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The compassionate decision-maker

Abstract

At times we respond to the predicament of another person with compassion. We come to an understanding of their difficulties and feel for them and suffer with them. Feelings of compassion call for an 'imaginative dwelling' on the particular circumstances of another. We will not have this experience or it will be misdirected if we do not treat the other person as an identifiable individual; someone with a particular history; someone with particular needs and desires. Compassion, in short, calls for particularity. The administration of the law, in contrast, calls for abstraction, it encourages an approach which treats people in general terms. Law's emphasis is on generality and the sameness of people; for justice demands that rights and obligations be applied equally, often irrespective of particular circumstances. That judges settle disputes according to law (and not moral principles or feelings) and that bureaucrats administer without affection or illwill are regulative ideals of our legal and administrative structures.

The Compassionate Decision-Maker

Arthur Glass

Of these states the poet is the equable man...
He bestows on every object its fit proportion, neither more or
less...
He judges not as the judge judges, but as the sun falling around a
helpless thing...
He sees eternity in men and women, he does not see men and
women as dreams or dots.

Walt Whitman, from *By Blue Ontario's Shore*.¹

At times we respond to the predicament of another person with compassion. We come to an understanding of their difficulties and feel for them and suffer with them. Feelings of compassion call for an 'imaginative dwelling' on the particular circumstances of another.² We will not have this experience or it will be misdirected if we do not treat the other person as an identifiable individual; someone with a particular history; someone with particular needs and desires. Compassion, in short, calls for particularity.

The administration of the law, in contrast, calls for abstraction, it encourages an approach which treats people in general terms. Law's emphasis is on generality and the sameness of people; for justice demands that rights and obligations be applied equally, often irrespective of particular circumstances. That judges settle disputes according to law (and not moral principles or feelings) and that bureaucrats administer without affection or ill-will are regulative ideals of our legal and administrative structures.

Compassion is concerned with a person's particularity while law conceives of its subjects in universal terms. To this observation could be added the remark that compassion is something we would expect to experience in our personal dealings while law belongs to the public sphere. Or again, that

compassion is something we feel, something which involves the emotions, while the application of the law is usually thought of as an intellectual affair. Without elaborating these ideas, there would appear to be at the least a degree of tension between experiencing compassion for another and decision-making by way of law. What then are the prospects for compassion playing some role in the world of law? To put it more crisply, how can compassion be understood in legal terms? These are hardly new questions. For example:

i. It was the pessimistic conclusion of Max Weber's influential writings on modernity that compassion and law have come to belong to different cultural spheres. In modern times the sphere of law, he claimed, is so dominated by types of thinking which are irreconcilable with the values of compassion that these feelings can exist, if at all, only in the realm of the personal. Our structures of law have come to be inhabited solely by 'specialists without spirit, sensualists without heart'.

ii. Kant's practical philosophy is based on the rational will; a will motivated by duty not by the inclinations. As has been frequently pointed out, the primacy given to practical reasoning seems to allow no place for feelings in legal or moral deliberation;³ the emotions being too partial and inconstant to provide a reliable ground for proper action.

iii. Carol Gilligan's work on the ethics of care has had a large influence upon legal theory, as upon other areas of study. It is not an uncommon experience to read a law journal article which proposes that we re-understand some area of legal life around the notion of care or that we inject more love or empathy into legal relations.

In this paper I do not respond directly to Weber's wintry assessment. But the example I make use of could be seen as running counter to his predictions.⁴ There is much more to Kant's practical philosophy than I have suggested. There is always much more to Kant and I summon him up towards the end of the paper.

As for the more recent calls for a place for the emotions in legal life or, more particularly, for an infusion of care or compassion into decision-making⁵; these claims would appear at times to miss the mark. For, with my topic in mind, who would say that a judge or a bureaucrat should not be compassionate? Perhaps someone who wanted to make analytic points about the appropriate framework for understanding law or about the meaning of the principle of justice. But these conceptual quibbles aside, who of

interest would recommend that legal officials be without pity? Isn't the problem, rather, that granted that a decision-maker should be compassionate,⁶ how should this official respond in the circumstances of each case or, from a different perspective, how do the particular legal structures encourage or inhibit this response?

To make this point more generally, one would be surprised to learn of a culture which did not treat compassion as one of its more important moral norms. The question then is not the presence or absence of the demand that people should show compassion towards each other. What is interesting rather is the differences in meaning of this demand both between moralities of different times and within moralities of the same period. For example, Seneca praised the generous spirit of the slave-owner who was not cruel to his slaves. We take the absence of cruelty in this relationship for granted; not as a display of compassion. Or, to come closer to our own times, it would not be unusual for the victims of a natural disaster to be given shelter for the night by their fellow citizens. Yet in everyday circumstances one would have to be a saint or a bit mad to take in homeless people.⁷

I take from the above that the question to be asked is not should legal officials be compassionate, for of course they should. But, rather, what does this demand amount to in the circumstances? And, more crucially, how can a compassionate decision be achieved within a legal order?

I

To assist my argument I would like to consider an example drawn from immigration law. This is an area of legal life in which concepts based on compassion have been developed within the law. Here the decision to grant or refuse a right has turned at times on tests of extreme hardship or prejudice; tests which appear to import into law some special concern for the plight of others.⁸ Australian immigration law is especially interesting in this regard. The notion of 'compassionate grounds' has been an important part of immigration law here since 1981. These provisions are thicket-like in their complexity and their reception by the Courts is complicated. But I need only consider one strand of this history.⁹

In December 1990 the Australian Migration Regulations were changed and persons who were longstanding illegal entrants were given a limited form of amnesty.¹⁰ They could make regular their stay if they could show that

between a stipulated date and the present they were the 'spouse', 'dependent child', 'aged parent', etc.¹¹ of an Australian citizen (or permanent resident). The regulation went on to provide in reg 131A(1)(d)(v) that an illegal entrant was entitled to an entry permit if:

there is any other compassionate ground for the grant of an entry permit, to the effect that refusal to grant the entry permit would cause extreme hardship or irreparable prejudice to an Australian citizen or Australian permanent resident (emphasis added).

The application of reg 131A(1)(d)(v) has involved three separate bodies. The Department of Immigration and Ethnic Affairs has processed some 7,600 applications under this regulation and as far as I can tell the courts have dealt with appeals from these applications on approximately 32 occasions. I shall consider the application of this regulation from the perspective of the Immigration Review Tribunal, an administrative body which stands between the Department and the Courts. Since 1991 this Tribunal has heard some 1200 appeals against Departmental decisions based on reg 131A(1)(d)(v).

The Tribunal can only grant an entry permit under 131A(1)(d)(v) to a person who comes within the stipulated criteria. To be successful the applicant must establish a 'compassionate ground' on the basis of a refusal causing 'extreme hardship' or 'irreparable prejudice' to an Australian citizen (or permanent resident). Clearly, to apply this regulation the Tribunal must have reached an understanding of 'compassion' over the years which has allowed it to make distinctions which it can justify between deserving and non-deserving applicants. How has it been able to do this? How has it fashioned a test of compassion sufficiently objective for law's purposes? The answer in short is that Tribunal members do not work with only the facts of the case and their personal feelings. A judgment about compassion, like all judgments is not simply a private affair. It is made by a member of a specific community in a particular social context. In this case the institutional context in which the Tribunal operates makes available to the decision-maker material both to come to an initial assessment of whether a compassionate ground exists and to question this assessment. A number of sources of these criteria can be readily identified.

First, there is the source of linguistic meanings. Members may consult dictionaries or other works and ponder the meaning of compassion and its difference if any from, say, pity or sympathy and they may reflect on the meaning of the terms 'extreme hardship' or 'irreparable prejudice'.

Second, as the notions used in reg 131A(1)(d)(v) can be assumed to have some point or purpose, the meaning of these words can be considered in the light of these purposes. Just what are the purposes at work here will, of course, often be a matter of debate. For example, it was repeatedly said that, as the *Migration Act* and Regulations were beneficial legislation, reg 131A(1)(d)(v) should be construed in ways that furthered the interests of applicants and their Australian sponsors. But it is not hard to argue that Migration law serves other interests as well.¹²

Third, as is not uncommon, the Minister issued directions as to how this regulation should be applied by other officials. This was done in a way which was binding on the Tribunal, insofar as these directives were considered to be consistent with the *Migration Act*. These Ministerial guidelines offered specific advice for testing particular claims and in this way operated to channel the Tribunal's discretion.

Fourth, the Tribunal is subject to judicial review by the Courts and a body of case law soon developed concerning the concepts used in reg 131A. Most significant here were two ideas. First, that 'extreme hardship' and 'irreparable prejudice' were separate notions and that while hardship was quantified - it had to be extreme - prejudice was not. It was enough, in other words, if the prejudice evoked compassion (as well as being irreparable). Second, because reg 131A(1)(d)(v) spoke of 'any other compassionate ground' it was helpful to ask whether the relationship established in any particular case was analogous to one of the other relationships specified earlier in the regulation (ie the relationship of spouse, or dependent child, etc.).

Now speculation about the meaning of words or the purpose behind these words or a consideration of policy directives or the decisions of Courts are all orthodox legal techniques. And what is involved in these activities calls for no further explanation, even if the detail in this particular example is unfamiliar. Instead I will comment upon a fifth source of criteria, namely, the Tribunal's own records. For a considerable body of decisions has been generated over the years as the Tribunal has justified its application of reg 131A(1)(d)(v) in case after case.

II

Even a cursory look at this material shows that while each case has its own unique facts, a number of typical problems recur. For example, many ille-

gal entrants base their claim to compassionate treatment upon the medical assistance, psychological support, child-care or financial assistance which they give to an Australian citizen. Or they point to the emotional hardship which would be suffered by an Australian citizen if he or she - their lover, family member or close friend - was required to leave Australia; emotional hardship possibly compounded by the Australian citizen's anxiety for the illegal entrant's welfare 'back home'. Parents who are 'illegals' argue that their Australian citizen child would suffer extreme hardship if they were required to leave Australia with them. Employers submit that they will suffer financial loss or that positions will be shed if a key employee is forced to depart. Members of a religious community suggest that they will experience spiritual loss if they are deprived of the services of a particular person; and so on.

A Tribunal member familiar with these and other typical examples has a sense of what has been accepted in the past and what has been rejected; and more importantly, how other people have assessed and weighed different parts of these arguments. They know, for instance, that far less weight has been given to the argument that the illegal entrant provides child care or financial assistance than the claim that they provide nursing care or other forms of medical support. They know, again, that a distinction has been made at times between the psychological distress caused by separation from close friends and the psychological distress which is the result of anxiety for the safety of those persons, if they had to return to their country of origin.

The first point I make about these received stories is that they provide some content and direction to the Tribunal's thinking. Without these stock examples and the distinctions which they generate Tribunal members could not properly grasp the salient features of the cases before them. It is through reading these examples that members educate themselves about what they should treat as relevant, about what is legally significant in the instant case, if the compassionate ground is to be made out. Exemplary stories, in other words, help to constitute the meaning of compassion in this context.

III

The second point to note is that while particular stories or examples are necessary for decision-making they can also work in ways which restrict the possibilities. Stories can ossify into rules; analogies with earlier decisions can be drawn in a lazy or unimaginative way. Stock examples may

be, as Kant is quaintly translated, the 'go-kart' (the children's walking frame) of judgment (1929: 178); but they can also limit our capacity to understand others. Fortunately there is more to the topic of compassion than can be found in the records of the Immigration Review Tribunal. Members have available to them many other stories about compassion. First to mind is the parable of the Good Samaritan from the New Testament or perhaps the meeting of Priam and Achilles after the death of Hector in the final Book of the *Iliad*. My own favourite example, or rather negative example, comes from that exquisite moment in Proust when Swann tells Mme Guermites and the Duke that he cannot accompany them to Italy next summer as he is terminally ill. But, of course, these three examples of compassion, or the lack of it, are hopelessly highbrow. Any proper account of how people from our cultural tradition come to an understanding of compassion would have to treat the pedagogical role of many different types of stories - from Aesop's Fables to episodes of *Full House*. And this is not meant to describe an ascent.¹³

Clearly, I cannot address this large topic in the space of this paper. But I am not unhappy to point in the direction of the writings of Martha Nussbaum. For the relationship between emotions and narrative - how we learn about compassion, say, from the stories that are told to us - is a basic theme of her work.¹⁴ In any event I don't need to identify which stories in order to make the point that Tribunal members would have heard many stories about compassion. And this puts them in the position of always being able to rethink the Tribunal's decisions in the light of this larger cultural inheritance. If the narratives which can be found within the Tribunal's records help make decision-making in this area possible, the availability of other stories always presents the possibility of standing back from and evaluating these records. In this way the meaning of compassion in 131A(1)(d)(v) can be and is regularly re-understood.

IV

Stories about compassion form part of what I will call, following Kant, the community's common sense. Decision-makers cannot but be exposed to these stories and they are an important source of the 'tertium quid' which is necessary for the public justification of their decisions. But how will the compassionate decision-maker operate? How should he or she think of this interplay between these received stories and the instant case? Or, more generally, how should the particular facts be understood in the broader legal context? A not uncommon response to these questions is to call upon

the decision-maker to make a proper assessment of the situation, one which takes into account all of the relevant concerns. Sensible as this is, everything now turns on the notions of proper and relevant.

To achieve a proper assessment decision-makers may be exhorted to be imaginative, flexible, open and responsive.¹⁵ But after saying this, explanation for how to arrive at a 'proper discernment of the particulars' would appear to give out; and it is hard to see how more concrete guidance could be given. However, while it is foolish to expect a science of deliberation, one which could direct the act of judgment, can nothing further be said about the process of discerning the particulars?

One could reflect upon the character of analogical reasoning as this is the mode of reasoning usually associated with law as it moves from the particular to the particular. But this is unlikely to take the matter further. For whether an analogy is appropriate or not will turn upon our very problem, viz., how should situations X and Y be described, or are the differences between X and Y (and there will always be differences) sufficient to be of legal significance.¹⁶

The faculty of judgment has recently attracted much interest, particularly as a topic of political philosophy.¹⁷ For modern commentators it would appear to be a matter of whom to turn to - is it back to Aristotle or back to Kant? Let me here speak briefly of one aspect of Kant's account of judgment, viz., how he uses the notion of 'common sense'. For Kant's remarks upon this faculty would appear helpful with regard to our problem of discerning the particulars.

V

In the *Critique of Judgment* Kant famously bases aesthetic judgment upon the sense of taste; a capacity which is usually thought of as so inherently subjective and arbitrary that, as it is said, matters of taste cannot be disputed - *de gustibus non disputandum est*.¹⁸ Kant's task is then to explain how the private sensation of taste can have a public dimension. As part of this explanation he distinguishes between two types of common sense. 'Vulgar' common sense - the beliefs which people actually hold in common is contrasted with common sense understood as *sensus communis*:

(B)y the name *sensus communis* is to be understood the idea of a public sense, ie a critical faculty which in its reflective act takes

account (a priori) of the mode of representation of everyone else, in order, as it were, to weigh its judgment with the collective reason of mankind, and thereby avoid the illusion arising from subjective and personal conditions which could readily be taken for objective, an illusion that would exert a prejudicial influence upon its judgment. This is accomplished by weighing the judgment, not so much with actual, as rather with the merely possible, judgments of others, and by putting ourselves in the position of everyone else, as the result of a mere abstraction from the limitations which contingently affect our own estimate (1928: # 40).

A few lines later Kant reminds us that when we put ourselves in the position of everyone else we should make use of three maxims of common understanding:

They are these: (1) to think for oneself; (2) to think from the standpoint of everyone else; (3) always to think consistently. The first is the maxim of unprejudiced thought, the second that of enlarged thought, the third that of consistent thought. The first is the maxim of a never-passive reason... As to the second maxim ...(it) indicates a man of enlarged mind: if he detaches himself from the subjective personal conditions of his judgment, which cramp the minds of so many others, and reflects upon his own judgment from a universal standpoint (which he can only determine by shifting his ground to the standpoint of others). The third maxim - that, namely, of consistent thought - is the hardest of attainment, and is only attainable by the union of both the former, and after constant attention to them has made one at home in their observance.

Note that there is no reliance here on what appears to our eyes dead in Kant; no mention of a method for testing judgment, no exclusion of prudence as a heteronomous form of reasoning. Speaking positively, there are two aspects of this account which I find suggestive. In picking out these two aspects, to be quite open about this, I am reading Kant as a precursor of twentieth century hermeneutics.¹⁹

First, Kant's discussion of *sensus communis* describes the conditions necessary for the possibility of reflective judgment. Reflective judgment we are told stands in need of principles.²⁰ The idea of a public sense - *sensus communis* - is the source of these principles and as such it is a presupposition of the possibility of reaching agreement about judgments.²¹ The pres-

ence of this critical faculty, and the availability of interpersonal standards for it to work upon, are both requirements of the possibility of appealing either to or from received opinion.

To make this point in more concrete terms. There is always a personal and direct moment of judgment - this is a beautiful picture (for me), these circumstances evoke compassion (in me) - but the capacity to reflect upon these experiences (a capacity which is part of commonsense in that it can be assumed we all have this ability) transforms this experience into something objective. All others under appropriate circumstances would take pleasure in this picture; everyone ought to feel compassion in these circumstances. But we can only reflect upon something if we have standards. The *sensus communis* provides these criteria for judgment. Not as the actual judgments of others upon our initial assessment; but as our ability to recover their possible judgments, if made under appropriate circumstances.²² In short, Kant's remarks on *sensus communis* describe the framework for understanding how it is possible to make judgments and achieve agreement about the relevant particulars.

The second aspect of Kant's remarks which I find attractive is his promotion of the three maxims of common understanding. In the search for relevant particulars these maxims can and should play an orientative role. By this I mean that following these maxims will work to enhance the practice of discerning the relevant particulars. The first maxim reminds decision-makers that making a judgment is always a productive and never merely a reproductive activity.²³ As it is their judgment decision-makers should make their own judgment; they should think for themselves and take responsibility for what they do. '*Sapere aude*' - dare to know - is of course Kant's motto for the Enlightenment.²⁴ The maxim of enlarged thought counsels decision-makers against misplaced partiality; judgment must free itself from private idiosyncrasies. This maxim encourages them to expand their horizon of understanding and attempt to see things from the standpoint of others. For this they need to listen to what others are saying and be willing to allow what they hear to question their original ideas. And the third maxim, the maxim of consistent thought, also works to guide the decision-maker from the partial to the general. For presumably it is not just concerned with the law of non contradiction. It insists that decision-makers strive to order their beliefs overall so that these hang together as a coherent whole.

VI

I have spoken of compassion and deliberation, of stories and of Kant's account of the structure of judgment. Let me bring these threads together. Deliberation will always involve subjectivity. After all the decision is made by a particular person. Whether this decision-maker is suitably compassionate (to stay with our example) is to a large extent a matter of chance. People can be lucky or unlucky with their inherited temperament and upbringing, their friendships and life experiences. Clearly no one will be made compassionate overnight by reading a philosophical work or a novel. But all of this is compatible with the two modest claims I make in this paper. First, that decision-makers can be educated on the job and that reading stories, and understanding the role of stories in the cultivation of sentiment, is part of this education. Exemplary stories can help us see the circumstances when compassion is appropriate; help us to see the particulars clearly. But, presumably, if people can be educated they also can be mis-educated. We can be exposed to bad stories. And even habituation to good stories may have its price. It may harden the senses.²⁵

Second, while philosophy cannot dictate to the act of judgment it can suggest practices and strategies which are conducive to good judgment. Kant's three maxims of common understanding are an example of this. If followed they do not guarantee a proper discernment of the particulars but they are more likely than not to lead in this direction.²⁶

But if there is an ineradicable personal moment to deliberation there is also an inevitable inter-personal moment. Someone decides, but that person is always socially and culturally situated. The finding that these circumstances warrant a compassionate response, is not simply a statement about the decision-maker's private feelings. It is a judgment that the experience of compassion is here appropriate. It is a claim that any fair-minded person in the decision-maker's position would make this judgment. Stories play a role in providing the examples necessary for the justification of judgments. The community's commonsense, both actual and idealised, is a source of these stories; as is the institutional setting in which the decision is to be made. All of these contexts provide criteria for assessing, and just as importantly for publicly re-assessing, judgments about compassion. As to the present character of these criteria and the possibility of uncovering their meaning in an undistorted way - that's another story.

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NOTES

- 1 Quoted by Martha Nussbaum (1990: 54)
- 2 For a recent philosophical discussion of the notion of compassion see Lawrence Blum (1994: 173-182)
- 3 Except the feeling of 'respect for the law'.
- 4 And my remarks in section V indicate a possible response to the influential thesis concerning the fragmentation of value spheres.
- 5 For example Lynne Henderson (1987), William Brennan (1988), Martha Minow & Elizabeth Spelman (1988) and from another perspective Paul Gerwitz (1988).
- 6 *Ie* this is an expectation of contemporary legal practice

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- 7 The examples are suggested by Simone Weil (1978: 177)
 - 8 See the provisions allowing for the suspension of deportation in America and the United Kingdom; *Immigration & Nationality Act* 1982 s1254(a)(1) and Rule 364 *Statement of Changes in Immigration Rules* (HC 395) 23 March 1994, respectively.
 - 9 For a good discussion of the struggle between the courts and the bureaucracy over the meaning of these provisions see Evan Arthur (1991)
 - 10 I will ignore the complication that these regulations themselves were superseded by the *Migration (1993) Regulations*. As Class 812 of these later regulations more or less reproduces reg 131A(1), references in the text to reg 131A should be taken to include its after life as reg 1.3, para 812.
 - 11 All defined terms in the regulations.
 - 12 See the objects section (s 4) of the present *Migration Act* 1958. On this point also note *Immigration: A Commitment to Australia, Report of the Committee to Advise on Australian Immigration Policies*, Canberra 1988, p 21f and *MIEA v Teo* (1995) 157 FCR 194
 - 13 I say this not just because of the content of these two types of stories but also because of their form. The fable is spare in form; it calls upon the reader to complete its meaning. The television comedy can be counted upon to fully explain its meaning. Walter Benjamin makes this point with effect by way of the strange story of the Egyptian King Psammenitus, as told by Herodotus; see 'The Storyteller' (1973: 89)
 - 14 See Nussbaum (1990), esp. ch 12
 - 15 Martha Nussbaum (1990) among others
 - 16 The recent article on this topic by Cass Sunstein (1993) is so successful for the very reason that he does not limit himself to describing the structure of this type of reasoning
 - 17 A revival stimulated by the writings of Hannah Arendt. See, for example, H Arendt (1982), Ronald Beiner (1983), Peter Steinberger (1993)
 - 18 A point I take directly from Arendt (1992: 65)
 - 19 Despite Gadamer's negative remarks (in *Truth & Method*) about Kant's treatment of *sensus communis* (1982: 39-50). For readings along these lines see Rudolf Makkreel (1990) esp ch. 8 and Howard Caygill (1989)
 - 20 To paraphrase the famous remark in Kant (1928: 180)
 - 21 See also Kant (1928) at #20
 - 22 For a nice discussion of the role of ideal circumstances in establishing the *sensus communis* - though one which comes to different conclusions from my discussion - see Patrick Hogan (1994)
 - 23 See also Kant (1928), comment on #22
 - 24 'What Is Enlightenment' in Kant (1963)
 - 25 Although it is possible to feel compassion less but do more to relieve it. On this point note the interesting remarks of Bishop Butler:
'Perception of distress in others is a natural excitement, passively to pity, and actively to relieve it; but let a man set himself to attend, to inquire out, and relieve distressed persons, and he cannot but grow less and less sensibly affected with the various miseries of

life, with which he must become acquainted; when yet, at the time, benevolence, considered not as a passion, but as a practical principle of action will strengthen: and whilst he passively compassionates the distressed less, he will acquire a greater aptitude actively to assist and befriend them.'

Works of Joseph Butler, ed., Gladstone 1, 111. Quoted by Norman Fiering (1976) at 213.

26 As I have brought together the topic of the role of stories in educating the sentiments with Kant's practical philosophy I should at least indicate that it is a matter of some controversy whether Kant's account of morality can deal satisfactorily with the emotions. For a recent discussion of this matter see Paul Guyer (1993) esp ch 10 and the Book Symposium given over to this work in *Philosophy & Phenomenological Research* (1995) 55/2 357-391.