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The 'Unseen' Deserve Empathy, Too

Judges can do the most good by following the law.

By JOHN HASNAS

While announcing Sonia Sotomayor as his nominee to the Supreme Court, President Barack Obama praised her as a judge who combined a mastery of the law with "a common touch, a sense of compassion, and an understanding of how the world works and how ordinary people live." This is in keeping with his earlier statement that he wanted to appoint a justice who possessed the "quality of empathy, of understanding and identifying with people's hopes and struggles."

Without casting aspersions on Judge Sotomayor, we may ask whether these are really the characteristics we want in a judge.

Clearly, a good judge must have "an understanding of how the world works and how ordinary people live." Judicial decision-making involves the application of abstract rules to concrete facts; it is impossible to render a proper judicial decision without understanding its practical effect on both the litigants and the wider community.

But what about compassion and empathy? Compassion is defined as a feeling of deep sympathy for those stricken by misfortune, accompanied by a strong desire to alleviate the suffering; empathy is the ability to share in another's emotions, thoughts and feelings. Hence, a compassionate judge would tend to base his or her decisions on sympathy for the unfortunate; an empathetic judge on how the people directly affected by the decision would think and feel. What could be wrong with that?

Frederic Bastiat answered that question in his famous 1850 essay, "What is Seen and What is Not Seen." There the economist and member of the French parliament pointed out that law "produces not only one effect, but a series of effects. Of these effects, the first alone is immediate; it appears simultaneously with its cause; it is seen. The other effects emerge only subsequently; they are not seen; we are fortunate if we foresee them." Bastiat further noted that "[t]here is only one difference between a bad economist and a good one: The bad economist confines himself to the visible effect; the good economist takes into account both the effect that can be seen and those effects that must be foreseen."

This observation is just as true for judges as it is for economists. As important as compassion and empathy are, one can have these feelings only for people that exist and that one knows about -- that is, for those who are "seen."

One can have compassion for workers who lose their jobs when a plant closes. They can be seen. One cannot have compassion for unknown persons in other industries who do not receive job offers when a compassionate government subsidizes an unprofitable plant. The potential employees not hired are unseen.

One can empathize with innocent children born with birth defects. Such children and the adversity they face can be seen. One cannot empathize with as-yet-unborn children in rural communities who may not have access to pediatricians if a judicial decision based on compassion raises the cost of medical malpractice insurance. These children are unseen.

One can feel for unfortunate homeowners about to lose their homes through foreclosure. One cannot feel for unknown

individuals who may not be able to afford a home in the future if the compassionate and empathetic protection of current homeowners increases the cost of a mortgage.

In general, one can feel compassion for and empathize with individual plaintiffs in a lawsuit who are facing hardship. They are visible. One cannot feel compassion for or empathize with impersonal corporate defendants, who, should they incur liability, will pass the costs on to consumers, reduce their output, or cut employment. Those who must pay more for products, or are unable to obtain needed goods or services, or cannot find a job are invisible.

The law consists of abstract rules because we know that, as human beings, judges are unable to foresee all of the long-term consequences of their decisions and may be unduly influenced by the immediate, visible effects of these decisions. The rules of law are designed in part to strike the proper balance between the interests of those who are seen and those who are not seen. The purpose of the rules is to enable judges to resist the emotionally engaging temptation to relieve the plight of those they can see and empathize with, even when doing so would be unfair to those they cannot see.

Calling on judges to be compassionate or empathetic is in effect to ask them to undo this balance and favor the seen over the unseen. Paraphrasing Bastiat, if the difference between the bad judge and the good judge is that the bad judge focuses on the visible effects of his or her decisions while the good judge takes into account both the effects that can be seen and those that are unseen, then the compassionate, empathetic judge is very likely to be a bad judge. For this reason, let us hope that Judge Sotomayor proves to be a disappointment to her sponsor.

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