

Professor Susan Bandes

Seminar: Emotion and the Law

Required Text: *The Passions of Law* (Susan A. Bandes ed. 1999). All other readings will be posted on Blackboard.

First Class Assignment:

Introduction to *The Passions of Law* (pages 1-15).
DeShaney v. Winnebago County Department of Social Services (Blackboard)
Owen Fiss, *Reason in all its Splendor* (Blackboard)

Grading

75% of the grade for this seminar will be based on a series of short (3-4 page) reaction papers which will react to the assigned readings and require no additional research, plus a short (4-5 page) paper containing some original research on a relevant topic chosen by the student. 25% of the grade will be based on class participation. On the first day of class, a schedule of assignments will be finalized. It is probable that each student will be required to write reaction papers for approximately half the scheduled class sessions.

Course Description:

The emerging interdisciplinary field of emotion theory poses some of the most profound and interesting questions at the heart of jurisprudence. For example, what role do or should emotions like fear, disgust, remorse, love, mercy, compassion and resentment play in the decision-making processes of judges, lawyers, juries or legislators? This seminar will explore the role that emotions play, don't play, and ought to play in the practice and conception of law and justice.

Over the last ten years or so, the field of law has taken increasing cognizance of the role of emotion in every aspect of legal theory and practice. In many respects, this interest in emotion is paralleled by developments in other fields, including philosophy, psychology, philosophy, sociology, and most recently, neuroscience. The emerging field of emotion theory lies at the intersection of these disciplines. Emotion theory explores questions about the role emotion plays in decision-making, in moral and ethical development, and in the creation and development of social and institutional structures. The implications of these questions for law are profound, and the legal academy has, albeit slowly, started to recognize emotion theory as a proper and even exciting area of scholarly inquiry.

An initial important issue is the question of what constitutes emotion. We will spend one class discussing this issue, through the lens of sociology, philosophy and psychology, but always with the consequences for the legal system as the focus of the inquiry.

We will then consider emotion in specific legal contexts. The syllabus highlights a number of ways in which emotion theory helps illuminate legal decision-making and legal institutions. The most obvious and explicit examples come from criminal law, and particularly, from the role of the jury in the criminal case. Criminal law, for example, explicitly recognizes heat of passion as a defense, though the issue of what constitutes passion, or what sorts of passion are appropriately mitigating, is generally discussed without benefit of any psychological knowledge of emotional states. Jurors in capital cases, to take another example, may be instructed to avoid sympathy or passion. Yet they are permitted to exercise mercy. These instructions raise issues, not only about what constitutes sympathy and how it differs from mercy, but about how juries make the deeply moral and emotionally charged decision to take or spare a life, and about how best to guide their exercise of discretion in this area. Criminal sentencing implicates issues of remorse (for example, the federal sentencing guidelines allow a downward departure for expressions of remorse); shame (for example, some judges explicitly give “shaming” penalties such as wearing a signboard) and empathy (for example, victim impact statements seek to induce empathy for victims, though I have argued that they also evoke rage and other emotions as well).

However, as the seminar will clarify, emotion pervades not just criminal but civil law, and not just the jury room but the judiciary, the legislature, the actions of attorneys, and even the structure of legal institutions themselves. The “invisible” emotions, those that are not explicitly recognized or labeled as emotional, are at least as important to study. Likewise, the emotions that drive and influence legal actors who are not usually labeled “emotional,” including judges and legislators, are essential to study as well. Indeed, as I will suggest, emotion plays an essential role in decision-making generally. The questions that need to be discussed involve how to tell which emotions belong in which legal contexts, and how to channel or even educate emotion (if it is educable) to improve the quality of justice.