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Law and compassion

Dermot Feenan*

Abstract

This paper provides the first overarching exploration and discussion of the relationship between law and compassion, based on a broad review of law and associated literature. The paper reviews the English-language literature worldwide, identifying and analysing key themes. It lays out a number of themes by which the relationship may be examined, including the problematic of defining compassion, addressing the concept of compassion, its components, to whom it is owed and under what conditions it is owed. The paper reviews how compassion is defined in formal law, including in case-law and legislation across a range of common-law and civil-law countries, and in international human rights and humanitarian law—revealing various judicial and legislative approaches to the place, meaning and application of compassion. The discussion of primary and secondary sources suggests a number of ways of thinking about the place or absence of compassion in law: how it helps theorise law, including its normative presuppositions and the conceptualisation of law. The paper concludes with consideration of possible pathways for future research on law and compassion.

I. Introduction

While compassion features in philosophy (Nussbaum, 1996a), ethics (Crisp, 2008), health care (de Zulueta, 2013b), sociology (Wuthnow, 1991), cultural studies (Berlant, 2004) and, increasingly, in self-care and psychologically based therapies (Gilbert, 2005), it appears rarely and sporadically in legal scholarship. There have been no published collections specifically on law and compassion, although a small edition of papers on compassion and judging was published in the US in 1990 (Cloud, 1990).[1]

Yet, compassion features across a wide range of laws worldwide. It appears most notably in immigration law, sentencing and prisoner release, and is often associated with mercy, clemency or leniency, but, as will be shown in this paper, it appears, perhaps more surprisingly, in a wider range of laws such as housing, employment and tort. Compassion's object – suffering – poses

* Associate Research Fellow, Institute of Advanced Legal Studies, London, UK. E-mail: Dermot.Feenan@sas.ac.uk. Thanks to Rebecca O'Rourke, the journal editors and anonymous reviewer; the co-contributors of papers to the special issue that this paper introduces; the American Bar Foundation, which provided a supportive environment to me as Visiting Scholar to conduct some research for the paper, May 2016; Belinda Crothers, Institute of Advanced Legal Studies, London, for cooperation in hosting the Symposium from which the papers emanate; participants in the Compassion Reading Group, who helped me cultivate some early thoughts; and Daniel Bedford for assistance in organising the Symposium, with regret that he was unable to co-edit the issue. Versions of this paper were presented at the Law and Society Association Annual Meeting, New Orleans, 2016, and the Socio-Legal Studies Association Conference, Lancaster, 2016; and I am grateful to all those there who offered comment.

1 The special issue on law and compassion that this paper introduces arises from the one-day 'Symposium on Law and Compassion', London, 1 July 2015, funded in part by the Socio-Legal Studies Association and hosted with the support of the Institute of Advanced Legal Studies. Two out of the seven papers draw from presentations at the Symposium (Bandes and Wilkinson). (Two other presentations were published separately: Eldergill, 2015; Butler-Cole, 2015.) The remaining papers (Del Mar, Herring, Biggs, Diamantides and the present paper) were written afresh for the issue. In sum, the papers represent the first published collection of scholarly work specifically on law and compassion.

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fundamental issues for law, including whether, and if so how, such an important feature of life is addressed legally. Such consideration implicates a broader range of traditional legal concerns about, for instance, harm, action, remedy and responsibility (Veitch, 2007) so that consideration of compassion can help also to theorise law, and analyse its animating concepts and normative presuppositions – such as individualism (Engel, 1984; Cotterrell, 1992).

Compassion is said to be one of the most politically charged emotions (Ure and Frost, 2014). It has featured in the writings of political and moral philosophers throughout history, such as Rousseau (1755), Smith (1759), Schopenhauer (1840), Nietzsche (1887) and Arendt (1963) – with implications for political (and legal) institutions. More recently, compassion has been rehabilitated by Nussbaum (2013) and Whitebrook (2002) as a political virtue. Yet, calls for compassion as a basis for political action may, it is countered, be 'at least as likely to foster despair and rage as it is to foster benevolence' (Marks, 2007, p. 739).

The sporadic but important engagement with compassion in legal scholarship, notwithstanding the importance invested in the concept in other disciplines and its presence and significance in law, warrants study. This paper, therefore, surveys the (English-language) legal literature (Section II), first addressing and discussing the challenges inherent in defining compassion, concluding with consideration of a number of prominent issues within the literature. The paper then turns to summarise key references to compassion in law worldwide (Section III), referring also to legal actors (Section IV) and judges (Section V), before identifying possible pathways for future research (Section VI).

II. Literature

2.1 Definitional challenges

This paper refrains from seeking to conclusively define compassion: as Crisp (2008) notes, compassion has a 'contingent evolutionary and cultural history' (p. 245). Instead, the paper sets out and discusses prominent components of compassion from across the literature. There are a number of key reasons why any attempt at conclusive definition of compassion is suspect. First, some of these components were known at different times by different or equivalent terms, such as 'pity' in Rousseau's *Discourse on Inequality* (1755), but they may also have had their own distinct emic meanings. Additionally, terminology often elides other cognate concepts, where, for instance, compassion is conflated with other concepts such as 'empathy' (e.g. Madeira, 2006; Karlan, 1995) or 'sympathy' (Feigenson, 1997), such that it may be impossible to fix on a pure and settled meaning. Moreover, there are instances where the recent literature does not mention compassion explicitly, but it is clear that the author means something that would on a number of such diverse accounts be regarded as implicating compassion (e.g. Schroeder, 2002).

On some accounts, compassion is seen as an 'impulse' (Acorn, 2004), yet this is disputed by others (Nussbaum, 2001). Often, compassion is treated as an emotion (Bandes, 1999; 2009) but, even here, approaches vary. Keating and Bridgeman (2012) treat it 'like fear and anger' (p. 712; see also Horder, 1992). Nussbaum (1996a) calls it the 'the basic social emotion', but one of the emotions that are 'not just mindless; they embody thoughts' and cannot be dismissed from judicial reasoning (1996b, p. 25). Nussbaum embraced Adam Smith's concept of sympathy in his *Theory of Moral Sentiments* to argue that such sympathetic emotion shows how emotion can enter into judicial thought and writing: emotion 'tethered to the evidence … carefully filtered for bias … informed by legal reasoning' (Nussbaum, 1996b, p. 29).

Conceptualising compassion as an emotion within the legal sphere carries risks, however. These are conceptual and political. Conceptually, emotion is notoriously vague and contested. Emotions tend to be perceived pejoratively in law, as illustrated in the designation of compassion (with

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other emotions) as 'ephemeral' (Law Commission, 2003) – that is, lacking permanence, solidity. Even though compassion is typically regarded as one of the 'positive' emotions, its emotional aspect can allow it to be grouped with the other, typically, devalued emotions – 'anger, jealousy, temper, exasperation, feeling depressed' (Law Commission, 2003).[2] Notwithstanding attempts to reconcile emotion and law (Abrams and Keren, 2010; Bandes and Blumenthal, 2012), emotion remains in the minds of many legal scholars and judges as irredeemably at odds with reason – as evidenced in Ronald Dworkin's statement that legal rights are a matter of principle and should not be affected by 'mere emotional reaction' (1977, p. 250). This idea that principle (associated with reason) is opposite to compassion (an emotion) is pervasive in adjudication.[3]

As for the political danger of treating compassion as an emotion, this risks disadvantaging women legal actors given the historical and still prevalent association between emotion, women and unfitness to perform key tasks in law: for example, rationality and impartiality. Take the example of women's exclusion from apex courts: one observer of the fact that only one of the twenty-eight judges on the Supreme Court of India is female states:

> '[t]he judiciary is male-dominated .... It is not because women are not capable of being judges. Women don't get elevated because it is considered by the men who make the decisions that they will be too emotional and they will be incapable of being impartial.'[4]

While an approach within the law and emotion scholarship to date has been to argue that emotions have a valid place in law, including judging, such views tend to be politically naive, and insufficiently nuanced to the tactical and strategic risks of utilising concepts that have been used against disadvantaged groups. True, concepts can be reappropriated but, where an alternative is to modify the abjected concept so that it is less likely to remain abjected, this can often be both conceptually and politically productive.

Del Mar (2017) defines compassion as 'cognitively-evaluative relational feeling'. He sees compassion as involving cognition because it involves an understanding of what the other person might be experiencing and the situation in which they are experiencing it. Evaluation is also a component in his definition of compassion, in so far as the observer both treats the other person as salient to, and a subject of concern for, the observer. These cognitive and evaluative elements move compassion away from its traditional locus in emotion, but 'feeling' draws compassion back into the affective domain. Del Mar is not alone in referring to 'feeling' as a component of compassion. Lazarus (1991) treats compassion as 'feeling personal distress at the suffering of another and wanting to ameliorate it' (p. 289). Other accounts of compassion view 'fellow-feeling' as a sufficient basis, but little attention has been given to what precisely this 'feeling' comprises and how, particularly, in the legal sphere, it might be evidenced.

On almost all accounts, compassion is concerned with suffering by any sentient being: human and/or animal. On some accounts, compassion requires action to alleviate suffering. Most accounts, however, settle on a desire, wish or intention to alleviate suffering (Blum, 1980). Del Mar (2017) makes it clear that no action is required. Many accounts treat compassion as a relation between an observer and an individual subject. Fewer accounts consider compassion as warranted socially, for the tribe, community or other social group, such as refugees – though on most accounts there seems no reason why compassion cannot also apply beyond the standard

2 Cited in *Marcus Jason Daniel v. State* [2012] UKPC 15.

3 Concurring opinion of Judge Pinto de Albuquerque in *X. v. Latvia*, 2013, Application no. 27853/09, contrasting 'valid legal principles' with 'an ephemeral and capricious act of "judicial compassion"' (p. 49).

4 Raies Ul Haq Ahmad Sikander, lawyer, quoted in Boland (2015).

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individual subject. Intriguingly, Del Mar (2017) advocates compassion for state institutions. But, while tribes, communities and other cognisable social groups can be injured – and, in that sense, experience a type of collective suffering – it is much harder to make this argument in relation to a state institution, where 'membership' of the institution is defined only by employment rather than affiliation, kinship or social bonding. There may be very many different personal needs, values and interests within an institution. Where Del Mar is correct is in recognising that institutions (and one might say the same about other organisations, such as companies) comprise people, and it is important to take cognisance of how legal decisions can affect livelihood, welfare, etc. However, this concern perhaps sits more appropriately in a broader welfarist approach or, say, a relational approach. A number of commentators agree, however, that compassion can assist law by illuminating suffering (Woodward, 2002; Avgoustinos, 2007; Bandes, 2017).

If differences about the subject of suffering are evident in the literature, the same applies to the nature of suffering (though the two may interrelate). Generally, suffering is couched in terms of physical pain, but it extends to psychological and emotional suffering. Yet suffering, like pain, as Scarry noted (1985), may be inexpressible: words run out, such that it may be communicated only in cries and moans, and, in some instances, it may be inflicted – as through torture – intentionally to destroy language. Suffering, and by extension compassion, can therefore pose irresolvable challenges for text-based law. Where recognised in law, the precise delineation of what suffering is recognised is clearly still to be fully developed. Burnton J. stated in *R. (on the application of A.) v. The Governor of Huntercombe Young Offenders' Institute* [2006] EWHC 2544: 'I do not think that compassion arises only in cases of death or illness. There are compassionate grounds whenever there is pain or suffering or distress or misfortune.'

But recognising, ignoring, inflicting, treating and ascribing suffering can also be a political act, as emphasised by Moon (2012). Moreover, some legal philosophers differentiate cognisable suffering that warrants compassion and that which does not. Nussbaum (1996b), for instance, drawing from Aristotle, insists that a person responsible for his or her own harm deserves blame or reproach, rather than compassion. On this account, it is necessary to believe that the person's suffering did not come upon her entirely through her own fault. This approach is contested by others (including Keating and Bridgeman, 2012; Del Mar, 2017). Such contestation reflects the various normative pre-suppositions underpinning compassion. Often, these are not made explicit. However, their articulation has significant implications for theorising the legal basis for compassion in law: some of which is captured in the following genealogical summary of the literature.

2.2 Scope of the literature

Much of the early literature on compassion and law emanated from feminist legal scholars and judges, largely in the US, who reacted during the period of second-wave feminism in the 1980s and 1990s against the prevailing gendered orthodoxies of Western law. Compassion had, according to this orthodoxy, been seen as an emotion – negatively associated with women, while contrasted with dispassion: positively associated with men. Feminist scholars approved compassion in jurisprudence (Colker, 1989) and as an attribute of the judge (Resnik, 1988). Indeed, a number of feminist judges then prominently advocated for compassion in judging (Schroeder, 1990; Kennard, 1997; L'Heureux Dubé, 1997). The further insistence in second-wave feminism that the personal is political sought in part to overcome the legal dichotomies such as public/private and objective/subjective that privileged men and disadvantaged women (Lutz, 2002), making it easier to argue for compassion – traditionally cabined as a private and personal sentiment – in law. Additionally, Carol Gilligan's *In a Different Voice* (1982), which argued for an ethic of care in place of the model of justice and rights developed in moral psychology by Kohlberg (which model many feminists saw as redolent of law's masculinist bias generally), was influential – though it is

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sometimes forgotten that Gilligan included compassion within her ethic of care. The relationality encapsulated in the ethic of care has informed subsequent proposals for incorporating compassion into law (Keating and Bridgeman, 2012). Herring (2017), for instance, argues that the law must seek to foster compassionate relational care. He sees a strong correlation between compassion and care, and, building on his earlier thesis that caring should not be seen as an unequal relationship of carer and cared, but rather a meeting of the needs and interests of each person, he approves Dewar and others who see compassion as not so much as doing *for* others but choosing to do *together with* them.

Herring introduces an important element into the discussion of compassion: to equalise the relationship between persons. Indeed, more work could be done on the relationship between compassion and other legally recognised concepts such as equality or respect for autonomy, or additional ethical concepts such as empowerment. Herring's articulation of the relational component of compassionate care appears to centre on both the status of the parties and the process of the relationship. He talks of the person expressing compassion as recognising the 'fellow humanity of the [other] individual' and that compassion and care should 'flow each way' (p. 161). Herring sets out a number of points as to why compassionate relational caring relationships must be taken seriously by the law. First, compassionate caring relationships are essential to human well-being. Second, emotions are ethically and practically significant. Here, Herring sees compassion as an emotion. He argues that, notwithstanding the reasons for the rarity of compassion in law, law can be used to encourage people to act in a way that will promote compassionate relational care. It can, he concludes, send messages that can influence people's attitudes by ensuring that court interventions make emotional sense as well as rational sense, and by rethinking the concepts of rights and best interests in a more relational way. He refers to two family law cases which, he states, show judges exercising compassionate care and seeking to encourage compassionate care.

Alongside the explicitly feminist approval of compassion, key early contributions were Zipursky's (1990) approval of the dissenting judgment of US Supreme Court associate justice Harry Blackmun in which he wrote in 1989 that 'compassion need not be exiled from the province of judging' (*DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct., p. 1012). Around the same time, Martha Nussbaum started the first of many contributions that she has made over the years advocating for compassion in law, first as a component of judging and 'an essential bridge to justice' (1996b) through to its place as a 'political emotion' suitable to shaping legal and political institutions (2013).

Much of the literature on compassion and law has emanated from the US, but distinct developments elsewhere have generated their own body of writing. Key among these are developments around assisted dying – which has referenced compassion, often positively, in parliamentary reports, papers and books across the world, from the UK (Biggs, 2011; Grubb, 2001; Keating and Bridgeman, 2012; Mullock, 2010), across Canada (Chan and Somerville, 2016) to Australia (Plattner, 1997), touching on developments in many jurisdictions in between (e.g. in France: Lewis, 2006, or the Netherlands: Ost and Mullock, 2011), but compassion increasingly is also adopted in the literature worldwide on immigration law, particularly on asylum (Pinson *et al.*, 2010). Moreover, compassion has been approved in the field of scholarship and practice known as therapeutic jurisprudence (Satin, 2008; King, 2003).

There exists also a small body of literature approving of compassion as an element of human rights. Its antecedents can be discerned in calls by Rousseau (1755) and Weil for equality as a basis of rights (see Teuber, 1986; Bell, 1998). Gearty (2006) argues in favour of drawing from compassion to help human rights survive what he sees as its crisis of authority. Compassion is pertinent, according to Gearty, because it evinces 'active concern for others' and helps 'frame and mobilise responses to suffering and atrocities' (2006, p. 43). A core task of the human-rights-oriented communications, he says, is giving voice to victims of cruelty and expression.

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'Compassion is the term upon which our modern human rights vocabulary can be most effectively built' (Gearty, 2006, p. 43), he concludes. One of the challenges facing the application of such 'concern' is how to do so for those we do not know and who are constantly positioned as the proverbial other (Muraskin, 2007). Herring (2017) argues that 'the concepts of rights [and best interests] ... may be useful for setting the boundaries for a space in which appropriate care and compassion can be exercised' (p. 158). This may seem odd. Rights have, historically, protected the individual from state interference.[5] They operate, as Herring says, 'to draw boundaries around ourselves and protect us from interference from others' (2017, p. 162). Traditional rights seem infertile ground for demanding compassion – concerned as it is with positive action to alleviate suffering. Herring asserts that, within an ethics of care, however, '[r]ights and interests are not designed to protect individuals per se, so much as upholding and maintaining networks of caring relationships' (Herring, 2017, p. 162). How precisely, and specifically in practice, can an ethics of care achieve this design or determine that a right is an appropriate vehicle to secure this outcome? Herring attempts the groundwork:

> 'Our starting point is therefore the necessity for care and the promoting of caring relationships. These generate responsibilities. Only then do rights come as tools to enable people to perform their responsibilities and enable relationships to be genuinely caring.' (Herring, 2017, p. 166)

Recognising the need to balance rights, he argues that a principled balancing of rights can be achieved by focusing on the values that underlie each right. Caring is a value that can be given greater weight in the balancing.

While much of the literature approves of compassion in law, a considerable literature opposes its role. Law and economics scholar Richard Epstein (1990) sees compassion as 'dangerous', equating it with coercion and making someone else bear the cost. Compassion would, he argues, allow 'rational, self-maximising recipients' to 'play the system for all it is worth' (Epstein, 1990, p. 27). Such an approach incorrectly assumes, however, that human behaviour inherently involves 'rational, self-maximising'. Extensive psychological research shows that human behaviour is much more complex. But, even if some people were 'rational, self-maximisers', it neither follows that law need be gulled by those who would seek to engage in exploitation for personal gain or that, even if this were attempted, an occasional exploitation should necessarily deny compassionate law for all. Equally critical are those, such as Markel (2004), who see compassion as a component of mercy, which has no place in the courthouse (cf. Ferguson, 2012; Staihar and Macedo, 2012; Murphy, 1988).

There are further critical perspectives on compassion. Acorn (2004) objects to what she sees as the 'compulsory compassion' of restorative justice. She views compassion as 'capricious', where '[t]he process of seeking justice becomes a potentially humiliating endeavour, wherein one is expected to parade and exploit the seriousness of her suffering' (p. 128). She adds that compassion can allow claims for substantive equality to be dismissed. A similar critique is made by Walklate (2012), who argues that the individualist orientation in compassion discussion plays into political discourses that focus on the individual, avoiding consideration of the social causes of, and consequent responses to, suffering. Harris (2011) suggests instead that compassion requires a 'transformation of social relations' (p. 330). Arendt (1963), by contrast, claimed, on the basis of the French Revolution, that compassion could never be a basis for political organisation. The inevitable consequence of making compassion (or pity) for the suffering of others the goal of revolution was the guillotine.

5 'The essential object of many provisions of the Convention [ECHR] is to protect the individual against arbitrary interference by public authorities'; *Özgür Gündem v. Turkey*, no. 23144/93, §§ 42–43, ECHR 2000-III.

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In addition to those who appear to be either largely or unequivocally opposed or supportive of compassion in law or specific laws are those who take an avowedly qualified approach, such as Bandes (2017), who observes that 'there are indeed reasons to be wary of compassion in the legal realm' (p. 185). Diamantides (2017) is also cautious. Building on his earlier work (Diamantides, 2003; 2007), he argues that the world needs less rather than more of the compassion that has emerged within the Western model of governance. Diamantides focuses on the Greek-Roman-Christian tradition. His study is, therefore, concerned with the longue durée, of epochal trends, rather than with l'histoire de siècle or current, fleeting concerns. He asserts that modernity is characterised by crisis management, and that there is a 'perennial anxiety' regarding the relationship between law and compassion. He states that law and politics are subsumed within 'oikonomia' (which he defines as 'administration/management'). He draws from Agamben's work to state that this model comprises an 'anomic economy' in which the world is cared for as if it were a 'household'. Within the Agamben model, 'beings are managed as things and some forms-of-life are abandoned' while others are 'anarchically promoted'. The relation between 'law and compassion' is typical of the binarism that is central to this Western tradition, and which requires to be managed by fantasised sovereign power (e.g. God, the People, Categorical Imperative). Diamantides states that he wishes to 'de-economise' the relation of law (and politics) to compassion. How? He relies on Levinas's ethical thesis that society is unthinkable without a pre-reflective sense of anarchic responsibility for ultimately meaningless suffering. This is, perhaps, not an easy argument to understand, and this may reflect the ambiguities and neologisms frequent in Levinas's writing. Levinas wrote famously of 'useless suffering'. By this, he meant that pure suffering is 'intrinsically senseless and condemned to itself with no way out', 'for nothing', 'meaningless': a suffering before reason, before the use [fullness] associated with reason; hence the sense of 'useless' suffering (Levinas, 2000/1991). According to Levinas, the other's 'useless suffering' requires succour. Diamantides is perhaps right to hedge on Levinas, when he says 'if Levinas is right', although Shepherd (2003) approves of Levinas's call for a 'radical responsibility' in place of what she deems the 'dim impulse of compassion that sometimes softens' the 'traditional egocentric foundations of American law' (p. 514).

A cautious approach to compassion and law is evident also in Wilkinson's (2017) work on the sociology of suffering, where he notes that the use of compassion can give rise to the 'most pronounced antinomies of our social being and existence' (p. 213). Wilkinson's caution operates largely at the level of policy, by issuing sobering reminders of how social forces and trends operate on consciousness. He observes that

> 'we are living in a period where we are made particularly subject to social and cultural conditions that dispose us to become morally preoccupied with the meaning of human suffering and with the moral adequacy of our response to what we know about the suffering of others.' (p. 213)

Indeed, Sontag observed that we may in fact be attracted to others' suffering (Sontag, 2003). Fassin (2011) asserts that, since the last decades of the twentieth century, humanitarian reason and governance have begun to supersede the language of rights as a response to suffering, with compassion mobilised at the expense of formal structures of rights and legal obligations. In a different vein, but equally sceptically, Saunders (2008) argues that particular deployment of human rights language in the procedure of South Africa's Truth and Human Rights Commission disappeared the suffering of victims of apartheid-era violence.

Much of the literature is normative, approving, rejecting or expressing ambivalence about compassion. Much less empirical, including anthropological, research has been conducted on compassion and law. Pirie's (2006) anthropological research in Amdo on the Tibetan Plateau records that, since the Chinese took control, two forms of law operate: Chinese and Tibetan, with

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compassion appearing not to inform resolution of conflict. Pirie observes that, while Tibetan pastoralists accept a role for state law in some matters, they insist that mediation by one of their own specialists, ultimately a Buddhist *lama*, is necessary before a conflict between them can be properly settled. Pirie notes, however:

> 'Buddhist norms of compassion and peace and the condemnation of anger, which are articulated by the *lamas* in other contexts, are not the basis of their authority over conflict or the solutions they promote. The *lamas* invariably suggest compromise based on the pastoralists' norms of retaliation, including the payment of blood money.' (p. 94)

Other studies provide little specific evidence for general claims about the influence of Buddhism on governance (see e.g. Ichikawa, 1979).

III. Law

3.1 Prominent themes

A range of legislation, case-law and other forms of law worldwide refer to compassion. Compassion appears more frequently than might initially be expected, informing judgments in ways that would offer rebuttal to the oft-repeated statement that compassion is inimical to justice. Across jurisdictions, compassion is typically addressed most prominently in relation to laws on assisted dying, prisoner release and leave to remain – as seen especially in this section with reference to the law in England and Wales. Here, it features across a range of legislation, judicial review and a myriad of fields – including in charity law,[6] employment law,[7] tax law,[8] housing law,[9] planning law[10] and criminal law[11] (particularly sentencing).[12] It is also pleaded and/or rejected in cases spanning a further range of fields, including accident compensation[13] and grant of anonymity.[14] In legislation, compassion is most frequently found in release from detention,[15] leave to remain under immigration law[16] and as a guiding principle of the NHS Constitution, which, following the Health and Social Care Act 2012, and section 1B of the National Health Service Act 2006, requires the Secretary of State to have regard to the Constitution.[17] There are also occasional

6 *McGovern & Ors v. A-G & Anor* [1982] Ch 321.

7 *St. Helens & Knowsley Hospitals NHS Trust v. McCully* 2001 WL 720342.

8 *Laidler v. Perry* [1966] AC 16.

9 *London Borough of Tower Hamlets v. Marcia Ellison* 1990 WL 10631287.

10 *Pembrokeshire Coast National Park Authority v. Wrench* (2001) 16 PAD 41.

11 *AG for Jersey v. Holley* [2005] UKPC 23.

12 *R. v. Pangetti* [2008] EWCA Crim 3120.

13 *Clover, Clayton & Co. Ltd. v. Hughes* [1910] AC 242; see speech of Lord Shaw.

14 *R. (application of Thayalanayagam) v. Secretary of State for the Home Department* [2006] EWHC 3339.

15 Crime (Sentences) Act 1997, section 30: the Secretary of State, may, following consultation with the parole board, at any time release a life prisoner on licence if satisfied that exceptional circumstances exist which justify the prisoner's release on compassionate grounds.

16 Immigration Rules, para. 317(i)(e): provides for a family reunion if a child over eighteen years of age is 'living alone outside the United Kingdom in the most exceptional compassionate circumstances'.

17 The NHS (Revision of NHS Constitution-Principles) Regulations 2013 third principle states that: 'Respect, dignity, compassion and care should be at the core of how patients and staff are treated not only because that is the right thing to do but because patient safety, experience and outcomes are all improved when staff are valued, empowered and supported.'

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references to compassion in English common law. For instance, it has been applied to reduce a homicide to manslaughter if done to aid another in danger. Lord Holt C.J. said in *R v. Mawgridge*:

> '[I]f a man perceives another by force to be injuriously treated, pressed, and restrained of his liberty … and others out of *compassion* shall come to his rescue, and kill any of those that shall so restrain him, that is manslaughter … for when the liberty of one subject is invaded, it affects all the rest: it is a provocation to all people, as being of ill example and pernicious consequence.'[18]

The concept continued to be used as the partial defence of provocation to a charge of murder in Canada,[19] although, in English Law, it has now been replaced by loss of control.

Compassion is not incorporated more widely within common law, certainly in tort. There is no general legal duty to alleviate the suffering of another:

> 'The dictates of charity and of *compassion* do not constitute a duty of care. The law casts no duty upon a man to go to the aid of another who is in peril or distress, not caused by him. The call of common humanity may lead him to the rescue … . A man who, while travelling along a highway, sees a fire starting on the adjacent land is not, as far as I am aware, under any common law duty to stop and try to put it out or to warn those whom it may harm. He may pass on, if not with a quiet conscience at least without a fear of legal consequence.'[20]

In many civil-law countries, such as France, the duty tends to be restricted to providing assistance to those in danger.

A range of legal guidelines in England and Wales refer specifically to compassion. Perhaps best known is the policy of the Director of Public Prosecutions (2014) on prosecution in cases of assisted suicide, which provides that a prosecution is less likely to be required if, inter alia, the suspect was wholly motivated by compassion. As with all such policies, these are subject to judicial review, but recent cases on the policy have rejected applications claiming that the law violates the claimant's rights to life or private life under the European Convention on Human Rights.[21] Moreover, the European Court of Human Rights has refused to find that a decision by a state not to legalise assisted dying amounts to violation of the right to be free from 'inhuman or degrading treatment' under Article 3 of the European Convention on Human Rights.[22]

Numerous attempts have been made in the UK to introduce legislation to legalise assisted dying, with compassion invoked by those opposing and supporting such legislation – even where the legislation itself makes no mention of compassion. A number of other jurisdictions incorporate compassion into their laws to reduce sentence in homicide. For instance, Article 114 of the Swiss

18 (1707) Kelyng 119, pp. 136–137, emphasis added.

19 In the Canadian case *R. v. Hayward* (1833), 6 Car. & P. 157, 172 E.R. 1188, at p. 1189, Tindal C.J. told the jury that the defence was derived from the law's 'compassion to human infirmity'; applied *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350.

20 *Hargrave v. Goldman* (1963) 110 C.L.R. 40, 66–67, per Windeyer J., emphasis added.

21 *R (Nicklinson) v. Ministry of Justice* [2014] UKSC 38; *R (Purdy) v. Director of Public Prosecutions* [2009] UKHL 45; *R (Pretty) v. Director of Public Prosecutions* [2001] UKHL 61. In 1980, the Criminal Law Revision Committee rejected a proposal for a new offence applying to a person who, from compassion, unlawfully killed another person permanently subject, for example, to great bodily pain and suffering and for which a two-year maximum sentence was applicable (*Offences against the Person*, Cmnd 7844). Parliament has repeatedly rejected bills seeking to allow assisted suicide.

22 *Pretty v. UK* (2002) 35 EHRR 1.

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Penal Code provides that a person who, for decent reasons, especially compassion, kills a person on the basis of his or her serious and insistent request will be sentenced to a term of imprisonment, with the minimum punishment being three days of imprisonment and the maximum being three years of imprisonment (see Schwarzenegger and Summers, 2005). Increasingly, litigation and legislation on physician-assisted dying relies upon the language of compassion – for instance, with Compassion & Choices, a US-based nonprofit organisation, both litigating key appellate cases and advocating for legislative change.

Though courts are often reluctant to justify rulings on the basis of compassion, compassion's object – suffering – becomes a vehicle by which compassion may be seen to be effectively exercised, even if not explicitly expressed, as a basis for judgment. One area in which this seems to be developing is in the case-law involving 'suffering' and the right to life, liberty and security of the person under section 7 of the Canadian Charter of Rights and Freedoms. In *Carter v. Canada*, the Supreme Court of Canada ruled that federal legislation that prohibited assisted suicide violated section 7, as follows: first, 'the prohibition on physician-assisted dying had the effect of forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable', thus violating their right to life.[23] The case was taken on behalf of both Kay Carter, a woman suffering from degenerative spinal stenosis, and Gloria Taylor, a woman suffering from amythrophic lateral sclerosis. The court found a violation of liberty and security thus:

> 'An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. The law allows people in this situation to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of life-sustaining medical equipment, but denies them the right to request a physician's assistance in dying. This interferes with their ability to make decisions concerning their bodily integrity and medical care and thus trenches on liberty. And, by leaving people like Ms. Taylor to endure intolerable suffering, it impinges on their security of the person.' (para. 66)

Here, both security and liberty are tied to the existing jurisprudence on autonomy, bodily integrity and dignity. While the Supreme Court of Canada nowhere refers to compassion in its judgment, the case was seen widely, and illustratively by the appellant's legal team, as a 'victory for the protection of human rights and compassion at the end of life'.[24]

Biggs (2017) develops an argument for compassion in health-care cases – particularly involving end-of-life decision-making for people who lack mental capacity, and with regard to assisted dying for those who are physically incapacitated – which draws both on respect for the autonomy and self-determination of the individual while also respecting the dignity of the person. She makes a remarkably simple yet profoundly important point: given that the best-interests test includes such factors as the person's beliefs, life experiences, values and any wishes expressed or alluded to, this must intuitively provoke a subject-oriented approach that pays heed not just to the person's perceived suffering, but also to his or her attitude to suffering. This is where compassion becomes relevant. Traditional approaches to best interests abjure consideration of suffering in terms of autonomy and yet, as Fisher and Appelbaum (2010) contend, patients at the end of life may refuse life-sustaining treatment out of a 'desire not to suffer' because 'continued suffering without any means to express oneself might be a fate worse than death' (p. 383).

23 2015 SCC 5; [2015] 1 S.C.R. 331, para. 57.

24 British Columbia Civil Liberties Association, 'The Death with Dignity Decision Explained'. Available at: ‹www.bccla.org/2015/02/the-death-with-dignity-decision-explained› (accessed 1 March 2017). For academic discussion of the case, see Chan and Somerville (2016).

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Beyond the area of assisted dying, the European Court of Human Rights has held the UK government in violation of Article 3 of the European Convention on Human Rights in refusing a request for compassionate leave by a prisoner in the terminal stages of AIDS to remain in the UK, where he was receiving treatment, not to be returned to St Kitts because there was a 'serious danger that the conditions of adversity which await him [would] further reduce his already limited life expectancy and subject him to acute mental and physical suffering'.[25] It added:

> '[T]he respondent State has assumed responsibility for treating the applicant's condition .... He has become reliant on the medical and palliative care which he is at present receiving and is no doubt psychologically prepared for death in an environment which is both familiar and compassionate. Although it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3, his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment.' (para. 53)

Compassion is not itself required under Article 3 (or its equivalent in Article 7 of the International Covenant on Civil and Political Rights (ICCPR)). It is noteworthy that Article 3 uses the word 'inhuman' rather than 'inhumane'. The latter means '[w]ithout compassion for misery or suffering'.[26] The latter is, as Waldron (2010) notes, a word of milder meaning than 'inhuman': a prohibition on 'inhumane conduct' is much more demanding, therefore, than a prohibition on 'inhuman conduct'. It may seem odd, therefore, that the principle of 'humane' treatment under international humanitarian law[27] does not require 'compassion', but this presumably reflects the negative-rights tradition in law. As Waldron (2010) states: 'Article 7 of the ICCPR and Article 3 of the ECHR both aimed at broadly dignitarian values: the purpose of these provisions was to uphold human dignity against various forms of egregious attack' (p. 274).

Also illustrative of UK government policy is *Compassionate Care in the NHS*, which provides that '[p]eople who use health care and care services have the right to be treated with respect, dignity and compassion by staff who have the skills and time to care for them'. In addition, recent public inquiries into ill-treatment of patients at hospitals have led to calls for an increased focus on a 'culture of compassion'.[28] It remains unclear, however, how such 'culture' would be achieved. Nor is it clear whether this should be the focus, rather than rectification of underlying neoliberal regulatory changes – with their instrumental approach to individuals and commodification of health care – which adversely affect the ability of staff to sustain compassion (de Zulueta, 2013a).

There is now perhaps enough recognition of the role of compassion in the best-interests test to inform an incipient jurisprudence. In addition to the comments of Eldergill (2015), Cobb J. ruled in *A NHS Foundation Trust v. Ms X* [2014] that it would be against the best interests of a mentally

25 *D. v. UK* (1997) 24 EHRR 423, para. 52, though subsequent UK courts (*GS (India) and Ors v. SSHD* [2015] EWCA Civ 40; *N. v. Secretary of State* [2005] 2 AC 296; [2005] UKHL 31) and the European Court of Human Rights (*N. v. UK* (2008) 47 EHRR 39) have insisted on a high threshold by recognising such breach only in exceptional circumstances.

26 Oxford Dictionaries online. Available at: ‹https://en.oxforddictionaries.com/definition/inhumane› (accessed 1 March 2017).

27 Article 27, Geneva Convention IV: 'Protected persons ... shall at all times be humanely treated'; Article 3, Geneva Convention III: 'In the case of armed conflict not of an international character .... Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely.'

28 E.g. Francis (2013).

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incapacitated women with anorexia to be treated, emphasising the distress that it would entail. He added:

> 'repeated force feeding over a long period of time against her clearly expressed wishes, most especially with the use of physical restraint, is likely in my judgment to amount to inhuman or degrading treatment, certainly it would amount to a severe interference with her private life and personal autonomy.' (para. 46)[29]

3.2 Miscellaneous instances

In addition to the prominent areas of law in which compassion typically is addressed, compassion features in various other miscellaneous, and perhaps lesser-known, laws worldwide. The recent introduction of laws in the US legalising use of marijuana on medical grounds has often been couched in terms of compassion, with Californians approving in 1996 Proposition 215, also known as the Compassionate Use Act of 1996 – one of the first state initiatives of its kind. Under the law, patients or their primary caregivers who possess or cultivate marijuana for medical treatment recommended by a physician are exempted from criminal prosecution under state law. A similar exemption exists under EU law, whereby medicinal products that would ordinarily only be available if authorised or subject to an approved clinical-trial protocol may be made available through a 'compassionate use programme'.[30]

Other legislation informed, in part, by compassion has included laws against cruelty towards animals (Kelch, 2013) –for instance, farmed animals, as in the successful campaign by Compassion in World Farming for a Veal Crate Ban in the UK, or in experimentation.[31] More significantly, the Constitution of India, provides that '[i]t shall be the duty of every citizen of India … to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures' (Article 45).

The Constitutional Court of South Africa, early in its existence, introduced into its interpretation of that country's new Constitution reference to compassion. In *S v. Makwanyane* (1995) (3) SA 391 (CC), Mokgoro J. stated that the concept of 'ubuntu' 'envelops the key values of group solidarity, *compassion*, respect, human dignity, conformity to basic norms and collective unity' (para. 308, emphasis added). He noted that ubuntu was not only specifically referred to in the epilogue of the Constitution, but was seen to be a 'basis upon which to develop a South African human rights jurisprudence' (para. 307). The concept was applied again in *Port Elizabeth Municipality v. Various Occupiers* (CCT 53/03) 2005 (1) SA 217, where Sachs J. said of The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), citing Mokgoro J. (emphasis added) in *Makwanyane*:

> 'PIE expressly requires the court to infuse elements of grace and *compassion* into the formal structures of the law. It is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order.'

29 *A NHS Foundation Trust v. Ms X* [2014] EWCOP 35.

30 Article 83 (1) of Regulation (EC) No 726/2004.

31 Animals (Scientific Procedures) Act 1986, section 5(5)(b).

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The concept has not since then been applied within the jurisprudence of the Constitutional Court. Notwithstanding, it is clear from the foregoing section that compassion features variously across a range of laws worldwide.

IV. Judges

4.1 General

It is perhaps symptomatic both of the slender approval of compassion in judging and the expectation that the recently-deceased should be heaped with praise, and not defamed, that approval of judicial compassion features most frequently in obituaries of judges (see e.g. Gilmore, 1987). There are numerous other approvals, however, of compassion in judging: by judges, lawyers and scholars (Zipursky, 1990; Nussbaum, 1996b; Avgoustinos, 2007; Feenan *et al.*, 2015). Sometimes, this approval applies clearly to compassion in substantive law, as will be seen below. More often, the approval applies to court management – which includes the law of procedure – but also covers how the judge behaves towards court staff and court users. Despite occasional approval of compassion in judging, there are those who oppose or have concerns about its application in adjudication, as shown in the subsequent part of this section. It is likely that, if judges refer to compassion in their judgments, it is in the context of asserting that, notwithstanding the circumstances of the case, compassion is incompatible with legal principle (as is evident in the opinion of Judge Pinto de Albuquerque, above, note 3).

4.2 Favouring compassion

Nonetheless, a number of judges have written *ex cathedra* in favour of compassion in judging (e.g. Kennard, 1997; Noonan, 1996). Mary Schroeder (1990), Judge of the US Court of Appeals for the Ninth Circuit, stated that 'an appellate judge can help build compassion into the black letter ... judges should look to the effect on human beings of any rule that they help to shape' (p. 46). Schroeder also argued in favour of compassion in terms of interpretation: 'statutes that do have a compassionate purpose should be interpreted accordingly' (p. 48). Former Madam Justice L'Heureux Dubé (1997) of the Supreme Court of Canada approved of compassionate justice. Joyce Kennard (1997), former Justice of the California Supreme Court, argued that compassion 'can create a space within which the voices of the persons affected by the decision can be heard, their humanity acknowledged, their sufferings understood and properly taken into account' (p. 11).

Judicial pronouncements in favour of compassion tend to the general rather than particular, perhaps unsurprisingly in the case of sitting judges, given their need to appear not to prejudge. English Judge Anselm Eldergill (2015) also sees compassion as an instrument of justice, and explains this with particular, illustrative, reference to mental health law. Eldergill sits in the Court of Protection. Under the Mental Capacity Act 2005, the Court of Protection has power to make declarations as to incapacity, and to take decisions on behalf of mentally incapacitated persons in their best interests in relation to deprivations of liberty, personal finance, social care and medical treatment. Eldergill draws from both legislation and case-law to construct his argument. In *Re MM (an adult)* (2007), it was held that best interests entailed a 'welfare appraisal in the widest sense, taking into account, where appropriate, a wide range of ethical, social, moral, emotional and welfare considerations' (per Munby J., para. 99). Eldergill treats compassion as enabling a deeper appreciation of the feelings and beliefs of the suffering individual. Feenan *et al.* (2015) endorse qualified recognition of compassion in the jurisprudence and jurisdiction of both the Court of Protection and High Court. More broadly, Herring (2017) sees compassion as consistent with an ethic of care and relationality in judging, with Del Mar (2017) arguing that compassion improves what he calls 'perspectival imagination', which is necessary to legal reasoning.

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In addition to the arguments in favour of compassion in substantive adjudication, there is evidence of support for compassion in managing the court: communicating with lawyers, parties to litigation and court staff. Schroeder has argued also in favour of compassion in the running of courts (2002). A survey by Roach Anleu and Mack (2014) in Australia found that 29 per cent of judges and 38 per cent of magistrates rated compassion as a quality or skill in the performance of their daily tasks. Similar findings have been replicated by Beier *et al.* (2014) in German courts. Yet, there are few judicial appointments processes that require compassion in the person specification of the holder of judicial office. The 'Criteria for Evaluating Candidates' produced by the Judicial Appointments Advisory Committee, Ontario, are among notable exceptions. And the Illinois Bench and Bar Council approved a report stating that an excellent judge should possess, inter alia, the attribute of 'compassion' as part of his/her 'temperament' (ISBA, 2002).

4.3 Opposing compassion

The opposition to compassion in judging is long-standing, extensive and varied in justification. Thomas Hobbes declared in *Leviathan* (1651/2016) that the ideal judge was one who was divested of 'all fear, anger, hatred, love, and compassion' (p. 195). Sir Matthew Hale eschewed compassion for the poor in one of his rules for judging. Rule 10 required that the administration of justice 'be not biased with compassion for the poor, or favour to the rich, in point of justice'.[32] As noted early in this paper, the principal reason advanced for opposing compassion in law generally is that it is associated with emotion—inimical to law's reason, objectivity and impartiality. Acorn (2004) describes compassion in judging as 'arbitrary and irrational' (p. 158). While these arguments are defeasible, more forceful are the arguments that compassion allows 'similarity bias', where compassion is felt only because of the similarity between the observer and sufferer (Feigenson, 1997). One of the effects of this potential partiality is the discounting, devaluing and ignoring of people who are in need because they are not seen as 'similar' to the observer (Shepherd, 2003, p. 514). These are forceful points, and resonate with insights elsewhere about the effects of aversive racism (Gaertner and Dovidio, 1986), including in decisions to help others who are deemed racially different (Saucier *et al.*, 2005). Rousseau (1755) acknowledged centuries ago that the rich could have no compassion for the poor, because the latter's lives were intentionally unknowable to them. In the post-Revolutionary era of equality, de Tocqueville noted, after observing the suffering inflicted by Americans on slaves, that 'the same man who is full of humanity towards his fellow-creatures when they are at the time his equals, becomes insensible to their afflictions as soon as that equality ceases' (Tocqueville, 1840, p. 156). But there is further reason to be cautious about unalloyed embrace of compassion within liberalism's avowal of equality. Law's treatment of those who are not recognised as having the basic component of humanity to warrant compassion has been the subject of much analysis, occasionally incorporated into legal analyses. Agamben's study of sovereign power, for instance, distinguishes political life (zoe) from 'bare life', which drew from the Roman concept of *homo sacer*—whose life could be taken by anybody (Agamben, 1995)—a fortiori in states of exception (Agamben, 2003).

Bandes (2017) is surely right, therefore, to conclude that whether compassion is a good thing in judging depends.

V. Lawyers and legal officials

Compared to the extent of scholarship on compassion and judging, there is relatively little engagement in the literature with compassion in legal practice, as this section shows. A number

32 'Things Necessary to Be Continually Had in Remembrance', (1660) in Burnett (1823), p. 23.

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of lawyers have studied and/or advocated compassion in legal practice. Cantrell (2010) conducted a survey of fifteen US attorneys who identified as Buddhist on the subject of compassion in their practice. She concluded that

> 'the Buddhist idea of compassion is multifaceted, not simplistic. Compassion does not mean a lawyer feels pity for her client and feels equal pity for the other side. It does not mean that a lawyer must be friends with everyone in a legal matter, including clients, opposing counsel, and third parties. It does mean that a lawyer intentionally triggers an empathetic survey of everyone involved in the legal matter and that a lawyer shares her thoughts from her empathetic survey with her client, and if appropriate, with others. It also means that a lawyer is prepared to meet negative actions and emotions with a response intended to de-escalate (and notice that de-escalate does not equate with capitulate).' (Cantrell, 2010, p. 74)

Gerdy (2013) argues that lawyers should develop compassion because their clients often value it. She adds that there may also be a number of practical professional advantages in so doing, including the client's enhanced ability to face a long, difficult legal battle. Moreover, a client who feels compassion from her lawyer may, she states, be more responsive to her lawyer's advice. While such advice is not reflected in professional codes, a 'compassionate checklist' by Keeva (2006) suggests that US attorneys should ask whether in considering litigation they are being sensitive to opportunities to minimise suffering for their clients. Similarly, in England, barrister Victoria Butler-Cole (2015) has said in relation to Court of Protection litigation that 'it is possible to consider ways of pursuing the litigation which may relieve or reduce ... suffering and distress' (para. 22). These references to compassion in legal practice are rare, and the reason for such dearth of reference deserves further study.

The need to minimise suffering is implicit in prosecution guidelines in England and Wales to take 'such steps as are possible' to reduce to a minimum the stress experienced by a child witness during a trial.[33] In addition to occasional approvals of compassion in professional legal practice, there is little engagement with compassion among other legal players, save Glass's (1997) recommendation to immigration officials and in acknowledgement of the challenge of exercising compassion where law is interpreted with reference to the broader political context – as occurred among immigration officials in England within the criminalising discourses circulating around refugees as terrorists and threats to security in the wake of 9/11 and 7/7 (Pinson *et al.*, 2010).

There appears to be little mention of compassion in academic and professional curricula.[34] This dearth of reference to compassion in legal education and training may reflect the misperception that compassion is a natural, impulsive emotional reaction and, perhaps, uneducable – but consideration of other professions and occupations shows that compassion is both recognised as a competency and can be developed through education and training, as is the case in medical and nursing programmes. In England and Wales, the report *Setting Standards* by the Legal Education and Training Review (2013), recommended a new range of professional competencies for legal education and training, drawing from the competencies in medicine identified by Epstein and Hundert (2002). However, while the latter included 'compassion', *Setting Standards* opts instead for 'empathy'. Again, in England and Wales, the Bar Standards Board's *Professional Statement for Barristers* (2015) requires

33 Crown Prosecution Service, Safeguarding Children as Victims and Witnesses. Available at: ‹www.cps.gov.uk/legal/v_to_z/safeguarding_children_as_victims_and_witnesses/#a01› (accessed 1 March 2017).

34 In January 2016, the Brandeis Law School in the US voted to 'champion the cause of compassion, serve as an exemplar for compassion, and promote a culture and climate of compassion', 'Brandeis School of Law Faculty Vote to Adopt Compassion Resolution'. Available at: ‹www.louisville.edu/law/news/brandeis-school-of-law-faculty-adopt-compassion-resolution› (accessed 1 March 2017).

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that one of the competencies should be that barristers 'will know how and where to demonstrate empathy, and act accordingly' (p. 9).

Perhaps the explanation for compassion's absence from professional codes and legal education and training better lies in insights from the sociology of the professions, which reveal law's historical elitism and protection of class privilege (Abel, 1988), traditional separation of reason and emotion (Abrams and Keren, 2010; Bandes and Blumenthal, 2012) and valorisation of competencies that are typically associated with the masculine rather than the feminine (Daicoff, 1997).

VI. Pathways for future research on law and compassion

This paper includes consideration of a range of contributions that engage with how compassion might be understood theoretically, in particular within relational or virtue-based approaches (e.g. by Herring and Del Mar, respectively); liberal traditions that embrace due process and the rule of law (illustrated by Bandes); and critical engagements, such as by Diamantides, that question reconciliation of compassion within Western law's *oikonomia*. Further questions arise from these contributions, which may warrant further consideration: how, if at all, can virtue-based theories on compassion gain leverage within the socio-historical conditions of law; what place and role, if any, does compassion play in non-Western legal traditions; and what further refinements would be necessary in order to overcome some of the theoretical objections to compassion in law? Compassion's concern with suffering implicates broader questions about law's attention to injury and harm. Indeed, such concern may help change the optics by which law is scrutinised, not simply through the narrow lens of traditional categories, but also through the prism of broader categories of injury, harm (Hillyard *et al.*, 2004), and suffering.

Wilkinson's work on the sociology of suffering is a reminder to infuse any such research with socio-legal awareness. Compassion, like suffering, is a concept not immune to social forces, phenomena and trends such as civilisation, individualism, humanitarianism and rationalisation that shape and influence law, and affect how law can be understood. Much philosophical engagement with law and compassion shows little, if any, understanding of the profound economic forces, social histories or political interests that effect economies of suffering and compassion. Further such research would benefit also from insights across disciplines, including the cultural history of emotions (Bourke, 2014), and the insights of media studies into the semiotics of suffering (Chouliaraki, 2006). There is room, too, for empirically based research on the understanding and application of compassion by legal officials that builds on some of the insights on compassion, asylum and education by Pinson *et al.* (2010) and by socio-legal researchers in other fields. Such research may help not only to better understand 'law in action', but to reach new understandings about what constitutes law, as evidenced for instance in the work of scholars on legal consciousness.

Further research is also suggested by the conceptually rich and doctrinally oriented scholarship that argues for a greater role for compassion in existing doctrine, such as in Biggs's argument in favour of compassion in assessing the best interests of the mentally incompetent person. The increasing recognition of the importance of addressing the beliefs, values and broader welfare not only of mentally incompetent persons, but also of those mentally competent persons seeking assisted dying makes this another area ripe for further research. The recognition of rights to life, liberty and security of the person seeking assisted dying in Canada, and linked justifications elsewhere on the bases of autonomy and bodily integrity, suggests consideration of new doctrinal development while also reinvigorating assessment of existing scholarship on rights and compassion, such as by Gearty (2006). Further research might also address the apparent absence of reference to

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compassion in scholarship on those countries with strong Buddhist influence, where compassion might be expected given its central role in Buddhism.

The varied and complex arguments about compassion in judging suggests additional further analysis, certainly involving more rigorous consideration of what is meant by legal reasoning and adjudication, and how precisely compassion may inform judging – whether in substantive adjudication or in managing a court. Consideration needs to be given, too, to the conduct of judicial inquiries (which tend to be neglected in research on judicial behaviour), especially those where the subject person or group experienced suffering, and a fortiori where they continue to experience suffering – for instance in inquiries into historical sexual abuse, where giving evidence without adequate support risks re-traumatising those who experienced abuse which a compassionate approach would likely preclude or diminish.[35]

VII. Conclusion

Across countries worldwide, there is no universal or even widespread legal duty to act with compassion or exemption from legal sanction where compassion is pleaded as an excuse. Moreover, there is no universal or widespread legal duty not to cause suffering or even to reduce suffering, which is compassion's object. Compassion is largely absent from law and, unsurprisingly, law generally not only does not seek to protect against suffering, but can inflict suffering. Moreover, many oppose or are at least cautious about the validity of compassion as a valid basis for adjudication, and few jurisdictions make compassion a requirement of judging. Yet, some laws in some jurisdictions around the world refer to compassion, either explicitly or implicitly. It features in laws on leave to remain and prisoner release. It is reflected in the exercise of mercy, and is increasingly incorporated explicitly or implicitly into legislation and case-law on assisted dying. Numerous scholars, policy-makers and legislators approve of compassion in law, whether as an overarching political principle, as a basis for adjudication, or as a competency for legal professionals. On some accounts, compassion is not necessarily incompatible with justice – if weighed correctly in the balance. While the risks of bias and partiality in exercise of compassion are significant, such risks are not necessarily fatal if known and corrected. Recent scholarship underlines that compassion is an important topic of legal study, helping reflection on theoretical and conceptual analysis of law, and its normative underpinnings and practices.

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35 See e.g. comments about the Historical Institutional Abuse Inquiry, Northern Ireland (O'Hara, 2013).

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