The Power to Pardon

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Temple Israel, Kol Nidrei 2018

I love the line in *Fiddler on the Roof* when they ask the rabbi if there is a blessing for the tsar. The rabbi thinks, strokes his beard, and says, "May God bless and keep the tsar…far away from us!" I was thinking about that line when Alla and I watched the Ukrainian countryside pass us by as we travelled from Kiev to Odessa on a Sunday in June. In Kiev we saw the building where Shalom Aleichem lived, the author of the Tevye the Milkman stories. And then we drove through the land of the shtetl that he wrote about.

In both Ukrainian cities we felt the presence of the Russian tsars. In Kiev our guide pointed out the domes of the Russian Orthodox cathedral looking down on the historic town. That was built by Catherine the Great, she told us, to remind us that we are in the Russian Empire. And Odessa was created by the tsars in order that Russia have a warm water part and not have to depend on St. Petersburg and the winter freezing of the Neva river at the mouth of the Gulf of Finland. But today the Ukrainians are at war with Russia. Our new friends in Kiev and Odessa were very worried for me and Alla when we told them we had plans to travel to Russia in July. "Oh no, we would not go there now!" They still say that same prayer as the rabbi in *Fiddler on the Roof,* asking God to keep the Russian leader far away from them.

Back here, people have been asking me why it was we went to Russia twice this summer. I keep explaining that Ukraine is not Russia, that it is an independent country and at war with Russia. Why do we think of Ukraine as a part of Russia? Because they speak Russian there? Well, they actually speak Ukrainian, though everyone seems to speak Russian as well. But we speak English with some Spanish in this country, and we are part of neither the United Kingdom nor Spain (even though big parts of the United States used to belong to both of those countries). Maybe because Ukraine was a part of the Soviet Union?

Or maybe because it was a part of the Russian Empire? Or maybe because that is what the Russian leader wants us to believe. But the fact that the Russian leader wants us to believe something does not make something that is false into something that is true. We did go to Russia, the real Russia, a month later in late July, and I thought a lot then about Russian leaders.

We went to Moscow because I was presenting a paper at the international Jewish Law Association conference that was being hosted by the law faculty of Moscow State University. We got into Moscow late at night, and the next morning we woke up and looked out the window of our hotel to see an enormously imposing building with a giant hammer and sickle upon the façade. Throughout the city we were impressed by the massive Soviet architecture inherited by the new Russian state, with its own addition of super-contemporary construction. And then, the center, Red Square. The Kremlin. The old medieval fortress with the Soviet leaders all laid to rest at its feet. And within the fortress, behind the walls, the palace still used by today's Russian leader.

In St. Petersburg, which we visited after the conference in Moscow, we encountered the old leaders, the Tsars. Enormous palaces, extraordinary opulence. The entire city was built as a backdrop to the palatial grandeur of the imperial power. The Winter Palace is absolutely extraordinary. One of the world's greatest collections of art that adorn its hallways is literally a mere decoration to the majesty of the palace itself. And its location, along the banks of the Neva, and on the other side facing out to a grand plaza, one of the greatest in Europe. The tsars sought to outdo Versailles and the Louvre. Several Buckingham Palaces could fit inside the Winter Palace of St. Petersburg. This was the center of the capital of the Russian Empire for two hundred years. And this was the spot where the Russian Revolution happened. And standing there, you can understand why. The tsars were not only flashy, they were out-of-the-park extravagant, and they built the most extravagant palace in the world right in front of everyone, in the center of their city, right in the face of their poor and impoverished people. The distance that stood between the tsars and their subjects could not be greater.

We stood there, Alla and I, on the banks of the river looking across the water at the Winter Palace, and we saw the tsar. Not Peter. Not Catherine. Not Nicholas. Not Joseph. Not Leonid. Not Vladimir Ilyich. (I would have liked to have seen him in his mausoleum in Red Square, but he apparently does not receive visitors on Tuesdays.) But we saw, in the flesh, in front of the palace and its majesty, the tsar himself, Vladimir Vladimirovich Putin. Well, his official title is President of the Russian Federation. But there is not much else that is different. He was surrounded by a parade of his navy in all its glory. Huge warships floated down the river before the palace, with their sailors and officers lined up at attention on deck saluting their commander-in-chief, while tens of thousands of people lined the banks of the river. The band played and the cannons roared. Literally. We happened to have been in St. Petersburg on the one Sunday of the year when it celebrates the Russian navy. Putin paraded in a small boat between the warships, and all the tens of thousands of us along the banks of the river could see him. It was the first time I had ever been in the presence of a head of state.

Not exactly true. I was at a Holocaust memorial service once at Yad Vashem which was attended by the president of the State of Israel, but Israel has no sense of grandeur like this, and the president of Israel has no real political power. But then there was a Rabbinical Assembly convention in Mexico City some years ago and the Mexican president came to address us. He was a real president. And I briefly met a former American president last June at a book signing in Westchester. But seeing Putin, with maybe a hundred thousand people around me, felt different.

In fact, there is a blessing for the tsar. There is a serious answer to that question. You will find it in the list of blessings for special occasions that any complete prayer book will give you. Upon seeing a monarch or head of state, we are to say: ברוך אתה ה' אלוקינו מלך העולם שנתן מכבודו לבשר ודם , blessed are you, God, King of the Universe, who has given of Your glory to flesh and blood. I said that brakhah on that Sunday in July in St. Petersburg.

Understand, that is a nonpartisan brakhah. It does not say that we support the individual or approve or even bless the individual. You might even say there is no confession of collusion. But it is a powerfully poetic line of liturgy. We are blessing God for giving of God's own glory to a mere human being. Whether for good or not, the blessing acknowledges the majesty that can befall specific human beings, and cleverly finds a way to affirm God's true sovereignty, asserting that the human king only reigns because of God allows it. It is not the king's own glory. We, as moderns, would say the same thing today, with the caveat that a leader bears the glory of his or her people, something that the actual tsars of Russia fatally misunderstood. What this brakhah expresses is a sense of awe at the majesty of a monarch. It reminds us, at the same time, that such awe in a human being is misplaced, and that superlatives of majesty belong only with the true King, the King of Kings.

The high holiday liturgy is filled with imagery of awe and majesty. We call the High Holidays the Days of Awe, *Yamim Noraim.* We focus on the majesty and sovereignty of God. References to God as God are changed from Rosh Hashanah through Yom Kippur to God as King. Many people understand these liturgical motifs as meant to emphasize the transcendence, or distance between us and God. Many liberal theologians and liturgists are uncomfortable with the imagery of God as king, both because of the gendered implication as well as the patriarchy that the model asserts, that God is the all-powerful sovereign and we are but lowly subjects. Many new liberal liturgies, our own including, offer alternatives to the well-known *Avinu Malkeinu¸* which means Our Father Our King. But as I read it, the point is not that God is a father or an awesome distant sovereign, but rather that God is *Our* master and loves us as a parent. The change in terminology from "God" to "King," from *El* to *Melekh,* is an assertion not of divine transcendence but of divine immanence, not of God's distance but of God's nearness.

Why? Because of the metaphor of judgment. Rosh Hashanah is called *Yom HaDin,* the Day of Judgment, but Yom Kippur is when God forgives. And God forgives as a sovereign who is a loving parent. We think of Rosh Hashanah as the happy holiday and Yom Kippur as a sad day but it is actually the

opposite. Rosh Hashanah, while we greet the new year with sweetness, has a seriousness about it as we examine ourselves and seek repentance. On Yom Kippur, the fast is a demonstration to God of our sincerity, a purification ritual, and an extraordinary festival of forgiveness. "Be happy oh Israel!" Rabbi Akiva says in the Mishnah at the end of the laws of Yom Kippur. "For Whom do you stand before to be purified? Who will purify you? It is your loving parent in heaven!"

God as God is a judge, a court which delivers strict justice. But God as King is merciful and forgiving. The Rabbis adapted as a metaphor into our High Holiday liturgy the role of the sovereign who has the power to pardon. Justice was strict in the Roman Empire where they lived, but the emperor had the power to grant pardon and annul the decree of the courts. As the Rabbis applied that idea to Yom Kippur, the court has handed down its verdict and we now approach the sovereign of the universe for mercy. Not because we deserve it, but because the King of Kings is loving and forgiving. We draw near to the King, and stake our lives on that immanence, on the nearness, directness and immediacy of that relationship.

The power of the executive to pardon is well known to us. While it was held by ancient kings from time immemorial and enshrined in the Roman law that the Rabbis lived under, it became established as a royal prerogative in English common law, and from there found its way into the powers of the American presidency, and of state governors for state offenses. Let me share with you the commentary of Alexander Hamilton on the presidential power to pardon from *Federalist* Number 74:

> The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.

He's a little harder to understand without the rhythm and rap, I suppose. But we can do it. I went to the same school as Lin Manuel after all. What Hamilton is saying here is that the presidential power to pardon is a check and balance against the judiciary branch. Justice can by necessity be cruel. The republic, then,

needs a human face, an ability to counter justice with mercy. Hamilton goes on to say that the power to pardon is better placed in a single individual (the president) than in a group of people (the Congress). People in groups "derive confidence from their numbers," he wrote, and might be less open to mercy than an individual who knew that "the fate of a fellow creature depended" on that person alone. Hamilton's general project in the *Federalist Papers* was to make the case for executive power to a nation that had fought hard to rid itself of a king. In this case, Hamilton said, the cause of mercy and compassion would be served by this executive power.

In the seminal 1833 Supreme Court decision that clarified the pardon power, *United States v. Wilson,* Chief Justice Marshall wrote, some forty-five years after Hamilton's advocacy:

> A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private though official act of the executive magistrate.

Marshall understands the pardon power as not only vested in the executive because he or she is more likely to be compassionate than a legislative body. And not only because historically this was always a right of emperors and kings. It rests there for systemic and structural reasons. The legislature writes the laws. The courts adjudicate, determining if one is in violation of the law and what the prescribed penalty is. The executive must then carry out the punishment in enforcement of the law. It makes sense then, that that same executive can commute the punishment, which is an act to stay the decision of the court, in its reading of the will of the legislature. The legislature cannot pardon because it must be consistent with its own laws. The court cannot do so either as the judicial process is already completed. Only the executive can invoke mercy, or, as the chief justice called it, "an act of grace."

There is also a full-circle accomplished here. The legislature represents the will of the people, but the executive can act in direct relationship with the people, in what Chief Justice Marshall called a "private though official act." It is official because it has the force of law. But it is private because it is a personal

act of grace between the executive and the individual appealing for mercy. That is the immanent or near aspect of God's presence that the Rabbis celebrate in our High Holiday prayerbook.

And here we can understand as well why the Rabbis composed a blessing for a monarch asserting that God gives of God's glory to flesh and blood. A truly might king, like God, is comfortable in giving or sharing or diminishing glory. That's what the king does who grants pardon. Such a king chooses not to make good on the power of the law. Such a king restrains that power, holds it back, out of mercy. Remember that scene from *Schindler's List* when Schindler convinces the Auschwitz commandant that real power is not killing but pardoning? A real leader will be able to diminish his exercise of might. That is what Alexander Hamilton and John Marshall understood.

Everything we read today about the presidential prerogative to pardon is about how the use of that power can or cannot protect the officers of the executive branch against judicial peril. I am not here to pronounce a legal opinion on the extent of presidential powers. My role is to articulate a moral position.

The ancient power of monarchs to grant clemency is a sharing of their glory with their subjects, not an entrenchment or self-defense. Rather than an expression of a ruler's self-obsessed majesty, the power to pardon is an attribute of a leader who cares for the governed, even at the expense of some of his or her own power. It is a surrender, not an assertion, of prerogative.

The Ukrainians are correct in praying that God keep the tsar far away from them. Because the leader in Moscow is not their leader, and he is a tyrant. But the Rabbis held on to a vision of the good leader, of a King who cares for the people, Who loves all His subjects individually, Who pardons their sins, iniquities and transgressions.

On Yom Kippur we experience God's nearness. We beg for God's mercy. We receive God's clemency and pardon.

We retain the language and ideals of the Rabbis as we proclaim our faith in the Holy One, the King of Kings. Understanding that we are created in God's image, we understand that the burden falls upon us to create human leaders in that holy image. There are times in history where we have, where we do, and where we must, pray that certain leaders be kept far away from us. But beyond praying, we must work to have the kind of leaders whom we want close and near.