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Introduction: Blessed are the Compromisers?

Robert F. Cochran, Jr.*

Pepperdine's Nootbaar Institute was honored to have Sanford Levinson deliver the 2010 Brandeis lecture. His topic, "Compromise and Constitutionalism," addresses how we might live with our greatest differences. Levinson's lecture, along with responses from some of the nation's leading scholars of jurisprudence, constitutional law, legal history, and dispute resolution, is included in this symposium edition of the *Pepperdine Law Review*.

This past year also saw two other memorable events in the life of Pepperdine, the Nootbaar Institute, and the Nootbaar family. We experienced the joys of Herbert Nootbaar's 102nd birthday. At age 102, Herb remains vital, energetic, and strong. His comments at his birthday party were full of his usual grace and self-deprecating humor. The other event was a sad one. On the day that I sat down to write this introduction, we learned of Elinor Nootbaar's death. She passed away following a long illness.

Both Herb and Elinor have been wonderful patrons of the Institute, supporting its many endeavors, sharing visits with the students we send around the world to do justice-related work, and attending many of our academic events. Among the many ways Elinor supported the work of the Nootbaar Institute, one of her most important contributions was that of encouragement. On many occasions, a conversation with Elinor left me, the Nootbaar Fellows, our staff, and other people associated with the Institute excited to continue the work of bringing justice and the insights and compassion of Jesus to those Jesus called "the least of these." Herb and Elinor's encouragement, compassion, and generosity are very much on my mind as I write this introduction.

Many will find irony in the fact that the Louis D. Brandeis Lecture is about "Compromise and Constitutionalism," for Brandeis is well-known as one of the Supreme Court's great dissenters. This suggests he was more

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likely to dissent than to compromise. But as Professor Levinson points out in his lecture, even Brandeis recognized the value of compromise and chose his dissents carefully. Brandeis wrote to Felix Frankfurter, “You may have a very important case of your own as to which you do not want to antagonize [other justices] on a less important case.” For Brandeis, there was a time to dissent and a time to compromise.¹

It is not surprising that many of the essays in this symposium address some aspect of religious faith and compromise. The commentators’ views range from that of Carrie Menkel-Meadow that religion may be uncompromising to that of Richard Weisberg that Christianity, at least, will be quick to compromise. (Our ambivalent attitudes toward compromise is captured in the fact that readers are likely to view both “uncompromising” and “compromise” in the prior sentence as negatives.)

Word searches of the Christian Bible’s popular New International Version and its traditional King James Version do not reveal a single use of the word “compromise.” But compromise appears to be a necessary component of much that Jesus calls for in his most famous sermon, “The Sermon on the Mount.” Among the nine “beatitudes” with which the sermon begins,² Jesus identifies both “those who hunger and thirst for [justice]”³ and those who are “peacemakers”⁴ as blessed. There is tension

1. MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 579 (2009) (cited *infra* by Sanford Levinson in *Compromise and Constitutionalism*).

2. Unless otherwise indicated, all translations herein are from the New International Version (“NIV”).

Blessed are the meek, for they will inherit the earth. Blessed are those who hunger and thirst for [justice], for they will be filled. Blessed are the merciful, for they will be shown mercy. Blessed are the pure in heart, for they will see God. Blessed are the peacemakers, for they will be called children of God. Blessed are those who are persecuted because of [justice], for theirs is the kingdom of heaven. Blessed are you when people insult you, persecute you and falsely say all kinds of evil against you because of me.

Matthew 5:5–11. For an explanation of the use of “justice,” rather than “righteousness” (the original translation) in the bracketed portions above, see *infra* note 3.

3. See *Matthew* 5:6. The Greek word “*dikaïosunē*,” translated here as “justice” is traditionally translated “righteousness.” For an exception using “justice,” see the Jerusalem Bible, cited in Nicholas Wolterstorff’s *Justice*. NICHOLAS WOLTERSTORFF, *JUSTICE: RIGHTS AND WRONGS* 111 (2008). As Nicholas Wolterstorff notes, the same word is commonly translated “justice” in English versions of Plato’s *Republic*. *Id.* at 109–10. Wolterstorff argues that either translation is linguistically possible and that the proper translation must be determined based on context. *Id.* at 112–13. The word is used again in the beatitudes, “Blessed are those who are persecuted because of [*dikaïosunē*’s] . . .” *Matthew* 5:10. Traditional translations here also use “righteousness,” but as Wolterstorff notes, “Apparently, the [traditional] translators were not struck by the oddity of someone being persecuted because he is righteous. My own reading of human affairs is that righteous people are either admired or ignored, not persecuted; people who pursue justice are the ones who get in trouble.” WOLTERSTORFF, *supra*, at 111. *Dikaïosunē* is probably a richer word than any English translation, encompassing both an inner goodness and a just society. In Plato’s *Republic*, *dikaïosunē* is both. PLATO, *THE REPUBLIC* bk. I, at 28, bk. IV, at 125 (A.D. Lindsay, trans., Alfred A. Knopf rev. ed. 1992) (c. 380 B.C.E.).

Jesus is a strong proponent of justice elsewhere. For example, on another occasion, he exclaims, “[W]ill not God bring about justice for his chosen ones, who cry out to him day and night?

between these two beatitudes. A commitment to both of them is likely to require compromise.

Two other qualities praised in the beatitudes—“Blessed are the meek”⁵ and “Blessed are the merciful”⁶—are likely to move people toward compromise. But the two final beatitudes—“Blessed are those who are persecuted because of [justice]”⁷ and “Blessed are you when people insult you, persecute you and falsely say all kinds of evil against you because of me”⁸—suggest that followers of Jesus should not compromise as to some matters and should even be willing to suffer persecution, rather than compromise.

The beatitudes which praise justice and peacemaking suggest the words of this introduction’s title: “Blessed are the compromisers?” The pursuit of both justice and peace may require compromise. But the final two beatitudes’ emphasis on holding to principle suggests that there is a time not to compromise—hence the question mark in title.

Some of the lectures that follow argue that compromise is a necessary part of government. Two authors quote Edmund Burke’s statement, made as he criticized George III for failing to compromise with the upstart North American colonies: “All government—indeed every human benefit and enjoyment, every virtue and every prudent act—is founded on compromise and barter.”⁹ Mark A. Graber, in his essay, identifies compromise as: “the high price of sharing constitutional space with those whose values are fundamentally different than ours.” Two authors (Paul Finkelman and Richard H. Weisberg) argue that compromise has led to or maintained two of the worst human rights violations in history (slavery and the Holocaust).

The lecture and responses herein address compromise in light of many of the great issues of the past—slavery, government structure, racial segregation, the Holocaust, and Yalta, as well many of the great issues facing the United States today—health care, taxes, abortion, and the death penalty. It might help to sharpen the reader’s consideration of our commentators’ discussion to ask whether today’s pro-life advocates and gay marriage advocates should compromise (e.g., if given the opportunity,

Will he keep putting them off? I tell you, he will see that they get justice, and quickly.” *Luke* 18:7–8.

4. *Matthew* 5:9.

5. *Matthew* 5:5.

6. *Matthew* 5:7.

7. *Matthew* 5:10.

8. *Matthew* 5:11.

9. AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISES 12 (2009) (quoting Edmund Burke, Speech on Conciliation with the Colonies (Mar. 22, 1775)) (quoted in this symposium by Sanford Levinson and Steven D. Smith).

should agree to protection of the unborn after viability in exchange for those who are pre-viability or agree to accept domestic partnership status for homosexual couples and give up on equal marital status). The standards suggested by our commentators are likely to push such advocates in different directions.

Professor Levinson's Brandeis lecture, *Compromise and Constitutionalism*, explores compromises (1) that went into the making of the United States Constitution, and (2) that have occurred in the Supreme Court's constitutional interpretation. He explores these compromises in light of Israeli philosopher Avishai Margalit's distinction between bad compromises and rotten compromises.¹⁰ "Rotten compromises" are indefensible except, perhaps, in the most exceptional of conditions. A "rotten political compromise" is one that agrees "to establish or maintain an inhuman regime, a regime of cruelty and humiliation, that is, a regime that does not treat humans as humans."¹¹ Under this standard, Levinson identifies as rotten compromises the Constitution's protection of slavery and the Supreme Court's dismissal, shortly after *Brown v. Board of Education*, of a case challenging Virginia's inter-racial marriage ban.¹² Levinson acknowledges that anti-slavery founders would argue that they had to agree to protect slavery in order to create a country and, likely, avoid future wars. And that Supreme Court Justices would argue that they had to dismiss the Virginia case in order to get the country to accept *Brown*. Levinson identifies as not-so-rotten compromises the founders granting equal representation to states in the Senate and dismissing the case challenging "under God" in the Pledge of Allegiance. Levinson strikes a balance that some of his commentators challenge for being pro-compromise and some for being anti-compromise. But much of his lecture simply raises difficult questions—Stephen Smith accuses him of having more question marks than periods. Many thanks to Professor Levinson for raising and helping us to think through questions which allow no easy answers.

Paul Finkelman's *The Cost of Compromise and the Covenant with Death* challenges the practice of compromise with a history of the Compromise of 1850 (which protected slaveholder interest in their "property" and admitted various slave and free states to the Union). He suggests that these were not only rotten compromises in the Margalit/Levinson sense—maintaining "an inhuman regime"—but bad compromises in a different sense, giving much to the pro-slavery forces and gaining little for the anti-slavery cause. Finkelman argues that the Compromise of 1850 gave the South additional time to arm itself and to develop industrial capacity and that it left Southerners believing that they

10. *Id.*

11. *Id.* at 2.

12. *Naim v. Naim*, 350 U.S. 985 (1956).

could demand and win anything. They became overconfident, demanded more and more, and in the end secession was their only solution. Professor Finkelman's lesson: "compromise is not always possible or worthwhile."¹³

Mark Graber's *Constitutional Democracy, Human Dignity, and Entrenched Evil* argues that, rather than contrasting principles and compromise, we should recognize that "compromise is rooted in the same kinds of principles as equality, justice, liberty, human dignity, and other constitutional goods."¹⁴ Graber reflects on a hypothetical constitutional compromise posed by Walter F. Murphy (a mentor to both Graber and Levinson). A constitutional convention agrees to the following compromise provisions: "human life is sacred," but "the political processes [will] make the initial choice [whether to protect unborn human life]."¹⁵ He identifies various means that might be used to interpret these provisions. Graber challenges advocates who assume that their opponents have evil motives. "Advocates who claim that pro-life advocates are misogynists or who equate abortion clinics with concentration camps do not treat rival positions as grounded in reasonable, if mistaken, conception of human flourishing."¹⁶ Graber holds up Lincoln as a model—he showed charity to those with whom he disagreed, even over the most important of issues. Graber also argues for resolution of great moral issues through democratic processes. "[C]ommitments to democracy provide more practical protections for basic human rights than commitments to constitutionalism."¹⁷ Nevertheless, we are confronted with a challenge: "For better and undoubtedly worse, human beings constantly find themselves in environments where they must cooperate with persons whom they find, if not morally reprehensible on most subjects, morally reprehensible on some subjects."¹⁸

Carrie Menkel-Meadow's *The Variable Morality of Constitutional (and Other) Compromises* argues that "sometimes, not always, compromise may itself be a moral good, justified because of the outcomes it permits (peace, some forms of justice and desert) and the process itself which recognizes the claims of 'another side' and takes them seriously."¹⁹ Nevertheless, she

13. Paul Finkelman, *The Cost of Compromise and the Covenant With Death*, 38 PEPP. L. REV. 845, 888 (2011).

14. Mark A. Graber, *Constitutional Democracy, Human Dignity, and Entrenched Evil*, 38 PEPP. L. REV. 889, 894 (2011).

15. *Id.* at 895 (quoting WALTER F. MURPHY, *CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER* 315, 321 (2007)).

16. *Id.* at 896.

17. *Id.* at 897.

18. *Id.* at 902.

19. Carrie Menkel-Meadow, *Constitutional (and Other) Compromises: A Comment on Sanford Levinson's Compromise and Constitutionalism*, 38 PEPP. L. REV. 903, 904 (2011).

states: “[W]istfully, I assert here, we will never be able to judge compromises or that seemingly greater good—‘principled’ decisions—by a universal standard. All compromises, whether of great constitutional, diplomatic, political, or ‘lesser’ personal or commercial moment, must be judged by the greater *context* in which they are situated.”²⁰

Though I am sensitive to the need when assessing the compromises of others or making our own to consider context, I am not so sure that we can “never” judge compromises or “‘principled’ decisions” by a universal standard. It seems to me, for example, that time, experience, and reason enable us to identify some universal standards. Most of the authors of this collection rightly, it seems to me, assume that slavery violates a universal standard, though they disagree over whether the compromises that allowed it in the United States were worth the candle. I hope that 150 or 200 years from now, experience and reason will enable our ancestors to have a clearer view of our moral foibles (and will be gracious in their assessment of them). Admittedly, our understanding of evil is limited and grows slowly, if at all. It seems that slavery, the Holocaust, and racial segregation are the only things that one can identify as evils today without losing a significant portion of one’s audience. Surely some things are evil and should be identified as such.

Steven D. Smith’s *Lessons from Lincoln* assumes that there is evil, but argues that our ability to assess it is limited. “The ethics of compromise essentially involve the problem of how to live morally in a morally disordered world—a world in which the people we live with and care about are morally disordered, and in which we know *that* but not always *when* or *how* we ourselves are morally disordered.”²¹

He criticizes uncompromising purists as “morally self-indulgent . . . valuing their own virtue above the welfare of their fellows . . . fail[ing] to take seriously the possibility that they might be wrong . . . [and falling] into self-deception . . .”²² Drawing from Lincoln’s arguments in the Lincoln/Douglas debates, Smith identifies two precepts for appropriate compromise. First, we should fight evil where we can, but “accepting an existing evil is quite different than agreeing to introduce or extend an evil where it does not presently exist.”²³ Second, even when we must compromise with evil, we have a responsibility to “declare that the practice was in fact evil.”²⁴

Richard H. Weisberg’s *Levinson Is to Mr. Justice “Isaiah” as St. Paul Was to the Prophet Isaiah* criticizes Levinson’s defense of compromise.

20. *Id.* at 905.

21. Steven D. Smith, *Lessons from Lincoln: A Comment on Levinson*, 38 PEPP. L. REV. 915, 915 (2011).

22. *Id.* at 916.

23. *Id.* at 919.

24. *Id.* at 920.

Weisberg blames the western tendency to compromise texts on the Christian (mis)interpretation of Hebrew texts. More particularly, Weisberg accuses the Vatican of compromising its Nazi-era Jewish advocacy in an informal contact with Vichy France. Both Weisberg's claim concerning Christianity in general²⁵ and his claim concerning the Vatican²⁶ are subject to challenge. (The tendency to compromise textual integrity strikes me as, not so much western or Christian, but universal—people in power do not like limits, textual or otherwise.) What is not subject to challenge is the fact that many Christians in both Germany and France compromised the teachings of Jesus, failing to stand up to the Nazi's treatment of Jews. They separated their faith from their relationship with the state by a high wall. The tragedy is that their failure to live out Jesus' teachings in all of life is likely to be a barrier between Christians and Jews for decades to come. Elsewhere,²⁷ Weisberg presents the clear, powerful, and challenging example of the compromises of Vichy lawyers who, rather than presenting a frontal attack on Vichy statutes

25. Jesus, far from downgrading commandments to "suggestions," as suggested by Professor Weisberg, called his hearers to experience a change of heart that would lead them, not only to not to murder and commit adultery, but not get angry, and not engage in lust. See *Matthew* 5:21–22, 27–30; Richard H. Weisberg, *Levinson Is to Mr. Justice "Isaiah" as St. Paul Was to the Prophet Isaiah*, 38 PEPP. L. REV. 925, 930 (2011). Jesus argued that he did not come to change the law, but to fulfill it. *Matthew* 5:17. He claimed, not to be compromising the teachings of the Hebrew scriptures, but to be getting to their true meaning. If anything, these are higher standards than the original Hebrew law, but Jesus offered his eternal, mystical presence as an aid in that change of heart. DALLAS WILLARD, *THE DIVINE CONSPIRACY*, 144–68, 271–83 (1998).

Weisberg also argues that Christians (mis)appropriated Hebrew prophecies and applied them to Jesus. Most Christian interpreters seek to show how the original intent of the prophetic message is perpetuated in the teachings of Jesus and the Church. The early Christians continued the Hebrew practice of seeing the events of their lives in light of the teachings of the Hebrew prophets. As Gerhard von Rad notes, "a prophetic prediction, which was at one time directed towards a particular political situation and all of a sudden applied to a quite different period, can often be observed in the Old Testament." GERHARD VON RAD, *THE MESSAGE OF THE PROPHETS* 270 (Eduard Haller ed., D.M.G. Stalker trans., Harper & Row 1972) (1967). The Christian interpreters of Jesus do the same thing when they speak of the fulfillment of a prophecy. There is continuity between the use of older material by later Hebrew writers and the use of Hebrew Scriptures by Christian writers. For a discussion of the Jewish and Christian uses of Messianic prophecy, see DONALD JUEL, *MESSIANIC EXEGESIS: CHRISTOLOGICAL INTERPRETATION OF THE OLD TESTAMENT IN EARLY CHRISTIANITY* (1988).

26. Professor Weisberg bases his argument that the Vatican compromised its support for Jews on Vichy lawyer Leon Berard's claim that "an authorized person at the Vatican told [him that] they mean no quarrel with the [Vichy] Jewish laws." Weisberg, *supra* note 25, at 934 (quoting RICHARD H. WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* 423–24 (1996) (quoting Berard's letter to Petain)). For Weisberg's documentation of this claim, see RICHARD H. WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* (1996). Running counter to the Berard report are the substantial public and private Vatican efforts to combat the anti-Jewish actions of the Nazis in France and elsewhere. For documentation challenging the Berard report, see RONALD J. RYCHLAK, *RIGHTEOUS GENTILES: HOW PIUS XII AND THE CATHOLIC CHURCH SAVED HALF A MILLION JEWS FROM THE NAZIS* 156–64 (2005).

27. See RICHARD H. WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* (1996).

defining Jews, argued that their clients did not fit the statutory definition. They may have saved some clients, but thereby legitimized a statute that condemned many Jews to deprivation of property, to prison, and to death.

The symposium concludes with Professor Levinson's responses to his commentators.

Our thanks to the contributors to this symposium for their engaging and thoughtful comments. My prayer is that this exchange will help us to understand how to pursue both justice and peace in a world that needs a lot of both.