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Doing Justice: Judging and Jewish Values

ESSAY

DOING JUSTICE: JUDGING AND JEWISH VALUES

THE HONORABLE JUDITH BARTNOFF*

The iconic image of justice is a figure—usually depicted as female—blindfolded and holding balanced scales. The artistic portrayal of blind justice dates back to fifteenth-century German manuscripts,¹ and the image has been interpreted both positively and negatively. It is a positive symbol of ultimate impartiality: that nothing but pure reason, as opposed to the often misleading evidence of the senses, should be used in making judgments. But it also is a negative symbol of unfairness and partiality—blind toward the poor, with eyes only for the rich.²

The image of blindfolded justice holding balanced scales is fundamentally flawed. First, we know that except in very rare

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1. Michael Evans, *Two Sources for Maimed Justice*, 2 SOURCE, Fall 1982, at 12.
2. See generally ADRIANO PROSPERI, JUSTICE BLINDFOLDED: THE HISTORICAL COURSE OF AN IMAGE 175 (John Tedeschi & Anne Tedeschi trans., 2018) (2008) (detailing the evolution of what blind justice has represented throughout history).

instances, the scales are not balanced. Several forces—economic, social, political—have the effect of placing litigants on an unequal footing when they come into the judicial system. Sometimes the law can attempt to redress those imbalances. For example, in criminal cases, we provide counsel to people who otherwise could not afford a lawyer.³ And, in certain types of civil cases, the law provides for awards of attorney’s fees to prevailing parties, which makes it more feasible, as a practical matter, for consumers or employees to take on opponents who have significantly greater resources.⁴ But balancing the scales generally is not the role of judges, both because the inequalities result from factors outside the court’s control and because a judge attempting to redress the imbalance effectively would be favoring one side over the other, which is precisely what a judge should not do. Nonetheless, a critical challenge for judges is to implement practices and procedures that make the system accessible to litigants so that the judicial system itself does not exacerbate the imbalances.

Second, judges only can do their jobs properly if they have their eyes open. To do justice and to make fair and correct decisions, judges must see the people who appear before them. When parties are shown respect and feel respected, they are much more likely to perceive the legal system as legitimate and fair and to accept the court’s decisions.

As a judge, it is my obligation to see the parties who appear before me not simply as cases, but as people. I also have a duty to the extent that I can to make the court open and accessible, so that the public perceives not only that I am not wearing a blindfold, but that the court system itself is not creating additional imbalances that interfere with doing justice.

Jewish law supports those principles. In Deuteronomy 16:18, Moses tells the people that when they enter the land, they are to appoint judges and officials for the tribes “in all the settlements that . . . your God is giving you, and they shall govern . . . with [‘mishpat tzedek’],”⁵ which often is translated as “due justice” or, in Robert Alter’s

3. *See, e.g.*, 18 U.S.C. § 3006A (2012); D.C. CODE § 11-2601 (2019).

4. *See, e.g.*, D.C. CODE § 2-1403.16(a)–(b) (providing a private cause of action for a person claiming to be aggrieved by an unlawful discriminatory practice and for the court to grant any relief that it deems appropriate, including attorney’s fees pursuant to section 2-1403.13(a)(1)(E)); § 28-3905(k)(1)–(2) (permitting consumers to bring actions seeking relief from illegal trade practices and making reasonable attorney’s fees an available remedy in those cases).

5. ETZ HAYIM: TORAH AND COMMENTARY 1088 (David L. Lieber ed., 2001).

beautiful translation, as “just judgment”⁶ “[T]zedek is justice in the sense of doing the right thing in a legal procedure; mishpat is justice as a cosmic principle that maintains harmony in the world and allows civilization to continue.”⁷ Accomplishing both is a tall order, but that is how the Torah describes the role of the judge.

Moses then goes on in verse 19 to explain how judges should conduct themselves in order to do justice. He states three fundamental rules of judicial conduct. First, “[y]ou shall not judge unfairly.”⁸ Second, judges shall not show partiality.⁹ And finally, judges shall not take bribes.¹⁰ The third is the only rule for which a reason is given: judges must not take bribes because “bribes blind the eyes of the discerning and upset the plea of the just.”¹¹ In other words, bribes incline the judge in favor of one party and influence the judge against the claims of the deserving or innocent party, which is a kind of blindness antithetical to judging fairly and impartially.

Moses then makes the famous statement, “Tzedek tzedek tirdof”— “[j]ustice, justice shall you pursue, that you may thrive and occupy the land that the Lord your God is giving you.”¹² Justice is the cornerstone of the society that the people are to build in the land. And justice cannot be blind.

The Torah also addresses the process of judging in the rules that God gives to Moses. Leviticus 19:15 states, “You shall not render an unfair decision: do not favor the poor or show deference to the rich; judge your kinsman fairly.”¹³ Exodus 23:3 similarly prohibits showing deference to a poor man in his dispute.¹⁴

In other words, judges must adhere to the law. Their role is not to redress the imbalance in the scales; they must neither favor the poor over the rich nor the rich over the poor. The Talmud gives the example of a judge who is tempted to rule in favor of a poor claimant, even though he had no case, because he needed the money

6. ROBERT ALTER, *THE FIVE BOOKS OF MOSES: A TRANSLATION WITH COMMENTARY* 962 (1st ed. 2004).

7. ETZ HAYIM, *supra* note 5, at 1088 n.18.

8. *Deuteronomy* 16:19.

9. *Id.*

10. *Id.*

11. ETZ HAYIM, *supra* note 5, at 1088.

12. *Deuteronomy* 16:20; ETZ HAYIM, *supra* note 5, at 1088–89.

13. ETZ HAYIM, *supra* note 5, at 696.

14. *Id.* at 471.

more than the rich defendant did.¹⁵ The judge is forbidden to rule in the poor person's favor in those circumstances. Instead, he is told to find in favor of the rich defendant and then to help the poor by giving tzedakah, or charity, from his own pocket.¹⁶ The rabbis were fearful that if non-legal considerations were permitted to distort legal judgments, people would lose faith in the fairness of the courts, which would result in even more suffering for the poor.¹⁷

But in the first instance, to make sound legal judgments, judges have to have their eyes open. That principle also is articulated in the Talmud and in the rabbinic tradition. The Talmud is filled with a variety of legal opinions, or posekim, that later scholars generally would follow—especially when the earlier ruling was made by their teacher, or (even better) their teacher's teacher. The rabbis devoted a great deal of energy and analysis to questions about the status of earlier rulings—essentially differentiating between clear legal precedent and what we now would call dicta. In that analysis, the rabbis were guided by the fundamental principle of “Ein lo la'dayyan ella mah she-inav ro'ot,” “a judge must be guided by what he sees.”¹⁸ A judge is supposed to look to legal precedents in deciding a case, but precedents cannot be applied in the abstract. To the contrary, judges are to exercise discretion based on the case that is actually before them. The exercise of discretion is not merely an option, but an imperative. To judge fairly, the judge must be guided by what he or she sees, which means that to do justice, the judge cannot be wearing a blindfold.

Let me now turn to two particular aspects of the values I have just outlined: one relating to the exercise of discretion in particular cases and what it means for judges to see the people in front of them, and the other to what judges can do, within our appropriate sphere, to address some of the imbalances.

First is judging without a blindfold. In 2017 and 2018, after spending several years in the Family and Civil Divisions, I presided over criminal cases—primarily murder cases, as well as other very serious felonies. Beginning in January 2019, I have been handling misdemeanor cases. I want to share a few observations about what it means to see the people who appear before the judge in criminal cases

15. *Id.* at n.3.

16. *Id.*

17. *Id.*

18. JOEL ROTH, THE HALAKHIC PROCESS: A SYSTEMIC ANALYSIS 82–83 (1986).

and to talk in particular about the exercise of judicial discretion and Jewish values in the context of certain issues that arise in sentencing.

It became clear to me fairly quickly when I moved to a criminal calendar how impersonal the process can appear to the defendant. He (or she, but realistically, it usually is he) is standing in court with a lawyer.¹⁹ The lawyers typically do all the talking, and the criminal defendant often is just standing there—told not to say anything by his counsel because anything he says can be held against him—while the lawyers and the judge talk about him or about legal matters he may not understand. So when the case is first called, I make it a point to greet the defendant by name. I believe most of my colleagues do that as well. At the least, I can start the hearing by letting the defendant know that I see him. As the discussion progresses, I make sure that the defendant knows what we are talking about, either by explaining it myself or confirming that he and his lawyer already have discussed it. I also acknowledge the defendant when the hearing is over. Those small things set a tone in the courtroom that lets the defendant know he is respected.

Many of our criminal cases eventually are resolved by guilty pleas. Often these are the result of plea bargaining between the prosecution and the defense, but it also is not uncommon that the defendant decides to plead guilty on the trial date, when he realizes that the witnesses have come to testify, and the trial really is going to happen. In either event, prior to accepting a guilty plea, the Rules of Criminal Procedure require the judge to engage in a colloquy with the defendant directly, in order to confirm that the defendant understands his right to a trial and the rights he is waiving by pleading guilty. The Court also obtains from the government a proffer of the facts that would be proved at trial, and the court confirms with the defendant that he did commit the charged offense.²⁰

I believe that I am not divulging trade secrets in telling you that we judges all have scripts that we use for these inquiries, which are passed along from one judge to another. But in almost all of them, near the end of the colloquy, the judges ask counsel for the government and

19. The system generally is more balanced on the criminal side than on the civil side because criminal defendants have a constitutional right to counsel. In the District of Columbia, we have a cadre of good lawyers who are appointed by the court to represent indigent criminal defendants, as well as a Public Defender Service that is one of the best, if not the best, in the country.

20. D.C. R. CRIM. P. 11(a)–(b).

the defense whether they know of any reason why the plea should not be accepted. After they both say “no,” the judge asks the defendant how he pleads to the charge. After the defendant says “guilty,” the script calls for the judge to say, “I am satisfied that the defendant understands his rights, that he is entering into this plea freely and voluntarily, and that there is a factual basis for the plea. So I accept the plea and find the defendant guilty” of whatever the offense is.

It occurred to me when I returned to the criminal calendar that something was wrong with that statement. I have just been talking directly with this person, who has admitted to me that he committed a crime. We have been engaged in a conversation that is personal, even though it is happening in open court. And it just feels wrong to me to end that conversation by reverting to impersonal language and referring to this person I have been talking to as “the defendant.” So instead, I end the colloquy by addressing the defendant directly. I say, “Mr. Smith, based on the discussion we just had, I am satisfied that you understand your rights, that you are entering into this plea freely and voluntarily, and that there is a factual basis for the plea. So I accept your plea, and I find you guilty” of the offense. He has admitted that he committed a crime, but I still see him.

The next step is sentencing, which almost always involves the exercise of substantial judicial discretion. District of Columbia law requires mandatory minimum sentences for very few crimes,²¹ and the judge generally has a great deal of discretion, both in deciding the length of the sentence and how much of it, if any, should be served in prison as opposed to a suspended sentence followed by a period of probation. I want to focus on considerations regarding sentencing that arise in virtually every case but have specific importance under the Youth Rehabilitation Amendment Act of 2018 (“Youth Act”), which now requires the sentencing judge to explain the basis for a determination to sentence or not to sentence an eligible defendant under that Act.²² The statute requires judges to make findings on several enumerated factors, many of which relate directly to the Jewish concept of teshuvah.

21. For example, under District of Columbia law, the crime of first-degree murder carries a mandatory minimum penalty of thirty years imprisonment. D.C. CODE § 22-2104(a)–(b) (2019). There also are mandatory terms when a firearm is used in the commission of a crime of violence or dangerous crime. *Id.* §§ 22-4502(a), 22-4504(b).

22. *Id.* § 24-903(c). The most recent amendments to the Act became effective on December 13, 2018.

In brief, the Youth Act recognizes that young adults—now defined, for purposes of the Act, as aged twenty-four or under at the time of the offense²³—may not yet have fully developed brains and often make impulsive and unfortunate decisions, which can result in a criminal conviction that will affect the defendant for the rest of his life. The Youth Act gives the court additional flexibility in sentencing young adults, but its most important benefit is that it gives the defendant the opportunity to have his conviction set aside if he successfully serves the sentence and completes any period of probation or supervised release.²⁴ The statute requires the court to consider and make findings about the defendant’s role in the offense, as well as the defendant’s background, family circumstances, physical and mental health, and capacity for rehabilitation.²⁵ The law also requires consideration of two factors that are of particular concern to me in the exercise of my discretion whether to afford the defendant the benefit of the Youth Act: whether the defendant has been sentenced under the Youth Act in the past and whether he appreciates the risks and consequences of his actions.²⁶ Those factors, in particular, relate to teshuvah.

We typically think of teshuvah in the period between Rosh Hashanah and Yom Kippur, but it is a process that is not limited to the high holidays. Teshuvah often is understood as repentance, but literally it means “to turn.” The process of teshuvah enables us to repair broken hearts, to ask for and grant forgiveness, to remember and acknowledge that our actions can cause pain to others, and to take the necessary steps to make amends and to take responsibility for what we have done—to turn back to ourselves or to whatever or from whatever we may have strayed. That process, according to Maimonides’ Mishneh Torah, includes six basic steps²⁷:

1. Modify our behavior. That is, we should stop engaging in behavior that we know is wrong.

23. *Id.* § 24-901(6). The definition of “youth offender” under the Act excludes persons who commit “murder, first [or second] degree murder that constitutes an act of terrorism, . . . first [or second] degree sexual abuse, . . . and first degree child sexual abuse.” *Id.*

24. *Id.* § 24-906(e-1)(1).

25. *Id.* §§ 24-906(e-1)(2), -903(c)(2)(B), (F)–(G), (I), (K).

26. *Id.* § 24-903(c)(2)(C), (H).

27. See generally MAIMONIDES, MISHNEH TORAH, LAWS OF REPENTANCE 2:4–5, 7, 9 (Simon Glazer trans., 1927), https://www.sefaria.org/Mishneh_Torah%2C_Repentance.2 [<https://perma.cc/9N5Y-W7VE>].

2. Internalize regret. We must regret our actions, but it must be real regret. Not “I regret that I ended up hurting you,” but “I regret that I did the thing that hurt you.”

3. Confession. This can be tricky when the defendant has been convicted at trial because he still has the right to appeal and therefore may not want to say anything at sentencing. But it is one of the statutory factors, and it is difficult to evaluate whether someone appreciates the risks and consequences of his actions when he does not admit to them.

4. Reconciliation. This means a sincere apology. For purposes of teshuvah, it also can include time and energy tending to the victims of our misdeeds, if the victims are amenable, although that typically is problematic in a criminal case. But I always give the defendant the opportunity to speak at sentencing if he wants to, and most defendants do apologize to the victims and the victims’ families, to their own families, and often to me.

5. Making amends. This includes returning what was taken, which often is not feasible in a criminal case. But the defendant can return something to the community, including doing community service, which usually is required as a condition of any probation imposed under the Youth Act.²⁸

6. Actual change. Finally, when confronted with the circumstances that resulted in the past misconduct, not doing the same thing again.

It usually is difficult to predict what someone will do when facing the same situation in the future. If a defendant has committed the offense before and is facing sentencing for doing it again, that past history can be reason to find that he does not appreciate the risks and consequences of his actions and does not deserve the benefit of the Youth Act. On the other hand, a young adult who committed the same offense at ages eighteen and twenty-three may have reached a level of insight by the time he goes to sentencing on the second offense that he did not have when he was younger. I therefore may find that even though he committed another similar crime, he still should be given the chance to have his conviction set aside if he earns that benefit and successfully completes his sentence.

I do not have a magic formula for determining what to do in those situations, which involve some of the most difficult decisions a judge

28. D.C. CODE § 24-903(a)(2) (requiring ninety hours of community service as a condition of probation under the Youth Act for youth offenders fifteen to twenty-four years of age, unless the court determines that community service would be unreasonable).

has to make. But I do find that principles of teshuvah are helpful in thinking about how to exercise discretion in sentencing, especially under the Youth Act, which requires consideration of many of the same factors that Maimonides outlined.

Let me return to “Ein lo la'dayyan ella mah she-einav ro'ot”—a judge must be guided by what she sees in deciding individual cases. A judge must treat all litigants fairly and impartially, which means not favoring either the poor or the rich. But judges also must be aware that the judicial process itself can be daunting and that court procedures and practices can serve to unbalance the scales. We have a responsibility to see how the court functions and to work to improve how we administer justice. I therefore want to turn to the role of judges in addressing imbalances in the system that may be created by the court itself.

In the past several years, there has been a great deal of discussion and attention in our community to issues relating to access to justice. I think it is fair to say that most of that attention has focused on making lawyers available to parties in civil proceedings who cannot afford counsel. Much has been done to increase pro bono representation in our courts as a supplement to the various legal services organizations, which do excellent work with limited resources. But access to justice involves much more than providing lawyers to more litigants, important as that is. The Court must look at its practices and procedures and make sure that our own systems are not creating additional obstacles to justice.

Let me give an example. Before my most recent assignments in the Criminal Division, I had the privilege of serving for several years as the Deputy and then the Presiding Judge of our Civil Division. During that time, beginning in around 2011 and 2012, we began to see increased filings of mortgage foreclosure cases, which was something new for our court. Prior to that time, virtually all mortgage foreclosures in the District of Columbia were non-judicial, based on a 1901 statute that allowed for foreclosure on a defaulted mortgage without a court proceeding.²⁹ After the foreclosure crisis around 2006, the City Council amended the law to provide more protections for borrowers in the foreclosure process,³⁰ and there was a

29. *Id.* § 42-815(a), (c)(1)(A).

30. *Id.* §§ 42-815.01 to .03 (establishing a foreclosure mediation fund and granting borrowers rights to cure residential mortgage foreclosure default and pursue foreclosure mediation).

moratorium on foreclosures for a time, while regulations were promulgated and new systems put in place. But even after the moratorium ended, the process was cumbersome, and title insurers were reluctant to insure properties sold after a non-judicial foreclosure out of concern that ownership would still be uncertain because of possible court challenges and extended litigation. As a result, there essentially were no foreclosures in the District of Columbia for about six years. There was talk of a judicial foreclosure statute, but then some smart lawyers for the lenders realized that a new law was unnecessary because a combination of the common law and a judicial sale statute, which also dated from 1901,³¹ gave them what they needed to bring foreclosure cases in court.

So we began to see foreclosure cases—first a handful, then a few hundred, then several hundred, and eventually thousands. In most of the cases, the defendant borrower, who had been in default on the mortgage for several years, did not respond to the lawsuit and ended up defaulting in court as well. That raised a variety of concerns for everyone involved. Legal services lawyers understandably were troubled about hundreds of people potentially losing their homes by default without ever appearing in court. The lenders felt a need to pursue foreclosure when mortgage payments had not been made for a substantial period of time but also recognized that, as a practical matter, they likely would end up as the owners of the properties, which was not a position they wanted to be in. The District of Columbia government wanted to avoid large numbers of D.C. residents losing their homes. And the court had to figure out how to manage all these cases and, if possible, to resolve them on the merits rather than by defaults.

I therefore convened a working group, which included representatives of all the affected groups. We agreed fairly quickly to create a special schedule for the mortgage foreclosure cases, which made mediation available at the very beginning of the process rather than near the end right before trial, as is the norm in most other civil actions. But an issue still remained about defaults. We could not bring people to mediation if they did not respond to the lawsuit or appear in court at all. The legal services representatives believed that many of the defendant borrowers had no idea what to do when they were served with the complaint for judicial foreclosure. Even though they received

31. *Id.* § 42-816.

a summons that told them to file an answer, they likely did not know what that meant or what to do, and so often they did nothing.

In the Superior Court, the standard practice in civil cases is to assign a case to a calendar and set an initial scheduling conference as soon as the complaint is filed; notice of that hearing then is served on the defendant with the summons and complaint. The Rules require that if the defendant does not file an answer or otherwise respond to the complaint, the clerk enters a default—not a default judgment, but simply a default.³² Under the usual practice, when the clerk enters a default, the clerk also cancels the initial scheduling conference, and a notice to that effect is sent to the parties. The plaintiff then usually files for a default judgment, and in the absence of any response from the defendant, a judgment is entered.³³ In other words, if the usual practice were followed in the mortgage foreclosure cases, defendant borrowers who defaulted in the lawsuit could have judgments entered against them and lose their homes without ever having appeared in court.

The legal services representatives on the working group did not want defaults to be entered against defendants who failed to respond to complaints in mortgage foreclosure cases, notwithstanding the Rules. On behalf of the court, I was not willing to ignore the Rules, which would amount to giving special treatment to the defendant borrowers and would be unfair to the plaintiff lenders. Nonetheless, we wanted to try to reduce the number of defaults in these cases, so that borrowers in danger of losing their homes could have the opportunity to attempt to resolve their cases in early mediation through the court and genuine disputes could be resolved on the merits.

It then occurred to me that we could change our processes to make the system work better for everyone. The Rules required the clerk to enter a default if the defendant did not respond to the complaint, but the Rules did not require that we cancel the initial hearing. It may have been counterintuitive to have a scheduling hearing when the defendant had not filed an answer, and the issues therefore had not been joined, but we decided that in these cases, it made sense to keep the hearing on the calendar.

32. D.C. R. Civ. P. 55(a).

33. If the complaint is verified and is for a sum certain, a money judgment can be entered by default without a hearing. In other circumstances, the judgment can be entered after an *ex parte* proof hearing, at which often only the plaintiff is present. *See* D.C. R. Civ. P. 55(b), 55-II(a) (4).

So we did not cancel it. Instead of sending a default notice to the parties cancelling the initial hearing, the Clerk's Office began to send out a different notice. The new notice advised the parties of the default, but instead of cancelling the initial hearing, it reminded the parties of the hearing and included language encouraging the defendant to attend. And the defendant borrowers did come. It turned out that when the borrowers were served with the voluminous foreclosure complaint, which typically included attachments an inch thick, they had no idea what to do. Many of them did nothing and overlooked or ignored the notice of the initial hearing. But when they received a single document from the court telling them about a hearing and advising them to come, they did. When they got to court, lawyers were present from the Legal Aid Society and Legal Counsel for the Elderly, as well as housing counselors who could explain the process to them. Often the lawyers and counselors would take the case themselves or refer the borrowers to other legal resources.

The changes we implemented are now the regular business process of the court. We have established a foreclosure calendar for these cases, which still number several hundred per year. Early mediation continues as the norm. Although there are some foreclosure judgments, including default judgments, a large number of the cases are resolved by the parties so that foreclosure is avoided.

We also have changed the court process more broadly, beyond foreclosure cases. In all our civil cases, we no longer cancel the initial scheduling conference when a default has been entered, and we send notice of the hearing to the defendants and encourage them to appear. The Clerk's Office now is working to implement a system to provide separate notices of the initial scheduling conferences to all civil litigants, not limited to those in default, so that they receive notice of the hearing from the court as well as from the papers served on them by the opposing party.

All of this is part of an ongoing effort to make the court accessible to litigants—many of whom will not have lawyers—and to make our processes fairer and more understandable. We continue to look at how the court system operates and at ways to redress imbalances, to the extent that they are within our control.

The Torah tells us “tzedek tzedek tirdof”—justice, justice shall you pursue. There are many commentaries on why tzedek is repeated twice in that formulation. Some commentators say it is simply for

emphasis; others say that it refers both to the means and the ends.³⁴ I prefer the latter explanation. Judges have to look to both the means and the ends, to the fairness of the process itself and to the goal of reaching impartial, informed, and correct decisions in our cases. I am proud of the changes we made in our processes, which resulted in thousands of people participating in their foreclosure cases who otherwise may have had judgments entered against them by default and in many of them saving their homes.

The way we treat litigants and our openness to seeing them as people help us make correct decisions on the law and exercise our discretion fairly. To do justice, we must be guided by what we see. Judges can do that only with their eyes open.

34. *E.g.*, RICHARD ELLIOTT FRIEDMAN, COMMENTARY ON THE TORAH 618 n.16:20 (2001).