

## SPEECH

### OF JUDGING AND JUDAISM

by  
*Hon. Rick Haselton\**

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#### I.

Today, in this season of Jewish joy and renewal, following the *Yom Ha Din*, the Day of Judgment, the Oregon Area Jewish Committee is, for the first time, conferring its highest honor, named after a judge, on a sitting judge—my dear friend, partner, and chief, Paul De Muniz. In a little less than two weeks, on the first Monday in October, the United States Supreme Court will, for the first time, begin its term with three Jewish justices taking the bench. What better time to speak of judging—and particularly, of judging and Judaism?

Jewish tradition and observance are replete with references to judging. During the High Holidays, we stand in judgment before the Heavenly Tribunal. When we learn of the death of a loved one, we rend

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\* Judge, Oregon Court of Appeals, 1994–present (Presiding Judge of Department 1, 2001–present); Stanford University (A.B. 1976); Yale Law School (J.D. 1979); member and past president of Congregation Kesser Israel in Portland, Oregon. This Speech was originally given at the Oregon Area Jewish Committee Judge Learned Hand Luncheon, September 21, 2010 (13 Tishrei 5771).

our garments and profess, “*Barukh Dayyan ha-Emet*,” meaning, “Blessed be the true [or Righteous] Judge.”<sup>1</sup> In the eleventh blessing of the Amidah, the great standing prayer, we pray, as Jews have done for 2,000 years: “Restore our judges as of yore, and our counselors as in the beginning . . . .”<sup>2</sup> And every Tuesday since biblical times, Jews have recited, as part of the morning liturgy, the 82nd Psalm: “G-d stands in the Divine assembly, in the midst of judges shall He judge.”<sup>3</sup>

Ultimately, as in all things Jewish, the essential and fundamental source is the *Torah*. Three of the first five books of the *Bible*—*Exodus*, *Leviticus*, and *Deuteronomy*—include explicit instruction on the qualities of judges and the process of judging. As an Orthodox Jew, I believe those precepts to be Divinely ordained. But regardless of one’s personal faith, I submit that those principles are transcendent and timeless—that they are as instructive and applicable to an Oregon judge in 2010 as they were to members of the Sanhedrin<sup>4</sup> before the destruction of the Second Temple or to a member of a *bet din* (religious court)<sup>5</sup> in medieval Germany. For today, at least, four of those principles are salient.

## II.

The first overarching principle: *Judging is a Sacred Trust*. It must be. It cannot be—can never be—about us. That is the message of the 82nd Psalm:

G-d stands in the Divine assembly, in the midst of judges shall He judge. Until when will you judge lawlessly and favor the presence of the wicked . . . ? Dispense justice for the needy and the orphan, vindicate the poor and impoverished. Rescue the needy and destitute, and deliver them from the hand of the wicked. . . . I said, “You are angelic, sons of the Most High are you all.” But like men you shall die, and like one of the princes you shall fall.<sup>6</sup>

Judging is an awesome responsibility. In imposing a criminal sentence, terminating a parent’s rights, or adjudicating a civil dispute, we hold the power to change the lives of others forever, irrevocably. In that way, for better or worse, we partake of the Divine.

It is for that reason that, under Jewish law, disputes are never adjudicated by a single judge.<sup>7</sup> Rather, a minimum of three judges (for

<sup>1</sup> 5 ENCYCLOPAEDIA JUDAICA *Death* 513 (2d ed. 2007).

<sup>2</sup> THE JEWISH ENCYCLOPEDIA *Shemoneh ‘Esreh* 271 (1901); see also 2 ENCYCLOPAEDIA JUDAICA *Amidah* 72–76 (2d ed. 2007).

<sup>3</sup> *Psalms* 82:1.

<sup>4</sup> 10 ENCYCLOPAEDIA JUDAICA *Israel, Land of: History* 143–44 (2d ed. 2007); 18 ENCYCLOPAEDIA JUDAICA *Sanhedrin* 21 (2d ed. 2007).

<sup>5</sup> 4B ENCYCLOPAEDIA JUDAICA *Bet Din and Judges* 722–27 (1971).

<sup>6</sup> *Psalms* 82:1–7.

<sup>7</sup> *Bet Din and Judges*, *supra* note 5, at 722; Talmud Bavli [Babylonian Talmud], *Sanhedrin* 3b. All Talmud Bavli citations are sourced from THE SCHOTTENSTEIN EDITION TALMUD BAVLI (Mesorah Publ’ns, Ltd. 2d ed. 2002).

example, for a conversion or for the annulment of vows) is required, with an increasingly greater number for even more substantial matters.<sup>8</sup> We are not perfect. Only G-d can act as a sole judge.<sup>9</sup>

It is also for that reason—that judges are performing a sacred function—that Jewish law prescribes rigorous qualifications for judges. Some of those may seem a little archaic; for example, one colloquy in the Talmud indicates that judges should not engage in manual work, because it might expose them to popular contempt<sup>10</sup> (which would eliminate the yard work that the Chief Justice and I both so enjoy—*seriously*). But other judicial qualities are immutable.

In the *Torah*'s first reference to judges, in *Exodus*, G-d says to Moses: “And you shall discern from among the entire people, men of accomplishment, G-d-fearing people, men of truth, people who despise money . . . .”<sup>11</sup> Later, in *Deuteronomy*, the *Torah* speaks of “distinguished men, who are wise, understanding, and well known to your tribes . . . .”<sup>12</sup> Judges are also enjoined: “[Y]ou shall not tremble before any man, for the judgment is G-d's . . . .”<sup>13</sup>

Thus, in Jewish law, judges are to be G-d-fearing, incorruptible, and independent—wise and courageous in their pursuit of the truth. I cannot imagine a better ideal of judicial integrity.

The quintessential example of Jewish judicial independence is described in the *Talmud Bavli* (Babylonian Talmud), in *Gemara Tractate Bava Metzia* 59b. The short version is that a group of rabbis were debating a point of *halachah* (Jewish law), with one rabbi, R' Eliezer, who was dissenting and adducing what he believed were irrefutable arguments for his position.<sup>14</sup> Finally, R' Eliezer, frustrated, invoked the aid of Heaven in support of his position, and a Heavenly Voice called out, “What argument do you have with R' Eliezer, whom the *halachah* follows in all places!”<sup>15</sup> Whereupon one of the rabbis in the majority replied, “It is not in Heaven,” meaning that under the *Torah*, extrinsic influences (even those emanating from the Almighty) must not alter the judgment of a majority of judges who have deliberated with integrity.<sup>16</sup> G-d responded by laughing, saying to the Angels, “My children have prevailed over Me; My children have prevailed over Me.”<sup>17</sup>

So how does *that* square with being “G-d-fearing”? *Perfectly*. Humility—being “G-d-fearing”—understanding one's proper role—is the

<sup>8</sup> *Bet Din and Judges*, *supra* note 5, at 722–23.

<sup>9</sup> *Id.* at 722.

<sup>10</sup> Talmud Bavli, *Kiddushin* 70a.

<sup>11</sup> *Exodus* 18:21–22 (Torah).

<sup>12</sup> *Deuteronomy* 1:13 (Torah).

<sup>13</sup> *Id.* at 1:17.

<sup>14</sup> Talmud Bavli, *Bava Metzia* 59b.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

essential condition of judicial integrity. That is not an easy balance because judges must be people of strong character and, yes, sometimes even (as is true of the Chief Justice) of “accomplishment.” But judging can never, *must never*, be about *you*. It is so easy and seductive to believe otherwise, with the robe and the title, with people standing when you enter the courtroom, or laughing at your jokes. But there is no more damning flaw; “like men you shall die, and like one of the princes you shall fall.”<sup>18</sup> *Judging is a sacred trust.*

### III.

The second transcendent principle of judging is expressed in one of the most inspiring (at least for lawyers) injunctions in the *Torah*: “*Tzedek, tzedek, teerdof*” (Justice, justice, shall you pursue).<sup>19</sup> Although many today construe those words as a reiterative anthem for social justice, traditional commentary offers a different understanding. No word in the text of the *Torah* is gratuitous (not unlike Oregon’s statutory construction); hence each use of “*tzedek*” (“justice” or “righteousness”) in the phrase “*Tzedek, tzedek, teerdof*” has independent significance. What is that significance? *To do justice, one must act justly.*

That is, most simply, the ends do not justify the means. *Both* the substance *and* the procedure must be just—and, if one adheres with integrity to the legally prescribed procedures, the result will, G-d-willing, be just.

What are the essential features of that “just” process under Jewish law? I can discern at least four:

#### A.

The judges must be open-minded—they must *listen*. The fundamental prayer of our faith begins with the word “*Shema*,” meaning “listen.”<sup>20</sup> In *Deuteronomy*, Moses speaks of instructing the judges, “*Listen among your brethren and judge righteously between a man and his brother or his litigant.*”<sup>21</sup> There is no more precious—and rare—quality among judges. To be able to listen, one must approach a dispute without fixed preconceptions, much less pre-commitments. Further, as the case proceeds, as evidence and arguments are presented, judges are to remain open and receptive, without any tentative “lean.” As *Pirkei Avos* (*Ethics of the Fathers*) admonishes us, when serving as a judge, “do not act as a lawyer.”<sup>22</sup>

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<sup>18</sup> *Psalms* 82:7.

<sup>19</sup> *Deuteronomy* 16:20 (Torah).

<sup>20</sup> 18 ENCYCLOPAEDIA JUDAICA *Shema, Reading of* 453–56, 453 (2d ed. 2007).

<sup>21</sup> *Deuteronomy* 1:16 (Torah) (emphasis added).

<sup>22</sup> PIRKEI AVOS [ETHICS OF THE FATHERS], ch. 1, mishnah 8. All *Pirkei Avos* citations are sourced from PIRKEI AVOS (Mesorah Publ’ns, Ltd. 1989).

Given such scrupulous rectitude, it is perhaps ironic that one of the hottest judicial ethical disputes in America today is whether, in the wake of the United States Supreme Court's opinion in *Republican Party of Minnesota v. White*,<sup>23</sup> candidates in judicial elections are entitled, while campaigning, to make pre-commitments as to how they will decide certain impending cases.<sup>24</sup> Under Jewish law, that is the antithesis of ethical judging.

B.

Under *halachah*, the judges must be even-handed. *Five* times the *Torah* comments that judges shall not “pervert” justice<sup>25</sup>—that is, to act other than impartially. Significantly, that prohibition is directed not only, as one might expect, against favoring the powerful and wealthy, but also against favoring the poor. For example, in *Leviticus*, we are told, “You shall not commit a perversion of justice; you shall not favor the poor and you shall not honor the great . . . .”<sup>26</sup> Only a few verses down in the same chapter of *Leviticus*, included in *Kedoshim*, the holiness code, we encounter the most familiar metaphor of judicial even-handedness: “You shall not commit a perversion in justice, in measures of length, weight, or volume. You shall have [*mozney tzedek*] . . . .”<sup>27</sup> *Mozney tzedek*—in English, variously either “correct scales” or “scales of justice.”

C.

Even more particularly, with respect to “perversion of justice,” judges are forbidden to accept bribes. That principle is expressed in the requirement that judges must “despise money,”<sup>28</sup> and in two explicit prohibitions against taking bribes.<sup>29</sup> But, even more remarkably, the *Torah*

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<sup>23</sup> 536 U.S. 765 (2002).

<sup>24</sup> See MODEL CODE OF JUDICIAL CONDUCT R. 2.10(B) (2008) (“A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”); MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(13) (2008) (providing that a judge or judicial candidate shall not, “in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”); see also Bauer v. Shepard, 634 F. Supp. 2d. 912, 945–48 (N.D. Ind. 2009) (sustaining ABA model code “pledges, promises, and commitments” prohibition against facial constitutional attack); Duwe v. Alexander, 490 F. Supp. 2d. 968, 975–77 (W.D. Wis. 2007).

<sup>25</sup> *Exodus* 23:2, 23:6 (Torah); *Leviticus* 19:15, 19:35 (Torah); *Deuteronomy* 16:19 (Torah).

<sup>26</sup> *Leviticus* 19:15 (Torah).

<sup>27</sup> *Id.* at 19:35–36 (Torah).

<sup>28</sup> *Exodus* 18:21 (Torah).

<sup>29</sup> *Id.* at 23:8 (Torah); *Deuteronomy* 16:19 (Torah).

recites, as among Divine attributes, “Who does not show favor and *Who does not accept a bribe*.”<sup>30</sup>

The *Torah* makes no bones about the reasons for this prohibition: “[F]or the bribe will blind the eyes of the wise and make just words crooked.”<sup>31</sup> Rashi, the great medieval commentator, is even more explicit, stating that if a judge accepts a bribe, “his mind will become confused, what he has learnt will be forgotten, and the light of his eyes will become dim.”<sup>32</sup>

All of that seems unremarkable—even self-evident—until one ponders modern judicial elections and campaign fundraising. Can a judge accept campaign contributions from attorneys or litigants with cases pending or likely to come before the judge without at least subconsciously compromising his or her impartiality? To what extent can, or should, a judge personally engage in fundraising solicitations? I wish that those were rhetorical questions—but they are not.<sup>33</sup>

#### D.

Under Jewish law, each member of the court has an independent obligation to decide the merits of each case. Although, as we have seen in the case of R’ Eliezer, the view of the majority must ultimately prevail,<sup>34</sup> and that disposition must be the product of a collegial dynamic of “men of truth”<sup>35</sup> engaging in arguments “for the sake of Heaven.”<sup>36</sup> Thus, a judge cannot simply defer to the views of a judge of greater seniority or stature and cannot acquiesce or remain silent in the face of a majority that the judge believes to be in error.<sup>37</sup>

And so, under Jewish law, justice shall be done justly—with an open mind, with an even hand, uncorrupted by material considerations, and elevated for the sake of Heaven. *Tzedek, tzedek, teerdof*.

But is that enough? As we know all too well, adherence to legal process, even the most laudable legal process, cannot be equated with justice. What of the variety of human experience? What of compassion?

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<sup>30</sup> *Deuteronomy* 10:17 (Torah) (emphasis added).

<sup>31</sup> *Id.* at 16:19 (Torah).

<sup>32</sup> RASHI, COMMENTARY ON THE TORAH, *Commentary on Exodus 23:8, translated in CHUMASH WITH TARGUM ONKELOS, HAPTAROTH AND RASHI’S COMMENTARY* 124 (A. M. Silbermann ed., A. M. Silbermann & M. Rosenbaum trans., Feldheim Publishers Ltd. 1934).

<sup>33</sup> See MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(8) (2008) (prohibiting judges or judicial candidates from “personally solicit[ing] or accept[ing] campaign contributions other than through a campaign committee”). *But see* *Carey v. Wolnitzek*, 614 F.3d 189, 193–94 (6th Cir. 2010) (holding “anti-solicitation” prohibition facially unconstitutional as overbroad).

<sup>34</sup> See *supra* notes 14–17.

<sup>35</sup> *Exodus* 18:21 (Torah).

<sup>36</sup> PIRKEI AVOS, *supra* note 22, ch. 5, mishnah 20.

<sup>37</sup> *Exodus* 23:2 (Torah).

## IV.

Thus, the third overarching principle: *Every case has dignity, and every litigant is to be treated with respect.*

For the last 3,000 years, some facts of judicial life have not changed. There are “big” cases and “little” cases, lots of each, and not enough judges to decide them. And—one more constant—in virtually every one of those cases, the outcome will substantially affect someone’s life. So, in fact, almost *every case is “big” to someone.*

In the rush and crush of overwhelming dockets, it is all too easy to forget that simple human reality. It is tempting to view cases, especially “small” cases, as abstractions, as “files” to be “processed.” Some of that may be inevitable—it probably is—but it is also insidious, individually and institutionally, subverting the judge’s soul. Once some cases, or classes of litigants, are deemed to be less “important” than others, where does it end?

That is why the *Torah*, speaking to our better angels, admonishes, “You shall not show favoritism in judgment, *small and great alike shall you hear . . .*”<sup>38</sup> In this context, “small” and “great” refer to the size of the disputes. Similarly, rabbinic commentary to another analogous prohibition in *Deuteronomy*<sup>39</sup> states that a judge must not speak harshly to one litigant and respectfully to another, or force one party to stand, but not the other.<sup>40</sup>

The instruction is explicit: The imperatives of judging righteously apply rigorously, and without exception, to every case. *Every case is important; the circumstances of each case matter.* And because they do, judgment ultimately is alloyed with compassion: “Righteous is Hashem in all His ways and *magnanimous* in all His deeds.”<sup>41</sup> There is no second-class justice.

## V.

The fourth and final overarching principle: *We are all judges.* Each of the forgoing principles applies to each of us. This may be the most difficult of all—including, and perhaps especially, for judges. Every day with family, friends, colleagues, adversaries, and strangers, we all act as judges, observing, evaluating, and responding to their acts and words, and assessing their motivations.

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<sup>38</sup> *Deuteronomy* 1:17 (Torah) (emphasis added).

<sup>39</sup> *Id.* at 16:19 (Torah).

<sup>40</sup> RASHI, 5 COMMENTARY ON THE TORAH, *Commentary on Deuteronomy 16:19*, translated in 5 YISRAEL HERCZEG, THE SAPIRSTEIN EDITION RASHI: THE TORAH WITH RASHI’S COMMENTARY TRANSLATED, ANNOTATED, AND ELUCIDATED 183 (Mesorah Publ’ns, Ltd. 1999).

<sup>41</sup> *Psalms* 145:17 (emphasis added).

We are counseled in *Pirkei Avos* to “judge everyone favorably”<sup>42</sup>—to give our fellows the benefit of the doubt, including considering a person’s conduct in the context of the whole person. Our challenge, and our charge, is to live each day *judiciously* in the best sense, with integrity, humility, insight, and compassion.

Thus, four transcendent principles: *first*, judging is a sacred trust; *second*, to do justice, one must act justly; *third*, every case has dignity, and every litigant must be treated with respect; and *fourth*, each of us acts as a judge and must act justly in our own life.

I know so well, from countless cases, conversations, and personal kindnesses, that today’s honoree lives by and personifies those principles. I have been blessed to have him as my mentor as a judge, and it is a wonderful privilege to be his friend.

My time serving with the Chief Justice was singular. But I have also been blessed for 17 years to serve with a group of judges who daily exemplify these ideals—and, I would like to say in this company, none more than the Honorable Robert Wollheim, who embodies the Oregon Area Jewish Committee’s highest values, and is a man of courage, honor, and great generosity of spirit.

It is most fitting to conclude by remembering another judge, a Jewish judge, with whom the Chief Justice served and whose seat on the Court of Appeals I am privileged to hold. Jonathan Newman personified the principles I have described. For nearly nine years, from 1983 to 1991, Jonathan served as a judge on the Oregon Court of Appeals. For nine years, no case was too “small” not to engage his searching intellect or to escape his compassionate eye. Every day for nine years, Jonathan cherished judging as a trust, a privilege, and a blessing. He loved being a judge; he loved engaging in what, for us, pass as arguments “for the sake of Heaven.”<sup>43</sup> And every day, even as he was in unimaginable pain near the end, he honored our sacred trust.

Jonathan Newman died 19 years ago next month, in the fall, just after the holidays. He remains an inspiration for those of us who knew him and loved him. May his memory be for a blessing.

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<sup>42</sup> PIRKEI AVOS, *supra* note 22, ch. 1, mishnah 6.

<sup>43</sup> *Id.* at ch. 5, mishnah 20.