assistance in literature and art that have detailed the kind of experience in question. The poet articulates pain and loss far better than any other. A conception of the particular experiences of a particular person, distant and different, could come from all of these methods of appreciation, utilised alone or together, in the endeavour to have this compassion aroused, deepened, refined and validated.

Compassion as Catalyst

As discussed, for one's compassion to be meaningful and for us to be able to capitalise on the unique vantage point it offers – as I argue in the next Part judges should – we must engage in sustained and rigorous scrutiny of our feelings regarding the other's suffering. It is important to note here, however, that the compassionate spectator is not merely going through these motions of refining and clarifying compassion's insights simply for the sake of it or for some stated objective. Rather, compassion in and of itself is a powerful driving force to gain as deep and clear an appreciation of the suffering at hand. This is because to have compassion is to *care* for the other and their wellbeing. Compassion demands that a spectator vigilantly remain open-faced to the tragedy – to not turn away, no matter how this scene of suffering may pain or haunt them.³¹ It obliges them to soak in and appreciate the suffering for what it is; its significance; its weight; the diverse ways it has attacked and wounded the sufferer.

In short, compassion is not just an emotional response to another's suffering, but a commitment to it.³² And thus, compassion itself is what fuels our endeavours to overcome obstacles of distance and difference; to appreciate the other as an equal; to resist the strong urge to look away; to judge this suffering untainted by our own objectives; and to call on the many plausible means of reaching these goals such as empathy and so forth that we looked at above.

³⁰ Such analogies must be drawn with careful appreciation of how the two paralleling propositions differ.

³¹ Berlant, above n 13, 7.

Compassion as Attitude as well as Emotional Response

For the sake of simplicity I have so far discussed compassion as an emotional response between a spectator and a sufferer. Before I proceed, however, I must expand slightly on this perception of compassion. That is, not only does ‘compassion’ describe one’s response to a specific other at a specific moment but the term ‘compassion’ also describes a general attribute of a person’s mindset, as when we refer to someone as a person with great compassion.³³ It may be helpful to consider compassion in the attribute sense as akin to a philosophical stance: where one approaches all human beings as equal (despite distance or privilege) and one’s sense of shared humanity keeps one open and sensitive to appreciate and absorb their stories of suffering. Someone with the *attribute* of compassion will more readily be open to feeling the emotional response of compassion towards specific others at specific moments.³⁴ So when we talk about the compassionate judge, we are describing ‘a judicial mindset that includes – along with logic, a sense of history, and other tools of legal interpretation – compassion in the attribute sense’.³⁵

Conclusion

As discussed above the judge and the compassionate spectator are after identical goals: to overcome the issues of distance and appreciate the other as an equal in order to gain a clear grasp of the suffering that took place. It is their identical distanced position from the suffering that provides them with clarity of vision to achieve this objective. Whilst their goals are the same, the critical difference is that judges have been groomed to believe emotional responsiveness is not the means of attaining these goals. As I shall demonstrate in the next Part this ill-founded belief is robbing them of a great means of judicial discovery.

³² But this should not be construed to mean that compassion leads judges to overemphasise one party’s suffering at the expense of the other obligations the judge must fulfill, to the other party and to the law. I shall look at this in more depth in Part III.

³³ Zipursky, above n 3, 1129.

³⁴ *Ibid.*

³⁵ *Ibid.*, 1129-1130.

II. COMPASSION IN ACTION

In Part I, I recognised compassion as an invaluable means of gaining the right perspective on another's suffering. I also showed how compassion 'in concert with cognition' allows it to be a reliable force – as far as any mental state can be. By drawing rough correlations between the nature of compassion and the judicial role I hoped to acquaint readers somewhat with the suitability of compassion in the courtroom. In this Part, I wish to sharpen this latter intention by mapping out specifically how a judge's compassion can be utilised in judicial interpretation.

Compassion by no means offers guidance in all of the judge's endeavours. Indeed, an important limit of compassion that must be appreciated immediately is that it does not and can not lead to any specific solution to the suffering witnessed. There is never a singular trajectory between emotion and action.³⁶ For that matter neither is there always a clear or plausible opportunity to ameliorate the other's suffering.³⁷ Ten different people can feel genuine compassion for a sick dog and each can differ in what they consider the 'most compassionate' solution – from sending the dog to have surgery, to letting him die naturally with a bone to chew on, to putting him down.

For what purposes then can judges utilise their compassion in decision-making? As I showed in Part I, compassion's strength is in illuminating the suffering of another. For this reason I propose judges utilise their compassion to further their comprehension of the suffering they need to address. This is no small task. The judge has a very complex and difficult job to determine what physical, emotional, mental and even spiritual suffering was endured and the extent of this suffering. As Brent demonstrated, gaining the right perspective on the suffering in question is fundamentally consequential to how one responds to that suffering – and the means to gain this right perspective was through compassion.

³⁶ Shane McGrath, 'Compassionate Refugee Politics?' (2005) 8(6) *M/C Journal* <<http://journal.media-culture.org.au/0512/02-mcgrath.php>> [29] at 18 May 2006.

³⁷ Sontag believes compassion is linked to a feeling of impotence when we are overwhelmed by the scene of suffering we have witnessed. See, generally, Susan Sontag, *Regarding the Pain of Others* (2002).

But the compassionate judge I am advocating is not only in a better position to grasp the facts of a matter, but also to interpret the law. As was demonstrated in Part I compassion is a process of thought experimentation that helps one imaginatively grasp the workings of human dynamics in a distressing scene. In figuring out how far untested precedent extends or how complex law should apply, the imaginative capacity compassion provides is of unique benefit.

Whilst a judge is always responding to another's suffering and thus compassion could always be of benefit I shall focus on two general instances where the critical usefulness of compassion comes to the fore. First, the insight one's compassion provides is invaluable when the suffering is abstract and 'invisible'. I shall illustrate this with a detailed analysis of the infamous 1939 torts case *Chester v Waverley Municipal Council*³⁸ ('*Chester*'). Second, compassion's capacity to 'overcome distance' is of significant benefit when the suffering is particularly foreign to the judge. I shall highlight the problems judges have with 'otherness' and the ways compassion can go some way to alleviating them with reference to a range of cases from the Australian Refugee Review Tribunal (RRT).

(a) 'Invisible' Suffering

There will be many instances where understanding the suffering of another will be relatively straightforward. In cases of physical suffering, say, where a plaintiff breaks their leg due to a defendant's negligence, it is clear from doctors' opinions and medical reports how dire or not the suffering is. Determining the cost of damages is then a matter of tallying up the medical bills and time off work and so forth.³⁹

But what of the suffering endured in the mind? Or the heart? The law is ever increasingly taking on board types of suffering that are not so easily discernible and are invisible to the human eye: mental and psychological suffering; attacks on one's dignity; on one's

³⁸ (1939) 62 CLR 1.

³⁹ Of course this is an oversimplification. Furthermore such cases may also involve issues of psychological distress and various other invisible less clear-cut forms of suffering.

‘reputation’; on one’s (supposed) right to free speech. Judges must appreciate how one’s damages can be ‘aggravated’. The weighing of abstract pain will often have a place in serious cases where the suffering endured is profound. Rape, for instance, is an attack that shocks and wounds on every level. There are a diversity of ways human beings can suffer – some easily understood, others not.

A judge’s compassion will be an invaluable aid in grasping these forms of abstract suffering. Let me examine this claim in detail by way of example with *Chester*..

Chester v Waverley Municipal Council (1939)

In *Chester* the issue at hand was one of nervous shock: an abstract form of mental suffering that has given judges an exceeding amount of trouble.⁴⁰ This case is a significant benchmark in Australian jurisprudence for it dealt with complex, then untested, questions on how far one’s responsibility for another’s mental wellbeing should extend.

In *Chester* a seven-year-old boy drowned in a water-filled trench that was inadequately fenced off by the defendant council. The council was held not to be liable in negligence for severe nervous shock suffered by the mother, Mrs Chester, at witnessing the recovery of her son’s body from the trench.⁴¹ The majority’s findings rested on the premise that it was not ‘reasonably foreseeable that the shock suffered by a mother on seeing the body of her infant child, whom she was seeking, raised from the bottom of a water-filled trench might well be such as to cause psychoneurosis or mental illness’.⁴² This perplexing line of reasoning (with slight variation) was followed by the initial trial judge as well as in the subsequent appeals to the Full Court in New South Wales and the High Court. In the High Court majority, Latham CJ held:

⁴⁰ See, generally, for instance: Des Butler Des, ‘A “kind of damage”: removing the “shock” from “nervous shock”’ (1997) 5 *Torts Law Journal* 255.

⁴¹ No one was disputing that the council would certainly be liable to the child if he were alive. See, for instance, *Chester v Waverley Municipal Council* (1939) 62 CLR 1, 7 (Latham CJ).

⁴² *Jaensch v Coffey* (1984) 155 CLR 549, 590 (Deane J).

‘A reasonable person would not foresee’ that the negligence of the defendant towards the child would ‘so affect’ a mother. A reasonable person would not antecedently expect that such a result would ensue. Death is not an infrequent event, and even violent and distressing deaths are not uncommon. It is, however, not a common experience of mankind that the spectacle, even of the sudden and distressing death of a child, produces any consequence of more than a temporary nature in the case of bystanders or even of close relatives who see the body after death has taken place.⁴³

In other words, because death is a common event, and even the violent and distressing deaths of children are not infrequent, it was not reasonably foreseeable that a mother would react *this* badly at seeing the body of her dead son. Whilst there is a certain logic at work in this reasoning, Latham CJ’s conclusions are plainly incongruous with basic human experience, and highlight the pitfalls of dispassionate analysis. In stark contrast, Evatt J’s sole dissenting judgment is a prime example of the utilisation of one’s compassion that I am advocating. It is clear from Evatt J’s emotive language and acute sensitive commitment to Mrs Chester’s harrowing experiences that he felt compassion for her. One can also see how this compassion served as a driving force behind the sophisticated insights that make up his lengthy humane dissent⁴⁴. Let us examine Evatt J’s findings in *Chester* closely to see how he succeeds where the trial judge, Full Court and High Court majority failed.

Getting the Facts Right

⁴³ *Chester v Waverley Municipal Council* (1939) 62 CLR 1, 10 (citation omitted). The quotation marks are in reference to the language of *Donoghue v Stevenson* (1932) AC 562.

⁴⁴ Remember, one’s compassion is not the unintelligible inner motive the emotion/reason dichotomy tradition takes it to be. As Nussbaum asserts in regard to one judge’s utilisation of compassion in judgment ‘we do not need to ask him whether he feels a pain; we need only look at the perceptions and thoughts expressed in what he writes (assuming that he is sincere). When we do this, we see in his opinion all the materials of compassion’: Martha C Nussbaum, ‘Compassion: The Basic Social Emotion’ (1996) 13(1) *Social Philosophy & Policy* 27. Also see Henderson’s discussion of how one can glean a judge’s emotions through analysis of their judgments: Lynne N Henderson, ‘Legality and Empathy’ 85 *Michigan Law Review* 1592-1593 at 1574.

A critical misstep in the other judges' findings is the abstraction of Mrs Chester's experiences that day. Evatt J, however, commits himself to detailing the facts of the case at length:

not only because an understanding of them is important from the point of view of liability, but because, in my opinion, they are summarily but insufficiently set out in the Full Court's statement that 'the discovery that her son had been drowned caused her a severe shock'. This statement takes no account of (a) the plaintiff's long agony of waiting when she feared that her son had been drowned but certainly did not 'know' it, or of (b) the effect upon the plaintiff of the actual removal from the water of her child, especially as the circumstances suggested at least to her and her husband that even at that moment life was not quite extinguished.⁴⁵

In illustrating these particulars of Mrs Chester's agony, Evatt J calls on the tools of fine-tuning one's compassion that we discussed in Part I. Drawing an understanding of Mrs Chester's plight from the woman herself was limited for the 'plaintiff was a woman of Polish extraction, and found special difficulty in narrating the precise nature of her feelings, her fears, her hopes and her sufferings'.⁴⁶ Evatt J, thus, takes to imaginative reconstruction.

Empathy, as discussed above, is the imaginative dwelling on another's experience. Evatt J calls on this method of enlightenment to map out what must have been brewing in the plaintiff's mind:

⁴⁵ *Chester v Waverley Municipal Council* (1939) 62 CLR 1, 17.

⁴⁶ *Ibid.* Indeed, the fact that Evatt J was attuned to this obstacle of distance in his appreciation of her experiences demonstrates his sensitivity to Mrs Chester and to the task of capturing her experiences. It is noteworthy that none of the majority judges make mention of this hurdle to their understanding.

She was terrified lest he should have been drowned, was taking notice of little except what her own senses were telling her, was hoping against hope that her very worst fear would not be realised.⁴⁷

He also drew on literary sources to adequately capture the unique grief of a parent not knowing the fate of their lost child. He provides an extract from the Australian novel *Such is Life* by Tom Collins as well as from the poetry of Will Blake whose ‘imaginative genius has well portrayed suffering and anxiety of this kind’.⁴⁸

Whilst all of these measures work to give relevant detail and form to Evatt J’s appreciation of Mrs Chester’s trauma that day, the other judges’ failure to grasp or see the significance in these subtle distinctions has real consequences in this case. The trial judge’s oversimplification of the plaintiff’s experiences inferred that ‘the plaintiff’s suffering was no different in essentials from that of any other mother to whom someone had delivered a message that her child had been drowned’.⁴⁹ It is little wonder then that the trial judge felt duty bound to deny Mrs Chester a remedy – if the giving of all news of another’s death were to be soothed with litigious action, a fear of floodgates is well-founded.⁵⁰

Further, determining the facts and drawing all reasonable inferences from those facts was a job for the jury. But the trial judge, subsequently backed by the Full Court and High Court, undercut this duty by directing the jury to find a verdict for the defendant. Evatt J, however, believes a jury, if given the chance, would agree with him that the other judge’s interpretation of the facts was inadequate. For example, they ‘might reasonably have found that the cause of her nervous shock and subsequent illness’ was not, in fact, the discovery of her son’s death but ‘the very terrifying setting of the tragedy’.⁵¹ That is, Mrs

⁴⁷ Ibid, 22.

⁴⁸ Ibid, 18.

⁴⁹ *Chester v Waverley Municipal Council* (1939) 62 CLR 1, 19.

⁵⁰ A fear of floodgates pervaded the majority judgments. See, for instance, ibid 7-8 (Latham CJ). Deane J noted this in *Jaensch v Coffey* (1984) 155 CLR 549, 590.

⁵¹ *Chester v Waverley Municipal Council* (1939) 62 CLR 1, 19.

Chester's mental illness might have been caused during the time she was waiting helplessly by the trench agonising

that within the apparently small area of the trench situated so close to his own home her child might be lying dead or in desperate danger of death; within such close reach in one sense, but in circumstances preventing immediate action by way of rescue or assistance.⁵²

Nevertheless, because of the trial and appeal judges' failure to appreciate the complexities of her suffering a jury was never given the opportunity to assess this suffering. If Evatt J was right they would have drawn a much different (more accurate, and more compassionate) conclusion.

The Full Court assessed her suffering in a slightly different but still troubling way. Jordan CJ worked from the assumption that she was aware her son was dead before seeing his body.⁵³ This is simply untrue, but such a mistake is too easy to make if one approaches another's 'invisible' suffering dispassionately, rather than with the committed focus on that suffering that compassion demands. Such a blatant misunderstanding of the facts of the case, however, again has consequences. If Mrs Chester was already aware that her son was dead, then seeing his body for the first time would have notably less impact than someone discovering her son is dead *by* seeing the body – which is in fact what happened. If we couple that with the (also questionable) assumption that it was seeing the body that sparked her mental illness, Mrs Chester's claim is certainly diluted. It was thus that much easier to deny Mrs Chester an appeal and deny these facts the chance to be determined by a jury.

The Reasonable Person

Putting to one side Evatt J's insightful findings of the more complex factors that may have led to her shock, let me return to Latham CJ's conception of the reasonable person.

⁵² *Chester v Waverley Municipal Council* (1939) 62 CLR 1, 19.

⁵³ *Chester v Waverley Municipal Council* (1938) 38 SR (NSW), 607-608.

As discussed above, Latham CJ's reasonable person would not foresee Mrs Chester's reaction, for the sight of a dead child does not commonly affect people, even close relatives, to such an intense degree. To put my objection bluntly, people, and certainly parents, simply do not react so nonchalantly to the sight of a child's (let alone *their* child's) lifeless body. As Evatt J notes 'only the most indurate heart could have gone through the experience without serious physical consequences'.⁵⁴ Evatt J's own conception of the reasonable person could appreciate that tortious acts and omissions that endanger a child not only can but most likely *will*, by extension, have serious consequences on his or her parents. His reason for concluding this is the simple fact that any opposing assertions, such as those of Latham CJ, are 'contradicted by all human experience'.⁵⁵ Evatt J did not have to dig deep into his feelings of compassion to conclude what should be such an obvious point, but it was compassionate nonetheless.⁵⁶

There is a telling irony here to appreciate. The judge's dispassionate stance and conscious emotional disengagement from this scene of suffering crippled his understanding of how others in everyday life would respond to such suffering. In describing and defining the reasonable person and what that reasonable person might foresee the judge must endow the reasonable person with a functioning grasp of human inter-subjectivity and a capacity to be attuned to the base needs, priorities and desires of others as all people are. To put it another way, the reasonable person is not just reasonable but passionate. Here our compassion does not just illuminate the experiences of a real particular person but, with its firm grasp of complex human mental and emotional capabilities and how they work in relation to others, it illuminates the inner workings of an imagined person. We can see how this acute understanding that compassion provides may well be critical when considering what damage was foreseeable from another's perspective. It certainly was in Mrs Chester's case.

Compassionate Interpretation of the Law

⁵⁴ *Chester v Waverley Municipal Council* (1939) 62 CLR 1, 25 (citation omitted).

⁵⁵ *Chester v Waverley Municipal Council* (1939) 62 CLR 1, 23.

Extended further, this superior appreciation of imagined circumstances that compassion can provide serves the judge well in dealing with questions of legal interpretation. Evatt J utilised his compassion to detail the flaws in the other judges' readings of *Hambrook v Stokes Brothers* (1925) 1 KB 141 ('*Hambrook*'), an English case which served as strong authority in this case. Let me look at one example. The court in *Hambrook* held that a negligent defendant was liable for nervous shock caused to a mother by *immediate apprehension* of injury to her children. The trial judge construed this requirement of 'immediacy' thus:

The essential elements to create a cause of action in cases similar to the present are that the perception of the act charged as negligence should amount to the perception of what might be reasonably regarded by the plaintiff as a *present* menace and should of itself in the circumstances create a reasonable fear of *immediate*, that is to say, *contemporaneous* personal injury to the plaintiff's child. The shock complained of must, I think, be a shock occasioned by a threat and fear of a contemporaneous menace to the safety of the child.⁵⁷

Evatt J investigates how such a requirement attaches to the human realities of a situation, where a spectator (or more potently, as in *Hambrook* and *Chester* a mother) is confronted with such a scene of suffering involving another (her child). By the trial judge's logic the shock that the spectator suffers must stem from the fear of the other's primary injury happening. This means that the shock must either result *before* or at the *immediate time* of the other's original injury. Ultimately, in Mrs Chester's case this would mean in effect that the defendant could not be considered liable to the plaintiff unless she witnessed the actual fall of her son into the trench.⁵⁸ As Evatt J notes there is no substantial reason why the spectator's fear and shock that results *after* the original injury should be excluded

⁵⁶ There was much more to Evatt J's thoughtful (and compassionate) formulation of the reasonable person that went towards assuaging other judges' misconceptions. See, specifically, *Chester v Waverley Municipal Council* (1939) 62 CLR 1, 23.

⁵⁷ *Chester v Waverley Municipal Council* (1939) 62 CLR 1, 20 (emphasis added).

⁵⁸ *Ibid.*

from a claim to legal remedy.⁵⁹ Indeed, this notion is not supportable when one looks closely at *Hambrook*.⁶⁰ Further the trial judge's formulation does not take into account the plausibility of one being struck with fear *before* the accident occurs but the actual shock accruing *after* the other's injury has been inflicted. As Evatt J concludes:

It seems very unreasonable to make liability depend upon too nice a psychological analysis of the nature and time of the first onset of the fear and shock suffered by a mother in circumstances analogous to *Hambrook*.⁶¹

Here we see how the imaginative capabilities that one's compassion draws forth aid in illuminating the direction a line of reasoning might lead to, and the consequences in how meaningfully it can be applied to the diversity of real human experiences that have not yet happened.

In *Chester* we can see the attributes of Evatt J's compassion shine through. He was acutely aware of his own shortcomings in appreciating Mrs Chester's experiences: that the suffering was abstract; that she had difficulties articulating her suffering; that a parent's anguish over a lost child is something so unique and serious as to be in many ways 'unimaginable'. But far from these obstacles depleting his commitment to understanding Mrs Chester's suffering, it simply made this commitment more critical. He recognised Mrs Chester as a vulnerable equal with an inner world and outer world fundamentally paralleling his (and everyone's) own. But the discernible difference was that hers were rocked by tragedy of the likes he could not appreciate without the rigorous humane investigation that compassion affords.

But further we can see how this compassionate stance made a real difference. By the trial judge's, Supreme Court judges' and the other High Court judges' dispassionate analysis Mrs Chester did not have a claim to damages. By Evatt J's compassionate analysis, she

⁵⁹ Ibid.

⁶⁰ Ibid, 21.

⁶¹ *Chester v Waverley Municipal Council* (1939) 62 CLR 1, 21.

most certainly did. Tellingly, Evatt J's judgment is the only decision from *Chester* that is favoured today and remains applicable⁶². The majority's judgment is so removed from any meaningful appreciation of the human suffering experienced by Mrs Chester that it was considered bad law almost immediately. The public shared Evatt J's dissatisfaction and in 1944 legislation was passed to ensure such a result was not repeated.⁶³

(b) 'Foreign' Suffering

I have just shown how compassion has already been of service to the judiciary. Let me now consider how it *could* be of service in cases of 'foreignness' in the specific setting of the Refugee Review Tribunal (the RRT).

It might be said that in every case, to some extent, the judge will have to overcome some obstacle of distance. If a case involves bakers the judge must understand to the extent relevant the demands placed on bakers. Whilst it is an element to some degree in all cases, it is when the suffering is *particularly* foreign to the judge that compassion's insights become invaluable.

Many would make this claim to foreignness. Feminist scholars highlight meticulously the challenges and incongruities that arise by male judges dealing with particularly 'female' dilemmas.⁶⁴ Indigenous rights critics have demonstrated the enormous difficulties Aborigines and Torres Strait Islanders have faced getting their unique cultural practices understood and adequately respected in the Australian judicial system.⁶⁵

⁶² See *Jaensch v Coffey* (1984) 155 CLR 549 for instance. See also Lord Wright's comments that Evatt J's dissenting judgement would 'demand the consideration of any judge who is called on to consider these questions': *Bourhill v Young* [1943] AC 92 (HL), 110.

⁶³ *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), s4 (1).

⁶⁴ See generally, for example, Lucinda M Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *Notre Dame Law Review* 886.

⁶⁵ See, for example Alex Reilly, 'Entering a Dream: Two Days of a Native Title Trial in the North-East Kimberley' (1998) 4(1) *Law Text Culture* 196.

To make my point clear let me examine the difficulties decision-makers face in refugee determinations based upon sexuality. In these matters the Tribunal and appellate courts are dealing with ‘the *other* other – a lesbian or gay man from a different culture’.⁶⁶

Refugees and Compassion

Compassion holds a special affinity with discourse on refugee law. Not only is ‘compassion’ consistently bandied about by activists and dissenters concerned by the Government’s noted lack of it, but it is a term that pervades official reports and documents. The Joint Standing Committee on Migration’s first report was entitled *Illegal Entrants in Australia: Balancing Control and Compassion*. Prior to its removal in 1989, s6A(1)(e) of the *Migration Act 1958* (Cth) permitted onshore applicants to apply for permanent residence on ‘strong compassionate or humanitarian’ grounds. As the time of writing, two members of the Australian Senate are proposing the *Migration Amendment (Act of Compassion) Bill 2005*. Whittle it right down and the entire enterprise of refugee placement can be seen as a project of compassion – one country goes out of its way to help a desperate citizen of another even though, by definition, that person’s plight would not otherwise be the immediate or official concern of that country. Hopefully my formulation of compassion will add some clarity (and some legitimacy) to how compassion may have some specific, pragmatic and beneficial role in the RRT reviewing process.

With regard to gay refugee applicants, Jenni Millbank notes in *Imagining Otherness*:

it is clear that in refugee law, law is not so much the issue. Rather it is the decision-makers’ (in)ability to understand and make sense of the applicant’s experiences.⁶⁷

As was made clear in the first section, one engaged in the thought experimentation of compassion is well versed in tackling obstacles of distance and difference that the two-

⁶⁶ Jenni Millbank, ‘Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia’ (2002) 26 *Melbourne University Law Review* 144, 145.

⁶⁷ *Ibid*, 150.

fold exoticness of homosexual foreigners would no doubt present. Keeping with law's deeply entrenched antipathy for emotional engagement, however, the RRT places firm preference on dispassionate analysis and 'cold' means of understanding.

For this reason (amongst others) it is of little surprise, but no less troubling, that a Western heterosexist gaze pervades these judgments. In one extreme example an Iranian man's homosexuality was in question in part because the Tribunal was 'surprised to observe such a comprehensive inability on the applicant's part to identify any kind of emotion-stirring or dignity-arousing phenomena in the world around him'.⁶⁸ The Tribunal suggest such emotion-stirring phenomena include Madonna, Bette Midler, Alexander the Great, and Greco-Roman wrestling. As Justice Kirby rightly asserted in the transcript of the applicant's High Court appeal:

Madonna, Bette Midler and so on are phenomena of the Western culture. In Iran, where there is death for some people who are homosexual, these are not in the forefront of the mind.⁶⁹

What happened here cannot be downplayed as an absurd one-off⁷⁰ for it is far too reflective of the narrow Western heterosexist gaze that abounds. It is highly unlikely that the compassionate judge I am advocating, with their attention turned to carving out any projection of self, would have made such a mistake. A simple empathetic imagining of the applicant's experiences could discern that it is entirely possible for him to be homosexual and not have crossed paths with the stereotypical staples of Western queer culture. Let me examine another example.

⁶⁸ This quote is taken from the High Court appeal transcript: *WAAG v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] HCA Trans 475 (19 November 2004). The original RRT decision is unreported and the High Court transcript does not provide the original citation for this matter.

⁶⁹ Ibid.

⁷⁰ Nor can it be dismissed because they specifically state afterwards that the Tribunal is not looking for such stereotypical signifiers. As Kirby J notes this disclaimer was somewhat undone by the way 'Marilyn (Monroe) is thrown in' at a later point. Gummow J's reaction to this unconvincing disclaimer was also noteworthy: 'Well, why mention it? What sort of training do these people get in decision making before they are appointed to this body? ... (W)hatever it is, what happened here does not speak highly of the results of it'. Ibid. For more discussion on why this disclaimer is so unconvincing, see McGrath, above n 36, [8]-[27].

Homosexuality in Public

In *Imagining Otherness*, Millbank highlights a disturbing pattern in a string of cases where the RRT has particular difficulty ‘seeing’ persecution when it came to public sex or other forms of public sexual expression.⁷¹ When gay men are bashed by police (as well as suffering other indignities) the RRT too readily chalks this up to the neutral enforcement of laws against sex in public places – laws that apply equally to heterosexuals and homosexuals alike.⁷² In a 1999 case, for example, two Chinese men were twice detained by police after being caught having sex in a park.⁷³ They were beaten by these officials and suffered serious subsequent discrimination, including job loss, as a result of their arrests. The RRT concluded: ‘The Tribunal finds that the treatment the applicants encountered was quite clearly as a result of them having been found having sex in public places and not for reason of their homosexuality per se’.⁷⁴

But this is to stand so loftily removed from the situation as to miss the facts entirely. If one engages in the thought experimentation of compassion, with its rigorous commitment to make sense of another’s experience coupled with a sensitivity to appreciate complex human dynamics at work, a clearer picture of this situation begins to emerge. If one were to inquire what brought the applicant to this vulnerable situation they might very well find it was not some frivolous exercise in exhibitionism. It is very often the *only* avenue of sexual expression these men have open to them. In many cases, sexual expression in private is not an option. In China, for instance, there is tight neighbourhood surveillance. As one more thoughtful Tribunal decision-maker pointed out: ironically a public secluded place *is* the more private setting for it provides them anonymity and freedom from fear of exposure in their own neighbourhood.⁷⁵

⁷¹ Millbank, above n 66, 168. I am indebted greatly to Millbank’s analysis here for shedding light on many of these RRT cases, and her analysis of the flaws in their reasoning and methods.

⁷² *Ibid.*

⁷³ RRT Reference Nos *N98/25853 and N98/25980* (Unreported, P Cristoffanini, 11 May 1999).

⁷⁴ *Ibid.*

⁷⁵ RRT Reference No *N96/10584* (Unreported, L Hardy, 15 March 1996). But this understanding is not without its difficulties as Millbank points out: Millbank, above n 66, 173-176.

Further, when the police bash these men and detain them, in some instances without trial, they are not enforcing the law, but breaking it.⁷⁶ Why would they go to these lengths? To answer this – though one cannot if they do not think to ask themselves the question – one must be attuned to the social realities and human dynamics evident in this situation. They have found these men acting in ways that identify them as gay. As Millbank notes, ‘it is only ever the outward manifestations of identity (behaviour, appearance etc) that “precipitate” persecution in the sense that these outward manifestations are required for the persecutor to know that the victim is a member of the despised group’.⁷⁷ To take the homosexual character of the acts that bore this violent outburst and subsequent torment out of the equation is to wilfully blind oneself to the workings of hierarchies of power and the real social dynamics of homophobic violence. Acute awareness of these things is clearly necessary when dealing with the issue of persecution because of one’s sexuality. In one case where they were not even engaging in sex, but were ‘kissing and cuddling’ in a public park, the applicant was nevertheless beaten, kicked, imprisoned for three months, and suffered subsequent discrimination such as loss of employment. To characterise this as neutral treatment is to assume that a heterosexual couple could possibly suffer similar torment, *or any torment*, for kissing and cuddling in public.

Tellingly, there is a parallel here with the ‘separate but equal’ rationale entrenched in America’s segregation laws and practices up until the mid-20th Century. Legislation enforcing the segregation of schools or the prohibition on interracial marriage was argued to be non-discriminatory for it applied equally to white children as it did to black children; to the black lover as it did to the white. Thus, to use an American phrase, ‘no harm no foul’. But it was only after the US Supreme Court in *Brown v Board of Education*⁷⁸ recognised the incongruity of this formal neutrality with the lived experiences of African-American citizens, that the wheels were set in motion to extinguish these racist laws:

⁷⁶ Millbank, above n 66, 147.

⁷⁷ *Ibid*, 146. Here we see it is helpful to utilise our empathy not simply to appreciate what was going on in the mind of the sufferer but to appreciate what was going on in the mind of the instigators of this suffering. We are aided by standing in their shoes and appreciating the world from *their* perspective.

To separate them [children in elementary and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.⁷⁹

It was only through compassionate investigation and imagination that the Supreme Court judges could recognise the ‘feeling of inferiority’ these laws manifest which those in favour of formal neutrality simply could not.⁸⁰

The Refugee Review Tribunal’s Approach

The decision-maker’s adherence to dispassionate analysis is particularly disheartening in the RRT because Tribunal hearings are set up in such a way as to be conducive to compassionate engagement. As I have noted, an appreciation of the sufferer’s personal narrative is of extraordinary value in illuminating their experience and humanising the sufferer. This means of understanding an applicant’s suffering is readily at the decision-maker’s disposal:

The refugee forum is unique in legal settings in that it relies heavily upon personal stories. Stories are the basis of a claim and the foundation of virtually all of the applicant’s evidence. Hearings are often composed almost entirely of a personal narrative by the applicant of her or his experiences.⁸¹

The RRT, however, routinely undermine the legitimacy of and potential for insight these stories may provide. In Peter Mares’ 2001 book *Borderline* he documents the concerns of many long-term observers of the RRT process who claim that the credibility of asylum seekers has improperly been used as a ‘frontline test to weed out applicants, rather than being included as one consideration among many when weighing up the details of a

⁷⁸ 347 US 483 (1954).

⁷⁹ *Brown v Board of Education* 347 US 483 (1954), 494.

⁸⁰ See, for instance, Henderson above n 44 and Martha C Nussbaum, *Upheavals of Thought* (2001), 441-445.

claim'.⁸² As noted by lawyer Mark Robinson, representing the Law Council in a 2000 Senate committee investigating refugee and humanitarian determination processes:

There are dozens and dozens of Federal Court references to the tribunal's obsession with the credibility of an applicant. It is an issue because it is a primary reason for refusal of the tribunal. It is an inappropriate emphasis in decision-making. It leads to error. It is also lazy, because the tribunal does not have to determine the real issues. It can simply say: 'I don't believe you. Next case please.'⁸³

Of course questioning an applicant's credibility is not entirely unwarranted. It is virtually impossible to determine which stories are true and which are false or exaggerated in part or whole. Further, it is clear that applicants would have strong incentive to do what it takes to bring themselves within the definition of 'refugee'.⁸⁴ Having said that, to think one can get around this potentially flawed, but undeniably central, source of information that is the applicant's personal narrative is both naïve and hazardous. This ingrained trait of disbelieving these stories and of maintaining suspicion of their narrator closes off the judicious spectator from gaining its insight.⁸⁵ As Delgado argues, for stories to have any effect in illustrating and illuminating the suffering of their narrator the reader must 'suspend judgment, listen for their point or message, and then decide what measure of truth they contain'.⁸⁶ In the refugee forum they have the potential to gain a great lived account of the suffering experienced. Instead, however, they prioritise use of the independent country evidence – a limited, sorely deficient and untrustworthy means of 'cold' understanding.⁸⁷ In short, the Tribunal decision-makers are already *hearing* these

⁸¹ Millbank, above n 66, 154.

⁸² Peter Mares, *Borderline: Australia's Treatment of Refugees and Asylum Seekers*, (2001), 98.

⁸³ *Ibid*, 107.

⁸⁴ See Catherine Dauvergne and Jenni Millbank, 'Burdened By Proof: How the Australian Refugee Review Tribunal has Failed Lesbian and Gay Asylum Seekers' (2003) 31 *Federal Law Review* 299, 308 for examples of such incentives.

⁸⁵ Millbank, above n 66, 156.

⁸⁶ Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea For Narrative' in David Ray Papke (ed), *Narrative and the Legal Discourse: A Reader in Storytelling and the Law* (1991) 290-291.

⁸⁷ Millbank, above n 66, 155-163. Also see, generally, Dauvergne and Millbank, above n 84.

stories but, unlike my proposed compassionate decision-maker, they are failing to *listen* to them.

‘Persecution’ can happen in a variety of messy, subtle and complex ways. Indeed persecution will often be more potent, sinister and devastating when it is so ingrained in one’s experiences as to be invisible. Thus, to ‘see’ the persecution one will often have to dig deep with a keen sustained appreciation of the human dynamics at play and of the various ways the sting of persecution can be inflicted. ‘Persecution’ is a rich term and to recognise how this term attaches to a specific human experience one is greatly served by compassion.

(c) Conclusion

As discussed in these cases, a judge’s compassion provides invaluable insight – there are crucial factors a compassionate judge sees that a dispassionate judge cannot. It should be considered no coincidence that one must draw on their own emotions to appreciate the emotions of another – to ‘fight fire with fire’ in a sense. Further, a judge’s compassion does not only help in unearthing the facts, but in legal interpretation. Law, for it to be good law, is something that must practicably attach to human experience, and compassion helps invaluablely in this endeavour.

III. OBJECTIONS AND FINAL THOUGHTS

In this Part, I would like to address possible objections and other musings my conception of compassion and its applicability in the judicial sphere might raise.⁸⁸ In doing so I hope not merely to neutralise criticism but explore some connotations of compassion in the courtroom I have not yet addressed.

(a) Objections

⁸⁸ In combating these objections I am particularly indebted here to Zipursky, above n3.

The Rule of Law

I have endeavoured to ensure my formulation is consistent with the rule of law. Talk of compassion in the courtroom commonly invites immediate resistance for it is assumed one is advocating a judge utilise their compassion *despite* the law. That is, if a party knows the right heartstrings to pull, the judge will give them a lighter sentence or a bigger payout and so forth. Alternatively it might lead to a judge feeling deeply for one party at the expense of the other. In criminal cases, for instance, would the judge's feelings of compassion for the victim's suffering and the intimate thought experimentation that this entails make her lean towards a more excessive punishment to the instigator of that suffering? In short, this is a concern that compassion compromises judicial impartiality.

But this conception of compassion in the judiciary has not been what I have put forth. My conception of compassion does not endorse the judge going on flights of fancy but that the imaginative reconstruction compassion provides be tethered to the evidence, the facts gleaned from this evidence and the law itself. In the task of appreciating the weight of another's suffering, picking sides has nothing to do with it. Compassionate insight might 'bring home' to us the graveness of the suffering experienced more so than dispassionate insight, but this points to the fallibility of dispassionate analysis rather than the reverse. Ultimately this criticism is tantamount to saying the judge has done her job *too* well and has gleaned *too* clear a picture.

Furthermore, the attribute of compassion sensitises one to the humanity of all the players, victims and instigators, in a scene of suffering. When our compassion is employed to appreciate a particular person in a particular situation, it is critical that the spectator appreciate the human dynamics at play. Thus the other players in this scene must be similarly appreciated as human beings, with all this entails, for the full impact of the suffering to be grasped. We do not appreciate the suffering as it was, as is compassion's objective, by vilifying or negatively skewing our view of the instigator/s of that suffering.

Lastly, as we see from *Chester*, compassion amongst other things provides the judge some insight into the plausible ways untested precedent might extend. The RRT cases showed how compassion may be utilised to illuminate the human meaning of legal terms like ‘persecution’. Thus, compassion aids in determining what the law *is*.⁸⁹ Rather than compassion being an affront to the rule of law, compassion enables its development and applicability.

Subjectivity

Some might still raise concerns that compassion is subjective: one, after all, cannot deny that we differ to some degree in what scenes of suffering arouse our sympathies. There are a variety of ways one might counter this argument. Firstly we might find some solace in the fact that compassion, and what arouses our compassion, tends to have fundamental and universal conditions of appropriateness for evolutionary, cultural and/or social reasons.⁹⁰ Further, as many would be quick to point out, there are a number of ways law, and the manner in which our legal system is set up, allows a judge’s subjective beliefs to seep in.⁹¹

More specifically, however, the problem with the subjectivity objection is that all ‘tools of judicial method are capable of yielding different results in different hands’.⁹² As Zipursky notes:

[T]here is obviously tremendous divergence on the propriety of judicial review, on how to read history, on how to interpret, and so on. If compassion is unacceptably subjective because it does not command enough convergence, then many judicial methods which are considered less contentious must similarly be condemned as unacceptable.⁹³

⁸⁹ Ibid, 1145.

⁹⁰ See discussion and critique of various research to support claims of evolutionary, cultural and/or social reasons for compassion at Nussbaum, above n 80, 337-342, 374-375.

⁹¹ Ibid.

⁹² Zipursky, above n 3, 1142.

⁹³ Ibid.

Zipursky also notes that the subjectivity objection is inherently flawed. I have advocated compassion as a method of judicial discovery and whilst ‘there are sometimes criteria of application of laws, there are not criteria for how or when to apply the judge’s methods themselves’.⁹⁴ That is, there are no strict criteria dictating how a judge should choose between conflicting precedents or favour one version of facts over the other. As Zipursky claims:

The idea that there must be a rule behind our methods defies experience and leads to logical absurdity. ... Like respect for precedent, logic, and a sense of the judicial balance, there are no definite rules for how to apply compassion. Like these other methods of adjudication, there could not be such rules, nor does there need to be.⁹⁵

(b) Final Thoughts

The Neutrality of Compassion

The legal sphere has always considered the dispassionate perspective as the neutral setting as if the dispassionate judge is a clean slate or an empty canvas. I would argue, however, that the compassionate judge has a better claim to neutrality. Let me look back at what I have argued. Not only can the compassionate judge be just as objective and faithful to the rule of law, but it is from a compassionate perspective that the judge is poised to recognise the parties as distanced but equal (to the judge as well as to the other party/ies). A dispassionate perspective can only guarantee that one is recognised as distanced.

Further, compassion makes us stand open faced and wide-eyed to the suffering and willing to appreciate the sufferer’s experience in its detail. Having a detailed appreciation of the party/parties’ experience is obviously a requirement placed on a judge. As we have seen, however, dispassionate analysis will too often only offer a blunted and deficient

⁹⁴ Ibid, 1143.

⁹⁵ Ibid, 1144.

appreciation of another's suffering, especially when that suffering is abstract or foreign. There is also implicit in a dispassionate approach that one will engage with the sufferer *but only up until a point* in fear that any deeper engagement may make one succumb to their emotions. This is based of course on traditional ideas that emotions cloud one's judgment, an approach that law and emotion studies obviously rejects as seen in Part 1. As Zipursky states:

a judge who believes that it is dangerous to be seduced by the warmth of compassion may disown the view reached from that stance. She may turn off the warm light of compassion and endorse the view she sees from the dispassionate stance. Compassion ... comes to stigmatise a theory.⁹⁶

Indeed this throws the purported neutrality of dispassionate analysis into a new light. The dispassionate judge is not simply *being* dispassionate but rather, is engaged in a sustained act to *maintain* her dispassion – and this is an act to avoid ‘succumbing’ to her compassion. If this paper is correct, then this is a detrimental act because it is from this compassion that she may gain the most valuable insights.

The Desire to Disengage

There is a further problem with dispassionate analysis that is compounded by the legitimacy it is given in the legal sphere – it allows the judge ample opportunity to conceal an illegitimate *desire* to disengage. What would motivate someone to specifically not endeavour to fully appreciate another's suffering? There is an infinite variety of conscious and unconscious reasons. It might be something particularly alarming like a cultural or personal bias against one or more of the parties. It could be judges giving into the quite natural desire to protect oneself from being haunted by the stories of suffering of others. It could be a desire to oversimplify, regardless of diluting, the other's suffering so that it does not conflict with other complex factors the case presents. One cannot help but wonder if this latter desire was on the mind of the majority judges in *Chester* considering how the fear of floodgates pervaded their judgments. Perhaps they, on some level, diluted

⁹⁶ Ibid, 1147.

the potency of Mrs Chester's agony in their minds? In the RRT case law analysed above it seems somewhat naïve *not* to pick up on a specific disturbing desire to drown out or downplay the applicant's harrowing experiences.

Of course this is mere conjecture. But that is precisely the point. It is virtually impossible to conclude whether subterranean motivations played a part in judgment.⁹⁷ Compassion does not offer any clear way of revealing these corrupting desires. But compassion, in itself, is a solution to the problem. The compassionate judge *cares* about 'getting it' and is highly attuned to filtering out any forces, either from within or without, that compromise this objective.

What if the Courts already have Compassion?

Compassionate judges, as I have described them, already exist. I have already asserted that Evatt J was compassionate and was guided by this compassion in *Chester*. We could point to many cases where the judge is similarly attuned to appreciating the party's painful experiences and the human dynamics evoked by their legal interpretation. There are also those cases where the judge was certainly compassionate but this attribute was not, for whatever reason, particularly discernible from their judgment. If judges are already exercising compassion, some readers might be wondering what is the point of having this discussion?

This objection, however, does not sit well with the law's overall favouring of the dispassionate judge. As Zipursky noted above judges may consider it their duty to ward off their compassion to maintain their dispassionate stance – and consequently deprive themselves of this valuable means of judicial discovery.⁹⁸

Furthermore, with the prevailing notion that compassion directly compromises one's objectivity and impartiality there is a real risk that compassionate judgments will be

⁹⁷ Although so much of the jurisprudential tradition, such as the critical legal theorists and feminist theorists, has been dedicated towards identifying and critiquing these subterranean motivations that hold significant weight.

⁹⁸ Zipursky, above n 3, 1147.

dismissed and replaced by those that keep with convention and remain dispassionate.⁹⁹ If what I have asserted in this paper is true, this means we are steamrolling perfectly good judgments to make way for less insightful ones.

This does not mean a judge cannot still draw on their compassion. But in writing their judgment they will have to conceal, repackage and downplay this means of discovery to ensure such traces of emotionality remain hidden. The judge's compassion, like a shameful secret, must stay below the surface. This highlights the ludicrous contortions a judge must go through to appease the law's insistence on a 'cold' state of mind.

If a judge's compassion were allowed to shine through in their judgments, it would not only work to counter this legal culture that prioritises dispassionate analysis. It would be of benefit to the parties as well. At least they will know someone cared for them.

Further, if compassion is applicable, of great aid and *already existent* in the law, for the sake of the community at large, one should be open about it. As argued in the opening statements of this paper, 'out of touch' dispassionate decisions often invite open cries from the public and the legal community for more compassion in the courtroom. These cries are immediately delegitimised for the prevailing thought is that law is meant to be free of such fuzzy persuasions. But as I have shown judicial compassion is certainly possible and already present. This plain fact should be realised, not just to give these cries of concern the validity and force they are due, but because openness and transparency are virtues the law is supposed to uphold. Only then can judges utilise their compassion productively, and can we critique its use in a more sophisticated way rather than simply trying to snuff out any sign of its existence.

CONCLUSION

⁹⁹ In *R v Skaf* [2005] NSWCCA 297, for instance, one reason the case was on appeal was because Judge Finnane was allegedly 'distracted by emotion': see *Skaf* [2005], [112]. Failing to remain dispassionate was unquestionably linked with failing to maintain one's judicial impartiality.

I hope I have gone some way in filling the void in our understanding of how compassion can have specific applicability in the courtroom. It is not some sublime magical solution to the complex problems judges face. But nor is it the corrupting force that ravishes a judge's claim to objectivity and impartiality. Whilst neither of these portrayals of compassion do this unique emotional attribute justice, they do ring true. Compassion, whilst not magic, is a profound and empowered means of appreciating another human being. There is a fundamentality and a neutrality to a compassionate perspective as a means of human beings interrelating effectively, despite the distance and privilege that might superficially distinguish them. Compassion, if not kept in check and scrutinised and informed may be a dangerous thing. All of the objections raised above are entirely possible outcomes of compassion's misuse.¹⁰⁰ But as I hope I have shown the insight it bestows on those who feel it is worth the risk. It can make all the difference in a judge's decisions – and in the lives of those affected by them.

¹⁰⁰ But devastating effects will abound by the misuse of any judicial method of discovery. See Zipursky, above n 3, 1145-1146.

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