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# Compassion and Compulsion

Richard A. Epstein\*

The subject of this panel is compassion. It seems to me that you cannot talk about compassion unless you pair it with another element that is every bit as indispensable to the judicial process: that is compulsion, the opposite side of the coin.

I think the way in which to frame the discussion is to ask exactly how this mix of compassion and compulsion works. In order to do this, it's very useful to step back a moment from what judges do in their professional lives to figure out how compassion works in the ordinary lives of most of us. Now, if this were a law and economics seminar, I would start with utility-maximizing individuals who are risk-averse under conditions of uncertainty and then proceed to explain how they behave in order to maximize consumer surplus. And that's actually not a bad model to describe how most people behave most of the time.

But, on the other hand, that model misses a very important element of ordinary human life, where large numbers of people are rational in acquiring wealth inside the marketplace, only to then turn around and act, not irrationally, not non-rationally, but certainly benevolently or charitably in giving their money away. So that if you think back to all the great robber barons of the nineteenth century, most of them set up universities or museums: the Field Museum of Natural History; the Rockefeller Institute; even Vassar, Smith, and Barnard were all magnates of one sort or another. Their major task in life was to find out how to give large sums of money away—intelligently.

And I don't see anything wrong with that. I think the simplest explanation for why this pattern is fine is that the compassion that is exhibited is compassion paid for out of resources owned and otherwise at the complete disposal of the individual who makes the gift. With voluntary transfers, the element of compulsion drops out of the picture, so you have a pure system of compassion. And it seems to work pretty well.

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Judges, however, are never in the position of deciding to dedicate their own resources to the benefit of other people. Judges are hired for the most part to resolve disputes. They are required to exert compulsion against one party or the other in litigation. So to the extent that a plaintiff comes in and Judge Schroeder or Judge Noonan says "demurrer sustained," compulsion, the force of the state, will be brought to bear against the plaintiff to make sure that he doesn't recover any money from this particular defendant by self-help. On the other hand, if the demurrer is overruled and the facts pleaded were proved, compulsion will run exactly in the opposite direction. A plaintiff will be able to exert the force of the state to collect money from the defendant.

Now under these circumstances, it's very hard to see how compassion can be an appropriate mode of analysis if the precondition for compassion—the giving of your own to somebody else out of your own free will—is necessarily absent. You face the situation in which you are necessarily compelling A to do something for the benefit of B, and you are doing so by virtue of the monopoly of power that the state conferred on you as a necessary condition for social order. So it seems to me that once you start to examine the judicial role, the willingness to show compassion is going to be extraordinarily dangerous and extraordinarily difficult.

But suppose somebody says, "Look, you don't have to worry about the structural features, what you have to do is to spend more time trying to figure out the merits of the individual case. Of course, we recognize that compulsion is the *raison d'être* of the judge, but the rules that he applies are not given as facts of nature; they don't come as self-evident clues from far and distant places; what we want to do is to make sure that when we generate the rules governing coercion, we take compassion into account."

So what my critic would say is, "Yes Epstein, you are right. It's quite clear that judges have to use compulsion, but choice of the rules that they are going to enforce is itself something which may well be influenced by compassion." Again, I think that's an alluring argument, but on balance, I think that it's wrong. Let me give you a comparison to a little bit to moral philosophy. There is in moral philosophy a very tricky class of obligations, known as "imperfect" obligations. These are obligations that, on the one hand, require certain individuals to do certain things; but, on the other, they give no particular enforceable right to any other individual to compel the performance of that particular act. Standard theory usually has obligations of benevolence falling into the class of imperfect obligations. I may well, as a citizen, as a Jew, as an American, as an Illinoisan, have various sorts of obligations

to give to certain other people. But there is no determinate party who, as a plaintiff, could turn around and sue me. Rather, the compulsion, such as there is, is compulsion of a more social sort; if I don't do these things, others who know my financial situation and my ability to help will look upon me less favorably than if I had discharged this social obligation.

I think that no one ought to be cynical about these imperfect obligations. There is a huge industry in the world of charitable giving that plays upon these powerful sentiments, which enables churches, hospitals, and universities to raise billions of dollars annually. (It is something of a mystery why compassion or charity should be directed towards law professors.)

Now this attitude toward benevolence does not translate into the legal system. If you, as a judge said, "Look, now that I have this kind of a difficult situation, I want compassion to tell me what the obligations are going to be," then you are going to give to some individuals the power to compel naked transfers from other persons because you think that they need the money. As you start down this road, you may think that you are compassionate as a judge in articulating legal rules, but you will systematically ignore the other part of the problem, which is how these rational, self-maximizing recipients will play the system for all that it is worth.

The difficulty, therefore, is that you create a fundamental imbalance in the operation of the system. Those judges charged with determining the scope of these obligations are going to be precisely those people who do *not* have to foot the bill. This is the most dangerous kind of political situation that you could create because of the fatal mismatch between cost and benefit.

To give the benefit to A and impose the cost upon B creates a constant political tension. The person charged with the obligation will be in the position of constantly resisting it, because his benevolence and interests run in different directions. The person who receives the right will dissipate huge portions of the political gain in self-interested behavior designed to secure the transfer. It is therefore risky business to make compassion an element in construing statutes. Far from creating stable social situations associated with imperfect obligations of benevolence, you move to the opposite extreme: you create a political dynamic where the level of self-interested conduct is apt to increase to take advantage of the opportunities for uncompensated transfers that have been introduced into the judicial system.

Now, the second question is, what happens if you, as judge, are faced with statutes that in fact seem to require uncompensated transfers from one group of individuals to another, or otherwise limit freedom

of contract. The American statute book is absolutely filled with obligations of this kind. What is the duty of a judge with respect to these statutes? That is, if the so-called "compassion judgment" has been made by the legislature, how should the judge respond? Here it seems to me that we have to distinguish very sharply between two judicial roles: The first asks the judge to engage in statutory construction; the second asks the judge to bring constitutional oversight to legislative behavior.

The two questions get different answers. As a matter of statutory construction, the right method is as follows: the judges ought, as best they can, to figure out the intention, design, and purpose of the legislature. They gather that information from the context of the statute or from its written language. If "X" is the way the statute reads, that's the way it ought to be interpreted.

As a judge I suspect I would be enormously hostile to 98% of the stuff that is churned out by Congress or a state legislature in any given year. But, having taken the oath of office and bowing to the rule of law, my job is to make sure that Congress directs us straight to hell by the fastest and most convenient way, if that's what its legislation ordains.

So if one is faced with a question about the proper construction of a rent control law, one might think that a particularly odious statute, as I do, but as a judge, I would make sure that it covers every single unit in New York City if that's how the state legislature or the city council drafted the statute. So at that point, it's not my role to be compassionate. It's simply to translate whatever legislatures have done into action.

But then my approach is far different when there is a constitutional issue. Now here I think you can all relax about my views, for it's quite clear nothing I could say would ever get past a Senate confirmation hearing. But I will say it anyway.

Within the modern framework on redistribution, there are two cuts that you could take. One is a very hard-line cut, which on balance I accept, but which is largely unsalable. The second cut, which is also political, is far more practical. Let me explain to you the difference between the two positions, and why one is a politically viable position while the other is not.

The hard-line position says that, given the dynamic that I have talked about—that efforts to create public compassion always result in self-interested behavior being magnified—one ought to keep the state out of the entire business of redistribution. There are a whole variety of clauses, most notably the takings clause, that are perfectly tailored for

that particular purpose. Today the legal authority against this view is so absolutely uniform that is scarcely within the realm of any judge, or justice, to overturn that social consensus by unilateral act.

But the second line seems to me to be much closer to the point. The legislature could be told: "It's okay for you be compassionate, but if you are going to be compassionate, you had better be compassionate out of general revenues." Let me give you an illustration with the rent control case as to what I mean.

There are three parties to a rent control situation. One is the landlord, one is the tenant, and the third is the state legislature or the city council that moderates the relationship between landlord and tenant. The legislature can make the following kind of judgment: it can identify a certain class of individuals who are entitled to receive premises at below market rent. If a unit would ordinarily rent for \$200, and the legislature thinks some tenant ought to get it for \$150, there's a \$50 per month difference, which a public subsidy can make up.

Once the subsidy is paid, you can be as compassionate to the poor as you choose. But who's going to pay the bill? The modern position is, well, the legislature does not have to be compassionate with public funds: it simply has to tell a certain group of landlords, many of whom are from out-of-town, to fund the full liability. I don't regard that as compassion: compassion presupposes you pay with your own resources, not that you make somebody else pay with his. So the proper constitutional response to all approaches of this sort is to say to the legislature: "You want that subsidy, but you can't do it off-budget." You must pass an appropriations bill that takes \$50 per month, per unit, and pays it to the landlord. In effect, the legislature rents the units at market price, and then relets them at below market prices to the favored class.

In principle you can now have all the redistribution you want. The issue is, how much will you have? The answer is, you'll have less. And the reason that you will have less is that the people who pass modern rent control statutes aren't compassionate. They are playing interest group politics. Once you make sure that their compassion has to be bought with their own dollars, you induce a state of affairs that has a clear (if imperfect) resemblance to private charity: the group who gives the money out of benevolence takes the financial hit itself.

So it is a perfectly responsible constitutional position to say, you may have all the redistribution that you want, you may have the world's largest welfare state, but you must fund it out of general revenues. In practice you will have a diminished welfare state. I have no question that, if put to a popular vote, the amount of coerced transfers in the

present political climate would be still far greater than zero. But it will be less than you observe today. By more closely aligning costs and benefits, you will have the right kind of compassion—compassion borne by individuals who think that, when others are in need, they should be helped, and who are willing themselves to foot the bill themselves.

So as a judge I think the appropriate response to all transfer programs is this: you are allowed to do them, subject to one formal constraint that is easily monitored and easily policed. So in my first read I construe statutes as clearly and honestly as possible. But I have an ulterior motive. Once it's clear exactly what these statutes prescribe, then in my second role, I strike them down as clearly unconstitutional. And that's probably the way it ought to be.