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The Influence of a Jewish Education and Jewish Values on a Jewish Judge

Cover Page Footnote

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THE INFLUENCE OF A JEWISH EDUCATION AND JEWISH VALUES ON A JEWISH JUDGE

*Hon. Alvin K. Hellerstein**

There is no religious test for office in the United States.¹ Jew, Christian, Moslem, or atheist are equal before the law, and enjoy equal opportunity to gain public office.² Consequently, how a judge decides a case should not depend on the judge's religious upbringing, religious identification, or religious values.

My late colleague, Richard Casey, set an example.³ Congress passed a law outlawing partial birth abortion,⁴ and a case attacking its constitutionality came before him.⁵ Judge Casey, an observant Roman Catholic, abhorred abortions, in particular, the kind of abortion

* Senior U.S. District Judge, Southern District of New York; Columbia University School of Law (LL.B., 1956), Columbia College (A.B., 1954). Judge Hellerstein was an editor of the *Law Review*, served as Law Clerk to U.S. Dist. Judge Edmund L. Palmieri (1956-1957). He served as First Lieutenant, U.S. Army, Judge Advocate General's Corps (Instructor, JAGC School, Charlottesville, VA, 1957-1959, Trial Lawyer and Legal Counselor, 7th Div. and HQ. 8th Army, Korea, 1959-1960); Stroock & Stroock & Lavan (1960-1998) (Co-Head, Lit'n Dep't). Judge Hellerstein, in addition to his practice at Stroock & Stroock & Lavan, devoted considerable time to professional and charitable activities. He was President, and then Chairman, of the Board of Jewish Education, and he served on the boards of his synagogue, The Jewish Center, the Ramaz School, and on important committees of UJA-Federation. He was active as well in professional organizations, and lectured and wrote for bar associations and for *The Practising Law* and *The American Law Institutes*. As a District Judge, Judge Hellerstein presided over all the 9/11 litigation (approximately 13,000 such cases were filed), the Freedom of Information Act cases against the Department of Defense and the Central Intelligence Agency relating to Abu Ghraib, and the renditions and interrogations of captured enemy combatants, among many other cases.

¹ U.S. CONST. art. VI, cl. 3.

² *See id.* (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

³ *See Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 492 (S.D.N.Y. 2004), *vacated sub nom. Nat'l Abortion Fed'n v. Gonzales*, 224 F. App'x 88 (2d Cir. 2007) (adhering to Supreme Court precedent and concluding that “[w]hile Congress and lower courts may disagree with the Supreme Court's constitutional decisions, that does not free them from their constitutional duty to obey the Supreme Court's rulings”).

⁴ 18 U.S.C. § 1531(a) (2006).

⁵ *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 439.

that extracts and crushes a late-term fetus.⁶ There was testimony at trial, included in Judge Casey's decision, which stated such an abortion was tantamount to infanticide.⁷ Nevertheless, he held the law unconstitutional, not to be enforced.⁸ As a judge, he had to follow the law in the form of a Supreme Court precedent.⁹ How ironic that the Supreme Court reversed Judge Casey, changing its own precedent to uphold the statute.¹⁰

In most cases, the law is not in dispute and our tasks are confined to finding the facts. While decisions of judges differ, their religious beliefs and values are not likely to make a difference. Yet, lawyers know that the selection of a judge for a case—in most courts, a random selection—is as important an event as any. How can we then say that the judge's upbringing, including his religious upbringing, does not make a difference? Since people inevitably are influenced by their upbringing, let us look at some of my own decisions and see if we can find a discernible trend.

Alejandro Orozco, a Mexican national and a permanent resident of the United States, was an automobile mechanic. He was married to an American citizen. His daughter, born in the United States, was a stellar high school student. As is the American way, he wanted to raise himself economically, and accepted a job, arranged by a cousin, to be the assistant driver on a transcontinental trailer truck. His goal, after gaining experience, was to become a principal driver.

Laden with groceries, the truck was stopped mid-country by state troopers with drug-sniffing dogs, but was allowed to continue. The principal driver, unnerved by the stop, then told Orozco that he had hidden a load of narcotics midst the packages of groceries. Not to worry, the driver told Orozco, "When we deliver the load, I'll give you a cut of my share."

Orozco did not want a cut of the share. He wanted to go home, but he had no money, and he saw no way to call the police. The cross-continent drive continued. At the destination, as the nar-

⁶ See *id.* at 479 (finding partial-birth abortion to be a "gruesome, brutal, barbaric, and uncivilized medical procedure").

⁷ *Id.* at 444, 446.

⁸ *Id.* at 493.

⁹ See *id.* at 492 ("[O]ur responsibility is to follow faithfully [the Supreme Court's] opinions, because that court is, by constitutional design, vested with the ultimate authority to interpret the Constitution.") (Luttig, J., concurring) (quoting *Richmond Med. Ctr. for Women v. Gilmore*, 219 F.3d 376, 378 (4th Cir. 2000)).

¹⁰ *Gonzales v. Carhart*, 550 U.S. 124, 165-66, 168 (2007).

cotics were about to be delivered, the trap planned by the police was sprung. New York and federal police arrested and charged the driver, Orozco, and the buyers with conspiracy and unlawful trafficking of narcotics, under a statute that imposed a ten-year mandatory minimum imprisonment to each defendant.¹¹

The case was wheeled out to me according to the random selection process used by the court. The prosecutor, after hearing Orozco's story, reduced his charge to misprision of felony, with considerably lower custodial punishment,¹² Orozco pleaded guilty.¹³

In connection with guilty pleas, a district judge is required to examine the defendant under oath (to allocute him) to ensure that the plea is voluntary, that the defendant has an understanding of the consequences, and that there is an independent basis for finding the defendant guilty.¹⁴ I allocuted Orozco and came to the view that he was not guilty, for he did not share the driver's criminal intent to conceal over 200 kilograms of cocaine secreted in the shipment of groceries being transported cross-country. I advised him that if I were to accept his guilty plea, the United States immigration authorities would likely deport him, causing him to be separated from his family.¹⁵

I called upon a friend to provide pro bono assistance from the immigration department of his law firm, to aid Orozco's appointed defense counsel. Meanwhile, I kept Orozco in jail, in order to avoid the warrant of the immigration police. Several weeks later, when Orozco came before me again, his immigration lawyer had good news to report. Immigration had agreed to adjust Orozco's status, so he could gain American citizenship derivatively from his wife. And the Assistant United States Attorney moved to dismiss the case against Orozco, having decided to *nulle prosequi*.¹⁶ I granted the motion; Orozco was free.¹⁷

Orozco, weeping, fell to his knees, thanked me profusely and wanted to kiss my hands, if the Marshals would only let him. I stopped him. "All in the courtroom," I told him, "were engaged in

¹¹ 21 U.S.C. § 841(b)(1)(A) (2006).

¹² 18 U.S.C. § 4 (2006) (providing for a maximum custodial punishment of three years).

¹³ Transcript of Plea Hearing at 16, *United States v. Morales*, No. 07 Cr. 897 (S.D.N.Y. June 23, 2008).

¹⁴ FED. R. CRIM. P. 11(b).

¹⁵ Transcript of Plea Hearing, *supra* note 13.

¹⁶ *Nolle Prosequi* at 1, *United States v. Orozco*, No. 07 Cr. 897 (AKH) (S.D.N.Y. Sept. 11, 2008).

¹⁷ Order at 1, *United States v. Orozco*, No. 07 Cr. 897 (AKH) (S.D.N.Y. Sept. 11, 2008).

the pursuit of justice—his lawyers, the prosecutor, and the judge.” I told him the wisdom of Deuteronomy: “Justice, justice shalt thou pursue.”¹⁸ “Justice has to be pursued,” I told him, “because it is hard to find and hard to apply. And since you, Mr. Orozco, enabled us to find justice, we should be thanking you; you should not be thanking us.”

Before we explore the significance of Orozco to our topic, let me describe another case. A non-profit agency specializing in the placement of mentally disabled adults in community housing contracted to purchase two adjoining condominium units. It filed plans to consolidate the two apartments into one supervised permanent residence for four of its charges and a live-in supervisor. The neighbors, alarmed at what they considered an uncomfortable intrusion into their quiet condominium, offered to buy one of the apartments to break up the unit and, thus, destroy the plan. They offered to pay a significantly higher price for the apartment and indemnify the seller against a breach of contract lawsuit by the non-profit. The non-profit sued, alleging discrimination in housing against the disabled under a federal housing law.¹⁹

I issued an injunction against the second transaction.²⁰ “The disabled, including the mentally disabled,” I ruled, were created in the image of God, just as we. If we are fortunate not to have a disabled child in our family, our friends and neighbors may not have been so fortunate. The disabled are we, and we are they. I urged the neighbors to follow their better intentions and settle rather than continue in their defense. They did.²¹

No one can say that decisions like these are unique to a Jewish judge. The pursuit of justice, or the Hebrew original *tsedek*,

¹⁸ Deuteronomy 16:20.

¹⁹ See 42 U.S.C. § 3605 (2006); Docket Transcript, *Young Adult Inst., Inc. v. Bd. of Managers of the Bennett Condo.*, No. 1:06cv15386 (S.D.N.Y. Dec. 26, 2006).

²⁰ Docket Transcript, No. 1:06cv15386 at Entry No. 49.

²¹ Transcript of Hearing at 55, 72, *Young Adult Inst., Inc. v. Bd. of Managers of the Bennett Condo.*, No. 1:06cv15386 (S.D.N.Y. Apr. 18, 2007) (“Look, everyone of us if we are fortunate enough not to have a disabled child or disabled relative has a friend who has a disabled child or a disabled relative. They are part of our lives. They are created the same as you and I are created in the image of God. They deserve the dignity of life and we in our communities can’t play the game not in my backyard. They are us as we are they. They are entitled to their lives as we are entitled to our lives and anyone who denies them that right to life irreparably damages them. . . . [W]e are they and they are us. They are our children. They are our neighbor’s children and they need to be able to live in dignity and the law does not allow discrimination.”).

tsedek, tirdof, is an American notion, not just a Jewish notion.²² My refusal to accept the plea of guilty of Orozco in *United States v. Morales*²³ was a conventional application of Rule 11 of the Federal Rules of Criminal Procedure, binding on all federal judges, not only Jewish judges.²⁴ The law prohibiting discrimination in housing is an American statute,²⁵ and my sentiments about the creation of man in the image of the divine were *ex gratia*, not really necessary to the decision.

The issue of Jewish influences came up again in a more complex setting. I presided over all the civil liability cases arising from the terrorist-related aircraft crashes of September 11, 2001.²⁶ Among them are 10,000 to 11,000 cases filed by the firemen, policemen, construction workers, and volunteers who cleared the debris of the three collapsed towers of the World Trade Center and neighboring areas.²⁷ After years of litigation, a settlement was agreed to between the FEMA-created captive insurance company that insured New York City and most of its contractors, and the attorneys for the plaintiffs.²⁸

According to the Federal Rules of Civil Procedure, the parties in a case have the power to settle their case; the approval of the judge presiding over the case is not required.²⁹ It is only in a class action (and a few other categories of lawsuit) that the judge's approval is a

²² *Deuteronomy* 16:20 (“Justice, justice, shall you pursue, that you may thrive and occupy the land that the Lord your God is giving you.”). See also *Deuteronomy*, in JPS TORAH COMMENTARY 90 (1996) (“The pursuit of justice is an indisputable condition for God’s enabling Israel to endure and thrive in the promised land.”).

²³ No. 07 Cr. 897 (AKH) (S.D.N.Y. 2008).

²⁴ FED. R. CRIM. P. 11(c)(3)(A).

²⁵ 42 U.S.C. § 3601 (2006); see also 42 U.S.C. §§ 3602-3605 (2006) (detailing the policy of the United States against discrimination within the housing context).

²⁶ Pursuant to the Air Transportation Safety and System Stabilization Act (“ATSSSA”), all cases arising from, or related to, the terrorist-related aircraft crashes into the World Trade Center, the Pentagon, and the field in Shankesville, Pennsylvania, must be filed in the federal court in Manhattan, the United States District Court for the Southern District of New York. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 408(b)(3), 115 Stat. 230, 240-41 (2001) (codified as amended at 49 U.S.C. § 40101 (notes) (2000)). The first case was randomly assigned to me. All the rest came to me as “related” cases. See S.D.N.Y. R. 13(a) (2011) (for the division of business among district court judges); Alvin K. Hellerstein, James A. Henderson, Jr. & Aaron D. Twerski, *Managerial Judging: The 9/11 Responders’ Tort Litigation*, 98 CORNELL L. REV. 127, 131, 172 (2012); ANTHONY DEPALMA, *CITY OF DUST: ILLNESS, ARROGANCE, AND 9/11*, at 255-56 (2d ed. 2011).

²⁷ DEPALMA, *supra* note 26.

²⁸ See Verdict, Settlement and Agreement at *100, *In re World Trade Ctr. Disaster Site Litig.*, No. 21MC00100, 2010 WL 4679450, at *100 (S.D.N.Y. June 10, 2010).

²⁹ FED. R. CIV. P. 41(a)(1).

condition of settlement.³⁰ And I had not granted class action status to the respiratory and cancer cases filed by the firemen, policemen, construction workers, and volunteers who cleared the debris pile.³¹

Nevertheless, I ordered a hearing, heard the stories of the plaintiffs who came to court, and disapproved the settlement.³² I ruled that the settlement gave too much to the lawyers and too little to the plaintiffs.³³

The lawyers were outraged.³⁴ What authority did Judge Hellerstein have to reject our settlement? One lawyer complained that Judge Hellerstein had a sense of fairness that was not in the law.³⁵ One of my colleagues, in a congratulatory email, wrote, amusingly, “What do you think you are doing applying notions like reasonableness and fairness? Do you think you are a federal judge?” Newspaper columns expressed wonder at why a judge would reject a settlement that promised to remove more than 10,000 cases from his docket.³⁶ A reporter for the *New York Times* suggested that it might have something to do with my being an Orthodox Jew. (I displayed a Hebrew calligraphy on my wall setting out the Hebrew phrase from the Torah, “Justice, Justice, Shalt Thou Pursue.”)³⁷

Although the story of the 9/11 cases is not yet ended, there has been excellent progress. The lawyers re-patched the settlement, providing significantly more money to the litigants, improving the fairness of the procedures, and reducing the fees and expenses that could drain the settlement.³⁸ Agreements were made, and continue to

³⁰ FED. R. CIV. P. 23(e).

³¹ DEPALMA, *supra* note 26, at 256.

³² See generally Order 2006, *In re World Trade Ctr. Disaster Site Litig.*, No. 21CV100 (S.D.N.Y. Mar. 15, 2010); see also *\$657M World Trade Ctr. Deal Falls Through*, 28 WL J. TOXIC TORTS 12, *1 (2010) (stating that the settlement was rejected, but litigation continues in *In re World Trade Ctr. Disaster Site Litig.*); Mireya Navarro, *Federal Judge Orders More Talks on 9/11 Deal*, N.Y. TIMES (Mar. 19, 2010), <http://www.nytimes.com/2010/03/20/nyregion/20zero.html> (stating that Judge Hellerstein rejected the settlement); A. G. Sulzberger & Mireya Navarro, *Ground Zero Deal Gives Plaintiffs \$712.5 Million*, N.Y. TIMES (June 10, 2010), <http://www.nytimes.com/2010/06/11/nyregion/11zero.html> (introducing a new settlement offer used to replace the previously refused offer).

³³ *\$657M World Trade Ctr. Deal Falls Through*, *supra* note 32; see also Navarro, *supra* note 32.

³⁴ DEPALMA, *supra* note 26, at 324.

³⁵ *Id.*; Navarro, *supra* note 32; Sulzberger & Navarro, *supra* note 32.

³⁶ Mireya Navarro, *Empathetic Judge in 9/11 Suits Seen by Some as Interfering*, N.Y. TIMES, May 3, 2010, at A17, available at 2010 WLNR 9121370.

³⁷ *Id.*

³⁸ Mireya Navarro, *Sept. 11 Workers Agree to Settle Health Lawsuits*, N.Y. TIMES, Nov.

be made, with other groups of defendants for additional settlements.³⁹ But the controversy remains over what critics call the judge's arrogation of power, and what supporters call the judge's reasonable and proper exercise of judicial power to assure reasonableness and fairness where attorneys in a mass tort action are or may be conflicted in their representations.

This is not the place to justify my decisions. My topic is to explore my orders and rulings as a United States District Judge in relation to my Jewish background and values.

I would argue that my Judaism is not a predictable influence on my judgments. Nor would I want it to be the case. I admire the way that Judge Casey reasoned through, and followed, the precedents which he considered binding, even while he made his distaste for partial-birth abortions abundantly clear in his reasoning.⁴⁰ He did not mention his Roman Catholicism; he did not have to, and it would have been improper had he done so. Under the First Amendment, the application of a religious doctrine as support, or as criticism, of a neutrally-worded statute might well constitute an unlawful establishment of religion.⁴¹ I would not want it to be said that I ruled in a certain way because I am an Orthodox Jew, and I would not want to feel that my Jewish upbringing or values cause me to rule in one way and not another.

Yet, it cannot be denied that judges are influenced by who they are and how they were brought up, and certainly I would not deny that. Indeed, can I be so certain in my disclaimer? After all, who, but God, can see the operation of a human mind, even one's own mind? And we cannot know the true essence of God, for as God said to Moses when Moses put that question to God, "I will be what I will be."⁴² When Moses wanted to see God, to better understand him and to predict what he may want of us, God put Moses in the cleft of the rock, to see God's back, to see Him after He passed by.⁴³ We can see the traces of God; we cannot see God.

So it is with a judge. As I said to friends and family at my induction as a United States Judge of the Southern District of New York, I am accountable for all my rulings, orders, and judgments to

20, 2010, at A1, *available at* 2010 WLNR 23157104.

³⁹ *Id.*

⁴⁰ *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 479, 492.

⁴¹ *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963).

⁴² *Exodus* 3:14.

⁴³ *Exodus* 33:22.

the litigants, to the courts of appeal, and ultimately to God. For as the Psalmist said, and as we read every Tuesday morning, God sits in the congregation of the judged, rendering judgment on the judge.⁴⁴ My rulings, over thirteen years of judging, are my record. They reflect all that influenced me: my immigrant parents, my growing up in the Bronx, my public school education, my forty-nine-year marriage, the parenting of my children, my thirty-eight-years of law practice, my service in The Judge Advocate General's Corps of the United States Army, the extraordinary faculty that taught me in Columbia College and Columbia Law School, my experience as a law clerk to United States District Judge Edmund L. Palmieri; indeed, all my life experiences, and, certainly, my Jewish education and my Jewish values. But, above all these influences, there is one category that stands pre-eminent—the Constitution, statutes, and cases that I swore as a judge to follow and uphold.

Benjamin Cardozo, also a Jew and a judge, put it very well in *The Nature of the Judicial Process*.⁴⁵ Referencing William James's lecture on Pragmatism, Cardozo proposed that everyone has “an underlying philosophy of life,” known or unknown, a “stream of tendency . . . which gives coherence and direction to thought and action.”⁴⁶ “All their lives,” Cardozo said, judges are tugged by

forces which they do not recognize and cannot name . . . inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense . . . of “the total push and pressure of the cosmos,” which, when reasons are nicely balanced, must determine where

⁴⁴ *Psalms* 82:1. The translations vary. See, e.g., THE KOREN SIDDUR 186 (Jonathan Sacks trans., 2009) (“God stands in the Divine assembly. Among the judges He delivers judgment.”). Babylonian Talmud, *Tractate Sanhedrin* 6b, at 58 (Steinsaltz ed., Random House 1996). The Talmud instructs judges to “know whom they are judging, and before whom they are judging,” citing as the proof-text the 82nd Psalm's opening phrase, “God stands in the congregation of God.” *Id.* Rabbi Steinsaltz comments that the judges “not only . . . judge the litigants who come before them, but also, as it were, God himself.” *Id.* As I understand the admonition, particularly when I have to sentence defendants to jail terms, a judge should deliver his judgments as if God were standing with the defendants, for they also are part of His Divine assembly. As the Talmud warns judges: “See what you are doing, for it is not before man that you judge, but before the Lord.” *Id.* (quoting II Chronicles 19:6).

⁴⁵ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

⁴⁶ *Id.* at 12 (referencing WILLIAM JAMES, *PRAGMATISM* (1995)).

choice shall fall.⁴⁷

“We may try,” Cardozo said, “to see things . . . objectively [But] we can never see them with any eyes except our own.” Be they “a form of pleading[s] or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation’s charter.”⁴⁸

I took an oath when I became a United States District Judge, prescribed by 28 U.S.C. § 453, but which resonates Biblically, to “administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [district judge] . . . agreeably to the constitution and laws of the United States.”⁴⁹ As the Bible puts it, “fear [no] man, for judgment is God’s.”⁵⁰ Talmud Sanhedrin comments, “judge the litigants as if they were a congregation of God, with God standing in their midst.”⁵¹

As a judge, and as a Jew, I consider that everything I do reflects God and affects His image. It is as if my orders and rulings, my decisions and opinions, stand before me in heaven, to judge me when I am to be judged. Justice is elusive, but it must be sought by passion and intelligence, so that the finished result reflects not only being Jewish, but being righteous, just, and correct. Let others pick the strands; I will stand by the results.

We live in a wonderful country. Our founders knew the Bible and freely took influence from it in shaping the seminal documents and practices creating the United States of America, and allowing it to endure and prosper as a light unto the nations, the envy of people everywhere. Just as the concept and pursuit of justice is fundamental to Judaism, so is it fundamental to the rule of law in the United States. I pray that my rulings, orders, and judgments do justice to our people, our Jewish people, and our American people.

⁴⁷ Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921), available at http://www.constitution.org/cmt/cardozo/jud_proc.htm.

⁴⁸ *Id.*

⁴⁹ *The Judicial Oath*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/oath/textoftheoathsofoffice2009.aspx> (last visited Mar. 18, 2013) (internal quotation marks omitted) (quoting *The Judicial Oath*).

⁵⁰ *Deuteronomy* 1:17.

⁵¹ *See supra* note 44.