

“Judging Others and Oneself:
Justice Tempered with Mercy, and Mercy Sobered by Justice”
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Shabbat Shalom!

In the many collections of gentle religious humor that exist, this one item spoke to me this week. It was a letter from a child to God.

“Dear God,” the letter said, “thank you for the baby brother, but what I prayed for was a puppy.”

On its simplest level, this joke raises the issue about whether we should get what we pray for, or what we need.

And in regard to the subject of my remarks this week, I broaden the question: How does a judge answer this question in his or her work. When do judges temper their justice with mercy, providing what the parties in a case hope for, or when do they toughen their mercy with justice, providing what they need, or deserve?

The recent nomination of Judge Sonia Sotomayor to the United States Supreme Court, and reactions to her nomination, raises some of these same questions. In a speech she gave eight years ago, she all but acknowledged that an attribute of empathy should accompany judges as they – each day – ascend to their seat above their courtroom.

Judge Sotomayor’s now famous remarks were these: “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”

For those who were looking for it, they found in these words chauvinism, at best; racism, at worst; and, minimally, they elicited an apprehension of bringing subjective criteria to a system of justice that is theoretically built upon the concept of equal protection under the law.

And so, as our nation – and one hundred senators – now deliberate on this nomination, it is, perhaps, appropriate to explore what Jewish

tradition says about the qualities of justice and mercy; what our legal and midrashic tradition teaches about empathy; and how these qualities can and should influence our attitude and approach to administering justice, and, in fact, our everyday lives.

It is clear through the biblical narrative of our people that God intends to have the world ruled through the “*midat hadin*,” the divine attribute of justice. Early in Torah, God expects people to follow the Divine Dictates without question: “Do not eat of this tree”. “Get yourself to a land that I will show you”. “Let my people go”.

These commands to the characters in the story of our people align with the legal sections of the Torah as well. We read – for example – in Leviticus, “Do not pervert justice; do not show partiality to the poor or favoritism to the great: with justice you shall judge your neighbor”.

And we learn later that these commands come from a deity who defines the Divine Self in a similar light. In the Second Commandment from Mount Sinai, God depicts the Divine Self by saying, “*Ki anochi adonai eloheicha: el kaneh*. For I the Eternal your God am an ‘impassioned’, or ‘zealous’, or ‘jealous’ God”. It is difficult, with great precision, to translate the word “kaneh”, but the sense of this verse is that God is a demanding and zealous creature.

This deity goes on to remind us, in the Ten Commandments, that not only sinful people will receive God’s wrath, but also their children, as well as the third and fourth generation of those who spurn Divine rule.

It is this kind of God who, in the book of Genesis, floods the world and destroys most of humanity without offering a opportunity for repentance.

It is this kind of God who constantly threatens the people of Israel with destruction throughout their forty-year wanderings in the desert.

And it is this kind of God who, in this week’s Torah portion, stifles dissent by opening up the ground under Korah, Datan, and Abiram, swallowing them up alive; and by sending forth a plague and fire against the rest of the people.

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And yet, this same deity intervenes in the lives of Israel by means of another Divine attribute: “*midat harachamim*,” or the attribute of mercy. It is this kind of God who negotiates with Abraham over the fate of Sodom and Gomorrah, and, in the end, changes the Divine fiat.

It is this kind of God whom Moses is able to persuade NOT to destroy the Israelites despite their stiff-necked behavior in the desert, and sentences them merely to thirty-eight years of wandering.

It is this kind of God who, despite imposing chastisements upon those who reject God, will welcome them back when they repent: The Second Commandment reminds us that God also ‘performs acts of lovingkindness to the thousands of generations of those who love me, and observe my commandments’.

For the God of Israel, and for God’s people, there has always been a kind of tension between these two worldly qualities, *midat hadin*, and *midat harachamim*, the attributes of justice and mercy. Yet the Rabbis of the midrashic tradition demonstrate the necessity for these two qualities to co-exist in this world. Here is one story they tell:

‘There was a king who had a set of delicate glass cups. He said to himself, “If I pour hot water into them, they will expand and burst; if I pour cold water into them, they will contract and shatter.” So what did God do? God mixed hot water with cold, and poured it into them, and they did not break.

‘So it was with God. When it came time to create the world, God reflected, “If I create the world with only the attribute of *rahamim*, compassion, alone, there will be an abundance of wrongful acts, as no one will be afraid of punishment. But if I create the world with *din*, justice, alone, how could the world endure? It would shatter because of the harshness of my justice. So I will create the world with both justice and compassion, and it will endure”¹. God understood that both qualities needed to be part of the world, and part of the people in it.

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¹ Genesis Rabbah 12:15

Now, there are those who believe in the imposition of strict justice upon any given situation. The visual personification of Justice is, after all, this blindfolded figure with scales evenly balanced, representing the impartiality of justice and the need for an equal application of the law in all circumstances.

For those who feel this way, the statement by President Obama asserting that a sense of empathy would be important to him in the selection of a Supreme Court nominee was clearly a non-sequitor, and a non-starter. In their view, it seems that the justice system should never employ subjective criteria.

Yet we, here tonight, must also take into account the subtle suggestion of the Torah in regard to the proper administration of justice. The book of Deuteronomy stresses that if a legal case is too complex or confusing, whether it's a criminal or civil matter, we are to, literally, raise up the issue with those sitting in high places and let the priests or the judges there pass judgment for us.²

This process tells me something about the reality of the legal process. If the law were clear, if there were no ambiguity – if there were no baffling or confusing situations – there would be no need for a court system or impartial judges. One would simply have some mechanism, say the police, to administer justice and see that it is carried out.

But the wisdom of our legal system, with its judges and its sometimes drawn out process, is that it allows for human frailty and subjective interventions. The implication is that no case is exactly like another, no set of circumstances is precisely like another, and no defendant or plaintiff is like those who came before.

And although the image of Justice is one of balanced scales, perhaps that is her personification at the conclusion of the justice process, that is, that by the close of a legal process, a sense of equity comes forth.

Now I know that the term “equity” is a technical term in legal circles, and I use it here to mean a judgment that makes things whole again, or

² Deuteronomy 17:8-13

brings a sense of fairness, or equitable relief. The law cannot foresee every eventuality, so perhaps, ultimately, a judge IS supposed to provide some kind of remedy through this fuzzy concept, which I view as 'fairness'.

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In the context of the Supreme Court, or in any court that oversees the application of statutes and case law, the challenge would be to bring a sense of equity to the proceedings and to the judgments that are rendered. But in the US Supreme Court, neither side of a case comes to the court chamber as equals. In previous trials, one side has already lost, and the other has already won. They come to Washington to try once more, to again present the evidence and ask for judgment in their favor.

And yet the same subjective factors that have been an integral part of the case will still be present, regardless of how previous courts have ruled. Here is one example.

I think about yesterday's ruling of the Court in the case of Safford Unified School District v. April Redding, a case dealing with a now unconstitutional body search of a 13-year-old girl in Arizona in 2003. The following description from the New York Times establishes the precedent – if one were needed – of bringing a sense of empathy, and thus equity, to judgments:

“Justice David H. Souter...said a search of Ms. Redding's backpack and outer garments did not offend the Fourth Amendment's ban on unreasonable searches. But the pills in question, each no stronger than two Advils, did not justify an 'embarrassing, frightening and humiliating search'...School officials ordered Ms. Redding, whom another girl had accused of giving her drugs, to disrobe and pull her undergarments way from her body for the search. No drugs were found...”

The Times goes on to report on an interview about this case that Justice Ruth Bader Ginsburg gave in the spring. She reported that “judging from their comments at the argument, her colleagues, all men, had failed to appreciate what Ms. Redding – the plaintiff – had endured. ‘They have never been a 13-year-old girl,’ Justice Ginsburg said. ‘It's a very sensitive

age for a girl. I don't think that my colleagues, some of them, quite understood."³

Whether they did or not, we may never know. But this was Justice Ginsburg's assessment, and it's clear that Justice Ginsburg, who ***had*** been a 13-year-old girl at one time in her life, could identify with the humiliation that might have come about from such an experience, something that her male colleagues could not do.

So when I wonder about how we think about the concepts of justice and mercy and bringing a sense of empathy to the understanding of court cases, I too think about what we want for our society, and contrast that with what we need.

We surely need a sense of fairness to pervade our society, even though internally we may want an advantage over others.

We need a justice system that takes all factors into consideration, even though some may want to discount or conceal contrary evidence away from the eyes of the law.

We need the assurances that society will treat all its members in the same way, so that even given differences in educational capacity or income earning, that our society overlooks those distinctions and ensures that each person will be made whole.

Sometimes we may get a puppy to whom we can give, and from whom we can receive, unconditional love. And sometimes we may get a set of responsibilities from which we need to learn a skill, or a coping mechanism, or patience, or some other life skill that will help us to grow.

I think it's advisable for us to expect to receive both, as our world is surely built on the concepts of justice AND mercy. But more important is the reality that by receiving both part of what we want and what we need, is so that we can flourish as well-balanced people.

Shabbat Shalom.

³ <http://www.nytimes.com/2009/06/26/us/politics/26scotus.html?hp>