



Ziegler School of Rabbinic Studies

OF AMERICAN JEWISH UNIVERSITY

WHEN POLICY HURTS

We live in an age of brittle political divide, in which labels substitute for nuance and caricature replaces engagement. In such a hostile environment, one of the tools of battle both Left and Right wield with gusto is the proper role of compassion in public policy. Ronald Reagan successfully portrayed Walter Mondale as weak by tarring him with the charge of compassion, and Bill Clinton was able to make Bob Dole appear cruel by insisting he lacked compassion. In both cases, the assumption lurking behind the charge was a dispute as to whether or not a person's pain should influence social policy. The implications of this disagreement cannot be overstated; its consequences shape our legal responses to such issues as affirmative action and race, civil rights and women, equality and gays, environmental ethics and corporate interests.

On the conservative side, the argument often goes as follows: laws inevitably establish general rules to shape and constrain proper interactions. In a duty-based system (as law ought to be) even the best of laws will occasionally pain some individuals. To jettison a law that is generally good because it is occasionally painful to some people is to invite social chaos and disintegration. In such a view, arguing for compassion is really an attack on social order and morality. Hence, Reagan's attack on Mondale.

Liberals take a different approach, seeing the preservation of rights and liberties as paramount. Law is a tool for maintaining equity and justice. An individual's pain (or that of a group) should rightly be redressed through legislative alteration. Since the goal of law is compassion and empathy, a law which causes pain is, by definition, one which must change. To refuse to tinker with laws in order to minimize pain is to trample on individual liberty and personal rights, the very point of having the laws in the first place. Such a refusal betrays a moral callousness that can destroy society as a whole. Hence, Clinton's attack on Dole.

Between these two characterizations there can be no compromise. Indeed, there can't be any substantive dialogue, since each begins with premises the other rejects, and each side uses terms in ways that the other viewpoint precludes. Within the Jewish world, this issue is compounded as politically conservative and liberal Jews each claim the exclusive support of Jewish tradition for their political orientations. Conservatives look to halakhah's emphasis on duty over rights, and to the normative nature of Jewish law to express the central premises of conservative political thought. Liberals look to Judaism's insistence on identifying with the oppressed rather than the oppressor, its

mandate to pursue justice, and its focus on God as the liberator of slaves to endorse the core ideology of political liberalism. And each group replicates the larger society's debate about the proper role of weighing individual pain in the formulation of legal norms, with conservatives generally holding that compassion is not a sound basis for legislative change, and liberals insisting that it is the primary motivation for legal innovation.

Shifting the Debate

As is so often the case, it needs to be reiterated that no political movement (nor any single denomination) possesses a monopoly on Jewish sources. The Torah was given to all and is owned by no one. There are deep affinities between biblical/rabbinic values and aspects conservatism, just as there are profound resonances between Jewish values and much of liberalism. And there are divergences too. Rather than perpetuating a propagandistic argument about which way is more Jewish, we might be well advised to seek a new way of speaking about the subject. It is quite clear that the issue of pain misses the mark, hindering the ability of decent and thoughtful people to reach a better understanding and, perhaps, consensus.

Rather than asking whether or not personal pain should have some bearing on social policy, let us reformulate the question. All law creates some pain for someone. Prison sentences for certain crimes causes pain to the convicted; handicapped parking zones creates pain for those people who must look elsewhere for parking; traffic lights make people wait. Any legal priority will create some measure of pain by what it seeks to discourage or prohibit. But the very act of legislating is one of drawing boundaries and of excluding certain practices and individuals. Law is, among other functions, a way of deliberately causing pain — by punishing crime and by imposing justice. Both liberals and conservatives would agree to that necessity. So we are not debating the issue that society intends to create pain as a way of shaping public practice. Good people may well differ as to which pain should be imposed on which people in which circumstances, but we need to admit honestly that no one is against imposing pain as a consequence of policy choices.

The real issue is whether or not social policy should abide an injustice unintentionally created or perpetuated by law. In other words, once we discover that a law (however well-meaning) creates or sustains a wrong, should legislators feel the need to try to rectify that wrong? Laws which sought to provide for the poorest in our midst (mothers and children) had the unanticipated consequence of discouraging marriage between poor men and women, resulting in unstable families and single mothers. Isn't that pain something that legislators should revisit? The Blue Laws, legislation that mandated Protestant norms (among the, closing businesses on Sunday) created an imposition to Jews, secularists, and others which was felt to be an infringement of the religious freedom. Would anyone argue that those laws should remain intact?

All agree, it seems, that good laws apportion pain —in the form of penalties, imprisonment, fines — in order to fashion a just society. And all agree that when legislation creates illegitimate suffering, legislators ought to try to modify the law to

ameliorate the pain. It turns out, then, that our disagreement has nothing to do with compassion or a commitment to the integrity of law after all. Liberals and conservatives differ in their assessment about what constitutes justice (should gay marriages be legal), desirable social goals (promoting racial balance in schools and in businesses), and equity (should the state permit surrogacy for hire). We differ as to who deserves our compassion; and who, our condemnation.

Rather than masking substantive disagreements behind irrelevant arguments about the proper role of compassion in formulating policy, let us face the ancient mandate: those who love Adonai must hate evil. We disagree about what constitutes evil, and we disagree about how and when to combat it.

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