



SHALOM HARTMAN INSTITUTE מכון
OF NORTH AMERICA שלום הרטמן

Justice and Compromise

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I. The Commitment to Justice

1. Deuteronomy 16:18-22

18 You shall appoint judges and officials throughout your tribes, in all your towns that the Lord your God is giving you, and they shall render just decisions for the people.

19 You must not distort justice; you must not show partiality; and you must not accept bribes, for a bribe blinds the eyes of the wise and subverts the cause of those who are in the right. 20 Justice, and only justice, you shall pursue, so that you may live and occupy the land that the Lord your God is giving you.

21 You shall not plant any tree as a sacred pole beside the altar that you make for the Lord your God; 22 nor shall you set up a stone pillar—things that the Lord your God hates.

2. Genesis 18:16-33

16 Then the men set out from there, and they looked towards Sodom; and Abraham went with them to set them on their way. 17 The Lord said, 'Shall I hide from Abraham what I am about to do, 18 seeing that Abraham shall become a great and mighty nation, and all the nations of the earth shall be blessed in him? 19 No, for I have chosen him, that he may charge his children and his household after him to keep the way of the Lord by doing righteousness and justice; so that the Lord may bring about for Abraham what he has promised him.' 20 Then the Lord said, 'How great is the outcry against Sodom and Gomorrah and how very grave their sin! 21 I must go down and see whether they have done altogether according to the outcry that has come to me; and if not, I will know.'

22 So the men turned from there, and went towards Sodom, while Abraham remained standing before the Lord. 23 Then Abraham came near and said, 'Will you indeed sweep away the righteous with the wicked? 24 Suppose there are fifty righteous within the city; will you then sweep away the place and not forgive it for the fifty righteous who are in it? 25 Far be it from you to do such a thing, to slay the righteous with the wicked, so that the righteous fare as the wicked! Far be that from you! Shall not the Judge of all the earth do what is just?' 26 And the Lord said, 'If I find at Sodom fifty righteous in the city, I will forgive the whole place for their sake.' 27 Abraham answered, 'Let me take it upon myself to speak to the Lord, I who am but dust and ashes. 28 Suppose five of the fifty righteous are lacking? Will you destroy the whole city for lack of five?' And he said, 'I will not destroy it if I find forty-five there.' 29 Again he spoke to him, 'Suppose forty are found there.' He answered, 'For the sake of forty I will not do it.' 30 Then he said, 'Oh do not let the Lord be angry if I speak. Suppose thirty are found there.' He answered, 'I will not do it, if I find thirty there.' 31

He said, 'Let me take it upon myself to speak to the Lord. Suppose twenty are found there.' He answered, 'For the sake of twenty I will not destroy it.' 32 Then he said, 'Oh do not let the Lord be angry if I speak just once more. Suppose ten are found there.' He answered, 'For the sake of ten I will not destroy it.' 33 And the Lord went his way, when he had finished speaking to Abraham; and Abraham returned to his place.

3. Isaiah 56:1-8

Thus says the Lord:

Maintain justice, and do what is right, for soon my salvation will come, and my deliverance be revealed.

2 Happy is the mortal who does this, the one who holds it fast, who keeps the sabbath, not profaning it, and refrains from doing any evil.

3 Do not let the foreigner joined to the Lord say, 'The Lord will surely separate me from his people'; and do not let the eunuch say, 'I am just a dry tree.'

4 For thus says the Lord: To the eunuchs who keep my sabbaths, who choose the things that please me and hold fast my covenant,

5 I will give, in my house and within my walls, a monument and a name better than sons and daughters; I will give them an everlasting name that shall not be cut off.

6 And the foreigners who join themselves to the Lord, to minister to him, to love the name of the Lord, and to be his servants, all who keep the sabbath, and do not profane it, and hold fast my covenant—

7 these I will bring to my holy mountain, and make them joyful in my house of prayer; their burnt-offerings and their sacrifices will be accepted on my altar; for my house shall be called a house of prayer for all peoples.

8 Thus says the Lord God, who gathers the outcasts of Israel, I will gather others to them besides those already gathered.

II. The Parameters of Justice and its Limitations

4. Tosefta Sanhedrin 1:1

Rabbi Elazar son of Rabbi Yose the Galilean said: Whoever compromises is a sinner and one who praises the one who compromises blasphemes before God. Concerning this it says "One who praises the *botzea* [literally, one who divides] scorns the Lord (Psalms 10). Rather let the law pierce the mountain. For Moses said: "Let the law pierce the mountain."

But Aharon would make peace between people, as is said "In peace and uprightness he walked with Me (Malachi 3)..." Rabbi Joshua son of Korha said: It is a commandment to settle/compromise as is said "Execute a judgment of truth and peace in your gates" (Zecharia 8:16). Now, is it not the case that wherever there is true justice there is no peace and wherever there is peace there is no justice? What kind of justice also contains peace? Let us say this is *bitzua* (compromise).

5. Genesis Rabbah 39:6

R. Levi commented: "Shall not the Judge of all the earth do justly" (ibid.)? If you desire the world to endure, there can be no absolute justice, while if You desire absolute justice the world cannot endure, yet You would hold the cord by both ends, desiring both the world and absolute justice. Unless You forget a little, the world cannot endure."

6. Babylonian Talmud, Sanhedrin 37b

GEMARA: The Sages taught in a *baraita*: How does the court describe testimony based on conjecture? The court says to the witnesses: Perhaps you saw this man about whom you are testifying pursuing another into a ruin, and you pursued him and found a sword in his hand, dripping with blood, and the one who was ultimately killed was convulsing. If you saw only this, it is as if you saw nothing, and you cannot testify to the murder. It is taught in a *baraita* that Rabbi Shimon ben Shataḥ said as an oath: I will not see the consolation of Israel if I did not once see one person pursue another into a ruin, and I pursued him and saw a sword in his hand, dripping with blood, and the one who was ultimately killed was convulsing. And I said to him: Wicked person, who has killed this man? Either you or I. But what can I do, since your blood is not given over to me, as the Torah states: "At the mouth of two witnesses, or three witnesses, shall he that is to die be put to death" (Deuteronomy 17:6), and I did not witness you killing him. The One Who knows one's thoughts shall punish this man who killed another. The Sages said: They did not move from there before a snake came and bit the murderer, and he died.

III. The Ethics of Compromise

7. Mishnah Bava Metsia 1:1

Two [persons appear before a court] holding a garment.

One of them says, "I found it," and the other says, "I found it."

One of them says, "It is all mine," and the other says, "It is all mine."

One shall swear that his share in it is not less than half, and the other shall swear that his share in it is not less than half, and [the value of the garment] shall then be divided between them.

If one says, "it is all mine," and the other says, "half of it is mine."

He who says, "it is all mine" shall swear that his share in it is not less than three quarters, and he who says, "half of it is mine" shall swear that his share in it is not less than a quarter. The former then receives three quarters [of the value of the garment] and the latter receives one quarter.

8. Babylonian Talmud, Eruvin 13b

R. Abba stated in the name of Samuel: For three years there was a dispute between Beit Shammai and Beit Hillel, the former asserting, 'The halachah is in agreement with our views,' and the latter contending, 'The halachah is in agreement with our views.'

Then a *bat kol* was pronounced: 'These *and* these are the words of the living God; and the law is according to Beit Hillel.'

Since, however, both 'these and these are the words of the living God,' what was it that entitled Beit Hillel to have the halachah fixed in agreement with their rulings?

Because they were kindly and modest, they studied their own rulings *and* those of Beth Shammai. Moreover they placed Beit Shammai's words before their own.

9. Babylonian Talmud, Hagigah 3b

There are those scholars who declare a thing ritually contaminated and there are those who pronounce it clean; those who prohibit and those who permit; those who disqualify and those who declare fit.

Perhaps someone will ask: *how can I ever learn Torah and understand it precisely, when every issue is subject to debate and disagreement?* To allay this concern, scripture states that all the various rabbinic opinions are *given from one shepherd*. One God gave them; one leader proclaimed them from the mouth of the master of all matters, blessed is God, as is written, *and God spoke all these words*. Hence, you too make your ear like a mill-hopper, and acquire for yourself a discerning heart to hear intelligently the words of those who declare a thing impure and the words of those who pronounce it pure; the words of those who prohibit and the words of those who permit; and the words of those who disqualify and the words of those who declare fit.

IV. Justice and Compromise in Tension and in Practice

10. Avishai Margalit, Excerpts from *On Compromise and Rotten Compromises* (2009)

Albert Einstein is credited with the warning “Beware of rotten compromises.” My book is an effort to explain and support this warning.

But the book is about much more. It is about peace and compromise.

More specifically: what compromises we are not allowed to make for the sake of peace.

The short answer is: rotten compromises are not allowed, even for the sake of peace. Other compromises should be dealt with on a retail basis, one by one: they should be judged on their merit. Only rotten compromises should be ruled out on a wholesale basis. Even though the book is about compromises we should avoid, come what may, its main goal is to leave the widest (morally) possible room for compromises made for the sake of peace, including cases in which peace is achieved at the expense of justice. The book is in pursuit of just *a* peace, rather than of a *just* peace. Peace can be justified without being just.

...

The concept of compromise, I believe, should take center stage in micromorality (dealing with individuals’ interactions) as well as in macromorality (dealing with political units.) After all, we very rarely attain what is first on our list of priorities,

either as individuals or as collectives. We are forced by circumstances to settle for much less than what we aspire to. We compromise. We should, I believe, be judged by our compromises more than by our ideals and norms. Ideals may tell us something important about what we would like to be. But compromises tell us who we are.

...

I believe that beyond the ambivalence toward compromise and the spirit of compromise lurks a deep tension between peace and justice. Peace and justice may even demand two incompatible temperaments, one of compromise for the sake of peace, and the other of a Michael Kohlhaas-like bloody-mindedness, to let justice prevail, come what may... The Talmud recognizes the tension between the two... Moses, in the eyes of the rabbis, incarnates the spirit of justice, and his brother Aaron incarnates the spirit of compromise and peace. Moses is admired. Aaron is loved.

...

The idea of political compromise is caught between two pictures of politics: politics as economics and politics as religion. Roughly speaking, in the economic picture of politics everything is subject to compromise. Compromise is not always desirable or prudent, but it is always possible. In the religious picture, there are things over which we must never compromise.

The religious picture is in the grip of the idea of the holy. The holy is not negotiable, let alone subject to compromise. Crudely put, one cannot compromise over the holy without compromising the holy. Conversely, in the economic picture of politics, compromise is at the heart of politics, and the ability to compromise is highly praised.

11. Isaiah Berlin, "A Message to the 21st Century," *New York Review of Books*, 10/23/2014

<http://www.nybooks.com/articles/2014/10/23/message-21st-century/>

"It was the best of times, it was the worst of times." With these words Dickens began his famous novel *A Tale of Two Cities*. But this cannot, alas, be said about our own terrible century. Men have for millennia destroyed each other, but the deeds of Attila the Hun, Genghis Khan, Napoleon (who introduced mass killings in war), even the Armenian massacres, pale into insignificance before the Russian Revolution and its aftermath: the oppression, torture, murder which can be laid at the doors of Lenin, Stalin, Hitler, Mao, Pol Pot, and the systematic falsification of information which prevented knowledge of these horrors for years—these are unparalleled. They were not natural disasters, but preventable human crimes, and whatever those who believe in historical determinism may think, they could have been averted.

I speak with particular feeling, for I am a very old man, and I have lived through almost the entire century. My life has been peaceful and secure, and I feel almost ashamed of this in view of what has happened to so many other human beings. I am not a historian, and so I cannot speak with authority on the causes of these horrors. Yet perhaps I can try.

They were, in my view, not caused by the ordinary negative human sentiments, as Spinoza called them—fear, greed, tribal hatreds, jealousy, love of power—though of course these have played their wicked part. They have been caused, in our time, by ideas; or rather, by one particular idea. It is paradoxical that Karl Marx, who played down the importance of ideas in comparison with impersonal social and economic forces, should, by his writings, have caused the transformation of the twentieth century, both in the direction of what he wanted and, by reaction, against it. The German poet Heine, in one of his famous writings, told us not to underestimate the quiet philosopher sitting in his study; if Kant had not undone theology, he declared, Robespierre might not have cut off the head of the King of France.

He predicted that the armed disciples of the German philosophers—Fichte, Schelling, and the other fathers of German nationalism—would one day destroy the great monuments of Western Europe in a wave of fanatical destruction before which the French Revolution would seem child's play. This may have been unfair to the German metaphysicians, yet Heine's central idea seems to me valid: in a debased form, the Nazi ideology did have roots in German anti-Enlightenment thought. There are men who will kill and maim with a tranquil conscience under the influence of the words and writings of some of those who are certain that they know perfection can be reached.

Let me explain. If you are truly convinced that there is some solution to all human problems, that one can conceive an ideal society which men can reach if only they do what is necessary to attain it, then you and your followers must believe that no price can be too high to pay in order to open the gates of such a paradise. Only the stupid and malevolent will resist once certain simple truths are put to them. Those who resist must be persuaded; if they cannot be persuaded, laws must be passed to restrain them; if that does not work, then coercion, if need be violence, will inevitably have to be used—if necessary, terror, slaughter. Lenin believed this after reading *Das Kapital*, and consistently taught that if a just, peaceful, happy, free, virtuous society could be created by the means he advocated, then the end justified any methods that needed to be used, literally any.

The root conviction which underlies this is that the central questions of human life, individual or social, have one true answer which can be discovered. It can and must be implemented, and those who have found it are the leaders whose word is law. The idea that to all genuine questions there can be only one true answer is a very old philosophical notion. The great Athenian philosophers, Jews and Christians, the thinkers of the Renaissance and the Paris of Louis XIV, the French radical reformers of the eighteenth century, the revolutionaries of the nineteenth—however much they differed about what the answer was or how to discover it (and bloody wars were fought over this)—were all convinced that they knew the answer, and that only human vice and stupidity could obstruct its realization.

This is the idea of which I spoke, and what I wish to tell you is that it is false. Not only because the solutions given by different schools of social thought differ, and none can be demonstrated by rational methods—but for an even deeper reason. The central values by which most men have lived, in a great many lands at a great many times—these values, almost if not entirely universal, are not always harmonious with each other. Some are, some are not. Men have always craved for liberty, security, equality, happiness, justice, knowledge, and so on. But complete liberty is not compatible with complete equality—if men were wholly free, the wolves would be free to eat the sheep. Perfect equality means that human liberties must be restrained so that the ablest and the most gifted are not permitted to advance beyond those who would inevitably lose if there were competition. Security, and indeed freedoms, cannot be preserved if freedom to subvert them is permitted. Indeed, not everyone seeks security or peace, otherwise some would not have sought glory in battle or in dangerous sports.

Justice has always been a human ideal, but it is not fully compatible with mercy. Creative imagination and spontaneity, splendid in themselves, cannot be fully reconciled with the need for planning, organization, careful and responsible calculation. Knowledge, the pursuit of truth—the noblest of aims—cannot be fully reconciled with the happiness or the freedom that men desire, for even if I know that

I have some incurable disease this will not make me happier or freer. I must always choose: between peace and excitement, or knowledge and blissful ignorance. And so on.

So what is to be done to restrain the champions, sometimes very fanatical, of one or other of these values, each of whom tends to trample upon the rest, as the great tyrants of the twentieth century have trampled on the life, liberty, and human rights of millions because their eyes were fixed upon some ultimate golden future?

I am afraid I have no dramatic answer to offer: only that if these ultimate human values by which we live are to be pursued, then compromises, trade-offs, arrangements have to be made if the worst is not to happen. So much liberty for so much equality, so much individual self-expression for so much security, so much justice for so much compassion. My point is that some values clash: the ends pursued by human beings are all generated by our common nature, but their pursuit has to be to some degree controlled—liberty and the pursuit of happiness, I repeat, may not be fully compatible with each other, nor are liberty, equality, and fraternity.

So we must weigh and measure, bargain, compromise, and prevent the crushing of one form of life by its rivals. I know only too well that this is not a flag under which idealistic and enthusiastic young men and women may wish to march—it seems too tame, too reasonable, too bourgeois, it does not engage the generous emotions. But you must believe me, one cannot have everything one wants—not only in practice, but even in theory. The denial of this, the search for a single, overarching ideal because it is the one and only true one for humanity, invariably leads to coercion. And then to destruction, blood—eggs are broken, but the omelette is not in sight, there is only an infinite number of eggs, human lives, ready for the breaking. And in the end the passionate idealists forget the omelette, and just go on breaking eggs.

I am glad to note that toward the end of my long life some realization of this is beginning to dawn. Rationality, tolerance, rare enough in human history, are not despised. Liberal democracy, despite everything, despite the greatest modern scourge of fanatical, fundamentalist nationalism, is spreading. Great tyrannies are in ruins, or will be—even in China the day is not too distant. I am glad that you to whom I speak will see the twenty-first century, which I feel sure can be only a better time for mankind than my terrible century has been. I congratulate you on your good fortune; I regret that I shall not see this brighter future, which I am convinced is coming. With all the gloom that I have been spreading, I am glad to end on an optimistic note. There really are good reasons to think that it is justified.