

HEBREW UNION COLLEGE - JEWISH INSTITUTE OF RELIGION
NEW YORK SCHOOL

INSTRUCTIONS FROM AUTHOR TO LIBRARY FOR THESES

AUTHOR SHELLEY KOVARE BECKER
TITLE JEWISH ETHICAL REALISM:
AN INQUIRY INTO THE LEGAL PRACTICES
OF THE MARKETPLACE

TYPE OF THESIS: D.H.L. () Rabbinic (X)
Master's ()

1. May circulate (X)
2. Is restricted () for ____ years.

Note: The Library shall respect restrictions placed on
theses for a period of no more than ten years.

I understand that the Library may make a photocopy of
my thesis for security purposes.

3. The Library may sell photocopies of my thesis. X yes no

3/15/91
Date

Shelly Kovare Becker
Signature of Author

Library
Record

Microfilmed
Date

Signature of Library Staff Member

THE KLAU LIBRARY
HEBREW UNION COLLEGE
JEWISH INST. OF RELIGION
BROCKDALE CENTER
1 WEST 4TH STREET
NEW YORK, N.Y. 10012

91-6479

HEBREW UNION COLLEGE - JEWISH INSTITUTE OF RELIGION
New York School

Report on the Rabbinic Dissertation Submitted

by

Shelley Kovar Becker

in Partial Fulfillment of the Requirements for Ordination

**Jewish Ethical Realism: An Inquiry into
the Legal Practices of the Marketplace**

Ms. Kovar Becker's thesis analyzes and comments on Mishnaic business law texts from the perspective of systematic ethics. The firstpart of the thesis outlines the major modern ethical systems, namely, deontology and utilitarianism. She also refers to Valesquez's theory of rights. Having clarified the basis for her commentary and analysis, Ms. Kovar Becker begins her work on mishnah selections from Baba Mesia and Baba Bathra.

The mishnaic texts are arranged according to their closeness to deontologist or utilitarian principles. Some mishnaic texts contained disputes which coalesced around these two ethical options. This arrangement brought to light the phenomenon that personal, individual-to-individual business relationships were guided by deontology. Business relationships which opened into the community at large were guided more by utilitarian considerations.

Ms. Kovar Becker's initial "find" showed the tannaitic world to be one in which the rabbis' rulings were informed, consciously or intuitively, by ethical principles. Their rulings, however, did

not demand self-sacrificial, super-ethical behavior. Furthermore, they did not subscribe to a single ethical system, responding, it appears, to the appropriate critique of each system in specific, but different, realms. One proof of their resistance to super-ethical legislation is found in the Ben Petura-Akiba debate regarding the two men in the desert, one of whom possesses sufficient water to live.

Ms. Kovar Becker proceeds to analyze cases outside the business realm, namely Zedakah and Mamazerut, which indicate that Torah contains both super-ethical and unethical legislation. Rabbinic law, at least in the realm of business, contains neither super-ethical or unethical legislation. Ms. Kovar Becker suggests this means that traditional Rabbinic Judaism accepts that God is not bound by the same ethics as humanity. It holds, however, that humanity must follow what it understands to be ethical in its legislative conduct. Liberal Judaism parts ways with traditional Rabbinic Judaism over the centrality of ethics in its theology, namely the belief that God is the author, commander, and observer of ethics as understood in human terms. She notes the theological and communal problems arising from both points of view.

Having arrived at this conclusion, she suggests that Liberal Jews may now have a systematic way of determining what is mitzvah. That which is ethically mandated is certainly mitzvah. That which is super-ethical may also be mitzvah. What is unethical is prohibited (= mitzvah lo ta'aseh). What is ethically neutral is in the Liberal

Jew's realm of choice.

Respectfully submitted,

Dr. Michael Chernick

JEWISH ETHICAL REALISM:
AN INQUIRY INTO THE LEGAL PRACTICES OF THE MARKETPLACE
SHELLEY KOVAR BECKER

Thesis Submitted in Partial Fulfillment of
Requirements for Ordination

Hebrew Union College-Jewish Institute of Religion
Graduate Rabbinic Program
New York, New York

1990

Referee: Dr. Michael Chernick

TABLE OF CONTENTS

ACKNOWLEDGEMENTS.....	ii
INTRODUCTION.....	1
CHAPTER 1 — FORMALIST OR DEONTOLOGICAL BUSINESS ETHICAL THEORY, INCLUDING THE KANTIAN CATEGORICAL IMPERATIVE.....	3
CHAPTER 2 — UTILITARIAN BUSINESS ETHICAL THEORY.....	12
CHAPTER 3 — CASE ANALYSIS.....	17
Initial Application R. Judah and the Sages	17
Formalist or Deontological Cases	21
Utilitarian Cases.....	28
Cases Displaying Both Theories	35
Summary of Case Analysis Chapter.....	40
CONCLUSION.....	48
APPENDIX I — TEXT OF ANALYZED CASES.....	54
BIBLIOGRAPHY.....	64

INTRODUCTION

This thesis endeavors to explore the ethics at work in the ancient marketplace. By applying business ethical theory to the cases and decisions of Mishnah tractates Bava Metzia and Bava Batra, it is possible to analyze the sages' behavior with regard to perpetuation of the economic life of the Jewish community. I readily acknowledge that this material, as analyzed in the following pages, does not take into account the historical circumstances that weighed heavily on the sages and doubtless influenced them as well.

The proponents of the business ethical theories dating as they do from the 18th and 19th centuries expounded certain intuitive human behavior that we may assume has some relevance for the ancients' actions. I do not claim that the rabbis and sages acted out of these motives, only that it is possible.

I further contend that this analysis is no worse than any other hermeneutic applied after 2,000 years. In our quest to explain why a heritage has survived for over 5,000 years, there is a certain liberality of interpretation tolerated. I will not say that the conclusions presented here are the intentions of the decisors or the redactors of משנה. I simply offer the application of moral theory to a tradition I always considered inherently ethical.

Through the process of research and analysis of this material and numerous hours of stimulating and provocative conversation with my

advisor, I have become more sensitized to the inherent realities and difficulties that Judaism poses for us moderns.

In the following pages you will find an explanation of the two major business ethical theories of our time: deontology and utilitarianism. The theories have been used to analyze cases drawn predominantly from two tractates of משנה, Bava Metzia and Bava Batra. I have found cases that agree with one or the other theory and also cases that accord with both. I herewith offer my justification.

I have endeavored to come to terms with the superethical and unethical components of the tradition, namely, צדקה and ממזרות. In the conclusion, I tried to address the liberal perspective. With this thesis as well as with my vision for my personal rabbinate I call for a return to heeding our traditional ethical imperative: צדק צדק תרדף.

CHAPTER 1 — FORMALIST OR DEONTOLOGICAL BUSINESS ETHICAL THEORY, INCLUDING THE KANTIAN CATEGORICAL IMPERATIVE

What is the critical difference between a deontological theory of ethics and a consequential idea of ethics? In order to speak about either in an informed way, we must understand each premise as a theory and as a tool for practical analysis and use.

In its purest dictionary definition, deontological theory refers to duty or moral obligation. If we subscribe to this principle, we allow it to become the overall structure for all our actions and the way we conduct ourselves. We make all our decisions based on moral obligation and we submit our behavior to the analysis of this theory. Through our adoption of this system, we make possible universal moral positions. Not only do we take these stances, but it then becomes possible to view ethics as central to our *modus operandi* and, for purposes of this thesis, essential in the dealings of the marketplace.

Deontological theory comes from the Greek word for duty. This concept of duty goes beyond the idea of achieving the greatest good for the greatest number of people. The application of deontological theory as an analytic tool for our actions presupposes that an action may be deemed right or wrong for a reason other than its ultimate consequence.¹ Included in these actions are promises in interpersonal relationships as well as

¹Tom L. Beauchamp and Norman E. Bowie, Ethical Theory and Business, 3rd ed. (Englewood Cliffs, NJ: Prentice Hall, 1988), p. 33.

contractual, implied or implicit, obligations in the marketplace. Such moral principles involve commitment and trust – fair dealing – between two parties, be they personal promises or corporate agreements. This premise can lead us to the adoption of universal moral positions which we deem correct for everyone. These positions, in keeping with Immanuel Kant's theories, propound that a response to any circumstance must be universally understood and accepted so as to be the only logical (from the viewpoint of pure reason) response for any and all in that circumstance. Kant and his principles will be explored in more depth a little further on.

Deontology accords a calculable value to individual rights and the individual in its theory and practice. It also weighs heavily the motives and character of its human participants.² Deontology further maintains that the ends do not always justify the means. Rather justice, fairness, right and responsibilities should prevail.³ All the roles that one plays, all the relationships that will be affected by a particular action or decision, are legitimately to be considered in weighing the moral issues involved.⁴ Moral expectations become paramount. Interpersonal relationships as well as those of the marketplace are based and thrive on moral language upon which we all agree.⁵ Businesses exist and continue because they are predicated on promises (contracts) freely entered into that presuppose a level of moral obligation that upholds those promises.⁶

²Ibid., p. 35.

³Norman E. Bowie and Ronald F. Duska, Business Ethics, 2nd ed. (Englewood Cliffs, NJ: Prentice Hall, 1990), p. 11.

⁴Ibid.

⁵Ibid.

⁶Ibid., p. 12.

Deontology and its concept of duty argues for the absoluteness of morality. It must identify an absolute of good, or truth or right.⁷ This recognition of absolute is thought, by some, to be beyond the human grasp. That is, the human mind may not be able to discern, and certainly cannot prove, the existence of an absolute good or right. But deontology believes in the inviolability of just such universals which give guidance and structure to our world.⁸

Deontological theory strives for the moral and upright. It also takes into account the non-consequential relationships that form the integral basis for, and enhance, our moral way of life.⁹ These relationships influence and shape our actions and moral judgments. Because of their existence, our choices are influenced significantly by more than just their good results.¹⁰ For instance, in the marketplace, these relationships include but are not limited to customer-vendor history and length of relationship, or a parent's or fiduciary agent's special position or obligation.¹¹

Deontology does not focus on goals or ends. The theory is concerned with the means and the non-consequential rights or claims of the individual involved in the business calculation or analysis.¹² By contrast, consequential reasoning would lead to an analysis of weighing the good for the multitude against the bad for the few. The resulting utilitarian theory, that holds that the ends justify the means, would allow one then to do the

⁷Ronn S. Davids, "Poverty and Homelessness: An Intuitive Response," Business Ethics Seminar Paper, Fall 1990, p. 4.

⁸Ibid., p. 5.

⁹Beauchamp and Bowie, Ethical Theory, p. 34.

¹⁰Ibid., p. 33.

¹¹Ibid., pp. 33-34.

¹²Ibid., p. 34.

greatest good by serving the greatest number, even though some harm would be the inevitable outcome. By contrast, deontology, despite the possibility of staggering loss or catastrophe, would uphold the "... rights and person [to] transcend utilitarian calculations."¹³

Deontology would abhor misrepresentation and deception in the marketplace, even if such tactics produced desired results. Any invasion of privacy would, likewise, be shunned. Similarly, deontologists are concerned with motivation. For a deontologist, motives can be analyzed in a way that demonstrates moral superiority on a hierarchical scale of moral principles. The deontologist looks for the particularly outstanding moral act that is especially worthy of praise.¹⁴ While many acts may produce good or kindness, these acts, held up to moral judgment, may not be morally superior by motive. Motivation from fear or self-interest does not necessarily result in harm. But the rightness of the act's consequence is not excused by the inappropriateness of its basis. Society may be benefitted, even pleased by the outcome, the deontologist is not mollified.¹⁵

Deontology has been refined further. W. D. Ross expounds on deontological theory when he explains it in light of what he calls *prima facie* duties. He finds the greatest duty in any and all circumstances by calculating the weight of right over wrong and following the overwhelming preponderance of good in that particular instance.¹⁶ *Prima facie* duties will always be clear and outstandingly apparent unless stronger or equal duties conflict or override them. This concurrent moral demand must be of a competing or even so compelling a nature, that when properly weighed

¹³Ibid.

¹⁴Ibid., p. 36.

¹⁵Ibid.

¹⁶Ibid., p. 39.

and judged, it is found to be more persuasive in its fulfillment. Thus, in any situation, a prima facie duty becomes "... right and binding. . . "17 until overtaken by another which then assumes this new compelling status. Prima facie duties cannot be absolutes, therefore, because each can be overridden by the driving nature of the next one.¹⁸

Absolute values, whether in Immanuel Kant's categorical imperative or in utilitarianism, are very difficult to maintain. The concept of a hierarchical structure that subscribes to exception-free rules and/or principles, has not lasted through time or practice. In any one situation there may be no single or correct action because more than one morally correct answer or solution can be found to be in unavoidable conflict, and may be weighted equally but still solve or fit the circumstance.¹⁹

Once we learned one truth, and it was cherished or discarded, but it was one. Now we are told that the world can be perceived by many truths; now, in the reality all of us encounter, some find lessons that others deny. Once we learned one kind of life, and one reality; it too we either adopted or scorned. But right was always right, and wrong was always wrong. Now we are told that there are many rights, that what is wrong may well be wrong for you, but right for me. Yet we sense that some acts must be wrong for everyone, and that beyond the many half-truths is a single truth all of us may one day grasp.²⁰

¹⁷Ibid.

¹⁸Ibid., p. 40.

¹⁹Ibid.

²⁰Chaim Stern, ed., Gates of Prayer (New York: Central Conference of American Rabbis, 1975), pp. 249-250.

Deontological theory is not without its critics. Deontologists do, in fact, consider the weight of utilitarian consequence in order to determine the rightness of their actions.²¹

Even Immanuel Kant's categorical imperative, which claims to produce the universal moral position, is affected by the weight of the good or bad consequence resulting from it. Any action which would yield an undesirable outcome is not only deemed wrong, it has little or no appeal to those who would choose it.²² Kant's theory allows for this possibility by acknowledging that the consequences of an action and the action itself may be inseparable. Therefore, both factors must be taken into account for the purpose of obtaining a universal moral principle. However, "rightness" of result is independent of consequence for the justification of Kant's theory.²³

Ethical formalism, proposed by Immanuel Kant, fits closely with deontological theory. In ethical formalism, humans are capable of pure reason, and pure reason can produce true moral judgments. Ethical principles are determined to be absolute, even for peoples of different cultures.²⁴ Human beings are understood to have the capacity to judge and act in a moral way. One acts in accordance with an overriding moral principle. This "categorical imperative" takes precedence over all other actions and motives in a given situation. It is as if a simple moral action identifies itself so clearly and is so overwhelmingly correct that one cannot help but act in accordance with it. This clarity and uniqueness also account for the action's universalization. Universalization, in Kant's view,

²¹Beauchamp and Bowie, Ethical Theory, p. 40.

²²Ibid., p. 41.

²³Ibid.

²⁴F. Neil Brady, Ethical Managing: Rules and Results (New York: Macmillan Publishing Company, 1990), p. 49.

means that these qualities endow the action with universal applicability by all individuals in the same situation. Its strength is that it produces a system of logical approach to our behaviors and acts.²⁵ Moral rules and regulations leave no doubt as to how to properly proceed in any game including the game of life. However, formal rules must increase and become more complex to cover all issues.²⁶ The system also has a tendency to become dogmatic. A rule, once formulated, takes on a life of its own and suffices to answer a situation like it, though not precisely it. Also, formalistic analysis ignores subtle individual differences.²⁷ These differences are important in ethical decision making. It can be easy to determine the universalization of an act by eliminating an idiosyncratic difference between individuals, but that very omission will negate the possibility of universalization by failing to account for the validity of individual rights.²⁸

Deontology's detractors ask: does it successfully harmonize with the concepts of justice or rights for all? I believe it is worthwhile to explore their objections, if only in a cursory manner, because I am attempting to explain vagaries in the marketplace, and by extension, in society as a whole. Society as we know it rests on principles and rules of law, culture and morals. People are free to abstain from this structure, but it is the overwhelming number of participants, who, mostly through a combination of free choice and some fear of coercive measures or punishments, maintain our structure of society. Any one of a number of factors that are

²⁵Ibid., p. 52.

²⁶Ibid., p. 53.

²⁷Ibid., p. 54.

²⁸Manuel G. Velasquez, Business Ethics: Concept and Cases (Englewood Cliffs, NJ: Prentice Hall, 1982), p. 71.

considered crucial to deontologists may have little or no influence or result in the marketplace. Among these factors are doctrines or notions of what constitutes fairness, or prices paid for goods and services. Concepts of fairness or unfairness are subjective measurements.²⁹ Prices may be categorized as high or low, affordable or not, but in a market controlled environment – subject to the law of supply and demand – all is fair.³⁰ Thus, the classical utilitarian "free market" contains inequities as judged by our subjective standards. It may also be manipulated or abused through control or coercion. Justice for all (deontological) as an overriding principle is in direct conflict with free market enterprise which would otherwise operate by utilitarian principles. Deontological ethics, with its emphasis on the moral obligations and constraints of relationships, argues for justice, fairness and entitlement.³¹

Fairness and justice may be universal moral maxims. These concepts govern social goods and services and rights that a society determines are due all its members. It also includes social services that are provided at society's expense.³² The moral, legal and cultural principles of a society are apparent in what a society takes from and gives to its members. They are a fair indication of the principles by which it functions.

In deontology, the application of justice to any situation carries with it a fundamental principle of equality. That is, all equals are treated equally and unequals are treated (alike) unequally.³³ In society, i.e., in

²⁹Beauchamp and Bowie, Ethical Theory, p. 42.

³⁰Ibid.

³¹Ibid.

³²Ibid.

³³Ibid., p. 43.

reality, justice will always be a relative principle. A system produces inequalities no matter how pure or good its motivation. Even if just procedures exist, they may not produce just results or vice versa. Any ethical theory will criticize either cause or effect or both.

Analysis can sometimes rely on paradigmatic cases of unjust consequence or principle, but there are no paradigmatic case resolutions which would obviate the need for moral principles.³⁴ Moral principles are our only guidelines to decision making in times of moral dilemma. Paradigms are helpful in that they alert us to obvious right or wrong as far as we can ascertain and judge.³⁵ All our energy is spent comparing principles and cases (or vice versa) in order to construct a moral framework.³⁶

The marketplace constructs its own framework as a result of interconnected economic intercourse.³⁷ By its very nature, it produces haves and have nots.

³⁴Ibid., p. 45.

³⁵Ibid.

³⁶Ibid.

³⁷Ibid.

CHAPTER 2 — UTILITARIAN BUSINESS ETHICAL THEORY

Utilitarian business ethic theory may be most easily defined as looking to the end to justify the means. The consequence or utility that achieves the greatest good for the greatest number becomes the standard principle of the marketplace. In this theory, the general welfare of the community is held paramount regardless of the hardship that will certainly be imposed on some individuals.

The founder of this theory was Jeremy Bentham. He envisioned the application of the theory to legislative decisions in his native London. Utilitarianism, in Bentham's view, proposes "... the greatest happiness principle,"³⁸ i.e., increasing happiness and decreasing suffering. In his time it was a more equitable system because it did not discriminate on the basis of class or economic standing. In 18th century England, as well as for us, it describes much of what man does naturally. It is able to give equal weight to every individual position, compare net gain to net loss and institute policy resulting in the best possible outcome for the majority.³⁹ The pursuit of utilitarianism leads to a framework of rational and consistent principles that are not capriciously created by man.⁴⁰ However, do we not have every right to expect a system of this kind to be ethical? Bentham defined the good as that which promotes happiness or pleasure.

³⁸Brady, Ethical Managing, p. 39.

³⁹Ibid.

⁴⁰Encyclopedia of Philosophy, 1967 ed., Edwards, Paul, ed. in chief, s.v. "Bentham, Jeremy," by D. H. Munro.

But the achievement of happiness or pleasure does not necessarily result in an ethical framework. Rather, the utilitarian system must be carefully monitored so it continuously self-evaluates. It must be constantly concerned with balancing its inherent problem of denying justice to some for the best overall results. Judgments are always rendered with regard to pleasure and pain. Alternative courses of action are considered and weighed by the effect they will have on all people.⁴¹ The greatest happiness principle has axiomatic status according to Bentham. It cannot be proven, but in practice, seems to underlie all human actions. Bentham refers to the measurements of pain versus pleasures as "hedonic calculus."⁴² It is axiomatic that pleasures differ in quality and quantity and that pleasure for some results in pain for others.⁴³

Actions can be deemed right if some quantified pleasure is created and some quantified pain is lessened for the majority.⁴⁴ Note that the pain is lessened or decreased but not totally eliminated. Utilitarianism wants the greatest good for no pain, but that is not realistic. If all pain could be eliminated for all parties, that would be the most ethical situation. There does not have to be a victim if the utmost level of efficiency can be reached. But that level remains a theoretical goal. What is good in the marketplace is defined as beneficial, advantageous, producing happiness; bad is that which causes pain, harm, excessive cost, or disadvantage.⁴⁵

Utilitarian reasoning is most evident in cost benefit analysis. In each of these systems, all the alternatives are examined, criteria are

⁴¹Ibid., pp. 281-282.

⁴²Ibid., p. 281.

⁴³Ibid., pp. 282-284.

⁴⁴Brady, Ethical Managing, p. 39.

⁴⁵Ibid., p. 40.

developed for analysis, the criteria are ordered according to priority and each possibility is weighed in order to choose the best outcome.⁴⁶

The strength of utilitarianism lies in its impartiality. Utilitarianism can view a situation widely, without preconceived notions asserting themselves. It strives anew for the greatest good each time it is applied.⁴⁷ However, the greatest good may not be the majority opinion. Rather, it is the consequence that benefits the most people or the general welfare.⁴⁸ It has great appeal in that it accurately describes human decision making with its reliance on information gathering and assessment leading to final determination.

However, utilitarianism falls short in a number of ways. First, there is a possibility of unequal distribution of good that leads to injustice among the general population.⁴⁹ This is best illustrated in the Ursula LeGuin story, "The Ones Who Walk Away From Omelas." In this scenario, one child is kept perpetually miserable so that the happiness level of everyone else is maintained. Consequently, some people cannot justify this immoral act and simply walk away from the society that lives this way.⁵⁰ The utilitarian society "... may rest on an unwilling sacrificial lamb ..." that must not only be accepted but perpetuated in order for utility to succeed.⁵¹

Perhaps utilitarianism's greatest drawback is its vulnerability to "... preference manipulation."⁵² This occurs most often in advertising where preferences for products are created without creating new alternatives.

⁴⁶Ibid., p. 41.

⁴⁷Ibid., p. 43.

⁴⁸Ibid.

⁴⁹Ibid.

⁵⁰Ibid.

⁵¹Ibid., p. 44.

⁵²Ibid., p. 45.

Personal preference is strengthened and then fulfilled by tailoring the product to the newly created need or perceived lack.⁵³ Utilitarian theory is thus opened up to manipulative practices that strengthen wants or needs through persuasion and not genuine assessments.⁵⁴ Utilitarianism relies on measurable criteria, that is, input must be reduced to comparable calculations. Non-quantifiable though important personal data or skills are not assessable under this system.⁵⁵

In market practice, utilitarianism is subject to Adam Smith's "invisible hand" hypothesis. The invisible hand is competition. In an absolute free marketplace, the market competition distributes resources in the most efficient way.⁵⁶ The law of supply and demand functions perfectly in this atmosphere, providing utilitarian benefits and protecting the right of all to enter into that marketplace, but only in an absolutely free market.⁵⁷ In the absolutely free market, the consumer is ruler. Resources are used sparingly, technology is efficient and competition regulates profits so that they are kept at their lowest level.⁵⁸ Perfect competition produces the greatest utility and preserves the greatest freedom of its participants.⁵⁹ However, in reality, the marketplace does not function at this level. Government intervention, on one hand, and monopolistic practices, on the other, prevent the true functioning of supply and demand.⁶⁰

⁵³Ibid.

⁵⁴Ibid., p. 56.

⁵⁵Ibid., p. 44.

⁵⁶Velasquez, Business Ethics, p. 124.

⁵⁷Ibid., p. 148.

⁵⁸Ibid.

⁵⁹Ibid.

⁶⁰Ibid., p. 126.

Utilitarian principles agree with social Darwinism as well. The application of Darwin's survival of the fittest hypothesis to free markets does, indeed, result in human progress fed by economic competition.⁶¹ However, the fact that survival of the fittest is not synonymous with survival of the best explains the difficulty of this position.⁶² Thus, utilitarianism cannot explain all market actions. The greatest utility must give way to the needs of production and the fostering of cooperation among individuals and marketplaces. And in practice, there is need for the imposition of rules to overcome a natural human tendency toward greed (Thomas Hobbes).⁶³

⁶¹Ibid., p. 129.

⁶²Ibid., p. 130.

⁶³Bowie and Duska, Business Ethics, pp. 26-27.

CHAPTER 3 — CASE ANALYSIS

Initial Application: R. Judah and the Sages

In this chapter, the application of business ethical theory to משנה begins with the classic debate and paradigmatic case of BM 4:12. When an instance of משנה deals specifically with the relationship between individual and individual, it may be categorized as deontological. When the משנה deals with the general welfare of the community, it is easy to analyze it from a utilitarian perspective.

Bava Metzia 4:12⁶⁴ states that a merchant should not distribute parched corn or nuts to children, but the Sages permit it. It also says he should not lower his prices, but the Sages remember him for blessing if he does. In addition, the Mishnah warns against tampering with stock, slaves, baskets, or utensils in order to make them appear newer or in better condition to promote their saleability. This tells us that the sages were aware of preference manipulation,⁶⁵ a common factor in utilitarian theory. They were also inclined in this case to allow the use of human beings (the minor population) to enhance the endgoals of the marketplace. It is apparent that the benefit received by the children based on the extra

⁶⁴סדר נזיקין, אליעזר לוי (Tel Aviv: Sinai Publishing, 5714), pp. קיא-קיב.

⁶⁵Brady, *Ethical Managing*, p. 56.

nourishment they were given outweighed the otherwise untoward behavior of the merchant.

While market manipulation (advertising) and *caveat emptor* are downside factors in utilitarian theory, cost benefit analysis and the general welfare of the community are upside consequences. By offering parched corn and nuts to an albeit impressionable population, two actions are set in motion. There is immediate benefit to the children in the form of nourishment that they were not previously enjoying, and by influencing their parents to shop at a particular merchant's store (the goal of the shopkeeper) competition in the marketplace will be increased. The surrounding businessmen are thus forced to take notice of the competition and do what they can to lower their costs to stay in the marketplace. As a next step, a price war, or at least a price cutting action, would enhance the entire economy. It is understood that weaker merchants who could not compete would be hurt by the increased pressure and this would be in keeping with the utilitarian principle of decreasing suffering for the majority (consumers) but not eliminating it (merchants). Eventually, the entire community benefits if profits are slashed to their lowest possible level while supply continues to be abundant. This is the ideal utilitarian market. As stated earlier, in an absolutely free market, the consumer rules.

R. Judah takes a formalist approach condemning the merchant's actions. The development and result of the case make it fully utilitarian, but also provide for a classic debate of the business ethical theories that are at the heart of this paper.

R. Judah says a shopkeeper may not distribute these items to children because they will be accustomed to coming to him only.⁶⁶ In prohibiting the action, he obviously takes the formalist approach. The manipulation of an unsuspecting population immediately makes suspect the motive of the merchant. The use of the Hebrew חנוני as opposed to מוכר puts this case into the realm of individual moral duty. A fuller explanation of these terms is found in Case 6. The fact that Judah forbids the action makes us rethink this from a deontological perspective. The absoluteness of morality and correctness that Judah calls for has its origin in the Biblical phrase צדק צדק תרדף (Deut. 16:20). The pursuit of trust, justice and fairness demand nothing less, particularly in light of a malleable population. Here is a classic debate where משנה decides that the community is better served if utilitarian principles are upheld. R. Judah maintaining that the moral obligation of an individual is paramount is overruled by the sages for the sake of the general welfare of the community.

In this case, R. Judah and the sages clash in their interpretation. Each side justifies its strong adherence to the opposing business ethical theory. But the sages, who see the greater and clearer picture for the utilitarian good, present their conclusion with more cogent arguments. R. Judah is arguably concerned with cutthroat competition that threatens the very existence of a merchant who cannot weather the rivalry of the marketplace. In fact, he is concerned with the very morality of competition that will further attenuate the weaker link of the chain. R. Judah questions the legitimacy of driving someone out of business. While these are all

משנה מפורשת: סדר נזיקין, קיא-קיב, pp. אליעזר לוי⁶⁶

reasonable concerns in a deontological mode, the sages' utilitarian perspective serves the greater good. The ultimate decision that condones such competitive behavior in the marketplace is made with the full knowledge and understanding of R. Judah's downside consequences. Nevertheless, it is undertaken because the general economic life of the community will be strengthened and enhanced by the sages' vision.

Given the model nature of this case and the classical debate presented, I can now set forth the categorization of the following cases.

Formalist or Deontological Cases

Case 1

In Mishnah Bava Batra 5:10,⁶⁷ we learn that a merchant must use clean and reliable weights and measures.

This maxim is first found in Leviticus 19:35-36, which says that one is expected not to falsify measures of length, weight or capacity. It goes on to say that one will have an honest balance, honest weights, an honest ephah and an honest hin. The Mishnah expands this principle to more carefully define what is meant by an honest or false measure. It also describes conditions, either deliberate or accidental, that can lead to a falsification in measurement.

The Mishnah states that the wholesaler is obligated to clean out his measures once every 30 days while the householder is obligated to perform this act once every 12 months. Bertinura's commentary explains the phrase, "cleans his measures," as relating particularly to wine and oil, as these products are especially prone to congealing in their measures, thus producing a false weight if the measuring device is not scrupulously clean.⁶⁸

As seen in Leviticus 19:35-36, there is a divine directive to act in this manner. One pursues this type of behavior in accordance with Immanuel Kant and deontological theory. An individual is propelled by a categorical imperative. This is perceived as the right and correct way to act. It is a duty and a moral obligation. Human beings are adjured: צדק צדק

⁶⁷Ibid., p. קצט.

⁶⁸Ibid., pp. קצט-ר.

תורה (Deut. 16:20). This action is moral because it can be deemed right or wrong irrespective of its consequence.

The instructions to the merchant and householder with regard to clean weights and measures relate to unrighteousness of judgment. Rashi comments that the merchant is likened to a judge who renders false judgment, perverting justice. Thus, the merchant who acts falsely brings about the same consequences. He defiles the land, profanes the name of God, causes the Shechinah to depart and exiles the children of Israel from the land.

Unjust weights are also a form of robbery. Thus, the merchant violates the moral obligation not to steal when he commits this fraud in the marketplace. In pursuing the deontological course of truth, justice, and fairness, the merchant also furthers the needs and the workings of the marketplace because he is subscribing to a principle of consumer protection. The marketplace will continue to thrive and provide the majority with the products they need as long as its internal structure is based on this coherent model. From the Jewish perspective, the merchant will be able to answer at his final judgment that he dealt honestly and faithfully in his business, a Godly ideal that he endeavors to work toward.

Case 2

Mishnah Bava Metzia 5:10 states that all the days of the dry season are alike and all the days of the rainy season are alike. A man may not say to another, "Help me to plow in the dry season and I will help you in the rainy season."⁶⁹ Bertinura tells us that work differs from the rainy season to the dry season. In the rainy season it is harder to toil in the fields and it

⁶⁹Ibid., p. קכא.

is probable that one would bear a grudge toward his neighbor for the inequality of the situation.⁷⁰ Therefore, this case must be categorized as deontological because by that theory an action will be held up to an absolute standard of morality as it is here. And, it measures up to that standard because trust, justice and fairness have not been abandoned for reasons of consequence or utility. A human being has carried out his obligation not to do to another that which is harmful to himself. He has acted in accordance with a moral obligation and duty to what is deemed right in his society. This is a classic case of deontological ethical theory.

Here we have a case based on a relationship forged between one man and another. In משנה, whenever we are dealing with individuals, we seem to have a moral obligation reducible to a categorical imperative of correct action regardless of consequence. In this instance, we have the promise of one man to another to give of his own sweat and toil in return for an equal output of his neighbor in the future. The commitment to uphold trust, justice and fairness can call for nothing less than full equality in the contractual obligations of return labor. The action of one man towards another can be deemed right or wrong regardless of its consequence in the greater marketplace. Right and responsibility to another human being are factors in the decision making process to enter into this agreement. The idea that an exchange of labor must be equal is a moral ideal that is expected of human beings. The Mishnah states an ethic, a baseline morality, of how to behave in a given situation. Thus the greed of human nature is prevented from taking over (Hobbes, Kant).

⁷⁰Ibid.

Case 3

Tampering with goods is wrong morally in and of itself when it seeks to fool the consumer and abrogate the ideals of justice and fairness. In Bava Metzia 4:11, the vendor may not mix produce with produce, whether it is fresh with fresh or fresh with old.⁷¹ However, wine may be diluted where it is the custom to do so and where disclosure of the fact is also involved.⁷² In addition, a vendor may not sell diluted wine to another vendor because he in turn may sell it to unwitting customers.⁷³ In fact, the משנה is concerned with precisely this instance, stating that the only reason another merchant would buy diluted wine is to ultimately deceive the consumer.⁷⁴ This warning should be seen then as stating a strong case against even the appearance of wrong doing. Full disclosure about a product is the optimum market condition. This case also informs us about the subject of shared responsibility. The seller does nothing wrong *per se*, but in the eyes of the sages, bears responsibility for another's action. The sages maintain concern for the practice of absolute honesty where there is a possibility that this principle will be abrogated. These prohibitions are in keeping with the moral positions of formalism. All of these regulations direct the seller's behavior in a given situation. These rules prevent what may be a natural human tendency toward deception from taking hold in the marketplace.

⁷¹Ibid., p. קי.

⁷²Ibid., p. קיא.

⁷³Ibid.

⁷⁴Ibid.

Case 4

It is helpful to consider Bava Metzia 6:3, 6:4 and 6:5 together as this section of Mishnah relates to proper behavior in upholding the terms of a contract delineating the rental of animals.

We see that Mishnah is concerned with changes in the original terms between owner and renter when those modifications are not provided for in the initial agreement. Specifically, animals are rented not only for certain tasks, but for particular chores in specific climates. When all these conditions form the basis of the rental agreement, any change in use or condition which endangers the animal is cause for the moral action of the renter to be called into question.

The agreement between two particular men to conclude a business arrangement essentially points to a formalist business ethic. If a man hired an ass to drive it through the mountains, but he drove it through the plain and it died, he (the renter) is liable.⁷⁵ Responsibility and blame are similarly laid on the renter if he abused the conditions under which he hired a cow for ploughing, or if a man abused a pack animal because he did not sufficiently calculate both the weight and bulk of its burden.⁷⁶ In each case, regardless of its consequence, we have an abrogation of commitment, trust, justice and fairness. In each case, we have an agreement to hire an animal for a specific task. However, in each instance that special chore is modified in some way without the knowledge of the owner and the animal is injured or killed. The resulting injury or death is caused by the lack of adherence to right and correct moral duty to uphold the contract as written or spoken.

⁷⁵Ibid., pp. קכד-ה.

⁷⁶Ibid., p. קכו

The deontological framework calls the parties to the absoluteness of morality. It requires the tenacious clinging to contract terms which one of them has now breached. By their decision, the sages are telling us that the duty or moral obligation of correct behavior outweighs the utility of the marketplace. The compelling action here is the importance of the morality of one's act insofar as he lives up to the promise he made to his fellow man and, ultimately, to God.

Case 5

In Mishnah Bava Batra 6:3, we have a case in which a product spoils and we learn that the seller is not responsible. This reflects a formalist ethic because the situation has now become specific with regard to the sale of wine to another individual. Here the wine turns and we learn that the seller is not responsible.⁷⁷ Even though the Hebrew word for the merchant is מוכר, the principle at work here is that once the goods are transferred, the seller is no longer responsible for their condition unless he sold defective goods at the outset. The seller may have different grades of wine. The buyer, we learn, has a certain responsibility in this transaction as well. The buyer may ask to taste the wine; he should tell the merchant to what use he will put the wine. These factors can affect the responsibility of the merchant and the buyer. The formalist theory calls for as much disclosure as possible on the part of both consumer and vendor in this case, based on an obligation to do what is right and moral. An absolute truth, good or right is being pursued here in terms of human interaction. The consequence is not what is at stake here, rather the absoluteness of morality in selling the finest produce, as defined by the consumer's need or request,

⁷⁷Ibid., p. רב.

is the highest ideal in this situation. The actions of the seller are held up to high moral scrutiny if he breeches the trust of his customer. But the vendor and consumer must be open and honest with each other. In this case, the seller's action can be wrong regardless of consequence, but the consumer is morally obligated as well to prevent his own damage by being clear with the merchant.

Utilitarian Cases

Case 6

Mishnah Bava Batra 4:3 teaches us that when a man sells a house, he sells it with the door, but not the key; he sells the fixed mortar that is in the ground, but not a moveable one; he sells it with the casing of a handmill, but not the sieve; and he does not sell the oven or a stove. However, if he says, "the house and all its contents," all these things are included in the sale.⁷⁸

Bertinura defines moveables and immovables for the purpose of the sale, but it is his characterization of the seller that has the most meaning for my categorization of this case as pure utilitarian.

המוכר את הבית is explained as the seller of any house.⁷⁹ This description of any seller of any house immediately thrusts this case into the general marketplace. Until we get specifically involved with a one-to-one scenario affecting a particular buyer and a particular seller, we can only view this case by the needs and conditions of the community as a whole.

The fixtures to be included in the sale of the house may vary according to local custom, but any standards that are imposed which give an advantage in the marketplace, must be seen as a utilitarian gesture. This can in no way be seen as a formalistic approach or moral imperative on the part of the seller until the sale affects what one individual has promised to another. At that time, the situation moves from the communal marketplace to the categorical imperative of what is right and moral between man and man.

⁷⁸Ibid., pp. קפז-י.

⁷⁹Ibid., p. קפז.

There seems to be some evidence that the use of the Hebrew, "מוכר" in describing this transaction deliberately points to the general nature of this situation, though this is not a hard and fast rule. Other Hebrew words for merchant, such as חנוני, seem to imply a more personal relationship between seller and buyer to which other ethical principles apply.

In this current case, we see that utilitarian principles obtain because a definition of inclusion and exclusion in this sale sets basic standards which, in practice, would achieve the greatest good for the greatest number. Most people's preferences would thus be protected in similar situations.⁸⁰ These general principles of house sales do indeed protect the general welfare of the community, a fundamental principle of utilitarian policy.

Case 7

Mishnah, Bava Batra 6:2, teaches that when the seller (המוכר) sells grain to his neighbor, a certain risk is involved to the buyer. In each transaction, a percentage of product that changes hands is not perfect goods. The receiver is understood to agree to this condition for the sake of buying the rest of the merchandise. The Mishnah specifically mentions grain, wine and figs.⁸¹ Bertinura refines the percentages of bad goods allowed by stating the standards of the marketplace.⁸²

This case presents itself as utilitarian because an allowable and recognizable percentage of breakage or spoilage (means) justify the ongoing structure of the marketplace (ends). The consequence or utility of this

⁸⁰Brady, *Ethical Managing*, p. 56.

⁸¹סדר נזיקין, רב, אליעזר לוי, משנה מפורשת:

⁸²Ibid.

agreement accepts some bad goods for the good and welfare of the community. The מוכר (the anyman merchant) is allowed to proceed, increasing the happiness of most of his customers with his supplies, while occasionally inconveniencing some (decreasing suffering but not eliminating it). Utilitarianism is at work here as well, if we look at this case from a cost benefit analysis perspective. There is also a certain allowable loss factor figured into the cost of doing business. The general welfare of the community proceeds as long as merchant and buyer are aware of the mishaps that occur on the road to exchange between the two parties.

Case 7 may be compared with the case of sifting beans (Bava Metzia 4:12). (See cases discussed *infra* in the section, Cases Displaying Both Theories). However, I will put a slightly different spin on it. The effort involved in sifting beans to make them more appetizing is labor intensive. The merchant who is willing to perform this task is entitled to extra remuneration, but only insofar as the market will bear. The sages seemed to understand this and so did not forbid it. In the long run, they knew that the public would only tolerate a certain price differential in this matter, and the market would regulate itself. While there is no doubt that the removal of refuse from a product yields a product that is pleasing to the eye, the preparation of absolutely perfect products not greatly superior to what is already available would not be cost efficient from almost anyone's perspective. When the marketplace acknowledges a manipulative tactic, it is tolerated precisely because it is known and advantageous to the economic structure of the entire community. And then it is only tolerated until something better comes along.

Case 8

If a merchant sells a ship, he sells the mast, sail, anchor and all the implements needed to direct it.⁸³ The Mishnah immediately following states similar conditions with regard to the sales of houses, towns and wagons.

This block of Mishnah (Bava Batra 5:1) presents itself as conforming to utilitarian theory in the marketplace. I say this because the Mishnah and the Bertinura delineate the general merchandise that is to be included in any sale between seller and buyer. The list of saleable items probably agrees with and is based on מנהג המקום to whatever extent the community is involved with setting standards in the marketplace. The general nature of the listing informs us that the utility of the market, i.e., the ability of the marketplace to function and thrive, rests on an understanding and agreement of what one gets for his money. This generally recognized standard is what is being set down for us in the Mishnah.

In this case, we have not yet reached the point of a relation of a specific buyer to a specific seller. Such specificity will necessitate much more careful and particular negotiation with regard to the property being transferred. Once negotiations move into this state, the case will require the seller to conform to a deontologically ethical pursuit of justice and fairness to his fellow human being. In other words, it will move into the realm of formal business ethics theory because the one-to-one nature of the transaction will necessitate the seller to act from a highly formulated correct moral position. For the time being however, our case is a general

⁸³משנה מפורשת: אליעזר לוי, Mishnah Bava Batra 5:1, סדר נזיקין, קצא p.

correct moral position. For the time being however, our case is a general transaction, subject at the moment, to utility in the marketplace. Therefore, usual business practices prevail which, complying with communal standards, allow the economy to proceed on an even keel. The general welfare of the community is paramount here and is preserved by the imposition and understanding of local standards.

Case 9

In the matter of חזקה in Bava Batra 3:1, we are dealing with a fully developed sense of utilitarian business theory in the marketplace. This section of משנה details the issue of rightful ownership of and title to houses, cisterns, trenches, vaults, dovecotes, bath-houses, olive presses, irrigated fields and slaves.⁸⁴ It uses the term חזקה to establish ownership after three years of undisputed possession or settlement.⁸⁵ The section deals with the universal and is therefore concerned with the welfare and continuation of the marketplace.

Firstly, we find general instances of ownership, not one-on-one specific title questions.

Secondly, it makes sense for universal rules and regulations to develop community-wide that would cover the above-referenced properties, as these are some of the ones that frequently change hands and are mostly in dispute.⁸⁶

Thirdly, the Bertinura is also concerned with the universal definitions of the above-mentioned possessions never relating חזקה to a

⁸⁴Ibid., p. קעז.

⁸⁵Ibid.

⁸⁶Ibid., p. קעז.

particular instance between one man and another. Rather, the section is clear-cut in its meaning for the universal marketplace. It explains what most individuals can expect with regard to their rights in the matter of חזקה, thereby protecting the public in these dealings.

Case 10

Bava Batra 3:7⁸⁷ teaches that a man should not let his windows open on a courtyard which he shares with others. If he takes a room in another courtyard, he should not make an entrance to it in a courtyard which he shares with others. This is a fully utilitarian concept justifying the consequence or utility of an action.

Bertinura⁸⁸ elaborates on the description of the courtyard, and understands it to be shared space. He tells us that damage may be caused to another because of the ability to see into houses. The commentator points out that in Biblical reference (Num. 24:2), Bilam noted that all of Israel lived according to their tribes, i.e., not having their door turned one toward another. Thus, privacy is recognized as a right and legitimate expectation of one who inhabits a domicile.

An analysis of this case leads me to conclude that the decision is for the good of the marketplace. While one tenant may be prohibited from exercising his right to increase his share of the courtyard, it is the general welfare of all that is preserved by these rules and regulations. These universal principles guarantee the rights of all the shareholders involved, justifying the ends by the means. A typical renter knows and agrees to the upfront conditions under which he will become a tenant of a particular

משנה מפורשת: סדר נזיקין, קפג, p. אליעזר לוי⁸⁷.

⁸⁸Ibid.

courtyard. Where normal circumstances apply, the public and the marketplace continue to operate at optimal levels with reasonable guarantees of consumer protection.

Cases Displaying Both Theories

Case 11

I take for this case Bava Metzia 7:1, which contains elements of both utilitarian and formal ethical business theory. In this section of Mishnah, the hirer of laborers or artisans must follow מנהג המקום in the treatment and demands he places on his workers.⁸⁹

The מנהג protects the workers as if this was a formalistic agreement subject to the moral duty of upholding a contract. But the general welfare of the community is also preserved and furthered because usual business practices that benefit the public at large are clearly set forth.

The best interests of the workers and the employer are being preserved by the words of the Mishnah. That is, the consequence or utility of the actions of the workers and the boss will benefit most of the parties to this traditional arrangement. The general understanding of the terms of employment will provide the greatest happiness principle for the many, increasing happiness and decreasing suffering. The cost benefit analysis to worker and employer alike will consequently be the most efficient in this arrangement too. On the other hand, the artisans will have gotten conditions and treatment that adhere to fairness and justice. The employer cannot compel them to work beyond that which is usual in the local community. This represents the contract and commitment that one man has made to treat his fellow man with dignity.

In this Mishnah, we see that human beings may not be treated as a means to an end. Their humanity may not be negated without some special recognition of their status. Even here, these human harvesting machines

⁸⁹Ibid., p. קכט.

command a moral obligation of their employer. He is held responsible with regard to their welfare.

Case 12

A classic case of both utilitarian and formalistic theory comes to us from Bava Kamma 10:9. No one may buy wool or milk from a herdsman or wood or fruit from a watchman of fruit trees⁹⁰.

I think this demonstrates both business ethical theories because the individual and the marketplace are benefitting by this decision. In prohibiting the commerce between watchman and public, the sages are pursuing a deontological position. It would be too easy and tempting for the guard to set up his own black market, if so inclined, if there was not certain prohibition that the act was absolutely immoral. In fact, Bertinura teaches that such transactions probably are exchanges of stolen merchandise.⁹¹ The understanding of commitment and trust on the part of the flock owner and guardsman must be impeachable. The right and responsibility toward his task on the part of the watchman should be unquestionable. The duty or moral obligation of the situation demands nothing less than a Kantian categorical imperative to correct moral behavior.

The utilitarian position also militates against the consequences of the selling of goods in the guardsman's control. The principle of consequence or utility will affect the marketplace in that it will undermine its operation along the lines of supply and demand. Wherever a black market exists, the general market suffers. The marketplace does not necessarily operate more efficiently when a black market exists. This is in contrast to actual

⁹⁰Ibid., p. 11.

⁹¹Ibid.

cost cutting or other efficiency measures that are advantageous to the system.

The utilitarian position is also served in that the trust that exists between consumer and vendor is not undermined should unauthorized sellers enter into the marketplace. The black marketeer has no moral obligation to his consumer. Therefore in this scenario, the general welfare of the community is protected and the greatest happiness principle is fulfilled with the continuation of an open economy. A cost benefit analysis of this situation would dramatically show the utilitarian position. The total economy may be undermined by the actions of this watchman. Through the application of formalistic principles, the utilitarian goals are served. —

Case 13

Bava Metzia 7:4 and 7:5 also present a dual categorization. In BM 7:4,⁹² the worker who worked among figs may not eat grapes and vice versa. He may wait to eat from the best fruits. And he eats as he walks from furrow to furrow. In BM 7:5,⁹³ a laborer may eat cucumbers and dates to a denar's worth. He may eat more than the value of his wage but he is cautioned not to be gluttonous.

The Bertinura⁹⁴ explains that eating in this manner keeps up the strength of the worker to continue his toil. He defines walking furrow to furrow as non-work time which can therefore be given over to eating. And Bertinura teaches that the worker in risking his life to climb a tree in order to harvest it, is therefore entitled to eat beyond his wage.

⁹²Ibid., pp. קלא-קלב.

⁹³Ibid., p. קלב.

⁹⁴Ibid., pp. קלא-קלב.

The formalistic position regulates the behavior of the individual to the highest moral ideal. Workers are hired for a wage and are allowed to eat of the choicest of the harvest while being adjured not to be gluttonous. This pursuit of fairness and morality is apparent in the correctness of action asked of the worker not to take advantage of the situation. The worker is restricted to an ethical act that is right regardless of its consequence. This instance demands duty of moral obligation to refrain from gluttonous behavior.

The utilitarian position protects both the worker and the owner. The purpose of the worker's employ is to harvest the land. The resulting harvest is of consequence to the owner. The ramifications of a successful gleaning feed directly into the marketplace where the product is available to the consumer and is the basis for the ongoing economy. These positions will protect the general welfare of the community. Utilitarianism is also apparent in protecting the worker. It is applying the greatest happiness principle for the many while decreasing suffering down to a few. Here morality is backed by self interest. Thus, the ends will justify the means and the ultimate utility of the worker's and employer's actions will help the marketplace to continue to exist.

Case 14

In this final case, the possibility of "preference manipulation" through advertising is classic utilitarian practice.⁹⁵ Advertising goes to the entire community and therefore advantageous, eye-catching display is fine. However, the sages clearly prohibit false claims that lead the public astray. Herein is the formalist approach.

⁹⁵Brady, Ethical Managing, p. 56.

BM 4:12 prohibits the sifting of beans and the painting of slaves, livestock or utensils. That is because the sifting of beans to remove refuse and the tampering with stock, slaves or utensils is usually intended to deceive the customer. This is a case, perhaps, of utilitarian theory where the ends justify the means. However, deception is clearly reprehensible in the eyes of a tradition that teaches the moral and the upright. The absoluteness of truth and justice between men can never condone even an appearance of impropriety in the marketplace. To remove the refuse or to artificially enhance broken or old men, cattle or utensils is a form of exploitation. In this case, it may be considered as an act of גניבת דעת, the stealing of another's mind.⁹⁶ The act may be so called because in concealing the truth, there may be damage or detriment to the consumer.⁹⁷ While the general economy may be unaffected or only slightly affected by such deception, the individual is risking far more in not following his moral duty. He is the גנב, categorically a moral and legal reprehensible person. The Mishnah makes clear that while it is permissible for a vendor to display his wares in the most alluring and attractive way possible (utilitarian), he is bound to a moral obligation *vis-a-vis* his fellow (formalism).⁹⁸

⁹⁶Basil F. Herring, Jewish Ethics and Halakhah For Our Time: Sources and Commentary, vol. 2 (Hoboken, NJ: KTAV Publishing House, Inc, 1989), pp. 235-36.

⁹⁷Ibid.

⁹⁸Ibid., p. 274.

Summary of Case Analysis Chapter

A pattern has emerged in the case analyses. The decisions of the sages do fall quite neatly into the major business ethical theories. This is because individuals as well as the elders of the community intuitively acted in a deontological or utilitarian manner. Through the application of these theories, we recognize that they explain basic human behavior. This has been demonstrated in the foregoing breakdown of deontological and utilitarian cases.

The introductory case, BM 4:12, and cases 1 through 5, including BB 5:10, BM 5:10, BM 4:11, BM 6:3, 6:4, 6:5, and BB 6:3, all lend themselves to a formalist interpretation. In each instance a one-to-one relationship between specific individuals has been established with a requisite call for adherence to the highest moral standard. In these cases, the sages' decisions tell us that the duty or moral obligation of correct behavior outweighs the utility of the marketplace.

By contrast, in cases 6 through 10, including BB 4:3, BB 6:2, BB 5:1, BB 3:1, BB 3:7, we see a fully developed sense of utilitarian business ethical theory. In each instance, the sages have determined working rules for the marketplace that display a general concern for the welfare of the community. The specifics of each case usually set a standard that furthers consumer protection and informs both buyer and seller as to acceptable behavioral expectations in marketplace actions. These cases demonstrate the greatest utility in the marketplace, providing guidance and standards for a successful economic structure.

The cases displaying both theories should not be dismissed as instances of inability to properly categorize. Rather, cases 11 through 14, including BM 7:1, BK 10:9, and BM 7:4 and 7:5, and BM 4:12 contain legitimate elements of deontological *and* utilitarian theory. In each instance, a formalistic agreement between individuals has been broadened to demonstrate its utility in the marketplace. While there is recognition of the fundamental moral behavior that must be observed in a one-to-one relationship, the decisions exhibit a concurrent appreciation of the principle of utility that promotes the general welfare of the community.

The rabbis allow human beings to apply deontological or utilitarian methods in the marketplace. However, an individual, in their opinion, may not decree supererogatory behavior for himself or others. This analysis should not conclude without exploring a particular instance of the supererogatory position as promulgated by one sage, even though it departs from strict market ethics and takes us into the realm of scarce resource allocation. It is nonetheless a case that has elements of utilitarian and deontological theories and explains a great deal about the way the sages perceived and interpreted human nature.

In BM 62b, we find two travellers with a diminishing supply of water.⁹⁹ If they share the water, they will both die. If one drinks, he will survive and reach town. Ben Petura states that both should drink and die, thus throwing this situation into a formalistic framework. The ethic of how to behave seems clear enough to Ben Petura. The decision to act in a morally correct manner takes precedence. It is not to deny sustenance to

⁹⁹Moshe Sokol, "The Allocation of Scarce Medical Resources: A Philosophical Analysis of the Halakhic Sources," in The Journal of the Association for Jewish Studies, Vol 15, Number 1, Spring 1990, p. 68.

either individual. Regardless of consequence, in this case almost certain death, the absoluteness of morality calls for the *sharing* of a scarce resource. On the other hand, Akiva, relying on Lev. 25:36, decides that only one man should drink, and therefore, live. And his is the decision that the sages followed.¹⁰⁰ The ends justify the means; a precious resource will be used to its greatest end. The consequence or utility of the action becomes the ultimate determinant of the rightness of the action because the general welfare of the community will be served. The result is that at least one life will be preserved, where otherwise two would have certainly been lost. The greatest happiness principle, here played out to its ultimate consequence increases happiness for many but does not eliminate the ultimate suffering for some.

Akiva's decision does not require one individual to give up his life for another. Akiva actually subscribes to both a deontological and utilitarian position. The obligation to nourish and preserve his own life is the ultimate moral duty of the individual. The categorical imperative prepares the way for the universal moral position that every human should act this way when faced with a similar situation.

Ben Petura, however, presents us with an untenable position. Deontology does not ask a person to give up that which is unquestionably his. Ben Petura is outside the system. The sages will not allow humans to establish a superethical category. The sages will not permit us to legislate our own death or to be a model so that others might do the same. They will not condone Ben Petura's act because its appeal is to an emotional level that does not speak to rational human behavior. This is actually the case that

¹⁰⁰Ibid.

proves the thesis of this paper. Ben Petura is discredited precisely because he sets up an instance that is not definable in deontological or utilitarian terms. Ben Petura's decision defies natural human behavior. Humans speak and act in deontological and/or utilitarian terms. Ben Petura defies both without offering a viable alternative. The sages do not spend time arguing his opinion, rather they reject it in its entirety. They do not admit the existence of man-made superethical concepts or decisions. However, the sages do withhold some concepts from this analytical process.

The issues of צדקה and ממזרות as they relate to ethical behavior pose different problems from those easily categorized in this chapter.

A liberal Jewish position which intellectually accepts ethical business theory and its application to משנה also understands the ideal of צדקה and its role in tradition. Much harder to rationalize is a determination that labels certain human beings unworthy of a place in the congregation of God. This is especially true because the fault is not theirs. The issue is compounded by the fact that these individuals cannot escape their fate by any action on their part. Let us take up the principle of צדקה first.

Historically, the Jewish community has always taken care of its own poor and needy. A settlement became a municipality when it had at least 10 institutions of an occupational, social and cultural nature.¹⁰¹ Included in this list was a charity organization.¹⁰² Torah, Prophets and the Writings are laden with verses that the rabbis interpreted as calling for the community and individual to care for the poor, stranger, fatherless and the

¹⁰¹Rabbi Dr. I. Epstein, ed., The Babylonian Talmud: Baba Metzia, Vol. 1 (London: The Soncino Press, 1962), Introductory Essay, p. II.

¹⁰²Ibid.

widow. The responsibility was to be shared by the community, even down to the one who himself was receiving צדקה. Maimonides states there was never a Jewish community without a תמחוי.¹⁰³

In משנה too, we are told that Israelites in need are entitled to a part of the crop yield that grows in Israel.¹⁰⁴ The poor are likened to the priests as the latter are forbidden to own land and the former have lost their portion.¹⁰⁵ Thus, we get all the regulations surrounding the leaving of the corners of the field for the poor.

Maimonides' interpretation of how צדקה is to be applied in עניים is of special interest. He writes quite specifically of the obligations of the community of Israel to the poor. It is the communal responsibility to restore a downtrodden one to his previous level, endeavoring to preserve his כבוד. While some of the requirements may seem extravagant, as in the case of providing a horse and servant to the one who previously could afford them but no longer can,¹⁰⁶ most of Maimonides is a prescription for maintaining a viable community and a sense of caring community. עניים details the care of the poor, in terms of their clothing and lodging as well as helping them to fulfil their own performance of the mitzvot.¹⁰⁷

Maimonides specifically sets out the compelling nature of the concept of צדקה. He tells us that the court could coerce a reluctant giver, going so

¹⁰³Maimonides, 9:1-3, משנה תורה.

¹⁰⁴Roger Brooks, Support for the Poor in the Mishnaic Law of Agriculture: Tractate Peah (Chico, CA: Scholars Press, 1983), p. 17.

¹⁰⁵Ibid.

¹⁰⁶Maimonides, הלכות מתנות עניים, זרים, פרק שביעי, פ ו: קלד.

¹⁰⁷Ibid., section ד.

far as to calculate the individual's amount, literally taking it from him and humiliating the man publicly.¹⁰⁸

Perhaps the most important consideration in all of what Maimonides has to say is the maintenance or restoration of the dignity of the one who finds himself in such dire straits.

There is a utilitarian and formalist way of looking at what seems to be a superethical principle. צדקה is the logical and ultimate outgrowth of the categorical imperative to act justly. It is the duty and the absolute morality of an Israelite to act in this manner. There is no doubt that צדקה is a universal moral position. It is an absolute act of commitment and moral duty between two individuals, even without considering its consequences or utility. Similarly, this superethical principle works at the utilitarian level because the ends, *i.e.*, the general welfare of the community, do justify the means, *i.e.*, the sometimes coercive nature of giving. All the usual axioms of utilitarian theory can be met, including the one that says some will be hurt by a greatest happiness principle that increases happiness but does not eliminate suffering. צדקה enables the community to continue unless, in the most dire of circumstances, all the inhabitants were to go on the public dole with no one left working who could contribute to the public charity organization. But that worst case scenario is an extreme and the situation would, no doubt, be remedied by another community.

In any event, while צדקה may seem to be in accord with business ethical theory, it is inadvisable to analyze it in this manner. This is especially due to its coercive component. While we are free to act in

¹⁰⁸Ibid., section 4.

accordance with Kant or Bentham, in most instances, traditional Jews do not view צדקה as a voluntary action. In practice, the community collectors went door to door on the eve of שבת.¹⁰⁹ This is because the community was likely to have food, money and clothing at that time in preparation for their own celebration of שבת. Therefore, the very time chosen for collection was a well planned move.

What we know about the giving of צדקה, particularly from Maimonides, is that every Jew was to open his hand to give and strengthen his people and the stranger among whom he lived. This מצווה was extended even to the unworthy poor. And this is where a deontological or utilitarian analysis particularly breaks down. The community that observed this מצווה was forbidden to investigate the claim of the ones who possibly took advantage of the system. If a poor one presented himself and asked for food, the community did not check him out, rather they provided for him immediately.¹¹⁰ If on the other hand, he asked for clothing, they were allowed to investigate his claim. However, the overriding concern here was to provide for the indigent without shaming them. Contrast this to a society that lets its poor, homeless and ill die in the streets, and we can see the futility of applying either deontological or utilitarian analysis to a principle that stands outside and above the realm of pure ethics.

In the issue of ממזרות, we face a precept that seems to fall below the line of ethicality. If we pursue ממזרות from a deontological perspective, we cannot justify it from a right or responsibility viewpoint. If the ever present צדק צדק תרדף is a maxim by which to live, where is it in this

¹⁰⁹ Encyclopedia Judaica; Vol. 5, s.v. "Charity," by Haim Hillel Ben-Sasson.

¹¹⁰ Maimonides, section 1, משנה תורה.

categorization? When deontology identifies an absolute truth, good or right which governs human behavior, where is the truth, good or right in treating individuals as **ממזרים**? When we endeavor to demonstrate that actions are right or wrong irrespective of their consequences, how can we defend positioning human beings in this category? We might suppose that two individuals involved in an illicit relationship which could produce a **ממזר** might consider a Kantian approach to the rights of this third party. However, in practice, we know of no such thinking. Even if such a position occurred to the erring parties, it would not preclude every incident of this kind from happening. The **ממזר** usually appears before a fully developed deontological case might be proposed or effected.

Neither can we justify **ממזרות** from a utilitarian perspective. While the greatest happiness principle may apply, i.e., some are hurt while most benefit, I have not yet discovered the driving force of the happiness principle in the case of **ממזרות**. The explanation is, of course, that Jewish tradition declared particular rules governing intercourse between consanguineous individuals which needed consequences for enforcement. These regulations, we surmise, protected and preserved the people. Like much of traditional Judaism, they remain in effect though efforts are made to ameliorate their consequences in even the most conventional communities. I do not think the utilitarian position can claim any justification based on the general welfare of the community either. The community, marketplace or economy would not seem to rise or fall on the issue of **ממזרות**. However, the cohesiveness and longevity of the religious community is directly tied to this God-given maxim. Therefore, **ממזרות** remains a part of the system of traditional Judaism whether or not we consider it to be ethical.

CONCLUSION

I have offered Chapters 1 through 3 with the possibility that those of us who identify ourselves as liberal Jews might acquire a new reference point and tool for our maintenance or rejection of מצוות. The Reform movement has made the ethical imperative of paramount importance in recreating and reshaping traditional modes of worship and observance. That which has been deemed as a higher calling has been retained, *e.g.*, צדקה. And that which has been examined and found wanting had been excised, *e.g.*, ממזרות. This is because liberal Jews have found some God-given commands to be less than justifiably ethical. For liberal Jews, ethics then is the last word in some instances, while for the more traditional this division is inconsequential.

The traditional community holds that a commandment, in a hierarchical structure of commandments, is a demand without recourse. The reasoning may be that the commandment may not yet be understood by the human mind. We must understand that the community refuses to "lock" God into a human ethical construct that may ultimately deny the existence of God. So the community renders the system unimportant, announces that God's ethics are God's ethics and obligates a human being to perform the act. This is where liberal Jews walk away from tradition. This is because the liberal Jew says, if I cannot "lock" God into a human ethical construct, then what is God in this system? By compartmentalizing our lives, we think we can separate our economic and other life decisions

from our moral and spiritual selves.¹¹¹ This was certainly not true of the conventional Jewish community. It is probably not the way we would like to view ourselves if we paid more than lip service to our religious tradition. Judaism never propounded an economic theory or systematic philosophy of the marketplace, but by maintaining a structure of moral and religious principles, the economic framework was circumscribed, yet thrived.¹¹²

Liberal Jews would probably subscribe to most of the scriptural statements written about conducting oneself in an ethical manner. It is easy to see that ethics in Judaism are intensely humane.¹¹³ Just as easily one might agree that humans, by nature, act ethically, make moral determinations and follow through on them.¹¹⁴

Jacob Neusner has analyzed the Jews as a social group for whom ethics is a way of life.¹¹⁵ He tells us that our manner of life conforms to what the people envision God expects of them.¹¹⁶ This then becomes the basis for the religious and social entity that lives within that particular framework of values.¹¹⁷ Such ethics and values work universally, but we must not lose sight that they cannot work only at that level. If they have lost their particular Jewish quality we play havoc with our claim to a special convenantal relationship with God.¹¹⁸

¹¹¹Meir Tamari, With All Your Possessions: Jewish Ethics and Economic Life (New York: The Free Press, 1987), p. 1.

¹¹²*Ibid.*

¹¹³Edward Zipperstein, Business Ethics in Jewish Law (New York: KTAV Publishing House, Inc., 1983), p. xiii.

¹¹⁴*Ibid.*, p. 132.

¹¹⁵Jacob Neusner, Judaism and Its Social Metaphors: Israel in the History of Jewish Thought (Cambridge: Cambridge University Press, 1989), p. 11.

¹¹⁶*Ibid.*, p. 2.

¹¹⁷*Ibid.*, p. 11.

¹¹⁸Eugene B. Borowitz, "The Critical Issue in the Quest for Social Justice: A Jewish View," in Frederick E. Greenspahn, ed., Contemporary Ethical

Emancipation thrust the Jewish community into a new social order in wanting to meet the rights and responsibilities of a secular society.¹¹⁹ It is precisely because of this freedom that liberal Jews struggle with the ethical imperatives of their own behavior. In the words of Eugene Borowitz, "For me, one must be a Jew *in everything one does*. . . . [This is] the heart of what one *is*, not merely *some* habits one still maintains."¹²⁰ At the very least, this means that in light of my ethical analysis of the marketplace, one does not pray and study the tradition weekends only to engage in questionable or nefarious practices in the marketplace Monday through Friday.

The covenantal relationship is one of ethical obligation.¹²¹ Ethics are primary in that relationship because the Jewish model is of a God who cares for people and cares that people relate to each other in a righteous way.¹²² In maintaining that their covenantal relationship changes through time and space, liberal Jews reform and recreate God's imperatives. Borowitz tells us that whatever it is that we choose to observe ". . . should rest upon us with the full force of commandment."¹²³ We are free to choose, we are even free to opt out of the system entirely, but we are not free to act unethically in any aspect of our lives while still calling ourselves Reform Jews.

Issues in the Jewish and Christian Traditions (Hoboken, NJ: Ktav Publishing House, Inc., 1986), pp. 194-95.

¹¹⁹Ibid., p. 202.

¹²⁰Eugene B. Borowitz, Liberal Judaism (New York: Union of American Hebrew Congregations, 1984), p. 128.

¹²¹Ibid., p. 134.

¹²²Ibid.

¹²³Ibid., p. 331.

I did not undertake the foregoing analysis lightly. Questioning the ethics of the marketplace of the last decade, and in particular, the actions of some businessmen, I felt a need to look into the ethical demands of Judaism for personal guidance. For my own spiritual needs and the leadership I hope to provide, I continue to explore the heavy burden of choice that Reform places upon me.

Humans are presumed to be moral beings. Deontology defines the individual as the small *one* interfacing with all others in the world.¹²⁴ Therefore, the pursuit of justice and absolute morality is of paramount importance in these one-to-one relationships. Utilitarianism, on the other hand, in the matter of the individual versus society, envisions a "... benevolent bureaucrat ..." in charge of doling out philanthropic gestures to others whom he may or may not know.¹²⁵ This difference in world view speaks to our understanding of what it is to function as a moral agent in the world. Each time we weigh the alternatives of two moral positions, the deontological versus the utilitarian, we are, in reality, choosing between these two views of moral agency. We may not be consciously aware of choice each time. We may not be consistent in the overall pattern of our lives, but by considering the possibility and validity of this analytical process we are delegating to ourselves the ability to make informed decisions rather than becoming victims of circumstance.

There is an emerging social utility versus religious utility confrontation within this analysis.¹²⁶ This confrontation is especially valid in the case of liberal Jews. This is due to the fact that they fashion their

¹²⁴Sokol, "Scarce Medical Resources," p. 75.

¹²⁵Ibid.

¹²⁶Ibid., p. 80.

lives primarily by the norms and standards of the society in which they choose to live. While the social conscience of liberal Jews is visible, I would contend that the religious utility of this same group is almost non-existent. The population that worships Friday night puts that experience and tradition aside when faced with the exigencies of the marketplace. It never imagines that *ancient* Jewish tradition has anything to say with regard to how one treats another in economic life. This group does not consider the categorical imperative whereby justice and fairness are held paramount as an integral part of the heritage that has been given to us.

When the traditional community hears God speak, it may interpret the demands as utilitarian or deontological. However, when it encounters the rubrics of צדקה and ממוזרות both of which lie outside the analysis, it does not interpret or question their ethicality.

On the other hand, Reform asks if God can command anything that is unethical. Liberals argue that what is ethical must be consistent with human understanding. If we hold that there is a clear dividing line of ethicality above which there is the superethical and below which there is the unethical, then what is מצווה for the liberal community? Acts of rite and ritual are not matters of ethics, and historically, liberal Judaism said that many rituals were meaningless. However, the underlying concepts, of which these acts are the manifestations, are the ethical ideas we struggle with in a liberal construct. The areas of choice turn out to be precisely the doing of rite and ritual. It is the doing that particularizes our behavior from any and all others who identify themselves as ethically moral people. What sets us apart is the practice. Otherwise, what is organized Judaism as opposed to Ethical Culture?

Is Judaism ethical, unethical or superethical? For liberal Jews, the answer is that Judaism, according to current standards, contains elements of all three. Thus, the continuing liberal struggle with this conundrum. For us moderns, Hillel's ethical imperative is as much about what we choose to believe as it is about what we choose to practice: "If I am not for myself, who will be? But if I am only for myself, what good am I? And if not now when?" (P. Av. 1:14)¹²⁷

¹²⁷Borowitz, Liberal Judaism, p. 395.

APPENDIX I — TEXT OF ANALYZED CASES¹²⁸BARA METZIA 4¹²

Mishnah 12

A merchant may buy [grain] from five granaries and put [it] into one store-room, [or wine] from five presses and put [it] into a single cask,¹ provided he does not intend to mix² [it for fraudulent purpose]. R. Judah³ says, A shopkeeper must not distribute parched corn or nuts to children, because he accustoms them thereby to come [to buy] at his place; but the Sages⁴ allow it. And he must not lower the price;⁵ but the Sages say, He is to be remembered for good.⁶ [A shopkeeper] must not sift pounded beans,⁷ according to the view of Abba Saul; but the Sages permit it, nevertheless they admit that he may not sift them only from the top of the bin since this is intended only to mislead the eye [of the buyer]. One may not give a deceptive appearance to a human being, or cattle or implements.⁸

משנה יב

התגר נוטל מחמש גרנות ונותן לתוך מערה אחת, מחמש גתות ונותן לתוך פיסם אחד, ובלבד שלא יהא מתכונן לזרוב. רבי יהודה אומר, לא יחלק החנוני קליזת ואטון לתינוקות מפני שהוא מרגילן לבא אצלו; ונחכמים מתירין. ולא יפחות יאת השער; ונחכמים אומרים יכור לטוב. לא יכור את הגריסין, דברי אבא שאול; ונחכמים מתירין, ומודים שלא יכור מעל פי מערה שאינו אלא כענב את העץ. אין מפרקסין לא את האדם ולא את הבהמה ולא את הכלים.

¹²⁸Taken from Philip Blackman, *Mishnayoth*, Vol. 4: Order Nezikin, 2nd ed. (New York: The Judaica Press, Inc. 1963).

BABA BATHRA 51^a

Mishnah 10

The wholesaler¹ must clean out his measures once every thirty days, and the householder [must do so] once in twelve months.² Rabban Simon ben Gamaliel says, The reverse is the case.³ The shopkeeper [or storekeeper] must clean out his measures twice a week,⁴ and rub up his weights once a week⁵ and polish up [his] scales [or balance] before each and every weighing.⁶

משנה י'
הסוסיטון מקנה מדותיו אחת לשלשים יום, ובעל הבית אחת לשנים עשר יחדש. רבן שמעון בן גמליאל אומר חלוקי הדברים. חנוני מקנה מדותיו פעמים בשבת, ומקנה משקלו אחת בשבת, ומקנה מאוננים על כל משקל ומשקל.

BABA METZIA 51^a

Mishnah 10

A man may say to his fellow, 'Help me to weed and I will help thee in weeding [for an equal length of time],' or, 'Help me in hoeing and I will help thee to hoe [for an equal length of time]';¹ but he may not say to him, 'Help me to weed and I will help thee in hoeing [for an equal length of time],' or, 'Help me to hoe and I will help thee in weeding [for an equal length of time].'² All the days of the dry season³ are considered alike,⁴ and all the days of the rainy season are deemed alike.⁵ One may not say to another, 'Assist me to plough in the dry season and I will assist thee in ploughing in the rainy season [for an equal length of time].'⁶ Rabban Gamaliel says,

There is *prepaid usury and there is postpaid usury; for instance, one intended to borrow [money] from another⁷ and he sent him [a present] saying, '[This is sent to thee] that thou mayest loan [some money] to me,' this is usury paid over in advance; if one borrowed [money] from another, and when he repaid his money to him he sent him [a gift] saying, '[This is] for thy money that was idle in my hands,'⁸ this is usury which is postpaid. R. Simon says, There is* usury [that is paid] in mere words; [as for example], [a debtor] may not say to another [a creditor], 'Know that so-and-so has arrived from such-and-such a place.'

משנה י'
אומר אדם לחבירו, נכש עמי ואנכש ועמך. עדור עמי ואעדור ועמך; ולא יאמר לו, נכש עמי ואעדור ועמך. עדור עמי ואנכש ועמך. כל-ימי יגיד יאחד, כל-ימי רביעה יאחד. לא יאמר לו, חרוש עמי בגיד ואני אחרוש עמך. בגריעה. רבן גמליאל אומר, יש רבית במקדמת הש רבית מאחרת; כיצד, נתן שיעז ללות ויקע ונהיה משלם לו ואומר, בשביל שאלתי. זו היא רבית מקדמת; לנה ויקע והחזיר לו את מעותיו, ונהיה משלם לו ואומר, בשביל מעותיך שהיו בשלות יאצלי. זו היא רבית מאחרת. רבי שמעון אומר, יש רבית בדברים; לא יאמר לו, רע כי בא איש פלוני ממקום פלוני.

Mishnah 11

One¹ must not mix together produce with other produce,² even new [produce] with new, and much less, needless to say, new with old; [yet] in truth, in the case of wine, they have permitted [the seller] to mix strong [wine] with mild,³ because this improves it. A seller may not mix the lees⁴ of [one barrel of] wine with the wine [of another barrel], but he may give him [namely, the buyer] the lees [together with the wine of the same barrel]. If one's wine were adulterated with water, he must not sell it in the shop unless he has told him [of the dilution], and he must not [sell it] to a merchant, even if he have informed him, because [he would buy it] only to deceive [consumers] therewith. In a place where it is the practice to adulterate wine with water, they may do so.⁵

משנה יא

אין מערבין פירות בפירות אסילו
תושים בתושים, ואין צריך לומר
תושים בתושים; באמת בין התירו
לערב קשה יבנה מפני שהוא
משקויו. אין מערבין יקמרי
בין, אבל טהן לו את שמרי. מי
שנערב קים ביעו לא ימכרו
בתחת, אלא אם כן הודיעו, ולא
לסגר אף על פי שהודיעו, שאינו
אלא לרמות בו. מקום שנהג להסיל
מים בין, יסילו.

Mishnah 3

If one hired an ass¹ to drive it over hilly country and he drove it in a valley,² or [if he hired it to drive it] through a valley and he drove it across hill country even when both distances were equal ten miles,³ and it died, [the driver] is liable.⁴ If one hired an ass¹ and it became blind,⁵ or it was seized for public service, [the owner] may say to the hirer, 'Here is thy [hired] property before thee'. If it died or broke [a limb],⁶ [the owner] must provide him [another] ass.⁷ If one hired an ass¹ to drive it through hilly land, and he drove it in a valley, if it slipped [the hirer] is exempt,⁸ if however it were overcome by heat he is liable.⁹ [If he hired an ass] to drive it in a valley, and he drove it over hill country, if it slipped he is liable, but if it were overheated he is exempt, but if [it became overheated] because of¹⁰ the ascent [of the hill] he is liable.¹¹

משנה ג

השוכר יאת-החמור להוליקה
בהר, והוליקה יבנקעה, בבקעה
הוליקה בהר, אסילו זו עשר
מילין, וזו עשר מילין, ומתה תיב.
השוכר יאת-החמור והבריאה או
שנעשית אנגרא, אומר לו הרי שלך
לפניך. מתה או נשברה, תיב
להעמיד לו חמור. השוכר יאת-
החמור להוליקה בהר והוליקה
בבקעה, אם החליקה פסטר, ואם
החמור תיב. להוליקה בבקעה
הוליקה בהר, אם החליקה תיב,
ואם החמור פסטר, אם מחמת
המעלה תיב.

BABA METZIA 6^a

Mishnah 4

If one hired a cow [with the necessary implements] to plough on hill country and he ploughed in the valley, he is not liable if the ploughshare¹ were broken; [but if he hired it to plough] in the valley and he ploughed in the hilly land, he is liable if the ploughshare were broken.² [If he hired it] to thresh pulse³ and he threshed grain,⁴ he is exempt [from liability if the beast slipped and was injured]; but if [he hired it] to thresh grain and he threshed

משנה ד
השוכר את הפרה לחרוש בקר, וחרש בבקעה, אם נשבר יתקן פסור; בבקעה, וחרש בקר, אם נשבר יתקן חייב. לדרש יבקטניות ודרש בתבואה פסור; לדרש בתבואה ודרש בקטניות חייב. מפני שהקטניות ימחלקת.

pulse, he is liable because pulse is

BABA METZIA 6^b

Mishnah 5

If one hired an ass to carry¹ wheat and he carried² [the same weight of] barley¹, he is liable [if the beast were injured]; [if he hired it for carrying] grain¹ and he made it carry straw¹ [of an equal weight], he is liable, because [an increase of] bulk is as a difficult addition to the load. [If he hired it] to carry³ a *letheh*³ of wheat and it carried a *letheh* of barley, he is exempt;⁴ but if he increased the measure [though not the weight], he is liable. And by how much shall [the hirer] increase his load in order to render him liable? Symmachos⁵ states in the name of R. Meir, One *suk* for

משנה ה
השוכר את החמור להביא עליה חטים, והביא עליה שעורים, חייב; יתבואה, והביא עליה תבן, חייב. מפני שהנפח קשה למשאוי. להביא לתוך חטים והביא לתוך שעורים, פסור; ואם הוסיף על משאו, חייב. וכמה יוסיף על משאו והוא חייב? יסומכוס אומר משום רבי מאיר, סאה ילגלג, שלשה קבין לתמור.

• O. להביא. * *One suk for a camel and three kabs for an ass.*⁷

BABA BATHRA 6 *

Mishnah 3

If one sold wine to his fellow and it turned sour, he is not answerable;¹ if, however, it were known that his wine was liable to turn sour,² then this is considered a purchase³ made in error. (And) if [the vendor] said to him, 'I sell thee spiced wine,' he must preserve it for him until the Festival of Pentecost.⁴ Old [wine] means that from last year, and very old [wine] means that which is three years [old].⁵

משנה 3

המוכר יין לחבירו והתקמץ, אינו חייב באחריותו; ואם ידוע שיהיה מתקמץ, הרי זה ימקח קטעות. ואם אמר לו יין מבושם אני מוכר י"ף, חייב להעמיד לו עד 'העצרת'. השן משל אשתמקד, ומידשן משל שלש שנים.

*Or the pausal לך.

BABA BATHRA 4 *

Mishnah 3

If one sold a house he has also sold the door but not the key;¹ he has sold a fixed mortar but not a movable one; he has sold the lower milkstone² but not the hopper³, or the oven (or the double stove),⁴ (but if he sold the oven he has sold the double stove also).⁵ But when [the vendor] said to him, 'It [namely, the house] and everything that is therein,' all these are sold also.* * See ADDENDA Page. 229.

משנה 3

המוכר את-הבית, מוכר את-הדלת, אבל לא את-המפתח; מוכר את-המכתשת הקבועה, אבל לא את-המיטלטלת; מוכר את-האצטרובל, אבל לא את-הנקלת ולא את-התנור (ולא את-הכירים). (מכר תנור מוכר כירים). בזמן שאמר לו, היא וכל מה-שבתוכה, הרי כולן מכורים.

Mishnah 2

If one sell produce to his fellow, the latter must accept* a *quarter-kab* of refuse in a *seah*;¹ [if one buy] figs, he must accept ten maggoty² ones in each hundred;³ [if one buy] a cellar of wine, he must accept ten [casks] of sour⁴ wine in each hundred;⁵ [if one buy] jars in Sharon,⁶ he must accept ten fragile⁷ ones in every hundred.⁸ *i.e., put up with.

מקנה ב

המוכר פירות לחבירו, הרי זה מקבל עליו רובע טנופת ילסאה; תאנים, מקבל עליו עשר מתולעות ילמאה; מרתף של יין, מקבל עליו עשר יקוססות ילמאה; גתים בקשרו, מקבל עליו עשר סססאות ילמאה.

Mishnah 1

If one sold a ship, he has also sold the mast, (and) the flag, (and) the anchor, and all the navigating implements;¹ but he has not sold the slaves, or the packing-bags,² or the cargo.³ But when* [the vendor] had said to him, 'It and everything in it,' then they are all sold. If one sold a wagon, he has not sold the mules;⁴ if he sold the mules, he has not sold the wagon.⁵ If one sold the yoke, he did not sell the oxen; if he sold the oxen, he did not sell the yoke. § R. Judah⁶ says, The amount paid makes it evident: for instance, if [the buyer] said to him, 'Sell me thy yoke for two hundred *zuz*, it is manifest that the yoke [alone] is not worth two hundred *zuz*.⁷ But the Sages⁸ say, The sum paid is no proof.

*Or the definite יבזמן.

§See ADDENDA, Page 229.

משנה א

המוכר את הספינה, מכר את התורן, ואת הגנס, ואת העוגין, ואת כל המנהיגין אותה; אבל לא מכר לא את העבדים, ולא את המרצופין, ולא את יתאמיקי. יבזמן שאמר לו, היא וכל מה שבתוכה, הרי כולן מכורין. מכר את הקרון, לא מכר את הפרדות; מכר את הפרדות, לא מכר את הקרון. מכר את יתאמדי, לא מכר את הקר; מכר את הקר, לא מכר את יתאמדי. רבי יהודה אומר הדמים מזיעין; כיצד, אמר לו מכור לי צמד בקמותים ונתתיך דע שאין הצמד בקמותים יוזי. יתקמים אומרים, אין הדמים ראיה.

Mishnah 1

The legal period for undisputed possession¹ for houses, cisterns, ditches, caves, dove-cotes, bath-houses, olive-presses, irrigated fields,² bondmen, and whatsoever else produces steady gain, is [obtained by occupation during] three years, from day to day³. The legal term for undisputed possession for a rain-watered field⁴ is [secured by its occupation during] three years, and it need not be from day to day. R. Ishmael⁵ says, Three months in the first year, and three months during the last year, and twelve months in the middle year, which make eighteen months. R. Akiba⁶ says, One month during the first year, one month in the last year, and twelve months during the middle year, making altogether fourteen months. R. Ishmael⁷ said, This refers only to a grain-field, but in the case of an orchard, when one has brought in his crop [of grapes] and harvested his olives and gathered in his summer harvest,⁸ this period is deemed as [equivalent to] three years.

משנה א

חוקת הבתים, והבורות, והשחין, והמערות, והשובכות, והמרחצאות, ובית הבדן, ובית השלחין, והעבדים, וכל שהוא עושה פירות תדיר חוקתן שלש שנים ימים ליום. יסדה הפעל, חוקתה שלש שנים, ואינה צריכה מיום ליום. רבי ישמעאל אומר, שלשה יחדשים בראשונה, ושלשה באחרונה, ושנים עשר חודש באמצע, הרי שמונה עשר חודש. רבי יעקיבא אומר, חודש בראשונה, וחודש באחרונה, ושנים עשר חודש באמצע, הרי ארבעה עשר חודש. אמר רבי ישמעאל במה דברים אמרים, בשדה לכן, אבל בשדה אילן, כנס את-חבואתו, מסק את-דיתו, כנס את-קריצו, הרי אלו שלש שנים.

BABA BATHRA 37

Mishnah 7

A man must not make his windows¹ to open into the courtyard of the jointholders.² If he purchased a house in another [adjoining] courtyard, he may not open it [by a door or entrance] into the courtyard of the jointholders.³ If he built an upper storey on top of his house, he must not make [its door or entrance] to open into the courtyard of the jointholders;⁴ but if he wished to do so, he may build a chamber inside his house,⁵ or build an upper room on top of his house and make it to open into his own house.⁶ A man may not open into the courtyard of jointholders by a door opposite a door [of another], or by a window⁷ opposite [another's] window;⁸ if it⁹ were small he must not make it larger, [and if there were] one he must not make it into two.¹⁰ But he may open up into the public domain a door opposite [another's] door or a window opposite a window [of another]; if it¹¹ were small he may enlarge it, [and if there were] one he may make it into two.¹²

משנה ז

לא יפתח אדם יחלוטתיו לחצר
השותפין. לקח בית בחצר אחרת,
לא יפתחנה לחצר השותפין. בנה
עליה על גבי ביתו, לא יפתחנה
לחצר השותפין; אלא אם רצה
בונה את-החדר לפנים ימביתו,
ובונה עליה על גבי ביתו, ופותחה
לתוך ביתו. לא יפתח אדם לחצר
השותפין, פתח כנגד פתח, וחלון
כנגד חלון; ה"ה קטן לא יעשנו
גדול, אחד לא יעשנו שנים. אבל
פותח הוא לרשות הרבים פתח
כנגד פתח, וחלון כנגד חלון; י"ה
קטן עושה אותו גדול, אחד עושה
אותו שנים.

BARA METZIA 71.

Mishnah 1

If one hired workmen and asked them to work early [in the morning] or late [in the evening],¹ he has no right to compel them² [to do so] in any locality where it is not customary to work early or to work late; where it is the custom to furnish them with food he must supply them [with food]; if it be the custom to provide³ them with sweetstuff,⁴ he must so provide⁵ [it];

everything should be in accord with local custom.⁶ It once happened that R. Jochanan ben Mattia said to his son, 'Go out and engage labourers for us.' He went and arranged to supply⁷ food for them, and when he came back to his father he said to him, 'My son, even if thou should prepare for them a banquet like to that of Solomon's in his time,⁸ thou wouldst not have discharged thy obligation towards them, for they are the children of Abraham, Isaac and Jacob;⁹ but before they begin the work go and say to them, "[You are to work] on condition that I have not to give you more than bread and pulse only".' Rabban Simon¹⁰ ben Gamaliel says, 'There was no need

for him to speak thus, for everything should follow local usage.'

משנה א

השוכר את הפועלים ואמר להם להשכים וילהעריב, מקום שנהגו שלא להשכים ושלא להעריב אינו רשאי לכוסן; מקום שנהגו לזון חזון; לספק במתיקה יספק; הכל כמנהג המדינה. מעשה ברבי יוחנן

בן מתאי שאמר לבנו, צא שכור לנו פועלים. הלך ויספק להם מזונות, וקשקש אצל אביו אמר לו, בני, אסירך אתה עושה להם כסעודת שלמה בשעתו לא יצאת ידי חובתך עמך שהן בני אברהם יצחק יעקב; אלא ער שלא יתחילו במלאכה צא ואמור להם, על מנת שאין לכם עלי אלא פת וקטנית בלבד. רבן ישמעון בן גמליאל אומר, לא היה צריך לומר, הכל כמנהג המדינה.

for him to speak thus, for everything

BABA KAMMA 10^a

Mishnah 9

None may buy from (the) shepherds any wool, or milk, or goats,¹ or from watchmen over fruit [-trees] any wood or fruit;² but from women they may purchase garments of wool in Judaea³ and garments of flax in Galilee,⁴ or calves in Sharon.⁵ But if any such [that sell them] say that they are to be hidden,⁶ it is prohibited. But they may buy eggs and poultry [from anyone] in any place.⁷

משנה ט

אין לוקחים מן-הרועים צמר וחלב, ויגרים, ולא משומרי פירות עצים ויפירות; אבל לוקחין מן הנשים יבלי צמר ביהודה וכלי ששמן בגליל, ועגלים בשרון. וכולן שאמרו ילהסמין אסור. ולוקחין ביצים ותרנגולים מקל מקום.

BABA METZIA 7 ^a

Mishnah 4

If one laboured among figs he may¹ not consume grapes,¹ if among grapes he may not consume figs; he may, however, refrain [from eating] until he reaches the place where the finest [fruits] are and then eat. And in all such cases [the Sages] said, [He may eat only] during the time of* [his] labour; but for the sake of restoring a lost article to its owner² they said, Labourers may eat on their way from furrow³ to furrow, or on their return from the wine-press, and in the case of an ass, [it is entitled to eat from the load it carries] while being unloaded.⁴

משנה ד

היה עושה בתאנים לא יאכל בפגבים, בפגבים לא יאכל בתאנים, אבל מונע את-עצמו עד שפגיע למקום היפות ואוכל. וכולן לא אמרו אלא בשעת מלאכה; אבל משום השב אגדה ילבעלים אמרו, פועלים אוכלין בהליכתן מאומן לאומן, ובחזרתן מן-הנח, ובחמור קשהיא פורקת.

BABA METZIA 7 ^b

Mishnah 5

A labourer may eat cucumbers¹ even to the value of a *denar*,² or dates¹ even to a *denar*'s worth. R. Eleazar³ ben Chisma says, A labourer may not eat more than the value of his wages; but the Sages⁴ permit it, nevertheless they teach a man not to be a glutton whereby he would close the door against himself.⁵

משנה ה

אוכל פועל יקשות אפילו בדיון, ויכותבת אפילו בדיון. רבי אליעזר בן חסמא אומר, לא יאכל פועל יתר על שקרו; ויחכמים מותרין, אבל מלמדין את-האדם שלא יהא רעבתן ויהא סותם את-הפתח בקניו.

BIBLIOGRAPHY

Books

- Beauchamp, Tom L., and Bowie, Norman E. Ethical Theory and Business. 3rd ed. Englewood Cliffs, NJ: Prentice Hall. 1988.
- Blackman, Philip. Mishnayoth. Vol. 4: Order Nezikin. 2nd ed. New York: The Judaica Press, Inc. 1963.
- Borowitz, Eugene B. Liberal Judaism. New York: Union of American Hebrew Congregations. 1984.
- _____. Reform Judaism Today. New York: Behrman House, Inc. 1983.
- Bowie, Norman E., and Duska, Ronald F. Business Ethics. 2nd ed. Englewood Cliffs, NJ: Prentice Hall. 1990.
- Brady, F. Neil. Ethical Managing: Rules and Results. New York: Macmillan Publishing Company. 1990.
- Brooks, Roger. Support for the Poor in the Mishnaic Law of Agriculture: Tractate Peah. Chico, CA: Scholars Press. 1983.
- Danby, Herbert D.D., trans. The Mishnah. Oxford: Oxford University Press. 1933.
- Elon, Menachem, ed. The Principles of Jewish Law. Jerusalem: Keter Publishing House Jerusalem Ltd. [1974].
- Epstein, Rabbi Dr. I., ed. The Babylonian Talmud: Baba Metzia. Vol. 1. London: The Soncino Press. 1962.
- Greenspahn, Frederick E., ed. Contemporary Ethical Issues in the Jewish and Christian Traditions. Hoboken, NJ: KTAV Publishing House, Inc. 1986.
- Herring, Basil F. Jewish Ethics and Halakhah For Our Time: Sources and Commentary. Vol. 2. Hoboken, NJ: KTAV Publishing House, Inc. 1989.

- James, William. Essays on Faith and Morals. New York: Longmans, Green and Co. 1943.
- Kant, Immanuel. Critique of Pure Reason. Translated by J. M. D. Meiklejohn. London: J. M. Dent & Sons Ltd. 1934.
- אליעזר לוי. משנה מפורשת: סדר נזיקין. Tel Aviv: Sinai Publishing. 5714.
- Levine, Aaron. Free Enterprise and Jewish Law: Aspects of Jewish Business Ethics. New York: KTAV Publishing House, Inc. and Yeshiva University Press. 1980.
- Maimonides. משנה תורה, זרים, הלכות מתנות עניים, פרק שביעי. Jerusalem: Pardes Publishing. 1956.
- Neusner, Jacob. Judaism and Its Social Metaphors: Israel in the History of Jewish Thought. Cambridge: Cambridge University Press. 1989.
- Steinsaltz, Rabbi Adin. The Talmud: The Steinsaltz Edition-A Reference Guide. New York: Random House. 1989.
- Stern, Chaim, ed. Gates of Prayer. New York: Central Conference of American Rabbis. 1975.
- Tamari, Meir. With All Your Possessions: Jewish Ethics and Economic Life. New York: The Free Press. 1987.
- Tanakh: The Holy Scriptures. Philadelphia: The Jewish Publication Society. 1988.
- Velasquez, Manuel G. Business Ethics: Concept and Cases. Englewood Cliffs, NJ: Prentice Hall. 1982.
- Zipperstein, Edward. Business Ethics in Jewish Law. New York: KTAV Publishing House Inc. 1983.

Articles

- Dauids, Ronn S. "Poverty and Homelessness: An Intuitive Response." Business Ethics Seminar Paper. HUC-JIR/NYU. Fall 1990.
- Encyclopedia Judaica. Vol. 5. S. v. "Charity," by Ben-Sasson, Haim Hillel.
- Encyclopedia of Philosophy. 1967 ed. Edwards, Paul, ed. in chief. S.v. "Bentham, Jeremy," by D. H. Munro.

Encyclopedia of Philosophy. 1967 ed. Edwards, Paul, ed. in chief. S.v.
"Kant, Immanuel," by W. H. Walsh.

Sokol, Moshe. "The Allocation of Scarce Medical Resources: A
Philosophical Analysis of the Halakhic Sources." The Journal of the
Association for Jewish Studies. Vol. 15. Number 1. Spring 1990.

THE KLAU LIBRARY
HEBREW UNION COLLEGE
JEWISH INST. OF RELIGION
BROCKDALE CENTER
1 WEST 4TH STREET
NEW YORK, N.Y. 10012