



Interview

# Susan Bandes

LSA Annual Meeting, Denver, Colorado, USA

Thursday, June 6, 2024

**Aliki Semertzi (AS):**

*Hello, Susan, and thank you for accepting our invitation for this short interview. Could you tell us a bit about yourself and your research? How your edited book 'The Passions of Law' came about in 2000?<sup>1</sup> What it meant for you as a legal scholar and what was its impact, the reception it received in legal research more broadly at the time?*

**Susan Bandes (SB):**

Oh, I'd be happy to. I was writing about criminal procedure and federal courts– very standard mainstream legal topics. And I took a sabbatical right after I got tenure and I started reading a lot of feminist legal theory and critical race theory, opening up my mind to all this fascinating work, which at the time was relatively new, and that began to change my thinking.

And then, in 1991, a case was decided. Two cases were decided within a couple of years. The first one was the *DeShaney* case, which was a case about Joshua DeShaney, a young boy in Wisconsin who was abused by his father and the Wisconsin Social Services Department completely dropped the ball. They ignored countless calls about the danger he was in. They clearly violated state law. The question before the United States Supreme Court was whether there was a due process violation because the Wisconsin Department of Social Services had failed to protect Joshua. And we know that the courts don't like to establish affirmative duties. But the decision was fascinating because the majority opinion written by Justice Rehnquist began by acknowledging emotion. And it was startling because you don't see it very often. And the judges said, like other humans, we feel compassion in a case like this– and sympathy. But our job is to make sure that that sympathy doesn't affect our

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<sup>1</sup> Susan A Bandes (ed), *The Passions of Law* (New York University Press 2001).

decision-making. And then there were two dissents. One of them became quite famous. It was by Justice Blackmun. And it began with the words ‘Poor Joshua (!) exclamation point. Justice Blackmun got a lot of flack for using an exclamation point and expressing his emotions so vulnerably. But Justice Brennan wrote the other dissent and, basically said, actually compassion can and should play a role in the law. It can really guide us in the way we find our facts, and in the way we decide what the legal obligations are. And this set off a fascinating debate that some law professors got involved in; in which a number of people were just shocked that he would want to open the door to the emotion, and others were just thrilled to see it acknowledged. And I read that, and I thought, I don’t know what to think. I was still sort of drinking the Kool-Aid, and I wasn’t sure yet.

But then the following year, another decision came down in a case about victim impact statements in capital cases. And so if I’m talking to a non-U.S. audience, I would want to acknowledge that the United States is the only civilized country in the world that still has capital punishment. And in this case, the question was whether the families who lost somebody to murder should be allowed to get up in court at sentencing and talk about the unique characteristics of the person they lost and the effect it had on them. And the court said, yes, this testimony is information, and it should be admissible. And it was at that point that I had my mind melt down, and I said, well, I thought you just said just a few months ago that sympathy should play no role in the law?. Yet you’re letting these victims’ families get up and talk to the jurors about how the death affected them. And so what is the answer here? And I had this sort of very misguided notion that I would spend about an hour on Westlaw, the legal search engine, looking up, what’s the role of compassion in law? And then I would have my answer. And the tagline to that is, it’s now about 30 years later? I don’t even know. I’ve lost count. And I’m still fascinated by the issue. And I’m still struggling with it.

So, it was at that point that I wrote my first article about emotion. It was called ‘*Empathy, Narrative, and Victim Impact Statements*’.<sup>2</sup> And I was trying to sort out this puzzle. And one of the things I had to do in that article was, I was reading the scholarship that was out there. A lot of it was feminist scholarship. And there were these wonderful articles that were basically exhorting the legal system to encourage more compassion, more empathy,

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<sup>2</sup> Susan Bandes, ‘Empathy, Narrative, and Victim Impact Statements’ (1996) 63 The University of Chicago Law Review 361.

more caring. And so, I felt like I had to make a little, very, very friendly course correction. And it was at that point that I said, it's wonderful that we are talking about this, but I'm very uncomfortable. I don't think we should continue down the road of saying, let's bring in more of these soft emotions and leave out the hard ones. I really don't think that's the issue. I think the issue is to acknowledge that the emotion is already there, not that it needs to be brought in, and acknowledge that context matters greatly, and that sometimes these soft, cuddly-sounding emotions are not really going to advance the cause of justice. It really depends on what legal values we're trying to advance. In the article I gave the example of a case in Texas, in which a judge was so empathetic toward a young man who had severely beaten a young gay man, and said, as a father of a son, I would never want to punish my son for doing something like that. Any red-blooded American boy would want to beat up a homosexual. That's empathy, right? But the point is, you don't just want to encourage empathy and you don't, as we talked about just this morning, want to discourage all anger because anger and outrage and moral outrage are drivers of reform, legal reform. So it's contextual, right. And it's a debate both about what the legal aims of the law are, which is something we should talk about a lot more often than we do, and about getting the scientific and social scientific knowledge, as well as the philosophical grounding to understand how emotions work and whether they advance those goals. So that was my first article.

And you ask about the reaction to that article. I mean, some of it was amazing. The University of Chicago Law Review accepted it. I've been hearing all day, and I know in my career about people who have lots of trouble explaining to law reviews and other gatekeepers why emotions should matter. So, I was very, very lucky, and I think it was very fortunate that it got such a prestigious placement because people had to take it somewhat seriously. And from there, the NYU Press called me and asked me if I would write a book about law and emotion. So in that sense, I feel like I'm really quite blessed.

But the issue of how the legal academy has reacted to my talking about emotion, I could certainly write at least one book about those reactions. Instead, I'll just tell one anecdote that's one of my favorites. I was talking about law and emotion at a major research university. As I was talking about it, there was a gentleman, a legal scholar, who was obviously getting more and more upset. He was really turning red with frustration. And, afterward, he came up to me and he said, why do you want to put emotion in law? Which is a very common misconception. I said to him, I really don't want to put it there.

For example, I don't like victim impact statements and I didn't put those into the law. And I'd like to see them taken out. So it's not that I'm advocating for more, but I'm advocating for acknowledging and evaluating it. And he was not mollified. He continued to be angry. And finally, my host, his colleague, said to him, why are you so upset? What are you saying about this? And he said quite memorably to me: "well, you know, it's like in polite society, we all know that everybody is naked under their clothes; that doesn't mean we have to talk about it."

**AS:**

*That's certainly a great anecdote! So, now, if we jump to 2021 and the Research Handbook on Law and Emotion that you just edited,<sup>3</sup> how would you summarize what happened in the field on research on law and emotion in the course of these years?*

**SB:**

Yeah, so much has happened and there's so, so much left to do, right? I mean, one giant thing that happened was neuroscience. When the *Passions of Law* was written, that was just a blip on the screen. And it's important in its own right. It's extremely important. Though I think people do overestimate what neuroscience can currently reveal about what actually is happening internally in our brains. But just that one insight that there is no separate emotion center of the brain and that emotion is distributed throughout the brain, I think is so important.

Actually, it really is a sign of things I think we are going to have to figure out as we go forward. To what extent is emotion a valuable construct, and to what extent is it that valuable to us in our thinking? As I was saying earlier, in a conversation this morning, we have to deal with the category in part because other people use it against us, whoever "us" may be. Courts and others use it to exclude evidence, to denigrate scholarship, to denigrate witnesses, etc. It is a category that's deployed—often as a way to marginalize or exclude. So it's very important to call that out and to talk about it. But as we learn more and more about it, and the more convinced we become that emotion is really a set of processes about memory and salience, and motivation to act, and so many other things – I'm just very curious about how we can think about it in a way that is more grounded in current physiological and psychological knowledge.

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<sup>3</sup> Susan A Bandes and others (eds), *Research Handbook on Law and Emotion* (Edward Elgar Publishing 2021).

So that's one thing about the research handbook—it has a wonderful article on neuroscience. How neuroscientific findings shape our understanding of emotion and how our understandings of emotion shape our legal understandings. And I think it's extremely interdisciplinary. One criticism of my first book that Terry Maroney made in her otherwise very laudatory review of it was that it didn't really have much psychology in it. And that's a well taken criticism. I tried but failed to include some psychology. But this book certainly did not make that mistake. And partly we are just so fortunate now, because we have such an explosion of interest in so many fields— in psychology, anthropology, sociology, history, etc. etc. So, we really tried to make use of that, and I think we succeeded. And we're really proud of that.

But, the future. What the future holds – I think we just need more and more sites for this kind of interchange. It's very popular to claim one's work is interdisciplinary. But I think law and emotion is a field that is just inherently interdisciplinary. To understand it requires seeing so many different parts of the elephant, to borrow an old analogy. You just cannot get a sense of emotion without the help of a range of disciplines.

And relatedly, I'll just mention, one of my proudest moments in law and society actually was, I think it was three or four years ago, when I suggested to the Law and Society Association that we needed a keyword on emotion. There wasn't one. We had to list our work under other categories. And Tom Ginsburg, who luckily was a friend and a colleague, was on whatever committee it was that decided on keywords. And I needed to articulate to him why an emotion keyword would matter. And I said, a lot of people are doing this work and don't know they're doing this work. They don't really know that they're writing about emotion. And they don't know that other people are trying to solve the same puzzle. And the emotion keyword, I think, has really helped with that. You find out, oh, there actually are people doing this work and I can talk to them.

**AS:**

*That's great! Thank you very much for your time and your thorough responses.*

**SB:**

Oh, I feel like I must have talked too long because you only had two questions!

