

Informed Judgments

Thank you for inviting me to be with you this evening. It is a great honor to join the list of distinguished Jethro speakers at Central Synagogue, including Chief Judge Jonathan Lippman, Former Chief Judge Judith Kaye, Former Attorney General Michael Mukasey, Corporation Counsel Michael Cardozo, Judge Edward Korman, and Professor William Hellerstein from my own law school.

As Rabbi Peter J. Rubinstein told us in his 2004 lecture, Jethro, the father-in-law of Moses, is “relevant especially because he had the intuitive legal sense to know that the way to incur the wrath of the citizenry was to make them wait for the settlement of disputes.”

This week's Torah portion tells the story of Jethro's advice to Moses about time management. When Moses "sat to judge the people," Jethro observed, "the people stood before Moshe from daybreak to sunset." Jethro then told Moses it was "Not good in this matter as you do it"—"you can not do it alone."

I want to pause here to remind you that problems with wanting to do it all run throughout history. This evening, because I am going to have a bit of a presidential theme in my remarks, I'd like to start with a story about time management and President Woodrow Wilson. Wilson insisted on doing his own typing. When his Chief of Staff pointed out that he had

secretaries to do that, Wilson replied that he was the best typist in the White House. His aide reminded him that, although that might be the case, there were many people in the White House who could type, but only one person who could be President.

Jethro, like President Wilson's Chief of Staff, realized that Moses needed help. He urged Moses to share his decision-making burden with "men of truth, hating gain." They would "judge the people at all times; the difficult matters they would bring before Moshe, but every small matter they would judge by themselves."

As you can see, Jethro was really an early proponent of having an appropriate work-life balance.

No one, not even Moses, can work all the time. If only Jethro were here to organize law firms.

Time management, of course, is only one of the things we remember about Jethro. He advised Moses to choose able men to judge small matters, so that only truly significant ones would need to be adjudicated by Moses. Because of Jethro's suggestion, a decision-making system was designed that looks very much like the court system we have today.

In such a system, many men (and women), rather than one wise, but very tired ruler, are called upon to make decisions that may alter the course of private lives and public affairs. But, professional decision-makers, such as lawyers and judges, are not the only

ones who must sift through facts, listen to competing points of view, and reach decisions.

All of us do that every day. We are continuously bombarded with a relentless flow of information and opinion and we are constantly called upon to make judgments relating to our friends, our family, our health, and our business dealings. We form opinions and make judgments about our political leaders, about the economy, and about foreign affairs.

But how do we form those opinions and make those judgments? Do we listen well and carefully? Do we inadvertently filter out data that might be important? How open are we to new ideas? Do we reason critically and reject cliched thinking?

Let's try a little test. Picture this:

A newly appointed president takes office.

His family has moved around a bit, but he is basically a Midwesterner, from Illinois.

The opposition, and many within his own party, say he is not qualified to be president. Although he is a lawyer and has served in Congress, he has never held an important administrative or executive position. Many observers find that he is unfailingly cool and deliberate – some critics complain he is too cool and deliberate – and slow to react to critics and crises, both of which there are many.

He is tall and thin, and his awkward personal appearance proves to be great fodder for editorial cartoonists – and some depict him as a baboon.

But tasteless cartoonists are the least of his problems. He takes office at a time of deadly peril for a country that is bitterly divided on critical issues.

The economy he inherits is fragile, but he steadfastly believes that it can be salvaged and strengthened. He has strong ideas about economic development and banking that a reporter describes as an “urgent vision of an entrepreneurial, innovative marketplace geared to upward mobility.”

He is willing to invest huge sums in public infrastructure and new technology, because he believes that they are keys to the nation’s economic future.

He believes that education and employment opportunity are the most effective ways to end generations of poverty.

In relatively short order after taking office, although his attention is distracted by a war, he manages to push through an aggressive domestic economic program.

Easy case. You don't need to hear any more about him to know who he is. I'm referring, of course, to the 16th President of the United States, Abraham Lincoln.

Let's take another example. And I'll continue the presidential theme, this time using an example suggested by philanthropist Robert Rosenkranz, the founder of the Delphi Financial Group and the organizer of Intelligence Squared, which sponsors debates on social and political issues. Rosenkranz recently told

a story – a parable of two presidents – one of whom was a staunch conservative, the other a staunch liberal.

One of these presidents balanced the budget, and, indeed, reduced federal debt to a degree unique in our lifetimes. He embraced free trade and achieved the breakthrough NAFTA treaty. And the stock market tripled under his watch.

The second president presided over faster growth in government spending and debt than any president before him. He gave us the largest new entitlement program in 40 years – a prescription drug program estimated to cost more than \$500 billion over a decade. He protected the steel and tire industries and seriously distorted global markets for agricultural products with

huge subsidies. He left office with the economy in shambles, and the stock market down 40 percent.

Question: Which was the liberal president and which was the conservative president? I can see from your knowing looks that you realize that the first president was Bill Clinton and the second was George W. Bush. The irony, of course, is that Clinton, a liberal, put conservative ideas into action, yet was reviled by the right. Bush, who put liberal ideas into action, was reviled by the left.

Now why would that be the case?

Robert Rosenkranz would explain that it is the result of cliched thinking and that cliched thinking is a root cause of the toxically emotional and reflexively partisan nature of today's politics.

The media encourage us to see things through rigid, partisan colored lenses. Television and radio talk shows – and of course the blogs – pit “conservative” against “liberal” discussants. What should be a discussion of complex issues, which are more likely to come in shades of gray rather than red or blue, devolves into a predictable cacophony of blah-blah-blah, that doesn’t help us understand or analyze – let alone solve – in any meaningful way the great (and not-so-great) issues of the day.

Can we solve the problem of those who rush to judgement by encouraging the kind of thinking that we train our law students to do? Possibly.

We teach fledgling law students that thinking like a lawyer is the process of unraveling complex

problems by clear-headed linear analysis and cold logic.

Early on they are introduced to the so-called IRAC approach, which trains them to identify the issue, identify the rule, analyze the issue in light of the rule, and reach a conclusion. IRAC is a tidy and useful way to begin, but it is just that – a beginning and it only gets you so far.

What happens if the situation at hand is one that seems to fit within a statute's literal meaning, but not within the contemplation of the legislature that drafted the rule. What happens if the rule is unclear. What happens if the facts are murky? We try to help our students learn to navigate this Bermuda Triangle of legal analysis by training them to sift through facts

and identify the relevant ones, to understand the ways in which legislatures act and judges think, and to take nothing for granted.

But I also tell students that there is another facet to thinking like a lawyer – a process that exists side-by-side with lawyerly thinking – an intellectual openness that is another antidote for cliched thinking. I tell students to open their minds to the power of serendipity.

The word serendipity is believed to have been coined by British author Horace Walpole in 1754. Walpole had been intrigued with a Persian fairy tale in which three princes of the island nation of Serendip – later known as Ceylon, now known as Sri Lanka – traveled the world.

In the course of their travels, the princes of Serendip made wonderful discoveries, Walpole wrote, “by accident and sagacity, of things they were not in quest of.”

Today, the Oxford English Dictionary defines serendipity as “the faculty of making happy and unexpected discoveries by accident.”

From time to time I have discussed the serendipity phenomenon with my friend, Dr. David Colman, a New Yorker, who is now Director of the Montreal Neurological Institute and Hospital. He is one of the least cliched thinkers that I know.

David, who has written about serendipity and science on his blog, says that one excellent example

of a serendipitous observation that led to a great discovery occurred in 1822 when researcher Alexander Fleming, suffering from a particularly nasty cold, happened to sneeze into a Petri dish full of bacteria. He absent-mindedly placed the dish on his cluttered desk. A few days later, he noticed to his great surprise that the bacteria in the dish had been destroyed. His curiosity was aroused and, following his nose, so-to-speak, he isolated the anti-bacterial protein that led to the development of penicillin. For this, he won the Nobel Prize. At the Nobel ceremonies, Fleming commented, "Nature makes penicillin. I just found it. One sometimes finds what one is not looking for."

Of course, David explained, the pharmaceutical industry has benefitted many times from serendipity. Viagra was originally tested as a treatment for angina. It was immediately found to be less effective than another drug, but researchers realized that it might have other potential when the clinical trials were terminated and subjects were instructed to return unused pills to Pfizer. The Company couldn't help but notice that never had so many unused clinical-trial pills been reported as lost or misplaced.

But the power of serendipity is not confined to scientific research. I am guessing that serendipity has probably played a role in your lives and has led you to reach sound conclusions while making

unexpected discoveries. You may have been working on a problem when you happened across a theory on an unrelated topic that made you consider a new approach to solving your original problem.

Every lawyer has had the experience of researching one line of cases in the hopes of pinning down a particular legal theory and unexpectedly coming across a less obvious, but nevertheless powerful legal theory that offered an entirely new approach to solving a client's problems. That's serendipity.

Each year Brooklyn Law School admits a class of students, 50% of whom want to be sports or entertainment lawyers. But thanks to a chance encounter with an inspirational professor, or an

experience in a clinical program, or while working at a summer job, they become inspired to pursue an entirely new and never before contemplated goal. That, too, is serendipity.

One cannot, of course, just sit back and wait for serendipity to open new ideas to you. As you have probably detected from my examples, or learned from your own experience, serendipity operates best in a special environment. As Louis Pasteur observed, “Chance favors the prepared mind.” And that where’s analysis, logical thinking, a willingness to avoid pigeon-holed thinking, and serendipity converge. Don’t only focus your attention on the views of people who agree with you; listen harder to those who don’t.

Actively engage with the ideas presented to you.

**Think not only out-of-the-box, but around the corner,
and into the future. Consider ideas or a theory that
you may never have thought would interest or
influence you. Be open to changing your mind.**

**We are all judges. Jethro and Moses got us started.
But Jethro's advice to Moses only gets us so far. It had
nothing to do with the substance of decisionmaking.
Jethro was only interested in procedure. It is up to all
of us to fill in the blanks -- to figure out how to go
about making a decision. The Bible warns us not to
rush to judgment. Do not judge another when you
do not have all the relevant facts. (See Jeremiah 5:1.)
Listen hard and do your research.**

A Japanese proverb says to “search seven times before you judge.” While you are searching, I urge you to do so with no preconceived notions and an open mind.

Thank you.