Listening to the Lament, Finding Our Dissent
Erev Tish'a B'Av 5776
Germantown Jewish Centre

I am a lawyer, a public defender. We have a temple in Washington, D.C. Standing on the steps of the Supreme Court, one is dwarfed by the towering marble façade. It proclaims: "Equal Justice Under Law." It is majestic. I wish it were true. Although this temple still stands, we know that the promise of equal justice under law, a promise born in Philadelphia, is unfulfilled.

When we are, as on most days, at home, we look around our neighborhood, our city, our country, and we see that we have failed to create a society that lives up to our constitutional ideals. Our failures to ensure equal justice are staggering. We may not mourn those ideals in the same way we mourn the destructions of Jerusalem, perhaps because our communal failures to protect our ideals are not as identifiable as those moments of destruction, dates marked on the calendar. But the violence, the loss of life, and the ruptures in sacred human community are no less real; and for some of us, they are far more immediate.

This summer, for me, those ruptures feel wider and more urgent than ever: our country's legacy of slavery and racial violence; our adoption of mass incarceration as a substitute for meaningful solutions to homelessness, education funding, unemployment,

mental illness, and substance abuse; and the disproportionate impact on the poor of chronic disease, inadequate schools, gun violence and environmental contamination.

I was invited to share tonight some thoughts about how we might respond to the overwhelming tragedies and trauma we find all around us, here in our beloved home. I've been exploring this in my own work, because as someone who came to her career before she came to Judaism, I've been able to observe my view shift as I begin to see from a Jewish perspective. This is an evolving project. Thank you for letting me attempt to sort it out here.

The Torah teaches us, over and over, that we shall not wrong a stranger, because we were strangers in Egypt. We are taught from the outset that God brought us forth from Egypt, from bondage. This identification of our own story of redemption with the oppression of strangers among us speaks directly to my work as a public defender. I try to release people from bondage. It doesn't even require a metaphor.

Even though freedom from bondage frames our story, the Torah reveals little about prisoners until we reach Lamentations. Tonight, we will hear imprisonment described as lonely and endless, miserable, dark, numbing, humiliating, and like being dead. I spend a lot of time talking to prisoners. These words are as apt today as they were when they

were written. Most chilling of all, to me, the prisoner laments: "And when I cry out and plead, God shuts out my prayer." Lam. 3:8.

As we listen to these words, we must remember that we imprison far more people per capita than any other country in the world. Right now we hold over 2.25 million people in our prisons and jails. Many millions more are under some form of law enforcement supervision and are affected by the collateral consequences of convictions. The population of our prisons and jails is not chosen at random. One in three African-American men, and one in six Latino men, will be incarcerated at some point in his lifetime. Or by another metric: there are approximately twice as many African-American men in prison right now than there were held under slavery in 1850. White women like me face a far different likelihood of incarceration: one in one hundred and eleven.

One of the privileges of my work is the opportunity to connect with my clients, who are in many ways strangers, those with vastly different experiences of living in our country. I defend their liberty and insist upon their dignity, in a criminal justice system that is relentlessly dehumanizing. I am entrusted with their stories. When I began practicing law, I imagined my career would contribute toward dismantling the systemic injustices facing racial minorities and the poor. Ten years later, I am not convinced we are

dismantling anything. Instead, I see my work in microcosm: in representing my clients and working with their families, I strive to reach across the boundaries of difference and locate our shared humanity. That radical act of extending compassion to a stranger may be the closest my work gets to social change.

The myth of law school, and even legal training for lawyers who wish to serve the poor, is that we are practicing law to "help" people. For me, the practice of poverty law became a two-way street immediately. My clients open my eyes; they transform me. I learn about resilience and love as much as I learn about trauma and violence.

I have a client who thanks me, constantly. He thanks me for updating him, for taking his calls, for answering his letters, for passing on bad news. A typical message reads: "Once again thank you for your efforts on my behalf and it's great to have a person such as yourself that takes their career as serious as you do!! GOD BLESS HAVE A NICE DAY." On some days, these two sentences buoy me more than they probably should. I hope he believes that I am fiercely in his corner, and I am fighting for him as well as any lawyer could. I hope he knows I hear him. On other days, I rail against my clients' low expectations. Performing the routine tasks of legal representation does not require thanks. But some of our clients don't expect competent lawyers, do not expect to be heard. They do not expect their lives to matter. More than anything, I believe I am

obligated not to accept this. Or, maybe, they do not expect me to act as if their black lives matter. And so I am also obligated to show that I do, deeply, believe black lives matter.

My clients, of course, have lives beyond their legal cases; the fortunate have lives embedded in families. I am frequently humbled by the grace and gratitude that my clients' families extend to me. One client's mother takes the time to thank me and bless my family every time I speak with her. Even when I called to tell her that I lost her son's appeal.

As I interact with my clients' mothers, wives and partners, and as I hear about their children, I see these family members as the widows and orphans of our fractured society. Just as we see women and children remain, struggling in the ruins of Jerusalem, the women and children who are my clients' families remain in damaged communities. Our justice system creates these orphans. 2.7 million children in our country have an incarcerated parent. That is one in 28 children. But again, it is not evenly distributed. One in nine African-American children is an orphan of our criminal justice system. One in nine.

Have you ever watched young children waiting in a prison lobby to visit a parent? It is heartening—because, one thinks, at least this family is fighting the geography of incarceration, they have somehow reached this prison, no matter how remote, and they are maintaining connection between the children and the imprisoned parent. It is also a source of despair. I see children for whom this routine is obviously unremarkable. Children who have learned to silently, motionlessly, wait. Children who see their caretakers, almost always women, endure the humiliation of the guards' scrutiny. Prison regulations about women's clothing are Talmudic in their inscrutability and can be applied to prohibit almost anything. My own clothing has occasionally been questioned, although as a lawyer I am generally accorded an exception even if some slight noncompliance is detected. But there are no exceptions for the underwire bra rule. Bras that set off the metal detector usually must be dismembered, because one cannot enter without a bra (that's another rule). Visitors are often sent out, and not always kindly, to remove metal from their bras. Children watch all of this. Children see the state exert control not only over the body of their incarcerated parent, but over the bodies of their mothers, aunts and grandmothers too.

Just over two years ago, I was in a Texas prison, in the death row visiting room. I was visiting a client. It was an execution day; another prisoner, not my client, was going to

be killed that evening. That prisoner was having a family visit, a farewell visit, on the other side of the same visiting room.

I was very pregnant. After speaking with my client for a couple of hours, I excused myself to use the bathroom. I waited outside the visiting room bathroom. Waited. And waited some more. The delay exasperated me, immersed as I was in the urgency and self-righteousness of late pregnancy.

When the door finally opened a girl emerged. A teenager, bent over double. I realized she was the condemned prisoner's child, and she had been throwing up. A second too late, I reached out for her shoulder, to comfort her; but she was gone.

What could I do but go back to my client and continue our visit; professional, competent. When we finished, I left; it is always surprising to exit a prison so easily. Guards, unnervingly calm, opened doors for me. I walked the path between the death row visiting room and the main gate. It was planted with red flowers, the same ones my grandfather grew. I got into my steaming car and called my wife, Abby. I call her from a lot of prison parking lots. But this time, as soon as I heard her voice my veneer of competency dissolved into sobs. She was alarmed: is it the pregnancy? No, it is fine, kicking. It's just that the child was heaving, and that child will never forget this. It's just

that maybe it was not a good idea to come on an execution day. It's just that we are so cruel.

When I say that representing my clients opens my eyes, this is what I mean. I am jolted out of my own narrow perspective. I leave every prison visit more aware of my experience as a free person choosing to be there; a white, educated, professional; a person who does not have to cultivate the patience of the incarcerated; a wife and mother unlikely to be widowed or see her children orphaned by the criminal courts, and extremely unlikely to see her children endure a final farewell in a prison visiting room. Understanding this allows me to understand more about those who are not me.

As we listen to the laments of ruined Jerusalem, as we hear of the prisoner whose face was ground into the gravel, and the streets defiled with blood, we learn that Jerusalem was complicit in her downfall. Somewhat incredibly, we are taught that it was our sins that brought the destruction upon us. The notion that God would destroy a nation for lack of righteousness seems so Biblical, so remote. And then we remember that this summer we have all watched, on video, blood spill in our streets. We have seen a human being's head, Alton Sterling's head, ground into the gravel as shots rang out, and we watched him bleed. We have grimly noted the rising number of children killed by gun violence in Philadelphia in 2016; it is now seven. You don't have to smell a child's

fear on the day of her father's execution to know that we are now, as in ancient times, living in deep transgression of our values. This spring, Supreme Court Justice Sonia Sotomayor wrote, dissenting in a case about police stops, "No one can breathe in this atmosphere."[1] She was right. And our hearts are sick.

The trauma around us may be overwhelming. But every day when we wake up, we are given the opportunity to begin afresh, and to see ourselves, and our contributions, anew. The Russian poet Anna Akhmatova wrote a poem cycle about the Stalinist purges of the 1930s; it is principally about the experience of women whose husbands and sons were imprisoned or killed. It was midsummer in St. Petersburg, when the sun doesn't set, on the day her son Lev was sentenced to labor camp in Siberia. Akhmatova described how disconcerting the flood of light was at that moment. She wrote of her soul turning to stone when she heard the sentence. But in the face of this trauma, she insisted that she must go on: Надо снова научиться жить.[2] (The English is not nearly as lyrical: I must learn again how to live).

We all must learn to live anew. Often we think that what we bring to our work is the ability to help our clients or students or patients, to help our colleagues, to use our special skills to *do something*. We forget, or we do not have our eyes and ears open to

[1] *Utah v. Strieff*, 579 U.S. ---, 195 L. Ed. 400, 418 (2016) (Sotomayor, J., dissenting).
[2] Anna Akhmatova, Requiem, VII, The Sentence.

see and hear, that our work can transform us. And when we hope to heal our fractured world, that might be the place we have to start.

Our youngest child, the one who kicked so reassuringly in that prison parking lot, is now two years old. His name is Simon. His Hebrew name is Shalom; he is named for his great-great-grandfather. Putting little Simon to bed at night is, of course, a moment of gratitude: for his life; for his drowsy weight in my arms; and for his sleep. We say the Sh'ma. With this sequence of shins—Simon, Shalom, Sh'ma, shhhh—I pray that by hearing, we may begin to build peace.

What can we bring about by hearing? There is a well-known rabbinic dialogue questioning which is greater, action or study. The rabbis concluded that study is greater, because it leads to action.[3] This is probably not a surprising answer. And yet, it's not the only answer. When Moses read us the Torah, we responded: "we shall do and we shall hear" (*na'aseh v'nishma*). Exod. 24:7. The rabbis also teach that our entry into the covenant with those words reflects a promise first to act, observing the laws of Torah, and only afterward to study and understand the law. This is seen as an extraordinary declaration of faith. It is also practical; imagine if we could not act, perform a mitzvah, until we understood the entire Torah? But even so this "act first" teaching seems

[3] Kiddushin 40b.

inconsistent with the initial lesson that study leads to action. I can only conclude that we are not to see "doing and hearing," or "action and study," as binary; they are intertwined. At its core we can understand our obligation to do, *and to hear*, as a promise to sanctify ourselves by emulating God—by letting our actions be affected when we hear the cries of strangers, of those who suffer. Tonight we see the counterexample, the society where there is no one to comfort those who cry out, and we resolve that it must not be ours.

May 15, 2016 marked the 100th anniversary of a notorious lynching in Waco, the lynching of Jesse Washington. If you ever studied twentieth century American history, you probably saw a photograph of it; you would not forget. Ten thousand spectators gathered to watch 17 year old Jesse Washington being brutally killed, burned and dismembered by the lynch mob. This spring, an African-American journalist named Jesse Washington, knowing he shared a name with this tragedy, traveled to Waco to interview residents about the lynching. He wrote a searing essay about this visit.[4] Among white residents, including judges now presiding at the courthouse where the lynching began, he encountered few people who knew the history of the lynching, or who cared to talk about it. Among African-American residents, he found that people

[4] Jesse Washington, The Waco Horror, published by ESPN, available at https://theundefeated.com/features/the-waco-horror/

immediately recognized the significance of his name, and knew about the lynching in great detail.

On his way out of town, the present-day Jesse Washington came upon Waco's Heritage Square, covered in paving stones bearing the names of prominent residents. He began reading the stones, looking for his name. He counted one thousand, three hundred and twelve stones. His namesake, the child lynching victim, was not among them. And he wrote: "The one name missing from Heritage Square symbolizes Waco's attempt to deny its full heritage and pave over the sins of the past. Yet here I stand, living proof of the power of that past. Jesse is an ancestor of today's victims of injustice, the names we never would have known save for the world-changing power of camera phones and social media. A large part of America tried to discredit these names, to say they did not matter. They failed, and unwittingly unleashed their power. By trying to deny these names, they burned them into history: Trayvon Martin. Tamir Rice. Eric Garner. Freddie Gray. Walter Scott. Jesse Washington."

I tell this story because it shows the power of listening and hearing. Some of us can choose whether to hear and listen to the story of Jesse Washington's lynching; others cannot choose. Some of the black residents interviewed for the article were old enough to have been told the story of the lynching in hushed tones, a cautionary tale about the

threat of violence in their town, violence by their neighbors. But some of us have to put ourselves in positions where we will be able to hear such stories. Only when we can hear, and understand the significance of Jesse Washington's lynching, can we hope to grapple with the weight of our history.

Because I have focused so much on being able to hear, I wanted to hear some voices other than my own. After all, who am I to tell you what it is like to be in prison? So I consulted with a few of my clients. I asked what they would want to explain about being incarcerated to people who, mostly, have little direct experience with the criminal justice system. This process itself was illuminating. At first I hesitated to ask my clients to produce something unrelated to their legal case. But the responses were enthusiastic and humbling. Two of the three clients I wrote to are people I have known for years; I have made it my job to talk to them, visit them, and learn about their lives, because I believe that is necessary to effective lawyering. But now I know I have a lot more to learn. In these letters I received, my clients told me things they had not told me before. One wrote that he was surprised to receive a letter from me when he knew there was not an upcoming deadline in his case, but he was "elated" I had asked for his story. Clearly, I am not asking enough to hear these stories.

The elated client wrote a lot about his family. In particular he wanted to praise his mother:

> I grew up in West Philadelphia. My mother raised three children, two daughters and one son, not to mention the fact that she also cared for her siblings as well. My mother did good with us and I make certain that I tell her that all of the time. […] I want to make her proud of me despite all the obstacles that I have come up against due to choices I have made.

This struck me, because I could always use a reminder to praise my own mother. And it struck me because, of all the ways I have attempted to understand imprisonment, I had never thought about how a prisoner might want to make his mother proud.

Another client wrote about something I have observed, too, but I would not have been able to describe from his perspective. He wrote:

> I will say this, it's interesting how much men read in jail. It might not all be high literature but it's reading. Most of these men didn't read in school or even like school. That shows me that in the right conditions the will to learn is there.

President Obama spoke, just days after my client wrote that letter, about how we have failed communities where "it is easier for a teenager to buy a Glock than get his hands on a computer or even a book."[5] Together, President Obama and my client teach us that there is an entire community of African-American and Latino men for whom the first environment we provide that is conducive to reading is a prison.

[5] Remarks by the President at Memorial Service for Fallen Dallas Police Officers, July 12, 2016, available at: https://www.whitehouse.gov/the-press-office/2016/07/12/remarks-president-memorial-service-fallen-dallas-police-officers

Another client's letter reflected on how he maintains his humanity after childhood trauma and three decades of solitary confinement:

> My childhood tragedy has not affected my ability to love others generously and that possibly is the real miracle. That ability can only be a blessing from God. . . . Loving others is my way of crying. Most of all, I want you to know I am human.

Rabbi Zeff teaches that this week, we descend to the depths of despair and face what we find there. It would be hard to find a lower depth of despair than holding in my hand a letter from this particular client, a person for whom I have prayed many times, in this space and in my office, and reading his words: "I want you to know I am human." I thought I had always, at a minimum, shown my clients that I see their humanity.

Maybe your stranger is not a prisoner or a person living in poverty. Many others also want us to know that they are human. Maybe your stranger is mentally ill, disabled, an immigrant, a person who is not Jewish, or a person who is differently Jewish. We do not lack for strangers, or for lives that remain unheard due to differences between us. You will hear things that I do not hear; those stories too will enrich our humanity.

It is somewhat intangible, maybe, to pursue hearing and listening. At home, at work, in community, we want to *do*. I believe in doing. I represent people with pressing needs.

But it is precisely this call to hear, the imperative we recite twice each day, that we hope can awaken us to engagement. It was when God heard cries—the cries of Ishmael, the cries of the Israelites enslaved in Egypt—that hearing brought about redemption. Our challenge is to put ourselves in positions where we will be able to hear. Sometimes, like me, we will need to ask to hear these stories.

And then how do we help each other, and our society, emerge from the depths? The legal scholar Robert Cover examined structural inequalities, and considered how to fight them with our religious tradition, based in mitzvot, and our secular legal system, based in rights. He concluded we need both. He saw mitzvot as our obligations to go beyond the letter of the law—to make real the rights that the law does not adequately protect. And he wrote, "I believe that I am commanded—that we are obligated—to realize those rights."[6]

So when I propose that we must listen, that we must make ourselves able to hear the cries of those suffering among us—and we must understand that those suffering are human—that is not the end of our responsibility. I don't believe that we can begin to heal these wounds by listening alone. Our individual intentions, no matter how righteous, cannot correct structural inequalities. Instead, may we hear the obligation to

[6] Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J. L. & Religion 65, 74 (1987).

realize those rights. May we be engaged to pursue, and to demand, the necessary political, legislative and judicial changes. May we restore luster to the edifice of rights, until the words Equal Justice Under Law tower, and ring true, above all of us.

Thank you.

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