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CHALLENGES IN JUDGING: SOME INSIGHTS FROM THE WRITINGS OF MOSES¹

GORDON J. BEGGS²

I. INTRODUCTION	145
II. JETHRO WITH MOSES AT COURT	147
A. <i>Resources</i>	148
B. <i>Duty to Hear the Case</i>	149
C. <i>Impartiality</i>	150
D. <i>Independence</i>	152
III. A LOVE TRIANGLE: ABRAM, SARAI, AND HAGAR	154
IV. MOSES' FLIGHT TO MIDIAN	156
V. THE CASE OF THE STOLEN IDOLS	157
VI. THREE JUDGMENT STORIES	160
VII. CONCLUSION	164

I. INTRODUCTION

As most of you are probably aware, Judeo-Christian principles played a significant role in the development of American legal ethics. David Hoffman, a legal educator at the University of Maryland, published the United States' first course on legal ethics in 1836.³ His course included a reading list that began with four books from the Bible - the Old Testament books Proverbs of Solomon and Ecclesiastes, and, from the Apocrypha, the books of Ecclesiasticus, and Wisdom.⁴ Hoffman's course on ethics also offers fifty "Resolutions in Regard to Professional Deportment,"⁵ which clearly incorporate wisdom from Scripture.⁶

¹Editor's Note: These remarks by Professor Beggs and excerpts from the Writings of Moses were presented to the Judicial Conference of the Cuyahoga County Court of Common Pleas, General Division, on October 11, 1996.

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³DAVID HOFFMAN, A COURSE OF LEGAL STUDY ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 724 (1836).

⁴*Id.*

⁵*Id.* at 752-75.

George Sharswood, who at one time served as Chief Justice of the Pennsylvania Supreme Court,⁷ succeeded Hoffman as the nation's leading authority on legal ethics.⁸ His lectures beginning in 1854 provided the foundation for our modern codes.⁹ Sharswood believed that law is derived from principles laid down by a Supreme Being and recommended "the most careful study" of the "system of law delivered by Moses to the Jews."¹⁰ Like Hoffman, he relied on Scriptural principles in his writing on legal ethics.¹¹

Canons of judicial conduct were not developed until the 1920s when a federal judge admitted he was supplementing his \$7,500 a year salary with \$42,500 a year in fees for legal services as a baseball commissioner.¹² In ABA canons promulgated in 1924, we see that the first precedents for the standards cited are from Scripture, specifically the writings of Moses.¹³

I would like to use the writings of Moses as a lens to examine some challenges in judging. Moses authored the first five books of the Old Testament known as the Pentateuch or books of the law—*Genesis, Exodus, Leviticus, Numbers, and Deuteronomy*.¹⁴ He is probably best known for leading the Hebrew people out of bondage in Egypt and for receiving the Ten Commandments. As our discussion today will reveal, he may also be credited with authoring some significant principles with respect to the judicial function.

Before turning to our selections from writings of Moses, however, I would like to suggest a caveat and an approach to interpretation. When examining the writings of Moses, we are not necessarily seeking a literal application. Much of the law was written for another culture. As one scholar has noted:

If we were to resolve the problems of capital punishment by directly applying texts from the Bible, then we would execute children who

⁶See Gordon J. Beggs, *Proverbial Practice: Legal Ethics from Old Testament Wisdom*, 30 WAKE FOREST L. REV. 831, 837-45 (1995) [hereinafter *Proverbial Practice*]; Gordon J. Beggs, *Reap What You Sow: Lawyers Ethics Could Benefit from an Application of Proverbs*, 82 A.B.A.J. 116 (1996) [hereinafter *Reap What You Sow*].

⁷GEORGE SHARSWOOD, PROFESSIONAL ETHICS 3, 8-9 (5th ed. 1993).

⁸THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS AND DISCUSSION TOPICS 76 (1985).

⁹SHARSWOOD, *supra* note 7, at 5; THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER 7 (1981).

¹⁰SHARSWOOD, *supra* note 7, at 10-12.

¹¹See *Proverbial Practice*, *supra* note 6, at 837-45; *Reap What You Sow*, *supra* note 6.

¹²DONALD R. FRETZ et al., ETHICS FOR JUDGES 2 (3d ed. 1982).

¹³CANONS OF PROFESSIONAL ETHICS - CANONS OF JUDICIAL ETHICS 45 (American Bar Association 1963) (citing *Deuteronomy* 1:16-17 and 16:19).

¹⁴THE NIV STUDY BIBLE 2 (Kenneth Barker et al., eds., 1985).

curse their parents (Exod. 21:17), adulterers (Lev. 20:10), and those who work on the Sabbath day (Exod 35:2).¹⁵

We would even execute those who are guilty of contempt of court.¹⁶ As attractive as these options may seem at times, and particularly that last one, they were applicable because Israel was a theocracy. Our country today is obviously not. Instead, I suggest, when looking at the writings of Moses, three questions should be answered: (1) what is the challenge in judging reflected in the passage?; (2) what is the underlying principle of the passage?; and (3) how should the principle apply today?¹⁷

II. JETHRO WITH MOSES AT COURT

The events in the first passage of Scripture in this section occur when Moses and the Israelites have left Egypt and are in Sinai desert near Mt. Horeb.¹⁸ Jethro is Moses' father-in-law and a priest of Midian.¹⁹ Jethro comes to visit Moses, bringing Moses' wife and sons,²⁰ no doubt a welcome sight. The text reads:

The next day Moses took his seat to serve as judge for the people, and they stood around him from morning till evening. When his father-in-law saw all that Moses was doing for the people, he said, "What is this you are doing for the people? Why do you alone sit as judge, while all these people stand around you from morning till evening?"

Moses answered him, "Because the people come to me to seek God's will. Whenever they have a dispute, it is brought to me, and I decide between the parties and inform them of God's decrees and laws."

Moses' father-in-law replied, "What you are doing is not good. You and these people who come to you will only wear yourselves out. The work is too heavy for you; you cannot handle it alone. Listen now to me and I will give you some advice, and may God be with you. You must be the people's representative before God and bring their disputes to him. Teach them the decrees and laws, and show them the way to live and the duties they are to perform. But select capable men from all the people—men who fear God, trustworthy men who hate dishonest gain—and appoint them as officials over thousands,

¹⁵R.K. HARRISON, *ENCYCLOPEDIA OF BIBLICAL AND CHRISTIAN ETHICS* 103 (1992).

¹⁶*Deuteronomy* 17:12.

¹⁷Compare HARRISON, *supra* note 15, at 103 (stating that the Bible should be analyzed to determine underlying moral principles).

¹⁸*Exodus* 3:1 & 18:5; NIV STUDY BIBLE, *supra* note 14, 90 n. 3:1 & 113 n. 18:5.

¹⁹*Exodus* 18:1 & 5. Midian was located at the western edge of the Arabia along the gulf of Aqaba. THE HARPER ATLAS OF THE BIBLE 57 (James B. Pritchard ed., 1987).

²⁰*Exodus* 18:5.

hundreds, fifties and tens. Have them serve as judges for the people at all times, but have them bring every difficult case to you; the simple cases they can decide themselves. That will make your load lighter, because they will share it with you. If you do this and God so commands, you will be able to stand the strain, and all these people will go home satisfied."

Moses listened to his father-in-law and did everything he said. He chose capable men from all Israel and made them leaders of the people, officials over thousands, hundreds, fifties and tens. They served as judges for the people at all times. The difficult cases they brought to Moses, but the simple ones they decided themselves²¹.

The second text comes from a sermon given by Moses at the end of his life. It reads:

So I took the leading men of your tribes, wise and respected men, and appointed them to have authority over you—as commanders of thousands, of hundreds, of fifties and of tens and as tribal officials. And I charged your judges at that time: Hear the disputes between your brothers and judge fairly, whether the case is between brother Israelites or between one of them and an alien. Do not show partiality in judging; hear both small and great alike. Do not be afraid of any man, for judgment belongs to God. Bring me any case too hard for you, and I will hear it. And at that time I told you everything you were to do.²²

The third text is from a chapter on general laws of the Hebrews. It reads:

Do not pervert justice; do not show partiality to the poor or favoritism to the great, but judge your neighbor fairly.²³

A. Resources

In the *Exodus* text, we see that Jethro observes that the situation at court is "not good,"²⁴ that the work is "too heavy" for Moses.²⁵ He suggests that Moses appoint additional judges to assist with simpler cases.²⁶ The passage identifies the challenge of securing adequate resources for the courts. Is this an ethical issue?

Cannon 6, adopted by the American Bar Association in 1924, states "[a] judge should exhibit an industry and application commensurate with the duties

²¹*Exodus* 18:13-26.

²²*Deuteronomy* 1:15-18.

²³*Leviticus* 19:15.

²⁴*Exodus* 18:17.

²⁵*Exodus* 18:18.

²⁶*Exodus* 18:21-22.

imposed upon him."²⁷ In the current Ohio Code, Canon 3(A)(5) provides, "[a] judge should dispose promptly of the business of the court."²⁸ The implementation of these principles is limited by the resources available to the court. In the General Division of the Court of Common Pleas of Cuyahoga County, two judges must share a single law clerk.²⁹ By contrast, in the U.S. District Court here, judges typically have two to three law clerks each.³⁰ Yet the work of the federal trial bench is not more important to the administration of justice in our community than that of the Common Pleas Court.

Both Scripture and the Canons suggest that the provision of adequate resources is a fundamental principle—one with ethical implications for the court. Fortunately, judges are not powerless to address this issue. Canon 4 permits judges to engage in activities to improve the law, legal system, and the administration of justice.³¹ As judges campaign, they may discuss the administration of the court with voters.³² Judges may also serve on government committees related to the improvement of the law and administration of the courts.³³

B. Duty to Hear the Case

The Exodus passage also illustrates the challenge of affording the parties a hearing. Moses sits before the people all day long and hears their disputes.³⁴ The sense that one has been heard is an important aspect of the judicial process. Canon 3(A)(4) provides that the judge should afford every person or his lawyer full right to be heard according to law.³⁵ This principle, of course, does not require that the judge act on all matters; a reference to referee does not violate the duty to hear a case.³⁶

This principle is protected in a number of ways. The primary one is the Code's prohibition on ex parte communications.³⁷ An ex parte communication

²⁷CANONS OF JUDICIAL CONDUCT Canon 6 (1963).

²⁸OHIO CODE JUDICIAL CONDUCT Canon 3(A)(5) (1995) [hereinafter OHIO CODE].

²⁹REFERENCE DESK BOOK & PHOTO DIRECTORY 12-13 (Cuyahoga County Bar Ass'n 1996).

³⁰LAWYERS' DESK BOOK & ROSTER 198-99 (Cleveland Bar Ass'n 1995).

³¹See OHIO CODE, *supra* note 28, Canon 4(A).

³²Berger v. Supreme Court of Ohio, 598 F. Supp. 69 (S.D. Ohio 1984); Bd. of Comm'rs on Grievances & Discipline Op 87-044 (10-13-87) (Judge may properly express opinions on matters relating to law.).

³³Bd. of Comm'rs on Grievances & Discipline Op. 87-013 (1987).

³⁴Exodus 18:13.

³⁵See OHIO CODE, *supra* note 28, Canon 3(A)(4).

³⁶Daloia v. Franciscan Health Sys. of Cent. Ohio, Inc., 1995 WL 771430, at *2 (Ohio App. 10th Dist., Dec. 21, 1995).

³⁷See OHIO CODE, *supra* note 28, Canon 3(A) *(4).

is permissible only when there is no substantive discussion of a case.³⁸ Extensive ex parte communication with a party or their representative may require reversal.³⁹ In the courtroom itself, the judge must afford the parties a meaningful hearing. This principle is so important that a judge should intervene to halt the proceedings when the attorney is unstable and representing a client improperly.⁴⁰

C. Impartiality

A third challenge expressed primarily in the *Deuteronomy* and *Leviticus* texts is that of impartiality. *Deuteronomy* requires that the court judge fairly whether the dispute is between Israelites or one of them and an alien.⁴¹ Both passages require that the judge show neither partiality to the poor, nor favoritism to the great.⁴²

This principle poses a difficult challenge, which is expressed by Canon 3: "[a] judge should perform the duties of office impartially and diligently."⁴³ A judge who seeks to achieve impartiality must be sensitive to relationships with parties, counsel and witnesses, and must follow the law as written.

Professional and personal dealings with parties are generally not proper.⁴⁴ A judge should recuse himself when a close relative is an officer of a party.⁴⁵ Ownership of bank stock is a financial interest in a party which requires disqualification unless it is insubstantial.⁴⁶ By contrast, service on the board of a hospital which is a party does not require disqualification if the judge has no financial or personal interest or knowledge of evidence in the pending case.⁴⁷

The appearance of certain individuals as counsel may jeopardize impartiality. The appearance of a close relative or appointment of one's son as attorney in a case typically requires disqualification.⁴⁸ A judge may also have sufficient bias against her husband's divorce lawyer to require

³⁸Redmond v. Sberna, 1996 WL 273764 (Ohio App. 8th Dist., Cuyahoga County, May 23, 1996).

³⁹In re Ross, 667 N.E.2d 1012 (Ohio App. 10th Dist. 1995).

⁴⁰Verbanic v. Verbanic, 635 N.E.2d 1260 (Ohio 1994).

⁴¹Deuteronomy 1:16.

⁴²Leviticus 19:15; Deuteronomy 1:17.

⁴³See OHIO CODE, supra note 28, Canon 3.

⁴⁴Volodkevich v. Volodkevich, 518 N.E.2d 1208 (Ohio 1988).

⁴⁵Cuyahoga County Bd. of Mental Retardation v. Association of Cuyahoga County Teachers of Trainable Retarded, 351 N.E.2d 777 (Ohio App. 8th Dist. 1975).

⁴⁶In re Disqualification of Lavrich, 657 N.E.2d 1330 (Ohio 1990).

⁴⁷Carrelli v. Goodwin, 1994 WL 409636, at 1 (Ohio App. 12th Dist., Aug. 8, 1994).

⁴⁸But see In re Disqualification of Olivito, 657 N.E.2d 1361 (Ohio 1994) (allowing judge to continue to preside in cases where brother and son practiced before him, but advising judge to work on professional relationship).

disqualification.⁴⁹ Similarly, a referee may not continue to sit in a case after he announces bias against a party based on counsel's inflammatory conduct.⁵⁰

Recusal is required when a private attorney or prosecutor who is representing the judge appears.⁵¹ Judges should likewise recuse themselves from cases involving former partners while they are still drawing income from the firm.⁵² The propriety of sitting in cases where a partner of the judge's spouse appears depends on the circumstances.⁵³ A judge should not sit in a case in which his lessee appears as counsel.⁵⁴ Disqualification is not, however, required when the attorney has filed a disciplinary complaint against the judge.⁵⁵ The principle of impartiality is so significant that a judge has authority to excuse a lawyer who appears only at the end of a trial.⁵⁶

Similar considerations apply to witnesses. A judge should not unduly favor a witness based on past acquaintance.⁵⁷ Disqualification may be required when a health care professional treating the judge is a significant witness.⁵⁸ Disqualification may also be required when the judge's spouse will be a material witness.⁵⁹

An impartial judge must follow law as written. Thus, it is improper to convict a defendant of a lesser included offense based on hardship once the party pleads to a charge.⁶⁰ Likewise, a judicial candidate may not, consistent with the principle of impartiality, announce a sentencing policy for a class of criminal offenses,⁶¹ and a sitting judge may not announce a bias against repeat DUI offenders.⁶²

Of course, remittal of disqualification under Canon 3(D) is available in most cases, except where the judge has personal knowledge of evidence or bias, the judge and a lawyer worked together during the pendency of the matter, or the

⁴⁹*Smith v. Leone*, 1994 WL 407043 (Ohio App. 8th Dist., Aug. 4, 1994).

⁵⁰*In re Reiner*, 598 N.E.2d 768 (Ohio App. 8th Dist. 1991).

⁵¹Bd. of Comm'rs on Grievances & Discipline Op. 89-034 (1989).

⁵²Bd. of Comm'rs on Grievances & Discipline Op. 95-003 (1995).

⁵³Bd. of Comm'rs on Grievances & Discipline Op. 91-008 (1991).

⁵⁴*Id.*

⁵⁵Bd. of Comm'rs on Grievances & Discipline Op. 89-032 (1989).

⁵⁶*See Josselson v. Josselson*, 557 N.E.2d 835 (Ohio App. 8th Dist. 1988).

⁵⁷*State v. Bayer*, 656 N.E.2d 1314 (Ohio App. 11th Dist. 1995).

⁵⁸Bd. of Comm'rs on Grievances & Discipline Op. 91-013 (1991).

⁵⁹Bd. of Comm'rs on Grievances & Discipline Op. 89-019 (1989).

⁶⁰*State ex rel. Sawyer v. O'Connor*, 377 N.E.2d 494 (Ohio 1978).

⁶¹Bd. of Comm'rs on Grievances & Discipline Op. 87-030 (1987).

⁶²*State v. Pass*, 1992 WL 386011 (Ohio App. 6th Dist., Dec. 30, 1992) (lower court judge failed to consider mitigation factors).

judge or such lawyer is a material witness.⁶³ The overall standard under Canon 3(C), however, is that judges should disqualify themselves in any proceeding in which their impartiality might reasonably be questioned.⁶⁴

D. Independence

The *Deuteronomy* text enjoining that judges "not be afraid of any man for judgment belongs to God" suggests the challenge and principle of judicial independence.⁶⁵ Several code provisions address this concern. Canon 4 permits judges to "engage in activities to improve the law, the legal system, and the administration of justice"; impliedly the Canon prohibits a range of other public activity.⁶⁶ Canon 5 requires judges to regulate their extra-judicial activities to minimize the risk of conflict with judicial duties.⁶⁷ Canon 6 requires judges to file financial disclosure statements and reports of compensation for quasi- and extra-judicial activities.⁶⁸ Canon 7 mandates that both judges and judicial candidates refrain from political activities which are inappropriate to judicial office.⁶⁹ Read together these Canons generally require that judges stand alone as far as their office is concerned.

The Ohio Judicial Disciplinary docket recently included a decision regarding the campaigns of James Keys and Christine Keele. Their names appeared on an invitation to another candidate's fundraiser.⁷⁰ The problem was that this constituted a political endorsement prohibited by Canon 7(B)(2)(b). Judges should not endorse another candidate for office.

The Code of Judicial Conduct allows a spectrum of permissible activity. The narrowest range applies to business. It is somewhat broader for political and nonprofit activity, and the greatest latitude is reserved for personal life. The Canons generally discourage or prohibit business related activities. Judges should divest themselves of shares of their legal professional corporations.⁷¹ A judge should not serve as an officer, director, manager, advisor, or employee of any business.⁷² A judge may not participate in a joint venture for business

⁶³Bd. of Comm'rs on Grievances & Discipline Op. 89-010 (1989) (remittal of disqualification available in cases where close relative is involved).

⁶⁴See OHIO CODE, *supra* note 28, Canon 3(C).

⁶⁵*Deuteronomy* 1:17.

⁶⁶See OHIO CODE, *supra* note 28, Canon 4.

⁶⁷See OHIO CODE, *supra* note 28, Canon 5.

⁶⁸See OHIO CODE, *supra* note 28, Canon 6.

⁶⁹See OHIO CODE, *supra* note 28, Canon 7.

⁷⁰*In re Judicial Campaign Complaint Against James G. Keys, Jr. and Christine Tailer*, Nos. 96-1814 & 96-1815, 76 Ohio St. 3d 1466 (1996) (per curiam order of commission of judges); see also *Office of Disciplinary Counsel v. Capers*, 472 N.E.2d 1073 (Ohio 1984).

⁷¹Bd. of Comm'rs on Grievances & Discipline Op. 89-017 (1989).

⁷²Bd. of Comm'rs on Grievances & Discipline Op. 88-007 (1988).

purposes; whether a judge can serve as executor for a close friend depends on the circumstances.⁷³ A judge may not serve as arbitrator and should not serve as bankruptcy trustee if it will require disqualification.⁷⁴ A judge may not serve as a partner in a continuing legal education enterprise, but may accept compensation for teaching continuing legal education.⁷⁵ Judges may teach on law related subjects in a variety of other contexts such as colleges and law schools, provided they receive no special treatment in their compensation.⁷⁶ A judge may generally receive compensation for writing on legal topics.⁷⁷

A judge's permissible range of political activities is somewhat limited. A judge may not serve as an officer of a political organization.⁷⁸ A judge should not serve on a government committee unless it is related to law.⁷⁹ On the other hand, a judge may properly express opinions on matters relating to law⁸⁰ and with regard to any organization of which the judge is a member.⁸¹ According to the Board of Commissioners on Grievances and Discipline, a judge may contribute to other candidates, but may not give to his or her party during an election year.⁸²

A judge may participate to some degree in the management of nonprofit organizations.⁸³ A judge may serve on the board of a nonprofit organization's retirement plan.⁸⁴ A judge may serve on a college board provided the school will not ordinarily be a party before the court.⁸⁵ On the other hand, a judge may not serve on a board of directors of a nonprofit corporation which provides services to the municipal court by contract.⁸⁶ A judge may not participate in a

⁷³Bd. of Comm'rs on Grievances & Discipline Op. 91-021 (1991).

⁷⁴Bd. of Comm'rs on Grievances & Discipline Op. 89-022 (1989).

⁷⁵Bd. of Comm'rs on Grievances & Discipline Op. 89-022 (1989). *See also* Bd. of Comm'rs on Grievances & Discipline Op. 95-009 (1995).

⁷⁶Bd. of Comm'rs on Grievances & Discipline Op. 94-012 (1994).

⁷⁷*See* Bd. of Comm'rs on Grievances & Discipline Op. 89-021 (1989).

⁷⁸Bd. of Comm'rs on Grievances & Discipline Op. 90-008 (1990).

⁷⁹Bd. of Comm'rs on Grievances & Discipline Op. 87-013 (1987).

⁸⁰Bd. of Comm'rs on Grievances & Discipline Op. 87-044 (1987).

⁸¹Bd. of Comm'rs on Grievances & Discipline Op. 87-040 (1987).

⁸²Bd. of Comm'rs on Grievances & Discipline Op. 88-017 (1988).

⁸³Bd. of Comm'rs on Grievances & Discipline Op. 90-016 (1990). (A judge may serve on board of nonprofit provided there is no conflict); *see also* Bd. of Comm'rs on Grievances & Discipline Op. 87-003 (1987) (Judge may serve as a member of the board of trustees for not-for-profit foundation, provided such activity does not otherwise violate Code of Judicial Conduct.)

⁸⁴Bd. of Comm'rs on Grievances & Discipline Op. 87-050 (1987).

⁸⁵Bd. of Comm'rs on Grievances & Discipline Op. 89-003 (1989).

⁸⁶Bd. of Comm'rs on Grievances & Discipline Op. 91-011 (1991).

fundraising telethon.⁸⁷ A judge may not permit the use of a likeness on the card of a nonprofit organization.⁸⁸ Even participation in parades is discouraged.⁸⁹

When we turn to personal life, a broader range of activities is permissible. A judge may continue to operate a farm co-owned with his wife and may prepare tax returns for family members only.⁹⁰ A judge may attend a bar meeting, even without payment of a registration fee.⁹¹ Finally, a judge's recommendations for employment should be based on factual knowledge and may not be offered solely to lend the prestige of office to an application.⁹²

III. A LOVE TRIANGLE: ABRAM, SARAI, AND HAGAR

The Abram who appears in this passage takes the name of Abraham after his circumcision⁹³ and is regarded as "the founder of the Hebrew nation and the father of the people of God."⁹⁴ The events occur after God calls Abram to leave his country and go to the land God will show him. God promises to make him a great nation. Abram obeys.⁹⁵ Subsequently, God covenants with Abram, saying "[l]ook up at heavens and count the stars, so shall your offspring be."⁹⁶ The text says that Abram believed and the Lord credited him with righteousness.⁹⁷ Some time passes, and Sarai implies that God is not keeping his promises. Moses writes:

Now Sarai, Abram's wife, had borne him no children. But she had an Egyptian maidservant named Hagar; so she said to Abram, "The LORD has kept me from having children. Go, sleep with my maidservant; perhaps I can build a family through her."

Abram agreed to what Sarai said. So after Abram had been living in Canaan ten years, Sarai his wife took her Egyptian maidservant Hagar and gave her to her husband to be his wife. He slept with Hagar, and she conceived.

⁸⁷Bd. of Comm'rs on Grievances & Discipline Op. 95-013 (1995).

⁸⁸Bd. of Comm'rs on Grievances & Discipline Op. 94-004 (1994).

⁸⁹Bd. of Comm'rs on Grievances & Discipline Op 93-009 (1993).

⁹⁰Bd. of Comm'rs on Grievances & Discipline Op 95-010 (1995).

⁹¹Bd. of Comm'rs on Grievances & Discipline Op. 95-008 (1995).

⁹²Bd. of Comm'rs on Grievances & Discipline Op 95-005 (1995).

⁹³*Genesis* 17:1-5.

⁹⁴THE NEW INTERNATIONAL DICTIONARY OF THE BIBLE 7 (J.D. Douglas & Merrill C. Tenney eds., 1987).

⁹⁵*Genesis* 12:1-7.

⁹⁶*Genesis* 15:4-6.

⁹⁷*Genesis* 15:6.

When she knew she was pregnant, she began to despise her mistress. Then Sarai said to Abram, "You are responsible for the wrong I am suffering. I put my servant in your arms, and now that she knows she is pregnant, she despises me. May the LORD judge between you and me."

"Your servant is in your hands," Abram said. "Do with her whatever you think best." Then Sarai mistreated Hagar; so she fled from her.

The angel of the LORD found Hagar near a spring in the desert; it was the spring that is beside the road to Shur. And he said, "Hagar, servant of Sarai, where have you come from, and where are you going?"

"I'm running away from my mistress Sarai," she answered.

Then the angel of the LORD told her, "Go back to your mistress and submit to her." The angel added, "I will so increase your descendants that they will be too numerous to count."

The angel of the LORD also said to her:

"You are now with child and you will have a son.

You shall name him Ishmael, for the LORD has heard of your misery.⁹⁸

Now the LORD was gracious to Sarah as he had said, and the LORD did for Sarah what he had promised. Sarah became pregnant and bore a son to Abraham in his old age, at the very time God had promised him. Abraham gave the name Isaac to the son Sarah bore him. When his son Isaac was eight days old, Abraham circumcised him, as God commanded him. Abraham was a hundred years old when his son Isaac was born to him.

...

Sarah said, "God has brought me laughter, and everyone who hears about this will laugh with me." And she added, "Who would have said to Abraham that Sarah would nurse children? Yet I have borne him a son in his old age."⁹⁹

The text suggests the challenge of dealing with adversary relationships. Sarai's statement "[m]ay the Lord judge between you and me"¹⁰⁰ is hardly friendly, nor is the court always a friendly place. How does a judge respond to the contentiousness that is the substance of everyday judicial life?

⁹⁸Genesis 16:1-12.

⁹⁹Genesis 21:1-6.

¹⁰⁰Genesis 16:5.

In the text, Abram tells Sarai your servant is in your hands.¹⁰¹ Sarai then mistreats her.¹⁰² The Lord intervenes when Hagar runs away.¹⁰³ The Lord reaffirms Hagar's duty to Sarai and rewards Hagar.¹⁰⁴ Then Hagar bears Abram a son; Abram is eighty-six years old at this point.¹⁰⁵ Subsequently, Sarai, now known as Sarah, bears Abraham, who is one hundred years old, a child.¹⁰⁶ Sarah responds with joy.¹⁰⁷

What the Lord has done is to intervene as judge to settle the matter to the satisfaction of all. God keeps his promise to Abraham, rewards Hagar, and restores the relationship among the parties. While judges do not have power to perform miracles in the same way as the Lord, they can and should seek to achieve reconciliation among the parties. An agreement which resolves the adversary positions of the parties to their mutual satisfaction yields a better result than any judicial disposition, no matter how well the court's order is crafted. The events in these passages suggest that a judge should always be alert for the opportunity to introduce into the parties' discussion an item not specifically in contention in order to reach a value added-settlement and achieve peace. In some cases, that will be miracle enough.

IV. MOSES' FLIGHT TO MIDIAN

This excerpt concerns an event early in Moses' life. Moses was rescued from the Nile, adopted by Pharaoh's daughter and has grown up as grandson to Pharaoh.¹⁰⁸ He is forty years old and has reached maturity.¹⁰⁹ Moses writes:

One day, after Moses had grown up, he went out to where his own people were and watched them at their hard labor. He saw an Egyptian beating a Hebrew, one of his own people. Glancing this way and that and seeing no one, he killed the Egyptian and hid him in the sand. The next day he went out and saw two Hebrews fighting. He asked the one in the wrong, "Why are you hitting your fellow Hebrew?"

The man said, "Who made you ruler and judge over us? Are you thinking of killing me as you killed the Egyptian?" Then Moses was afraid and thought, "What I did must have become known."

¹⁰¹Genesis 16:6.

¹⁰²*Id.*

¹⁰³Genesis 16:8-9.

¹⁰⁴Genesis 16:9-10.

¹⁰⁵Genesis 16:15-16.

¹⁰⁶Genesis 21:1-5.

¹⁰⁷Genesis 21:6-7.

¹⁰⁸Exodus 2:1-10.

¹⁰⁹NIV STUDY BIBLE, *supra* note 14, at 89 n. 2:11.

When Pharaoh heard of this, he tried to kill Moses, but Moses fled from Pharaoh and went to live in Midian....¹¹⁰

After Moses slays an Egyptian who was mistreating a Hebrew, Moses is unable to command the respect of his countryman; indeed they mock him.¹¹¹ The excerpt illustrates the challenge of integrity.

Integrity in all of a judge's life is the overarching principle of the Code:

Judges are counseled by Canon 1 to preserve their own integrity and that of the judiciary in universal terms. The other provisions of the Code give substance to Canon 1; of the six 'regulatory' Canons, five deal in whole or in part with quasi-judicial or nonjudicial activities. Only Canon 3 is concerned solely with the actual process of judging.¹¹²

In the Scripture excerpt, Moses flees after his crime becomes known. He is called back into service to his people at age 80,¹¹³ and dies at age 120.¹¹⁴ The author does not question God's timing in this event, but from man's perspective, Moses' failure to maintain integrity in his personal life results in a great loss of productive years.

In the judicial context, similar consequences can occur. One Ohio judge who was convicted of extortion lost his seat on the bench and license to practice law.¹¹⁵ A former judge received a one-year suspension from the practice of law for sexual harassment.¹¹⁶ Misconduct may also result in loss of respect for the court, as occurred with Moses. This is certainly true for the general public, but consider the issue from the perspective of an incarcerated individual sentenced for a drug offense by a judge who is subsequently convicted of a felony drug charge.¹¹⁷ As this example suggests, much more is at stake in the maintenance of integrity than an individual judicial career.

V. THE CASE OF THE STOLEN IDOLS

This excerpt involves the theft of Laban's household idols by his daughter, Rachel. The events occur after Jacob, Abraham's grandson, and the son of

¹¹⁰*Exodus* 2:11-15.

¹¹¹*Exodus* 2:11-14.

¹¹²STEVEN LUBET, *BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES* 3-4 (1984).

¹¹³*Deuteronomy* 3.

¹¹⁴*Deuteronomy* 34:7.

¹¹⁵*Disciplinary Counsel v. Mosely*, 632 N.E.2d 1287 (Ohio 1994).

¹¹⁶*Disciplinary Counsel v. Campbell*, 623 N.E.2d 24 (Ohio 1993).

¹¹⁷James Ewinger, *Judge Being Paid Despite Pleading Guilty*, *THE PLAIN DEALER*, Jan. 18, 1996, at 2B (describing guilty plea by Common Pleas Court judge to federal charge of distributing cocaine).

Isaac,¹¹⁸ has stolen Esau's birthright.¹¹⁹ Their mother, Rebekah, learns of Esau's intent to kill Jacob and sends Jacob to Laban, her brother.¹²⁰ There Jacob falls in love with Laban's younger daughter, Rachel. Jacob serves Laban for seven years to earn the right to marry Rachel. At the wedding, Laban substitutes his older daughter Leah, and Jacob ends up agreeing to work another seven years in order to marry Rachel.¹²¹ As one might expect, a spirit of competition develops between the two men. Jacob prospers, and Laban and his sons become jealous.¹²² Jacob is then led by God to return home.¹²³ At this point, Moses writes:

When Laban had gone to shear his sheep, Rachel stole her father's household gods. Moreover, Jacob deceived Laban the Aramean by not telling him he was running away. So he fled with all he had, and crossing the River, he headed for the hill country of Gilead.

On the third day Laban was told that Jacob had fled. Taking his relatives with him, he pursued Jacob for seven days and caught up with him in the hill country of Gilead. Then God came to Laban the Aramean in a dream at night and said to him, "Be careful not to say anything to Jacob, either good or bad."

Jacob had pitched his tent in the hill country of Gilead when Laban overtook him, and Laban and his relatives camped there too. Then Laban said to Jacob, "What have you done? You've deceived me, and you've carried off my daughters like captives in war. Why did you run off secretly and deceive me? Why didn't you tell me, so I could send you away with joy and singing to the music of tambourines and harps? You didn't even let me kiss my grandchildren and my daughters good-by. You have done a foolish thing. I have the power to harm you; but last night the God of your father said to me, 'Be careful not to say anything to Jacob, either good or bad.' Now you have gone off because you longed to return to your father's house. But why did you steal my gods?"

Jacob answered Laban, "I was afraid, because I thought you would take your daughters away from me by force. But if you find anyone who has your gods, he shall not live. In the presence of our relatives, see for yourself whether there is anything of yours here with me; and if so, take it." Now Jacob did not know that Rachel had stolen the gods.

¹¹⁸Genesis 25:19-26.

¹¹⁹Genesis 27:1-40.

¹²⁰Genesis 27:41-45.

¹²¹Genesis 29:14-30.

¹²²Genesis 30:25-31:2.

¹²³Genesis 31:3.

So Laban went into Jacob's tent and into Leah's tent and into the tent of the two maidservants, but he found nothing. After he came out of Leah's tent, he entered Rachel's tent. Now Rachel had taken the household gods and put them inside her camel's saddle and was sitting on them. Laban searched through everything in the tent but found nothing.

Rachel said to her father, "Don't be angry, my lord, that I cannot stand up in your presence; I'm having my period." So he searched but could not find the household gods.

Jacob was angry and took Laban to task. "What is my crime?" he asked Laban. "What sin have I committed that you hunt me down? Now that you have searched through all my goods, what have you found that belongs to your household? Put it here in front of your relatives and mine, and let them judge between the two of us."¹²⁴

The search for truth does not succeed in this case. Though Rachel knows where the idols are and knows that Laban is seeking them, she does not reveal their location, and ultimately they are not discovered.

The case involves the principle of candor.¹²⁵ Let me suggest two applications. The first concerns the court's treatment of facts supporting the party against whom it rules in a civil case when a request for findings of fact and conclusions of law is made under Rule 52.¹²⁶ Does the court treat the facts supporting the losing party's case as non-material and not mention them? Or does it find them to exist as facts and indicate why they do not control? If the former approach is taken, the losing party must persuade a busy Court of Appeals to canvas the record outside the opinion and in effect make additional findings of fact. Such an effort will, under the manifest weight of the evidence standard of review, rarely succeed.¹²⁷ The difference in approaches is enormous and, I believe, poses a challenge of candor for the court.

Another issue of candor is presented when a judge adopts a new or unprecedented legal position in an order issued in a civil case. Even though findings of fact and conclusions of law are generally not required,¹²⁸ should they be provided in these circumstances? The view of Judge Charles Brietel, who ultimately became Chief Justice of the New York Court of Appeals, on this issue may be helpful:

¹²⁴Genesis 31:19-37.

¹²⁵Cf. *Proverbial Practice*, *supra* note 6, at 841-43 (this article addresses the candor issues for judges, not attorneys).

¹²⁶OHIO R. CIV. P. 52.

¹²⁷OHIO R. APP. P. 12(C) (describing procedure in civil action where appeals court finds that judgment or order is against manifest weight of evidence).

¹²⁸OHIO R. CIV. P. 52.

Actually, the failure to supply the grounds of decision is the place where the commonest disservice to the administration of justice may occur. This occurs, although most thoughtful examiners of the judicial process consider the explanatory opinion one of its greatest safeguards and its special rationalist characteristic. Nevertheless, too often the reason there is no elaborated opinion for a determination or ruling is not because the determination is too obvious to require one but because there is a conscious desire to avoid giving an explanation. Men who consider themselves quite honest and brave will frequently say that they do not state their grounds for decision in a difficult matter because they do not wish to look for trouble or, in the vernacular, they do not wish to stick their necks out, as if the judge were to lose, like a litigant, if his determination would be later upset or repudiated. Less often is it admitted, if ever, that the reason an elaborated statement is not provided is because the judge knows that he is powerless to do in law what he wants and intends to do, for the sake of a justice he subjectively conceives and desires to achieve.

This does not mean that every determination should carry with it elaborated reasons. It would be nice if that were practicable, but the volume of business, especially in the busier American courts, is too great. Moreover, many matters are truly simple, and it takes either an ignorant or distorted mind not to realize that the conclusion follows closely on the mere statement of the question. But, buried among the multitude of rulings and determinations without statement of reasons are the kind to which I have adverted. This is not intellectually honest, and sometimes might be characterized in even more drastic terms.¹²⁹

VI. THREE JUDGMENT STORIES

Finally, let us turn to three texts about judgment. The first concerns the Cities of Refuge, which were part of the instructions God gave Moses for establishing his nation in the promised land.¹³⁰ Moses writes:

Six of the towns you give the Levites will be cities of refuge, to which a person who has killed someone may flee.

...

If a man strikes someone with an iron object so that he dies, he is a murderer; the murderer shall be put to death. Or if anyone has a stone in his hand that could kill, and he strikes someone so that he dies, he is a murderer; the murderer shall be put to death. Or if anyone has a wooden object in his hand that could kill, and he hits someone so that

¹²⁹Hon. Charles D. Brietel, *Ethical Problems in the Performance of the Judicial Function*, in CONFERENCE ON JUDICIAL ETHICS OCTOBER 22, 1964, 72 (U. Chicago Law School 1965).

¹³⁰NIV STUDY BIBLE, *supra* note 14, at 240 n. 35:6-16.

he dies, he is a murderer; the murderer shall be put to death. The avenger of blood shall put the murderer to death; when he meets him, he shall put him to death. If anyone with malice aforethought shoves another or throws something at him intentionally so that he dies or if in hostility he hits him with his fist so that he dies, that person shall be put to death; he is a murderer. The avenger of blood shall put the murderer to death when he meets him.

But if without hostility someone suddenly shoves another or throws something at him unintentionally or, without seeing him, drops a stone on him that could kill him, and he dies, then since he was not his enemy and he did not intend to harm him, the assembly must judge between him and the avenger of blood according to these regulations. The assembly must protect the one accused of murder from the avenger of blood and send him back to the city of refuge to which he fled. He must stay there until the death of the high priest, who was anointed with the holy oil.

But if the accused ever goes outside the limits of the city of refuge to which he has fled and the avenger of blood finds him outside the city, the avenger of blood may kill the accused without being guilty of murder. The accused must stay in his city of refuge until the death of the high priest; only after the death of the high priest may he return to his own property.¹³¹

In the second, Abraham pleads with God regarding Sodom and Gomorrah:

Then the LORD said, "The outcry against Sodom and Gomorrah is so great and their sin so grievous that I will go down and see if what they have done is as bad as the outcry that has reached me. If not, I will know."

The men turned away and went toward Sodom, but Abraham remained standing before the LORD. Then Abraham approached him and said: "Will you sweep away the righteous with the wicked? What if there are fifty righteous people in the city? Will you really sweep it away and not spare the place for the sake of the fifty righteous people in it? Far be it from you to do such a thing to kill the righteous with the wicked, treating the righteous and the wicked alike. Far be it from you! Will not the Judge of all the earth do right?"

The LORD said, "If I find fifty righteous people in the city of Sodom, I will spare the whole place for their sake."

Then Abraham spoke up again: "Now that I have been so bold as to speak to the Lord, though I am nothing but dust and ashes, what if the number of the righteous is five less than fifty? Will you destroy the whole city because of five people?"

¹³¹Numbers 35:6, 16-28.

"If I find forty-five there," he said, "I will not destroy it."

Once again he spoke to him, "What if only forty are found there?" He said, "For the sake of forty, I will not do it."

Then he said, "May the Lord not be angry, but let me speak. What if only thirty can be found there?"

He answered, "I will not do it if I find thirty there."

Abraham said, "Now that I have been so bold as to speak to the Lord, what if only twenty can be found there?"

He said, "For the sake of twenty, I will not destroy it."

Then he said, "May the Lord not be angry, but let me speak just once more. What if only ten can be found there?"

He answered, "For the sake of ten, I will not destroy it."

When the LORD had finished speaking with Abraham, he left, and Abraham returned home.¹³²

Subsequently God sends two angels to visit the city, and Lot offers them reverence and hospitality.¹³³ The next day the angels spirit Lot, his wife, and two daughters from the city before it is destroyed.¹³⁴

The third excerpt describes The Golden Calf. While Moses is up on the mountain receiving the Ten Commandments, the people, led by Aaron, construct an idol:

When the people saw that Moses was so long in coming down from the mountain, they gathered around Aaron and said, "Come, make us gods who will go before us. As for this fellow Moses who brought us up out of Egypt, we don't know what has happened to him."

Aaron answered them, "Take off the gold earrings that your wives, your sons and your daughters are wearing, and bring them to me." So all the people took off their earrings and brought them to Aaron. He took what they handed him and made it into an idol cast in the shape of a calf, fashioning it with a tool. Then they said, "These are your gods, O Israel, who brought you up out of Egypt."

When Aaron saw this, he built an altar in front of the calf and announced, "Tomorrow there will be a festival to the LORD." So the next day the people rose early and sacrificed burnt offerings and presented fellowship offerings. Afterward they sat down to eat and drink and got up to indulge in revelry.

¹³²Genesis 18:20-33.

¹³³Genesis 19:1-3.

¹³⁴Genesis 19:15-16.

Then the LORD said to Moses, "Go down, because your people, whom you brought up out of Egypt, have become corrupt. They have been quick to turn away from what I commanded them and have made themselves an idol cast in the shape of a calf. They have bowed down to it and sacrificed to it and have said, 'These are your gods, O Israel, who brought you up out of Egypt.'

"I have seen these people," the LORD said to Moses, "and they are a stiff-necked people. Now leave me alone so that my anger may burn against them and that I may destroy them. Then I will make you into a great nation."

But Moses sought the favor of the LORD his God. "O LORD," he said, "why should your anger burn against your people, whom you brought out of Egypt with great power and a mighty hand? Why should the Egyptians say, 'It was with evil intent that he brought them out, to kill them in the mountains and to wipe them off the face of the earth'? Turn from your fierce anger; relent and do not bring disaster on your people. Remember your servants Abraham, Isaac and Israel, to whom you swore by your own self: 'I will make your descendants as numerous as the stars in the sky and I will give your descendants all this land I promised them, and it will be their inheritance forever.'"

"Then the LORD relented and did not bring on his people the disaster he had threatened."¹³⁵

These excerpts illustrate principles of mercy. In the Cities of Refuge text, mercy is based on the degree of fault. Willful murder is subject to the death penalty,¹³⁶ but involuntary murder warrants a conditional reprieve.¹³⁷ In the second excerpt, Abraham pleads for Sodom and Gomorrah.¹³⁸ For the sake of ten righteous persons, God agrees he will not destroy the cities.¹³⁹ Mercy is based on actual righteousness in this instance. In the excerpt involving the Golden Calf, God relents from his desire to destroy Israelites.¹⁴⁰ Here, mercy is based on appearance of justice. Moses argues persuasively, "[w]hy should the Egyptians say it was with evil intent God brought them out of Egypt, only to kill them in the mountains and wipe them off the face of the earth?"¹⁴¹ Not only must justice be done, it must also appear to be done.

¹³⁵*Exodus* 32:1-14.

¹³⁶*Numbers* 35:16-21.

¹³⁷*Numbers* 35:22-28.

¹³⁸*Genesis* 18:20-33.

¹³⁹*Genesis* 18:32.

¹⁴⁰*Exodus* 32:14.

¹⁴¹*Exodus* 32:12.

These principles can be considered in a hypothetical involving a criminal sentencing under Ohio's new comprehensive statute, commonly known as Senate Bill 2.¹⁴² As you are aware, the statute vests enormous discretion in sentencing judge to determine the actual length of sentences.

Let's take an offender who, after serving a prison term for aggravated robbery with a knife (a first degree felony),¹⁴³ commits three more aggravated robberies with a knife. In each he holds the victim with the knife to the throat, and, though he disclaims any intent to harm the victim, in each case he nicks the victim's throat with the knife. The offender is 18 years old. If convicted of the first degree offense of aggravated robbery in each case, his possible sentence is ten plus ten plus ten years for the underlying three aggravated robberies.¹⁴⁴ And since actual physical harm of a type that court could find posed a substantial risk of death, the court could sentence him to an additional ten plus ten plus ten years as a Repeat Violent Offender (RVO) based on the seriousness of the offense and the need for punishment and to protect the public.¹⁴⁵ Of course, the court can also sentence him to ten plus ten plus ten years concurrently and find that the specifications for RVO enhancement are not met, resulting in a ten year sentence.¹⁴⁶ The possible sentences vary between ten and sixty years, or what is essentially life imprisonment.

The principles of mercy should have application here. Upon sentencing the court should carefully consider the degree of fault presented in the record. While the consistent cutting of the victim is suspicious, it may make all the difference if the court concludes it occurred as a result of defendant's clumsiness rather than a desire to brand or terrorize the victim. The court should scrutinize the offender's history and should incline toward leniency depending on the evidence of "right" behavior. Moreover, the court should exercise great care that individuals from different groups, particularly racial groups, do not receive disparate sentences in order that justice be done and the appearance of justice be preserved. Courts will not achieve justice under the statute if they sentence similarly situated defendants to terms of imprisonment differing in length by as much as 50 years. Consistently applied, the principle of mercy should mitigate against this risk.

VII. CONCLUSION

Scripture can be helpful in thinking about issues of judicial ethics, and it is particularly valuable in discerning some bright line principles. In regulating the profession and judiciary, we tend to write rules that look like statutes. In

¹⁴²Amended Substitute S. B. 2, 1995 OHIO LAWS ___: see also Amended Substitute Senate Bill No. 269, 1996 OHIO LAWS __ (corrections bill).

¹⁴³OHIO REV. CODE ANN. § 2911.01 (Banks-Baldwin 1996).

¹⁴⁴*Id.* at § 2929.14(A)(1) (Banks-Baldwin 1996).

¹⁴⁵*Id.* at § 2914.01(D)(2).

¹⁴⁶*Id.* at § 2929.41(A).

teaching professional responsibility, we often, to the great detriment of our students, focus solely on the line between permissible and impermissible conduct. An analogy to driving illustrates the results of these approaches. What happens to the car if we drive along looking at the edge of the road? The car goes toward the side of the road. Instead, what we want to do is aim high and straight ahead. The same principle applies to legal profession. In judging, we should focus on high moral principle, and that is what the study of Scripture helps us to do.

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