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**EMPATHY, EQUITY, AND THE ESTABLISHMENT:
AN UNCLAIMED LEGACY OF SOCIAL JUSTICE**

STEPHANIE KOLIN

Thesis Submitted in Partial Fulfillment of Requirements for Ordination

**Hebrew Union College-Jewish Institute of Religion
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Advisor: Rabbi Dr. Aaron Panken**

SUMMARY PAGE

The intended contribution of this thesis exists on two levels. For the academic world, this thesis allows for the often abstract values of biblical social justice to be understood as the worldview by which these same values are enacted in exilic Judaism. It also suggests to the academic community the need for more serious work toward constructing a theology of social justice. The second level of contribution is the intention that this thesis may encourage today's Jewish communities to work toward an authentic approach to creating and enacting a new model of social justice, based on these findings.

The goal of this thesis is to bring to light the rich tradition of systemic forms of social justice and equity in Jewish history and text. Furthermore, the goal is to describe ways in which innovation and risk-taking were the means toward these ends, beginning in our biblical sources and leading to the current day. This thesis seeks to ground congregational social justice in that rich tradition and urge new ways of expressing this model. Ultimately, this thesis is intended to inspire new thought, new energy, new direction, and new action as the modern Jewish world seeks to repair the world.

This thesis includes three chapters, an introduction, and a conclusion. The first chapter is a survey of the biblical worldview of social justice. The second chapter is an academic approach to discovering how that biblical worldview was realized in the classical rabbinic period. The third chapter includes textual examples of biblical and Talmudic situations in which that worldview is, in fact, fulfilled. The conclusion is a projection and charge for how these ideas might be carried out today.

The materials I used in writing this thesis include journal articles, books, the JPS TaNaKH, the Babylonian Talmud, and the Bar Ilan and BibleWorks computer programs.

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INTRODUCTION

The asymmetry of power can indeed generate a kind of quiet brutality. We know, of course, that power corrupts and absolute power corrupts absolutely. But inequalities of power in general prevent the sharing of different opportunities. They can devastate the lives of those who are far removed from the levers of control. . . . (I)f inequality of power, in different forms, is central to deprivation and destitution, then little sense can be made of the frequently aired and increasingly popular slogan, "I am against poverty, but I am really not bothered by inequality." That attempt at a putative dichotomy can be disputed from different perspectives, for example, through an appreciation of the powerful effects of social and economic inequality on the unfreedoms that the subjugated experience.¹

This statement, made in the year 2005, is as true for any generation of organized society as it is today. The inequality of power and the ever-widening gap between the haves and the have-nots is a type of oppression that has been perpetrated and felt by members in each successive generation. Amartya Sen, a Harvard professor who has written extensively on economic freedoms and inequalities, expresses in these words an eternal truth. For a people who are not commanded to busy themselves with the injustices of the world, it is a truth that can be discarded. For the Jewish people, it is a truth that must be studied, understood, and addressed.

In this thesis, I will attempt to address the issues of injustice as they relate to power differentials, oppression, suffering, and the mandate to respond to issues of social concern and those who suffer because of what they do not have or who they are not. With the recognition that this method may only supply us with hypothetical situations or ideals, I will mainly seek to understand these issues in the most authentic way available

¹ Amartya Sen, forward to *Pathologies of Power: Health, Human Rights, and the New War on the Poor*, by Paul Farmer (Berkeley: University of California Press, 2005), xvi.

for understanding events and policies in Jewish history: through text. While Sen is able to do much more than armchair anthropology, I am restricted, for the most part, to trusting the inherited tradition of the Hebrew Bible, classical rabbinic texts, and the scholars that comment on them. While study of our tradition often calls for interpretation and sometimes even a moderate suspension of disbelief, for the purpose of this thesis, I will accept those texts as true and related to the historical context in which they were written.

While the issues involved in this thesis are power and inequality, the main focus will be the concept of social justice and equity in society and how it was or was not realized in sacred literature. In order to embark upon such an analysis, I will here try to parse the phrase "social justice" in order to have a more complete understanding of the topic at hand. Rabbi Daniel Nussbaum writes:

Social justice tends to focus on distributive equality and, from the perspective of social welfare policy, one can best conceive of social justice along an equality-inequality continuum. . . . In addition . . . social justice requires value-orientations of universalism, rather than particularism, mandating that rights be distributed as universal entitlements and not for membership in a particular group; a collectivity-orientation which fosters cooperation rather than as orientation of rugged individualism; and a non-ascriptive orientation which prohibits allocation of goods and services on the basis of social class.²

Nussbaum highlights the notion of equality when discussing social justice. He prioritizes a universalizing factor in which one's identity is insignificant in that rights and goods must be distributed equally among all people. We can extrapolate from Nussbaum's description that in a case in which it is a person's identity or social class that has caused him to receive fewer rights or goods, the remedy would be a reassessment of those goods

² Daniel Nussbaum, "Tsedakah, Social Justice, and Human Rights," *The Jewish Journal of Communal Service* 59:3 (1983): 288-9.

in a fair and universalistic manner. Finally, Nussbaum also states that an entire community is required to be engaged in the act of cooperation, each member's freedom and success tied to the freedom and success of every other member.

While Nussbaum and others call social justice distributive justice, there are many other angles from which to name this value. Michael Walzer, a prominent scholar of the ideas of justice and equality, deals with the term "political egalitarianism" in a similar paradigm as that of Nussbaum and Sen:

The aim of political egalitarianism is a society free from domination. This is the lively hope named by the word *equality*: no more bowing and scraping, fawning and toadying; no more fearful trembling; no more high-and-mightiness; no more masters, no more slaves. It is not a hope for the elimination of differences; we don't all have to be the same or have the same amounts of the same things. Men and women are one another's equals . . . when no one possesses or controls the means of domination. But the means of domination are differently constituted in different societies. Birth and blood, landed wealth, capital, education, divine grace, state power – all these have served at one time or another to enable some power to dominate others. Domination is always mediated by some set of social goods. Though the experience is personal, nothing in the persons themselves determines its character. Hence, again, equality as we have dreamed of it does not require the repression of persons. We have to understand and control social goods; we do not have to stretch or shrink human beings.³

Walzer is also concerned with distributive justice, but he asserts that it is not entirely about who has more and who has less. Rather, he goes on to explain a theory of equality in which it is the measure of power that determines whether people are equal to one another, and not to be evaluated based upon the actual goods that they possess. The amount of domination permitted and inherent in a society, he asserts, means the difference between equality and inequality, justice and injustice.⁴ The above theories allow us to glean from them that the primary concerns of equality and power are driving

³ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (USA: Basic Books, Inc., 1983), xiii.

⁴ *Ibid*, xii-xvi.

forces behind the catchall term "social justice." The issue of whose responsibility it is to regulate such power and equality is also questionable.

Rabbis Albert Vorspan and David Saperstein discuss this issue regarding the opinions of different political types regarding whose responsibility this type of social compassion might be. Conservatives, they explain, tend to believe that a society left on its own will provide correctly and morally for all of its members. Vorspan and Saperstein deny the truth of this statement however, and lean more to the left in their politics:

Liberals take a very different approach, maintaining that our economic system is inherently neutral and therefore subject to the outside influence of the powerful. Since in this society, power emanates from wealth, that influence has been used to further the interests of the privileged. In such a context, it is not only the right, but the responsibility of the government to intervene in the functioning of our economy and, where necessary, to regulate it to assure a more compassionate and just society for all people – the powerless as well as the powerful.⁵

Whatever the particular political leanings of these rabbis, they attribute the responsibility of social causes to the government and governmental institutions. I intend to discover in this thesis whether it is in fact the individual or the government who is charged with the care of the powerless and the re-envisioning and redistributing of a society's wealth and power. As my focus in this thesis will be how these issues evolve in Jewish tradition, we will now turn to how these theories relate to Jewish text and history. The ideas above regarding distributive justice and power inequalities lead us to view Jewish society, policy, and theology, in the light of these theories.

Louis Newman, also defining social justice as distributive in nature, helps us make this connection:

⁵ Albert Vorspan and David Saperstein, *Jewish Dimensions of Social Justice: Tough Moral Choices for our Time* (New York: UAHC Press, 1998), 81.

Distributive justice concerns the distribution of goods within a society. The gap between the rich and poor or unequal distributions of power among groups raise questions of distributive justice. . . . Within the Hebrew Bible, the most prevalent and best known principle of distributive justice is the demand to show special concern for the disadvantaged within society: the stranger, orphan, widow, and poor. . . . God takes special concern for those in the world who are at the bottom of the social hierarchy. So, in modeling our behavior on God's, people must also reach out to assist those who are disadvantaged.⁶

Newman goes on to explain that justice in the Jewish tradition cannot be understood as separate from theology as God serves as the model for acting fairly and equitably. In fact, I intend to demonstrate in this thesis that the Jewish mandate to do social justice comes directly from God both as a commandment and as a means of *imitatio Dei*. Over the centuries, the Jewish community has come to relate to the above theories in many different ways, using many different terms and historical contexts to express the Jewish concern for social justice. One of the most common terms today is *tikkun haolam*. While we will not be looking at the many iterations of this phrase nor at its historical complexities, it would be unwise to mention what is now at the heart of Jewish social justice work:

It is only in the mid-twentieth century that the term *tikkun olam* comes to mean that we human beings (not just rabbis) fix the world of concrete objects, animals, and persons by engaging in both environmental and social care and repair. Possibly a creation of the civil rights era of the 1960s, the term with that meaning first gained its more widespread use in the Reform Movement, which was heavily invested in civil rights work. . . . Now it is used by Jews of all sorts to denote the broad Jewish mandate to care for others.⁷

While *tikkun haolam* has, in fact, become a focus insomuch as it is the name of committees, programs, and youth group events, the unasked question must now be asked.

⁶ Louis Newman, *An Introduction to Jewish Ethics* (New Jersey: Pearson Prentice Hall, 2005), 87-88.

⁷ Elliot Dorff, *The Way Into Tikkun Olam* (Vermont: Jewish Lights Publishing, 2005), 12-13.

Are Jews engaging in *tikkun haolam*, what has now been defined as social justice, in a manner which is in concert with both modern theories of social justice and with an authentic reading of Jewish tradition? Furthermore, does the Jewish tradition of social justice address the critical questions of power, equality, and the distribution of goods and then are Jews engaging in acts of social justice that fulfill such a paradigm? These are the questions which I will attempt to answer in the coming chapters.

In Chapter One, we will explore the biblical textual tradition of social justice in the hopes of unearthing an authentic structure and method for carrying out acts of social justice as based on a biblical mandate. Beginning with a survey of nearby cultures in the Ancient Near East, we will examine such social concepts as equity, law, and the monarchical right to enforce or enact a balance between the two. Through a brief exploration of Egyptian, Mesopotamian, and Assyrian forms of divine social justice, we will attempt to unearth the cumulative ancient culture of justice as it came to be known as a cosmic balance in the world brought into being by God or a god and sustained by that being thereafter. The similarity between the terms used in other ancient cultures and those found in the Bible will make apparent a specific worldview which later is adopted by and developed in Jewish tradition.

Moving toward a singular focus on Jewish tradition, our study will then consider the roots of Hebrew words used in the context of justice in the Bible and other biblical indicators of social justice. We will begin with the root *shafat*, as many scholars explain that it is a term that denotes not just justice in a courtroom, its common usage, but also a cosmic balance of justice, similar to the concept in other Ancient Near Eastern societies.

Its meaning will become clearer as we explore the other words with which it appears and how it is used grammatically to express more than it does standing alone.

From this discussion will emerge critical elements of the specifically Jewish approach to social justice. The empathy statements, or those verses which attempt to elicit an emotional response from the reader, serve as a foundational device of Jewish social justice. We will see that these statements, which recall the narrative of oppression and slavery in Egypt, are used to explicate a Jewish responsibility to act on behalf others who experience a comparable oppression and slavery. This tool, we will come to see, is also one means of compiling lists of those who fit into such categories.

There are some verses of the Bible, however, that may seem to contradict this sense of acting on behalf of the oppressed by introducing the idea of the value of impartiality. As I intend to prove that the value of impartiality is dwarfed by the call for subjectivity, these verses will then be put in context of contradictory verses, chronological relevance, and the extent to which later iterations of Jewish tradition related to these conflicting values emerge. As greater proof of the value of subjectivity in justice, God's own partiality toward the weaker members of society will be brought to light.

One conjugation of the root *shafat*, the word *mishpat*, will then play a major role in defining the list of marginalized members of society. The verses that comprise this section will begin an earnest collection of archetypal examples of the powerless members of a community. *Mishpat* will then be joined to the word *tzedakah*, forming a hendiadys which will render a more complete expression of Jewish social justice. We will then trace this terminology and similar word pairs, using these roots and the root *yashar*,

through biblical texts that employ them to connote a justice that is, in fact, more fair than a superficial or impartial justice.

The last section of Chapter One will include a discussion about how this more ultimate brand of justice, that which we will name social justice or equity, is activated in the world. Through verses that deal with God's own sense of equity and the equity with which God imbues kings, particularly the line of David, the top down model of social justice will become apparent. We will find that not only is this type of justice expected from ancient kings, but that it is the intended result of the period of redemption and the return of the Davidic line to power in the form of the Messiah.

This will lead us to wonder if the biblical mandate of Chapter One was carried out by the generations that succeeded it. With the question of how this relatively abstract worldview might be played out in a concrete manner in the classical rabbinic period, Chapter Two will focus on the struggle in which the Talmudic rabbis were engaged as they sought to balance strict adherence to the law with the equitable worldview of the Bible. We will begin by dealing with the evolution of the verses regarding impartiality in the classical rabbinic period. These ideas assumed an important place in Jewish tradition as well, though to a lesser extent than the verses demanding partiality from judges.

Taking one of the main verses that mandates impartiality, we will sketch its evolution through the Talmud and survey its role in the Mishneh Torah. We will note that the laws that emerge in this realm seek to make the courtroom a fair venue for any person with a grievance, guaranteeing that the judge will not give greater credence to a litigant with higher social or financial status. We will note the similarity of these laws to

some theories of John Rawls, a preeminent modern scholar of social justice. In these cases, the onus of justice falls on the judge and his ability to rule without prejudice.

While this tradition certainly has its place in Jewish law, we will find that there are other models that were used beyond impartiality. Before entering into a discussion of how the rabbis of this era attempted to realize the biblical vision of social justice, there will be a statement regarding the limitations placed on the rabbis by the boundaries of *halakhah*. We will be most concerned with the simple fact that the rabbis saw themselves as bound by Jewish law and even their processes of innovation and manipulation were functions within the confines of the law itself. There is, however, some discussion on the flexibility, divinity, and extensiveness of the laws as they are written. Whether or not the laws foresaw every possible issue or left room open for issues that would arise later will be a matter of some contention at this point.

Whichever theory of legal innovation is adopted by the various rabbis, the result is the same: innovation or interpretation becomes necessary to fulfill the biblical worldview of social justice. We will here identify the two methods of creating an equitable justice that will dominate the rest of Chapter Two and the examples brought in Chapter Three. First, we will explore the category called "equity in adjudication." This category will explore the issues surrounding instances in which a law is generally fair, but in a specific case, for a specific person, it will prove unfair. Here, it is a person's identity or other mitigating factors which require a judge to act subjectively on behalf of a weak litigant. These rulings will neither set precedent for future cases, nor change the law itself in any significant way. They are intended to effect change on a case by case basis for the sake of carrying out the spirit of the law rather than the letter of the law.

While the benefit of fulfilling the spirit of the law will be clear in the context of this thesis, we will engage in some discussion of law itself and the need for its generality. Far from demonizing a generalized law, we will make clear that it is a general law that allows for a stable society with known and consistent rules to which people may adhere. We will note, however, that the value of equity overrides the benefits of consistency.

From the depths of *halakhah* itself, we will then engage in a process of understanding how the rabbis may have come to find textual support for their *halakhic* innovation. With an emphasis on Deut 17:11, we will demonstrate how various scholars and rabbis interpreted the tradition to both place greater power in their own hands and allow themselves liberties in their rulings which would result in an equitable outcome for individuals who might otherwise be hurt by the existing law. While all of the scholars and rabbis do not agree as to the legal or interpretive theory behind such innovation, we will see that they all struggle to realize the vision of biblical social justice. The last part of this section will be a survey of some of the hermeneutical tools employed by the Talmudic rabbis in order to uphold the spirit of the law.

The second category of equity which we will consider will be named "equity in legislation." We will note that this type of equity occurs when the general law itself has become unfair for a certain type of marginalized person, rather than a single individual. The type of equity discussed in this section is intended to set precedent and change the law in a significant manner. This section will also include the varying methods that different rabbis and scholars enacted this type of equity or explained its existence.

In this section, the concept of the evolution of the ethical mind will be related to the changing expectations of both society and its rabbinic leadership regarding the fair

treatment of weaker members of society. We will refer to a "sense" of justice and a rabbinical instinct that the spirit of the law was not being carried out and how some rabbis chose to respond halakhically. We will find two major distinctions of issues that require this type of equity: a law that once seemed fair will begin to seem untenable and a Torah law that did not necessarily intend to oppress a certain type of person will have evolved to do just that.

It is in Chapter Three that we will find actual examples of situations in which Talmudic rabbis and some biblical characters are credited with enacting the two types of equity named above. In this chapter we will bring instances in which adjudicative and legislative equity will be brought to bear by rabbis enacting what they understood to be the biblical worldview of social justice and therefore the correct spirit of the law. This chapter, like Chapter Two, will be divided into two sections, adjudicative equity and legislative equity.

The first textual example we will encounter will set the tone for and frame the texts that follow, describing a worldview in which acting according to Torah law rather than beyond the letter of the law results in destruction for the Jewish people. The rubric of going beyond the letter of the law will play an important role in the texts that follow, not just in conceptual argument, but in the use of this phrase as a hermeneutical tool. Not only will this phrase play an important role in human action, but also in divine justice.

Our examples of adjudicative justice will then be presented. We will analyze textual situations in which singular individuals are at risk of being hurt by standard law or court proceedings. From Talmudic texts, we will specifically look at instances in which a judge manipulated or abrogated the law in order to rule equitably in the case of a socially

and physically weak member of society and in the case of a financially weak group of individuals. Returning to a biblical example, we will then deal with the case of Zelophehad's daughters, weak for their status as women and as daughters unable to inherit land from their deceased father.

This last case will lead us into our discussion on legislative equity. Not only did God and Moses act on behalf of Zelophehad's daughters as individuals, but we will learn that the law was changed for all time regarding women and the inheritance of land. Our second example will also deal with the status of women, in this case the status of *agunot*, women trapped in marriage by a husband who will not or cannot give them a *get*, a writ of divorce. We will explore the ways in which the Talmudic rabbis, recognizing the unfairness of these laws, found means to free these powerless women. The third example in this section will be that of *mamzerim*, a term discussed more deeply within Chapter Three. The rabbis will struggle, here, to free people from the stigma of this status or, at the very least, free their progeny from inheriting it. Finally, we will deal with texts that confront the unfair, yet unexpected, results of debt remission in the sabbatical year. These texts will represent the issue that the rabbis took with the widening gap between the wealthy and the poor.

In our conclusion, we will imagine a modern Jewish society that enacts a biblical worldview of social justice with the same courage, compassion, tenacity, and intellectual rigor with which the rabbis have demonstrated to have done in their own era. We will extend the arguments raised in this thesis to an appropriate global scale and carry the concepts dealt with in these chapters to the next logical level. We will challenge the state

of Jewish social justice today as it does or does not realize the biblical worldview of social justice and the rabbinic extension and fulfillment of that worldview.

I find these questions and issues of ultimate concern and at the heart of Jewish life today as they have been throughout Jewish history. Social justice is, I believe, both the means toward an end and the end itself. Newman expresses this sentiment with the following:

Because the goal of human history is to reach that time when God will reign supreme, and since humans know that God is the paradigm of justice, it follows that that time will be one of complete justice on earth. When people execute justice, therefore, they bring the world closer to the fulfillment of that messianic vision.⁸

⁸ Newman, *Jewish Ethics*, 93.

CHAPTER 1

A BIBLICAL WORLDVIEW OF SOCIAL JUSTICE

"Certainly, the world without the Jews would have been a radically different place. Humanity might have eventually stumbled upon all the Jewish insights. But we cannot be sure. All the great conceptual discoveries of the human intellect seem obvious and inescapable once they had been revealed, but it requires a special genius to formulate them for the first time. The Jews had this gift. To them we owe the idea of equality before the law, both divine and human; of the sanctity of life and the dignity of human person; of the individual conscience and so a personal redemption; of collective conscience and so of social responsibility; of peace as an abstract ideal and love as the foundation of justice, and many other items which constitute the basic moral furniture of the human mind. Without Jews it might have been a much emptier place."⁹

Amidst a world that sometimes seems overwhelmingly anti-Semitic, Paul Johnson and many others have extolled the virtues, both intellectual and moral, of the Jewish people throughout time. Johnson here even attributes "all the great conceptual discoveries of the human intellect" to the Jewish people, to the creativity and insight of Jewish thought, and to the Jewish concern for morality. As we shall see below, the Jewish people share this history and these successes with other peoples of the Ancient Near East. However, this research is not intended to detract from statements like those made by Johnson, rather to locate the nascent beginnings of this type of thought and praxis amongst Israel and those nations with whom it shared its borders and historical narrative.

Johnson ascribes a certain lasting sense of ethical awareness and action to the Jews and names the Jewish ideals of equality, conscience, social responsibility, peace, and justice as the legacy of the Jewish people, lent to the world in which they have

⁹ Paul Johnson, *A History of the Jews* (New York: HarperCollins, 1987), 585.

evolved over so many thousands of years. This conception of Jewish values, while shared with other peoples who have long since disappeared, is a valid and felicitous one. It would be an authentic reading of Jewish sacred texts to see these as values upheld by the recorded ideals of the Jewish people. Below, we will explore some reasons that statements like the one above would aptly describe the history of the values of the Jewish people.

These values, however, were not born without contradiction and complication. The philosophical question of the nature of justice, its definitions, and its applications is such that there are various streams of thought regarding its meaning and use within the societal model of the Ancient Near East and even within the Bible itself. Regarding both Mesopotamia and Ancient Israel, Eberhard Klingenberg writes that "circles associated with the courts . . . and with legislation are likely to have taken a positivist view (of law); those associated with religious institutions appear from the biblical texts to have adopted the covenantal model (of law).¹⁰ In this case, covenantal law relates to the agreement between God and the Jewish people regarding the order of society and the spirit of the law, while positivist law adheres more to the strict letter of the law as it has evolved in society, regardless of what it accomplishes:

Legal positivism is the thesis that the existence and content of law depends on social facts and not on its merits. The English jurist John Austin (1790-1859) formulated it thus: "The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry." (1832, p. 157) The positivist thesis does not say that law's merits are unintelligible, unimportant, or peripheral to the philosophy of law. It says that they do not determine whether laws or legal systems *exist*. Whether a society has a legal system depends on the presence of certain structures of governance, not on the extent to which it satisfies

¹⁰ Eberhard Klingenberg, "'Law' and 'Justice' in the Bible," *Journal of Jewish Studies* 49 (1998): 229.

ideals of justice, democracy, or the rule of law. What laws are in force in that system depends on what social standards its officials recognize as authoritative; for example, legislative enactments, judicial decisions, or social customs. The fact that a policy would be just, wise, efficient, or prudent is never sufficient reason for thinking that it is actually the law, and the fact that it is unjust, unwise, inefficient or imprudent is never sufficient reason for doubting it. According to positivism, law is a matter of what has been posited (ordered, decided, practiced, tolerated, etc.); as we might say in a more modern idiom, positivism is the view that law is a social construction.¹¹

Even as Klingenberg posits the use of both positivist and covenantal law in Ancient Near Eastern societies, with regards to the enactment of positivist law, he writes “[a] quite different conception of the relationship between law and justice may be perceived in the Bible.”¹² Klingenberg argues that Moshe Weinfeld is correct in asserting that certain terms and biblical constructions more than insinuate that acceptance of a positivist law system was insufficient and was not in congruence with the biblical ideal of justice:

“When we examine the charges given to judges in the biblical sources, we find a conspicuous absence of reference to any duty to apply codes or rules of positive law. Rather, the charges to judges in the pre-exilic period are characterized by two demands: (i) to avoid corruption and partiality; (ii) to do ‘justice.’¹³

In the chapter that follows, we will explore both this concept of partiality and the contradiction in terms presented in the Bible and also the meaning of “doing justice” within the context of biblical writings. Klingenberg argues here that “these judges are expected to apply, in the very act of adjudication, the same concept of social justice which the king applies in the proclamations of *deror*,” a royal practice of the Ancient

¹¹ Stanford Encyclopedia of Philosophy. “Legal Positivism.” n.p. [Cited 6 December 2005]. Online: <http://plato.stanford.edu/entries/legal-positivism/>.

¹² Klingenberg, “Law and Justice,” 218.

¹³ *Ibid*, 223.

Near East that is discussed below.¹⁴ He is primarily arguing, however, that the judges of the Ancient Near East were responsible not for applying strict law codes, but rather using a certain amount of judgment influenced by divine inspiration, a personal sense of justice, and the spirit of the law.

Weinfeld agrees, writing that "[t]he judge, although subject to legal rules, cannot overlook considerations of fairness and equity."¹⁵ While there was obviously a system of law in place, it was more of a skeletal framework than it was a tool of micromanagement for each case heard by a judge. While the basic law would be applied similarly in similar situations, lest there be chaos and anarchy, Klingenberg explains:

Nevertheless, we may doubt that there was yet any clear conception that 'like cases ought to be treated alike'. A strong discretionary element is likely to have characterized the administration of these measures, not least because of the origin of this notion of justice in divinely-mandated royal intervention.¹⁶

Judicial actions, similar to administrative measures taken by the king were understood to be an enactment of the will of God, both because God acts with this same discretionary element, therefore commanding the people to do the same, and because God endows the rulers with a sense of justice in the cosmic sense. These issues will be discussed below in greater depth and textual illustration. While Klingenberg is here discussing biblical law, the ancient Israelites did not invent the idea of a divinely mandated system of law or a cosmic balance of justice in the universe.

¹⁴ *Ibid.*

¹⁵ Moshe Weinfeld, *Social Justice in Ancient Israel and in the Ancient Near East* (Minneapolis: The Magnes Press, The Hebrew University, Jerusalem Fortress Press, 1995), 44.

¹⁶ Klingenberg, "Law and Justice," 225.

Egypt, Mesopotamia, Assyria, and Ancient Israel: Influence, Ideas, and Ideals

Philip J. Nel writes:

It is significant that the first steps towards an organized and complex society in the Ancient Near East, including Mesopotamia, Egypt, and Israel, were prompted by ideals of a just society, or at least a society in which the rights of all people were balanced and reflected the cosmic norms bestowed on the cosmos by the custodian and ruling gods.¹⁷

It is indeed significant and noteworthy that justice was not merely a utilitarian tool for maintaining a society and its members, but a deontological ideal commanded and enacted by the ruling gods.¹⁸ Fairness, compassion, and other seemingly human means of interacting were elevated to a divine level and therefore put a sizable weight behind discretionary law over positivist law. Positivist law, was, after all, merely what came about through the people, while discretionary law, or as Klingenberg calls it, covenantal law, is a divinely mandated form of equity in this region and age.

Nel, quoting Koch, does argue that there was some sense of utilitarian purpose to this law in that it did help to manage and maintain society, but he is not willing to relegate the paradigm of cosmic justice to a hoax or means of manipulating the people into submission:

A striking, and indeed unique, phenomenon of the Ancient Near East is the fact that a normative principle of justice was maintained as part and parcel of the created universe. . . . The concept of justice primarily designated a religious ideal in terms of which diverse rights in the community could be balanced to ensure a stable and healthy society.¹⁹

¹⁷ Philip J. Nel, "Social Justice as Religious Responsibility in Near Eastern Religions: Historic Ideal and Ideological Illusion," *Journal of Northwest Semitic Languages* 26/2 (2000): 143.

¹⁸ Nel also explains that there was a discrepancy between the ideal and the actual practice among the people. The hierarchies and the abuses of power often did not allow the fulfillment of the divine ideals of justice.

¹⁹ Nel, "Social Justice as Religious Responsibility," 144.

Nel, like others, sees a pattern in the similarities between peoples of this area and era and has used these similarities to decode the meaning of justice in the Hebrew Bible. For example, Nel explains, "In Egypt *Ma'at* (justice) was seen as a deity representing the 'just' order of the cosmos, but it was also the normative principle to which the conduct of the king and all human actions had to conform."²⁰ We can easily see the similarity between this concept and the idea of being created in the image of God found in Gen 1:27. As the Egyptian god was justice, so must the faithful people act out the attributes of that god. Moreover, their god was not simply the god of justice, but was also the maintained balance of justice in the world.

Nel reports a similar concept at work in Mesopotamia:

In Mesopotamia, *misarum* (righteousness or justice) represented a concept equivalent to *Ma'at*. . . . In Mesopotamia "correct" acts of conduct were seen as the "good" (*isarum*), consequently all actions establishing good had the status of being just/righteous (*misarum*) . . . *misarum* was perceived to be the order of creation . . .²¹

The kings of Mesopotamia did not merely subscribe to the abstract idea of a cosmic justice, however. This concept grew into what has been called Misharum Edicts, instituted by a king upon his ascent to the throne. According to Nel, the issuing of such edicts extended from the Old Babylonian period, approximately 1800-1170 BCE, to the New Babylonian period, from 612-539 BCE.²² He explains that "[p]art of the comprehensive responsibility of the king to ensure social justice and equity was his

²⁰ *Ibid.*

²¹ *Ibid.*, 145.

²² Mesopotamian Timeline. n.p. [Cited 9 December 2005]. Online: <http://www.wsu.edu:8080/~dee/meso/timeline.htm>

actions in stemming the tide of economic oppression and balancing vested rights."²³

These edicts were intended to "rectify imbalances in society."²⁴

These edicts were a blatant suspension of positivist law in that kings would simply nullify standing laws in order to maintain a balance of equity in society toward the greater end of reestablishing the cosmic balance of *misarum*, or justice, that had no doubt gone awry or fallen by the wayside during the reign of the king before him. Nel offers some explicit examples of which societal disorders the kings addressed during this period:

It is evident from the Old Babylonian edicts that they were aimed at redress and reparation of quite a broad spectrum of societal imbalances. Specifically, they targeted the economic disorders caused by malpractices and unbridled economic development of price rises and increased interest rates. The development of the administration led to a situation where ordinary citizens became indebted to the administration . . . and were finally reduced to economic dependence on the state. As a consequence, individuals fell into irredeemable debt to the state and even became enslaved through debt to creditors and merchants.²⁵

If this particular societal ill sounds eerily familiar, it would only be due to the seeming eternity of this type of economic oppression. Mesopotamia, like many cultures since and up to our day, experienced extreme imbalances of power, leading to unbearable economic hardships among its own people and insurmountable gaps between the rich and the poor. This was clearly not in keeping with the divinely required balance of equitable justice and so the Misharum Edicts sought to repair what was ostensibly broken.²⁶

A third example of a similar justice system from this general era is the Assyrian *andararu* edict. "The Neo-Assyrian *andararu* edicts were . . . primarily concerned with

²³ Nel, "Social Justice as Religious Responsibility," 146.

²⁴ *Ibid.*

²⁵ *Ibid.*, 147.

²⁶ For various examples of the failures of the Misharum Edicts, see Nel, p. 148.

the remission of debt, liberation of debt-enslaved citizens and the restoration of land to the original owners.²⁷ Like the Misharum Edicts, this institution in Assyrian law speaks to the divinely equitable nature of their law. These edicts allowed for citizens to break free from a system that would otherwise imprison the members of its society in a constantly perpetuating debt. These edicts allowed the impoverished and the enslaved to take part in the state and business sectors of society at the same level as other members, thereby leveling the playing field at certain intervals of time.

Just as we can easily draw the linguistic connection between the Mesopotamian Misharum Edicts and the Hebrew word for "equity," or "*meisharim*," so can we see the obvious connection between the Assyrian *andararu* edicts and the Hebrew term used for the freeing of slaves in the Jubilee year: *deror*. We learn in the book of Leviticus of the Israelite practice to free their slaves in the fiftieth year. While in Assyria and Mesopotamia, there was no constant interval of release of debt or slaves, the Israelite innovation was to set a constant schedule for such economic release.

Leviticus 25:10

וְקִדַּשְׁתֶּם אֶת שְׁנַת הַחֲמִשִּׁים שָׁנָה וְקִרְאתֶם דְּרוֹר בְּאַרְץ לְכָל
יֹשְׁבֵיהָ יוֹבֵל הוּא תְּהִיָּה לָכֶם וּשְׁבַתֶּם אִישׁ אֶל אַחֲזָתוֹ וְאִישׁ
אֶל מִשְׁפַּחְתּוֹ תָּשׁוּבוּ:

And you shall hallow the fiftieth year. You shall proclaim release throughout the land for all its inhabitants. It shall be a jubilee for you: each of you shall return to his holding and each of you shall return to his family.²⁸

²⁷ Nel, "Social Justice as Religious Responsibility," 147.

²⁸ All biblical translations are from JPS Tanakh (1985) unless otherwise noted. Where JPS has translated the tetragramaton as "the Lord," I have replaced it with "Adonai" to preserve a sense of gender neutrality. Likewise, I have replaced male gendered pronouns with "God."

This sense of instituting a regular interval of assuring economic freedom is not just seen in Leviticus in the Jubilee year every 50 years:

The Deuteronomist (also) borrowed some of his/their ideas on social transformation from Assyria. In particular, this is made abundantly clear by the Deuteronomist reinterpretation of the old Sabbath law of Ex 23:10-11. . . . In Deut 15:1-18, a totally new dimension is brought into play, namely a *semitta* year every seven years during which debts had to be cancelled and Israelite brothers, enslaved on account of debt, set free. Loans to fellow Israelites should also be cancelled by creditors. The economic interpretation of the agrarian Sabbat (*sic*) laws on such a marked occasion and correlation with the *andararu* edicts are so obvious that their development independent from one another is hardly feasible.²⁹

Johnson's earlier statement regarding the creation of ethical laws regarding oppression and social responsibility is not diminished in light of these obviously connected systems of development of law in the Ancient Near East. It is the Israelite tradition that recorded these ideals in its sacred texts which survived into the modern day. Nel finally draws the necessary correlation to the Hebrew Bible, placing Ancient Israel amongst the first peoples to prioritize covenantal law above positivist law, equity above austerity, and the spirit of the law above the strict letter of the law. Nel writes:

An analogous principle of justice is found in Israel. Righteousness (*sedeq/sedaga*) was viewed as the just order destined by Yahweh, the Israelite God, but it was simultaneously a normative obligation resting on the king, his administration, the judiciary, and the community as a whole to practice righteousness.³⁰

Here, Nel indicates that it is the word *zedek* that is in direct relation to Ma'at, *misharum*, and *andararu*. Other scholars insist that it is, rather, the verb *shafat* that stands parallel to these concepts. As we will see below, it is in fact a shared task, often in the form of the hendiadys "justice and righteousness." It is often, although not exclusively, the king who was to act out this "justice and righteousness" among the

²⁹ Nel, "Social Justice as Religious Responsibility," 149.

³⁰ *Ibid*, 144.

people as it was in other law systems in the Ancient Near East. In this way, the Judean king, like the kings of the other peoples, represented and doled out a cosmic sense of justice to the people. The verses below illustrate this proposition.

Nel is, however, not particularly idealistic about the reality of how well these edicts and issuances actually worked amongst the people. He explains that many of the Misharum Edicts came to be used for fame for the king instead of for relieving the economic oppression of the impoverished. There was, he believes, a system of hierarchy in these nations that could not sustain such societal ideals as social justice and equity.³¹ Whether the biblical worldview of justice succeeded in institutionalizing these ideals, however, remains to be seen and is one of the main questions of this thesis. Through the study of various biblical texts, we will explore the sense of justice put forth in the Bible and how such a justice is intended to be carried out. It should be noted that there are many ways to conceive of biblical justice, including a system of reward and punishment meted out by God based on what each human being deserves according to his or her actions.³² Yet this is not the justice parallel to *Ma'at*, *misharum*, or *andararu*. Rather, the biblical justice that will be the focus of our study is that of social justice, equity, and fairness.

The Meaning of the Root *ShaFaT*

The word first used in the Bible to denote a concept of justice is *mishpat*.

Berkovits explains that "When Abraham exclaims before God: 'Shall not the Judge of all

³¹ *Ibid*, 151.

³² See Leon Kass, "A Genealogy of Justice," *Commentary* 102 (1996); and Leroy H. Pelton, "Biblical Justice," *Journal of the American Academy of Religion* (2003).

the earth do *mishpat*?' what he means is: Shall not God Himself act justly, shall He not enact justice?"³³ This is a justice that functions most like the cosmic balance discussed above. Abraham expects God to set a precedent of justice so that what was meant to be in the world is maintained, if not by people, then by God.

Nel, in obvious reaction to the neighboring peoples, agrees with this sense of a cosmic balance of justice, writing:

"Justice" was in the first place not a judicial term for proper legal practice or an indication of the "correct" measure of punishment. The principle of justice was . . . the assumption of an existing/created autonomous design/order which should be upheld and adhered to in all sectors of society.³⁴

Berkovits agrees, also stating that ". . . *mishpat* . . . is the cosmic principle of balance and harmony that is required for the preservation of God's creation."³⁵ Now, the question of how it evolved to become a justice of deserts is an interesting one. One might suppose that it became a sense of divine punishment from a misunderstanding of what people really "deserve." In the sense of social justice, human beings deserve a certain amount of freedom, dignity, and equality, while in the sense of punishment, people "get what they deserve."

There are other positions, though, regarding the original meaning of the root word *shafat*. Berkovits explains that this root word and the concept of judgment in general, originally meant "to save:"

The purpose of judgment is to save the innocent from injustice. This idea is so deeply anchored in Biblical thought that "to judge" becomes an equivalent "to save." . . . The commandment to judge is the responsibility to deliver.³⁶

³³ Eliezer Berkovits, "The Biblical Meaning of Justice" *Judaism* 18, #2 (1969): 189.

³⁴ Nel, "Social Justice as Religious Responsibility," 144.

³⁵ Berkovits, "Biblical Meaning," 203.

³⁶ *Ibid*, 193-4.

Klingenberg extends this definition with examples: "This can be done through a judicial decision, through active intervention, by proclamation of an edict on high, or through battle and struggle."³⁷ This explanation would surely help explain why the *shofetim* were in fact called "Judges," given that they are more often warriors than judges as we understand them in later periods.

Justice, as it is often understood, would stand in opposition to the type of justice we have been considering up to this point. Berkovits expertly drives this point home by aligning the concept of *mishpat* with other various ethical mores in the biblical tradition.

He reveals a most interesting and fundamental nature within the word *mishpat*:

It is probably the most surprising aspect of *mishpat* that it is able to keep comfortable company in the Bible with such other Biblical ideas as *hesed* (love or loving kindness), *rahamim* (compassion or mercy), *ts'daka* (any good deed, not obligatory upon the doer or, simply, charity). In Jeremiah, for instance, God is called "the Lord who exercises lovingkindness (*hesed*), justice (*mishpat*), and charity (*ts'dakah*)" (Jer 9:23). . . . *Hesed* and *mishpat*, *ts'daka* and *mishpat* are opposites within the frame of reference of practically all cultures and their religions. A judge is either just or merciful. . . . Not so in the Bible.³⁸

In the Bible, he tells us, *mishpat* "is to be sought on a more primary level of human interest than that of justice or law."³⁹ *Mishpat* is merely our starting place. It goes without saying that not all verses in the Bible that attend to the issue of social justice employ this term. Most focus on the marginalized members of society and the burdens they tend to carry above and beyond what is experienced by the more powerful members of society. Some call upon the empathy of a people with an ancient slave narrative. Above all else, it is made abundantly clear that "[e]very perversion of justice is also the imposition of

³⁷ Klingenberg, "Law and Justice," 224.

³⁸ Berkovits, "Biblical Meaning," 197.

³⁹ *Ibid*, 198.

suffering on someone who is unable to defend himself against it.⁴⁰ In that, the Bible is unambiguous: such a societal state of existence is unacceptable and not in keeping with the cosmic balance of justice in the world.

Empathy Statements

Since Late medieval or early modern times, there has existed in the West a characteristic way of thinking about political change, a pattern that we commonly impose upon events, a story that we repeat to one another. The story has roughly this form: oppression, liberation, social contract, political struggle, new society. . . This isn't a story told everywhere; it isn't a universal pattern; it belongs to the West, more particularly to Jews and Christians in the West, and its source, its original version, is the Exodus of Israel from Egypt.⁴¹

The laws by which a people abide surely tell a story about the people themselves. If it were otherwise, then this thesis would teach us little about the Jewish people. Fortunately, whether a law system is defined by the people or a people is defined by its law system, the legal biblical worldview of justice does indeed tell a significant part of the Jewish story, expounding upon its values and clarifying its priorities. One of the unique aspects of Jewish law, as opposed to those characteristics that have clearly been influenced by surrounding cultures, is what I will call "empathy statements." I define empathy statements as those verses or sets of verses that recall the exodus from Egypt as a means of reminding the people of how it feels to be enslaved and oppressed and eliciting an emotional response from them. These verses are written as the word of God and require that the reader "remember" the collective history of communal slavery and the experience of being the oppressed minority. In that memory, God commands both a

⁴⁰ *Ibid.* 191.

⁴¹ Michael Walzer, *Exodus and Revolution* (New York: Basic Books Inc., Publishers, 1985), 133.

feeling of gratefulness to God and empathy for other oppressed peoples. While recalling past pain can sometimes leave a person feeling helpless, Michael Walzer explains that "(a)nger and hope, not resignation, are the appropriate responses to the Egyptian house of bondage."⁴²

In the following verses, we will note that the people are not commanded to do justice merely because God requires it, although this concept does exist in other verses. Rather, the people are enjoined to treat the oppressed fairly because of their identity as former slaves and oppressed people.

Exodus 22:20-26

(כ) וגר לא תונה ולא תלחצנו כי גרים הייתם בארץ מצרים: (כא) כל אלמנה ויתום לא תענון: (כב) אם ענה תענה אתו כי אם צעק יצעק אלי שמע אשמע צעקתו: (כג) וחרה אפי והרגתי אתכם בחרב והיו נשיכם אלמנות ובניכם יתמים: (כד) אם כסף תלוה את עמי את העני עמך לא תהיה לו כנשה לא תשימון עליו נשך: (כה) אם חבל תחבל שלמת רעך עד בא השמש תשיבנו לו: (כו) כי הוא כסותו לבדה הוא שמלתו לערו במה ישכב והיה כי יצעק אלי ושמעתי כי חנון אני:

You shall not wrong a stranger or oppress him, for you were strangers in the land of Egypt.²¹ You shall not ill-treat any widow or orphan.²² If you do mistreat them, I will heed their outcry as soon as they cry out to Me,²³ and My anger shall blaze forth and I will put you to the sword, and your own wives shall become widows and your children orphans.²⁴ If you lend money to My people, to the poor among you, do not act toward them as a creditor; exact no interest from them.²⁵ If you take your neighbor's garment in pledge, you must return it to him before the sun sets;²⁶ it is his only clothing, the sole covering for his skin. In what else shall he sleep? Therefore, if he cries out to Me, I will pay heed, for I am compassionate.

Exodus 22:20-26 begins with one of the phrases that identifies a text as an empathy statement. In this case, the people are reminded of being strangers in the land of Egypt. As the people are compared to the strangers in their community and God

⁴² Walzer, *Exodus and Revolution*, 22.

commands the people not to institutionalize biased economic oppression, we can assume that the people are being warned regarding others feeling estranged, being without rights or the ability to assert their rights, and living without institutionalized assistance. The specific acts that would cause others to experience such oppression include maltreatment of orphans, widows, and the poor. These are, according to this text, marginalized members of society who are most likely to feel the oppression that a stranger might feel in society. They do not have the power to assert their own rights, nor would many of the legal institutions respond to their needs in a patriarchal society.

While this text is from Exodus, a book that certainly supplies Jewish tradition with the ultimate narrative from which empathy statements emerge, it is the book of Deuteronomy from which the majority of empathy statements come. At the end of this section, however, we will bring a more problematic empathy statement from Exodus that follows those verses listed above. There is one empathy statement that appears in the book of Leviticus as well, in the section termed the Holiness Code by biblical scholars:

Leviticus 19:33-34

(לג) וְכִי יִגּוּר אִתָּךְ גֵּר בְּאַרְצְכֶם לֹא תוֹנוּ אֹתוֹ: (לד)
כַּאֲזָרְחָ מִכֶּם יִהְיֶה לָכֶם הַגֵּר הַגֵּר אִתְּכֶם וְאַהֲבַת לוֹ כְּמוֹךְ כִּי
גֵרִים הִיִּיתֶם בְּאֶרֶץ מִצְרַיִם אֲנִי יְהוָה אֱלֹהֵיכֶם:

When a stranger resides with you in your land, you shall not wrong him.³⁴
The stranger who resides with you shall be to you as one of your citizens;
you shall love him as yourself, for you were strangers in the land of Egypt:
I, Adonai, am your God.

These verses also use the term “strangers” as the term that is intended to evoke empathy in the reader who is the formerly oppressed stranger. There is a sense in this text that the stranger who resides among the people Israel should not be treated as an outsider, presumably the way they were treated in Egyptian society as their “stranger-ness” was

institutionalized as part of the established Egyptian law. As will become clear, we are most interested in farming these texts in order to understand societal and institutionalized forms of justice. Here, to be commanded to treat the stranger “as one of your citizens” can be understood in legal terms. This is not a charge to be friendly to the stranger as much as it is a charge to afford the stranger his legal rights in a fair and just manner, as a “landsman” would be treated.⁴³

The rest of the verses we will cite as empathy statements come from the book of Deuteronomy. The verses below use the same phrase as those above to create a sense of empathy in the reader: “you were strangers in the land of Egypt.” Israel’s experience in Egypt is again compared to the experience of strangers that live amongst them in their own day. There is an additional and important theological sentiment in these verses, however:

Deuteronomy 10:18-19

(יח) עשה משפט יתום ואלמנה ואהב גר לתת לו לחם
ושחלה: (יט) ואהבתם את הגר כי גרים הייתם בארץ
מצרים:

God upholds the cause of the fatherless and the widow, and befriends the stranger, providing him with food and clothing.¹⁹ You too must befriend the stranger, for you were strangers in the land of Egypt.

While the message here is implicit, it is elsewhere explicit, as we will see – not only must Israel love the stranger out of an empathic connection, but also because God does. Eliezer Berkovits writes: “All Biblical law is, in a sense, *imitatio Dei*. To practice *hesed* and *rahamim*, which is the way for God, is thus God’s law for man.”⁴⁴ Here, God “befriends” the stranger and so Israel is expected to do the same. “Befriend” is

⁴³ See the verses that follow.

⁴⁴ Berkovits, “Biblical Meaning,” 201.

apparently defined within the verse itself as providing the stranger with food and clothing. One could similarly draw the conclusion that just as treatment of the stranger is cause for *imitatio Dei*, so too, would be upholding the cause of the fatherless and the widow.

One will often find that a list that includes the stranger in the Bible will often also include the poor, the fatherless, and the widow. The same is true of our verses above. While these texts no doubt refer to actual orphans and widows, this kind of litany causes us to consider the identities and defining characteristics of those who are included in the list. Their interchangeable nature and the frequency of their appearance together, then, also likely refer to the archetypal nature of those without power, those without property, rights, or recourse to action. This becomes all the more obvious when they are added to the greater list found in these verses:

Deuteronomy 16:11-12

(יא) ושמחת לפני יהוה אלהיך אתה ובנך ובתך ועבדך
ואמתך והלוי אשר בשעריך והגר והיתום והאלמנה אשר
בקרבתך במקום אשר יבחר יהוה אלהיך לשכון שמו שם: (יב)
וזכרת כי עבד היית במצרים ושמרת ועשית את החקים
האלה:

You shall rejoice before Adonai your God with your son and daughter, your male and female slave, the Levite in your communities, and the stranger, the fatherless, and the widow in your midst, at the place where Adonai your God will choose to establish God's name.¹² Bear in mind that you were slaves in Egypt, and take care to obey these laws.

The list of marginalized groups in society in this empathy statement includes children, servants, Levites, the stranger, the orphan, and the widow. We are already familiar with the last three. The addition of the first three, however, is telling. In keeping with the characteristics of the last three, this is a list of people without power or property. Even

the Levites, who have standing in the community, are not allowed to own property.⁴⁵

Children are surely powerless and without rights until they come of age. In the case of a daughter, even once she gets married, she is in the charge of her husband. It is interesting to note that the charge to care for the fatherless and the widow is only found once in Exodus, never in Leviticus, and yet it is found eleven times in Deuteronomy! There is a clear theological moral statement being made in the 7th century BCE with the reign of Josiah that was not being made in earlier eras. By that period, either there was greater concern for the marginalized of society or the list of who was actually being marginalized had grown in type or quantity of individuals. Surely as societies change and evolve, different peoples find themselves at the edges of the community, marginalized and without rights or recourse to action. It is interesting to note that the list grows through biblical time. Whether this is due to changing societal concerns or simply a heightened or evolved communal awareness is unclear.

Finally, the reader is commanded to rejoice, that is, to feast and rest with one's own servants. It is perhaps most significant, then, that rather than being reminded that Israel was once "strangers in the land of Egypt," Israel is here called "slaves in the land of Egypt." Reminded of such a significant and painful memory, the reader could hardly oppress his own servant. A "stranger" surely experiences different kinds of oppression than a "slave" would, tapping into a host of emotions which are no doubt intended to influence the reader's actions.

In the following pericope, Israel is also referred to as former slaves, rather than strangers, in the land of Egypt. Here, that term follows the admonitions regarding setting

⁴⁵ Num 18:23

a slave free. The Israelite is first of all commanded to free his slaves on every seventh year for the *shmita*, an issue to be taken up in Chapter 3. Further, he is commanded to give him animals, food, and wine in order to sustain him as he leaves, just as the Israelites took silver, gold, and clothing from the Egyptians as they fled from their own enslavement.⁴⁶ It would not be beyond the scope of plausible argument to say that only Ex 15:12-15 are connected to the empathy statement in verse 15 given that they are the verses that discuss slavery and the people are being reminded of their own slavery, yet I believe that the entire pericope is meant to be empathic:

Deuteronomy 15:7-15

(ז) כי יהיה בך אביון מאחד אחיך באחד שעריך בארץ אשר יהוה אלהיך נתן לך לא תאמץ את לבבך ולא תקפץ את ירך מאחיק האביון: (ח) כי פתח תפתח את ירך לו והעבט תעביטנו די מחסרו אשר יחסר לו: (ט) השמר לך פן יהיה דבר עם לבבך בליעל לאמר קרבה שנת השבע שנת השמטה ורעה עינך באחיק האביון ולא תתן לו וקרא עליך אל יהוה והיה בך חטא: (י) נתון תתן לו ולא ירע לבבך בתתך לו כי בגלל הדבר הזה יברכך יהוה אלהיך בכל מעשך ובכל משלח ירך: (יא) כי לא יחדל אביון מקרב הארץ על כן אנכי מצוך לאמר פתח תפתח את ירך לאחיק לעניך ולאבינך בארץ: (יב) כי ימכר לך אחיק העברי או העבריה ועבדך שש שנים ובשנה השביעת תשלחנו חפשי מעמך: (יג) וכי תשלחנו חפשי מעמך לא תשלחנו ריקם: (יד) העניק תעניק לו מצאנך ומגרנך ומיקבך אשר ברכך יהוה אלהיך נתן לו: (טו) וזכרת כי עבד היית בארץ מצרים ויפדך יהוה אלהיך על כן אנכי מצוך את הדבר הזה היום:

If, however, there is a needy person among you, one of your kinsmen in any of your settlements in the land that Adonai your God is giving you, do not harden your heart and shut your hand against your needy kinsman.⁸ Rather, you must open your hand and lend him sufficient for whatever he needs.⁹ Beware lest you harbor the base thought, "The seventh year, the year of remission, is approaching," so that you are mean to your needy kinsman and give him nothing. He will cry out to Adonai against you, and you will incur guilt.¹⁰ Give to him readily and have no regrets when you do so, for in return Adonai your God will bless you in all your efforts and

⁴⁶ Ex 12:25

in all your undertakings. ¹¹ For there will never cease to be needy ones in your land, which is why I command you: open your hand to the poor and needy kinsman in your land. ¹² If a fellow Hebrew, man or woman, is sold to you, he shall serve you six years, and in the seventh year you shall set him free. ¹³ When you set him free, do not let him go empty-handed: ¹⁴ Furnish him out of the flock, threshing floor, and vat, with which Adonai your God has blessed you. ¹⁵ Bear in mind that you were slaves in the land of Egypt and Adonai your God redeemed you; therefore I enjoin this commandment upon you today.

Exodus 15:7 urges the Israelite not to harden his heart. The language is reminiscent of Pharaoh hardening his heart and not allowing the Israelites to go free. The root of the verb used here is פחַח which is admittedly different from all three verbs listed in Exodus in relation to Pharaoh. The three roots of the verbs used in relationship to Pharaoh in Exodus are: קָשָׁה , כָּבַד , and חָזַק . However, in Deuteronomy, the root פחַח is found parallel to the roots חָזַק (Deut 31:6) and קָשָׁה (Deut 2:30) which, in the realm of Biblical literature, suggests that they are interchangeable synonyms for the Deuteronomist. The difference in choice of words used at this time, then, makes no difference as the book of Deuteronomy views these words as identical. We can understand, then, that this pericope begins at Ex 15:7 and therefore the empathy that this verse is intended to inspire reaches beyond the slave. Given that these verses are connected, it is clear that the needy person is to be taken care of outside the realm of mere interests on loans. Our list of those who are powerless and require special attention and compassion from the community is now relatively complete from a biblical perspective.⁴⁷

These are the members of society who apparently merit partiality and greater care due to their status, weakness, lack of rights, and inability to protect or argue for

⁴⁷ For other examples of empathy statements, see also Ex 23:9, Deut 5:15, Deut 24:17-22.

themselves. These are the stranger, the orphan, the widow, the child, the needy, and the slave. Israelites are expected to take care of these people and potentially unnamed others. We will soon see that in the prophetic books that deal with these people, the people Israel will be commanded not just to care for these types of people out of a sense of empathy, but also to argue their case and rule cases related to them justly. If these commandments are followed, the law system that would come from them would be an equitable one, leveling the playing field for those weaker members of society. It would be one that allowed for mitigating circumstances and the identities of the litigants to matter in the deciding of a case.

Partiality and Impartiality

These verses may be contradicted by other verses that, on their surface, decry partiality of any type. The following verses seem to run contrary to the worldview of an empathic law, an equitable justice system, and a society that assists those who are often crushed by the law. Mere verses away from the Exodus text above and surrounded by exhortations to aid the needy and act fairly, we find the following commandment:

Exodus 23:2-3

(ב) לא תהיה אחרי רבים לרעת ולא תענה על רב לנטת
אחרי רבים להטת: (ג) ודל לא תהדר בריבו:

You shall neither side with the mighty to do wrong, you shall not give perverse testimony in a dispute so as to pervert it in favor of the mighty,
nor shall you show deference to a poor man in his dispute.

If we are to argue that God is most concerned with taking care of the weak members of society, if God is indeed an equitable God, then how can this impartiality actually be fair or fit into the biblical worldview of justice? Furthermore, we have the following text:

Leviticus 19:15

(טו) לא תעשו עול בחשפט לא תשא פני דל ולא תהדר פני
גדול בצדק תשפט עמיתך:

You shall not render an unfair decision: do not favor the poor or show deference to the rich; judge your kinsman fairly.

These types of texts say something about impartiality and the primacy of a certain type of fairness. As we will see in Chapter 2, this verse develops into an attempt at assuring the ability of the judge to act fairly and not play favorites based on the litigants' status or class. Both this Leviticus text and the Exodus text that precedes it name both rich and poor as parties whose identities should not bias a judge or a community. While these verses are ultimately contrary to the idea of equity within a court room, their existence does not disprove or discount the overarching fact that impartiality is not the greatest or highest value in the biblical worldview of justice.

First of all, these texts are older than those found in Deuteronomy, the book in which we will find the most evidence of an equitable society that allows for some partiality on the part of a judge. Second, it is simply difficult to argue for a judge playing favorites amongst litigants. The basic idea of fairness is, by all counts, a desirable one. It would be plausible that a basic structure of justice would be needed so that equity could be applied to it when necessary. Without that basic structure, there would be no laws to proverbially bend. We can also learn from these warnings to judges that it may have been a time of corrupt judges in which simply judging fairly would be a standard in the courtroom. Perhaps a corrupt judge would need to be directed to follow the strict letter of the law to prevent his taking bribes or ruling according to status. In contrast, Bazak writes that "The righteous judge will decide that a transaction legal on its face may in fact be null and void for lack of free will and intelligent consent if the poor man was exploited

and the inexperienced defrauded and tricked."⁴⁸ A society with such corruption might not have the latitude to make room for discretion toward equity.

Finally, both of these verses are flanked with mitigating concepts. Immediately after our Exodus verse, Ex 23:6 warns a judge not to subvert the rights of the needy in disputes. There is no mention of a fear of subverting the rights of the rich in the same breath. Regarding our Leviticus text, Lev 19:32 tells the reader to "rise before the aged and show deference to the old." The aged are another facet of society who are often powerless and require extra compassion from the community. This is an issue that is rife with partiality. While these impartiality verses should give us pause, they seem merely to set a more ancient basic standard for law while still allowing for equity to be practiced according to the other laws that come before them, after them, and most especially in later books.

So if one of our claims is that these laws are older than those laws of reform found in Deuteronomy, then what of the impartiality laws found within Deuteronomy itself? For example:

Deuteronomy 1:16-17

(טז) ואצוה את שפטיכם בעת ההוא לאמר שמע בין אחיכם
ושפטתם צדק בין איש ובין אחיו ובין גרו: (יז) לא
תכירו פנים במשפט כקטן כגדל תשמעון לא תגורו מפני
איש כי המשפט לאלהים הוא והדבר אשר יקשה מכם תקרבון
אלי ושמעתי:

I charged your magistrates at that time as follows, "Hear out your fellow men, and decide justly between any man and a fellow Israelite or a stranger. ¹⁷ You shall not be partial in judgment: hear out low and high alike. Fear no man, for judgment is God's. And any matter that is too difficult for you, you shall bring to me and I will hear it."

⁴⁸ Jacob Bazak, "The Meaning of the Term 'Justice and Righteousness' in the Bible," *The Jewish Law Annual* 8 (1989): 12.

Clearly, Deuteronomy also seems to expound such a tradition. This text, however, is not proposing a new insight on society nor is it responding to a situation in its own time.

This verse is merely a reminder of what was already said in Exodus. This is more likely an attempt to tie Deuteronomy to the rest of the Torah than it is to expound legal theory.

We can state this with relative confidence given that many other Deuteronomic verses that deal with those on our list of powerless people commends some level of partiality, not just on a personal level, but on a communal and indeed institutional level.

As in other canonized books, however, there are certainly contradictions within Deuteronomy as well. There is a tension within the book, sometimes even within juxtaposed verses. Half of this tension was brought above as an empathy statement:

Deuteronomy 10:17-19

(יז) כִּי יְהוָה אֱלֹהֵיכֶם הוּא אֱלֹהֵי הָאֲדָנִי וְאֲדֹנָי הָאֱלֹהִים
הַגָּדֹל הַגִּבּוֹר וְהַנּוֹרָא אֲשֶׁר לֹא יִשָּׂא פָנִים וְלֹא יִקַּח
שָׁחַד: (יח) עֹשֶׂה מִשְׁפָּט יְתוֹם וְאַלְמָנָה וְאֹהֵב גֵּר לַתֵּת לוֹ לֶחֶם
וְשִׁמְלָה: (יט) וְאֹהֲבֶתְם אֶת הַגֵּר כִּי גֵרִים הֵייתֶם בְּאֶרֶץ
מִצְרַיִם:

For Adonai your God is God supreme and Adonai supreme, the great, the mighty, and the awesome God, who shows no favor and takes no bribe,¹⁸ but upholds the cause of the fatherless and the widow, and befriends the stranger, providing him with food and clothing.¹⁹ You too must befriend the stranger, for you were strangers in the land of Egypt.

In reaction to this verse, Berkovits writes:

This is the description of the mighty and powerful judge who is impartial and cannot be deflected from his course of executing judgment. It is, however, important to note that immediately after these words, the text continues: He doth execute justice for the fatherless and widow, and loveth the stranger, in giving him food and raiment" (ibid. vs. 18). This very stern judge, who "regardeth no person," does regard the fatherless and the widow. He exacts justice for their sake. His insistence on justice is motivated by his concern for the weak and the oppressed. . . . God's insistence on justice is dictated by His concern for those to whom justice is denied. It is for this reason that the Biblical command to do

justice is so often connected with the injunction to protect the right of the weak and helpless.⁴⁹

As Berkovits makes clear, this verse seems to take the reader from impartiality, a neat and clean justice system in which no litigant deserves special attention or favor, to reality, in which God argues the case of the orphan and the widow and takes care of the stranger because it is the powerless in society for whom justice is so infrequently done.

Verse 17 uses one of the major phrases that argues against partiality: **לֹא יֵשָׁא פָנָיו**. The verb in this phrase is synonymous with the root **הָכַר** and **הָדַר**, both used with some form of the word for “face” after it. The basic meaning is that the judge should not know or be familiar with the identities of the litigants before him. Yet it is the very next two verses that claim that God does exactly that – God knows and argues for the litigants whose lives are more difficult, who hold less power, and who cannot argue their own case equally against a litigant who does not carry the same burden.

This tension surely does not exist solely in Deuteronomy, either:

Proverbs 28:21

הָכַר פָּנָיו לֹא טוֹב וְעַל פֶּת לֶחֶם יִפְשַׁע גִּבּוֹר:

To be partial is not right, a man may do wrong for a piece of bread.

While the sentiment of impartiality all but disappears after Deuteronomy, it appears one more time here in relation to class and issues of power. To be partial without cause is not just “not right,” or not good; it is illegal and corrupt. Yet the second half of this verse is amphibolous. This structure can mean a number of different things. Does it mean that a man is capable of doing wrong for a piece of bread? Could it mean that if a society makes stealing bread a criminal act, then a poor man who must do so to survive will be forced

⁴⁹ Berkovits, “Biblical Meaning,” 190-1.

to commit a crime? Is this an ironic statement? A man may indeed do wrong for a piece of bread, yet hunger is probably the most relatable basic need that the reader could imagine. The writer could hardly expect to illicit no sympathy from the reader who engages with this text. It is unclear, in fact, even to whom the first half of the verse might be directed. Finally, as the book of Proverbs is part of the Writings section of the Bible, it carries some secondary status to both Torah and the Prophets.

Equity for the Marginalized in Society: Use of the Word *Mishpat*

These very few examples of times in which impartiality is explicitly tied to members of the community from the list of those without power are dwarfed by those verses that praise some sense of partiality as compassionate and equitable law.⁵⁰ Interestingly and predictably, the only Torah verses that demand partiality in adjudication come from Deuteronomy. The rest are mainly from the prophetic books that flank Deuteronomy chronologically, and the book of Psalms. Deuteronomy was likely written after the book of Isaiah, a storehouse of verses of partiality, and clearly reflects Isaiah's understanding of law and equity. These verses paint a historically contextualized picture of the biblical worldview of equitable justice as it pertains to the powerless of society and the equity due them during these later periods of time.

Deuteronomy 24:17

לא תטה משפט גר יתום ולא תחבל בגד אלמנה:

You shall not subvert the rights of the stranger or the fatherless; you shall not take a widow's garment in pawn.

⁵⁰ There are other verses that use similar root words and command impartiality, but they are not explicitly connected to the poor, orphan, widow, or other marginalized or powerless members of society. See Deut 16:18-20, Lev 19:35, 2 Chron 19:15.

The use of the word משפט here should remind us that while it might refer to simply the cosmic balance of justice in the world, it also likely refers to actual court proceedings and the manner in which a judge is to conduct himself (and certainly will result in this meaning in future generations). Three of the weak members of society are named: the stranger, the fatherless, and the widow. Even though the widow seems part of a separate clause, the interchangeability of those who are powerless in society allows us to view this as biblical parallelism, therefore the taking of the widow's garment appears here as an unfair verdict, not simply something a bully might do.⁵¹ In this verse, then, not taking a widow's garment is synonymous with the phrase לא תטה משפט ruling unfairly against the stranger or orphan. Similar sentiments related to partiality in court and extra measures of compassion being applied to these members of society can be found in other Deuteronomic verses as well.⁵²

While Deuteronomy plays an important role in creating the worldview of justice in the Torah itself, it is the prophetic books and the Psalms that round out and drive home the message of caring for and ruling for the powerless of society in order to level the playing field and institutionalize equity. Beginning with the oldest verses that develop this worldview, Isaiah compares the people to Sodom and Gemorrah, denouncing them for their evil deeds. The answer, he offers, is not sacrifice, but moral deeds. He says:

Isaiah 1:17

למדו היטב דרשו משפט אשרו חמוץ שפטו יתום ריבו אלמנה:

Learn to do good, seek justice, relieve the oppressed, uphold the rights of the orphan, defend the cause of the widow.

⁵¹ See Chapter 3 for equitable ruling regarding the taking of one's garment.

⁵² See Deut 24:19, Deut 27:19.

Isaiah is speaking to a community. Up until this point, some of the commandments regarding treatment of the powerless and impartiality were in the plural and some were in the singular. The verbs here in Isaiah and all those that follow are grammatically in the plural, announced to a people. This is a move toward institutionalizing equitable management of the burdened members of society.

In the case of this verse, Isaiah communicates that seeking justice means judging people equitably, knowing that they cannot argue their own case. Berkovits explains:

To seek justice is to relieve the oppressed. . . . The toleration of injustice is the toleration of human suffering. Since the proud and the mighty who inflict the suffering do not, as a rule, yield to moral persuasion, responsibility for the sufferer demands that justice be done so that oppression be ended.⁵³

As in today's society, those who have power will not necessarily do "the right thing" without being held accountable by others with the full backing of the law. Philip Nel, writing about the ideals of justice in Ancient Near Eastern society and not just Ancient Israel, explains: "Throughout the ages . . . one encounters an impasse in the relationship between these religio-cosmic ideals of justice and the vicissitudes of vested powers and hierarchies in society, as well as an ambivalence toward them."⁵⁴ What is ideal is not always carried out. Isaiah must know that his own words, while ostensibly coming from God, could not have nearly the impact of a law system that requires judges, legislators, and law enforcement officials to carry out equitable and compassionate law. This verse, then, deals with the institutional regulation of law for those who abuse the powerless. Isaiah is demanding that the people institute fair procedures for people who bear the brunt of injustice in society.

⁵³ Berkovits, "Biblical Meaning," 192.

⁵⁴ Nel, "Social Justice as Religious Responsibility," 143.

The verse below describes a society in which the above is true – leadership is normally corrupt and therefore requires institutions that will keep it in check. Isaiah also succeeds in painting a picture of a leadership whose followers would agree with and wish to uphold Isaiah's own exhortations. The society he describes is itself corrupt; the powerful have run amok with their power unchecked and unlimited. Singular individual demands for compassionate actions in this type of community would be futile and ignored. Isaiah's anger seems to lie in the institutionalized corruption of the leadership while his demands for equity lie in the need for systemic change. Here, Isaiah bluntly describes how he views the people of Israel and Judah in the 8th century BCE:

Isaiah 1:23

שריך סוררים וחברי גנבים כלו אהב שחד ורדף שלמנים
יתום לא ישפטו וריב אלמנה לא יבוא אליהם:

Your rulers are rogues and cronies of thieves, everyone avid for presents and greedy for gifts; they do not judge the case of the orphan, and the widow's cause never reaches them.

Generations later, Jeremiah suggests similar problems with the corrupt leadership of his society. Again, Israel has forgotten its moral charges and again it is the weak of society that are forgotten, that live without justice:

Jeremiah 5:28

שמנו עשחו גם עברו דברי רע דין לא דנו דין יתום
ויצליחו ומשפט אביונים לא שפטו:

They have become fat and sleek; they pass beyond the bounds of wickedness, and they prosper. They will not judge the case of the orphan, nor give a hearing to the plea of the needy.

Berkovits responds to this verse as well: "It is the denial of justice that causes God to exact justice. His anger has its source in the compassion for those who, by the denial of the justice which is due to them, are made to carry the yoke of human

wickedness."⁵⁵ Exacting, or demanding justice is not something that God does on a lark. The problem for God is not that God's word is not being fulfilled, but that God's people are being hurt. The orphan and the needy are representatives, again, for those whose lives are troubled and without justice. Deuteronomy, Isaiah, and Jeremiah demand that these people deserve equity, not because God says so, but because they are most easily hurt when the powerful members of society are not forced to deal justly, and in their case, equitably, with them.⁵⁶

We have thus far made a case for the partiality of judges and societal leaders in general through the legal means of equity on behalf of those weaker members of society. We have done so based on the use of the word *mishpat*, understanding it as more than just a cosmic balance of justice, but rather a juridical word meant to create not just a worldview of justice, but also an institutionalized form of equity for marginalized groups in society. There are terms that do an even better job of expressing the biblical worldview of justice, however. The one we will discuss in depth is *mishpat u'tzedakah*, found further below, but there is a term in Zechariah, a prophetic book whose first eight chapters are written against the backdrop of the Israelites' return from Babylonian exile, that also expresses a justice deeper than mere *mishpat*, something that is more just than justice.

Zechariah 7:9-10

(ט) כה אמר יהוה צבאות לאמר משפט אמת שפטו וחסד
ורחמים עשו איש את אחיו: (י) ואלמנה ויתום גר ועני
אל תעשקו ורעת איש אחיו אל תחשבו בלבבכם:

Thus said Adonai of Hosts: Execute true justice; deal loyally and compassionately with one another.¹⁰ Do not defraud the widow, the

⁵⁵ Berkovits, "Biblical Meaning," 191-2.

⁵⁶ See also Jer 22:3 which also uses the term *mishpat u'tzedakah*.

orphan, the stranger, and the poor; and do not plot evil against one another.

Mishpat emet or "a true justice" is the type of justice intended for our list of marginalized members of society, here denoted by the widow, the orphan, the stranger, and the poor. To add an additional word to *mishpat* in relation to the powerless of society is to say that *mishpat* itself is sometimes not enough. Strict justice works for those on equal footing. Here, those not on equal footing are not punished for it, but rather entitled to "true justice," or a justice that is in the spirit of the law even if it may not follow the letter of the law. This is another biblical term for equity and another clue as to the biblical understanding of justice.

Through the generations, from before the Babylonian exile to the eras after it, the writers and editors of the Hebrew Bible created a moral stance regarding the weak members of society. That tune was taken up many times over by the writers of the Psalms, whose editing took place through the Hellenistic period. In some cases it is God who is called upon to rule justly, or, as we suspect, equitably, for these members of society, and in other cases, it is the people from whom this kind of justice is demanded. We should note here that the list of powerless evolves in this generation again. Added to the list of widow, orphan, stranger, and needy are the טל , meaning the downtrodden, the שכר , another word for the poor, the לד , yet another word for the poor, the עשוקים , the oppressed, the רעבים , the hungry, the אסורים , the imprisoned, the עורים , the blind, and the כפופים , those who are bent.⁵⁷ While the biblical implications of this are minimal, as we have defined these members of society as archetypal synonyms, the

⁵⁷ See Ps 10:18, Ps 82:3-4, Ps 146:7-9, Ps 103:6.

implications for our current day are extensive, opening the door to the evolution of the list of those who deserve equity in our own day.⁵⁸

Even in the late date of the 3rd-2nd century BCE, it is clear that powerful societal leaders continued to harass the powerless members of society and treat them unjustly. Is it any wonder that the writers of these later texts would have concluded that strict justice simply does not work?

Ecclesiastes 5:7

אם עשק רש וגזל משפט וצדק תראה במדינה אל תתמה על
החפץ כי גבה מעל גבה שמר וגבהים עליהם:

If you see in a province oppression of the poor and suppression of right and justice, don't wonder at the fact; for one high official is protected by a higher one, and both of them by still higher ones.

Besides noting the simple notion of a lack of compassion for the poor and powerless, Ecclesiastes is merely echoing his forebears when he writes of the corruption and fraud that was rampant amongst the people, forcing the hand of the law to allow for and even demand some sense of equity to be carried out. During the exilic generations, Ezekiel found a similar problem in the society:

Ezekiel 22:29

עם הארץ עשקו עשק וגזלו וגזל ועני ואביון הוננו ואת
הגר עשקו בלא משפט:

And the people of the land have practiced fraud and committed robbery; they have wronged the poor and needy, have defrauded the stranger without redress.

It should not be difficult for us to understand why, as time moved forward, as the systems of law of Israelite society developed, the principles and priorities of justice evolved toward the equitable. The actual actions of the powerful created a need for such

⁵⁸ See Chapter 4.

institutions of equity to simply protect the community from falling apart entirely. As we will read in Chapter Two, this is a trend and tradition that continued with great strength and creativity through the generations long after the second exile.

Mishpat U'tzedakah and Other Hendiadys of Equity

Above, in the book of Zechariah, we came across the term "true justice," used to express a justice that is more just than the mere strict letter of the law. One of the reasons we can speak so confidently about the nature of equity as being a critical part of the biblical justice system is that there are numerous terms used to describe actions, rulings, and a worldview that propounds to be more just than justice. The root words used to express this sentiment are *tzedek*, *shafat*, and *yashar*, often making their point most clear by appearing together in a grammatical form that makes one of them a description of the other.

Weinfeld writes:

The concept of social justice was expressed in Ancient Israel and in the Ancient Near East by means of a hendiadys. The most common word-pair to serve this function in the Bible is "*mishpat u'tzedakah*", "justice and righteousness", or "*tzedakah u'mishpat*", "righteousness and justice". However, alongside this expression, we find "*tzedek u'mishor*" or "*tzedek u'meisharim*", "righteousness and equity", word-pairs which are found in poetic passages, and therefore appear primarily in parallelism.⁵⁹

Weinfeld explains that this is a hendiadys and not a pairing in which one of these roots is the noun and another root is its adjective. Rather, the two nouns together create a new meaning and a new reality. He explains that "doing '*mishpat u'tzedakah*' is . . . bound up

⁵⁹ Weinfeld, *Social Justice in Ancient Israel*, 25.

with actions on behalf of the poor and the oppressed.”⁶⁰ Bazak further explains that: “In the hendiadys ‘justice and righteousness’ the word ‘righteousness’ is an attribute of the word ‘justice’. Therefore, the term signifies justice marked by righteousness, i.e., not justice in its usual meaning but justice of a higher kind and better quality.”⁶¹ Below, we will explore some of the verses that promote not just a worldview that allows for some partiality, but a worldview that prioritizes equity and special adjudication for the powerless through a language that reaches far beyond its superficial meanings.

These terms do appear separately many times in the Bible and carry several different meanings on their own. Bazak, also responding to Weinfeld’s studies, writes, however:

When the term ‘justice and righteousness’ appears in a national context, it refers to social measures introduced by the Kings for the benefit of the poor and the oppressed. Such measures, known in Mesopotamia as *misharum* (social justice) and in Egypt as *durarum* (freedom) were introduced by the kings on ascending to the throne. Professor Weinfeld suggested that the same phenomenon occurred in ancient Israel, where the Biblical term “justice and righteousness,” when used in a national context, means loving kindness and mercy.⁶²

There is an argument, however, regarding the true meaning of *mishpat u'tzedakah* and the other terms used in similar manners. Loewenberg explains this terminology, stating:

Jewish kings were commanded to practice *mishpat u'tzedakah*. The literal translation of this term is “justice and righteousness” or “justice and charity.” Classical as well as modern commentators agree that this command does not refer to “courtroom justice and charity” but to *social justice*. The major wrongdoing to which the prophets objected was not the perversion of the judicial process, but

⁶⁰ *Ibid*, 33.

⁶¹ Bazak, “Justice and Righteousness,” 6.

⁶² *Ibid*, 5.

oppression and exploitation of the poor by the political elite and the wealthy classes.⁶³

Loewenberg is, in fact, writing in agreement with his predecessor to this idea, Moshe Weinfeld. Weinfeld, who has written the defining studies on this subject, purports that this term is in fact not a juridical term, but rather a term that deals with maintaining the cosmic balance of justice with which the world was created, a divinely mandated social justice that only kings and other legislative administrators could enact. In short, he believes that the courts have nothing to do with mercy, compassion, or equity.⁶⁴

Weinfeld sees "justice and righteousness" (*mishpat u'tzedakah*) as particular responsibilities of the king, reflected in the practice of issuing proclamations of liberation . . . whereby he provided relief from economic (and other forms of) oppression, through the remission of debts, liberation of debt-slaves, reversion of mortgaged land and . . . restoration of prisoners and exiles. Weinfeld argues strongly that 'justice' is conceived as a matter of (predominantly royal) administration, rather than legal adjudication.⁶⁵

Klingenberg, writing in response and support of Weinfeld's theories, logically extends Weinfeld's argument to include along with a sense of cosmic balance and the edicts issued by kings and legislators, also the adjudicative measures taken by the sitting judges of that particular era.

Klingenberg contests that "This may be viewed as a particular application of the positivist's separation thesis: law consists in the rules applied by the court; justice is an external criterion."⁶⁶ Furthering his challenge to Weinfeld's limiting the scope of the meaning of *mishpat u'tzedakah* and other hendiadys like it, Bazak writes:

⁶³ Frank Loewenberg, *From Charity to Social Justice* (New Brunswick: Transactions Publishers, 2001), 159.

⁶⁴ Klingenberg, "Law and Justice," 219.

⁶⁵ *Ibid*, 218-219.

⁶⁶ *Ibid*, 219.

It seems that an additional interpretation of the expression "justice and righteousness" is possible – a legal system which is not strict and rigid but which allows for consideration of principles of equity as well as of law; a system that is not content with mere formalistic justice but which aims at legal solutions that will embody the true spirit of the law.⁶⁷

Whether or not the courts had actual power to adjudicate according to the spirit of the law rather than according to the strict letter of the law during biblical eras is beyond the scope of this thesis. However, the use of the word *mishpat*, obvious exhortations by prophets of many generations, and the respectful reactions of other scholars seem to suggest that the courts were at least expected to do equity to oppressed members of society, even if they did not in fact carry out this charge. It is absolutely true that rabbis of later generations, as can be seen in Chapter Two and Three, did read these charges both in the realm of precedent-setting legislative enactments and case by case adjudication.

Weinfeld offers several meanings for the hendiadys *mishpat u'tzedakah*. First, it can refer to a character trait granted by God to the king:

1 Kings 10:9⁶⁸

יְהִי יְהוָה אֱלֹהֶיךָ בָּרוּךְ אֲשֶׁר חָפֵץ בְּךָ לִתֶּתְךָ עַל כִּסֵּא יִשְׂרָאֵל
בְּאַהֲבַת יְהוָה אֶת יִשְׂרָאֵל לְעַלְמָּה וְיִשְׁמַח לְמֶלֶךְ לַעֲשׂוֹת מִשְׁפָּט
וְצִדְקָה:

Praised be Adonai your God, who delighted in you and set you on the throne of Israel. It is because of Adonai's everlasting love for Israel that God made you king to administer justice and righteousness."

This verse is actually spoken by Queen of Sheba to King Solomon. We learn from it that God intended Solomon to rule with justice and righteousness and, indeed, it was for that purpose that Solomon was anointed as king. God does not, however, merely wish such

⁶⁷ Bazak, "Justice and Righteousness," 11.

⁶⁸ An almost identical replica of this verse is repeated in 2 Chron 9:8.

things on the kings of Israel. Rather, God bestows, or endows the kings with such characteristics, through God's own attributes of justice and righteousness:

Psalm 72:1-2

(א) לשלמה אלהים משפטיך למלך תן וצדקתך לבן מלך: (ב)
ידין עמך בצדק וענייך בחשפט:

Of Solomon. O God, endow the king with Your judgments, the king's son with Your righteousness;² that he may judge Your people rightly, Your lowly ones, justly.

We find here that God is enjoined to give over the divine attributes of *mishpat* and *tzedakah* to the king. We learn for what purpose the king is endowed with these attributes and toward what end he must rule with justice and righteousness. It is so that he will judge the poor people of the society with justice and righteousness. He is given the power of equity, the power to discern, as God is able to, when the strict letter of the law will not result in a just verdict. Using this verse as proof, Bazak writes that "... the original meaning of the term "justice and righteousness" ... was indeed a juridical expression."⁶⁹ God, then, intended to guide the king in his judgments of the people and the way he ruled on their cases. And so it is that the kings, particularly the Davidic line, were expected to act accordingly to these attributes, as it is recorded in the following verse:

2 Samuel 8:15⁷⁰

וימלך דוד על כל ישראל ויהי דוד עשה משפט וצדקה לכל
עמו:

David reigned over all Israel, and David executed true justice among all his people.

⁶⁹ Bazak, "Justice and Righteousness," 5.

⁷⁰ Also found in 1 Chron 18:14.

Not only is David extolled for his present state of being as king, but he also merits a future of descendants who will also rule in his ways. The Messianic line linked to David is messianic in that the future messiah will restore the world to a state of "justice and righteousness":

Jeremiah 23:5

הנה ימים באים נאם יהוה והקמתי לדוד צמח צדיק ומלך
מלך והשכיל ועשה משפט וצדקה בארץ:

See, a time is coming, declares Adonai, when I will raise up a true branch of David's line. He shall reign as king and shall prosper, and he shall do what is just and right in the land.

Finally, regarding God's establishing justice in the land, the following text adds a critical element that ties the Bible to other peoples of the Ancient Near East and establishes a deeper meaning of *mishpat u'tzedakah*.

Psalms 99:4

ועז מלך משפט אהב אתה כוננת מישרים משפט וצדקה
ביעקב אתה עשית:

Mighty Ruler who loves justice, it was You who established equity, You who worked righteous judgment in Jacob.

This is an important verse because it sets up a poetic parallelism between *mishpat u'tzedakah* (justice and righteousness) and *meisharim* (equity). Just as through the Misharum Edicts, Mesopotamian kings leveled the playing field in their society (ideally), so here this verse describes how God, called the "mighty King", also established equity among God's people. It is a good hint that *mishpat u'tzedakah* intends a justice that goes deeper than simple justice, in that equity is a system of fairness more than a strict system of inflexible law.

A second possible definition that Weinfeld offers for this word pair is that it represents "a social ideal, along the lines of mercy and kindness."⁷¹

Jeremiah 9:23

כִּי אִם בְּזֹאת יִתְהַלֵּל הַמִּתְהַלֵּל הַשָּׂכֵל וַיִּדַּע אוֹתִי כִי אֲנִי
יְהוָה עֹשֶׂה חֶסֶד מִשְׁפָּט וְצִדְקָה בָּאָרֶץ כִּי בְּאֵלֶּה חִפְצֵי נֶאֱמַר
יְהוָה:

But only in this should one glory: In his earnest devotion to Me. For I Adonai act with kindness, justice, and equity in the world; For in these I delight, declares Adonai.

In this verse, we see how God acts rather than how God causes people to act. God acts in the world with justice and equity. Furthermore, this list of connected words draws a parallel between justice, equity, and *chesed*, or kindness. This may not be institutionalized equity, but it is the necessary atmosphere for creating a society against whose backdrop one could institutionalize equitable law. Berkovits writes:

Justice alone will not feed the hungry nor raise up those who are bowed down, but without justice, neither of these acts of kindness and compassion can be performed. The love for the righteous and the concern for the stranger will be mere sentimentalism if injustice is permitted to be rampant.⁷²

Acts of kindness and acts of adjudicative equity must co-exist if either are to succeed in the long term. It is well and good to do small acts of compassion, but unless there are institutional changes that make it difficult for corrupt people to do corrupt things, then those individual acts of kindness will not be felt. Similarly, in a society in which there is no sense of compassion or kindness, no one, not even the leadership will be compelled to carry out the laws of an institutionalized equity.

There are many other verses that include this hendiadys and the others mentioned above that are synonymous to it, but this will suffice to embark upon the next task of

⁷¹ Weinfeld, *Social Justice in Ancient Israel*, 29.

⁷² Berkovits, "Biblical Meaning," 193.

exploring the concrete ways in which the generations of rabbis that followed worked to fulfill the abstract worldview of justice laid out in the Bible. As we will see, rabbis of later generations read these texts as a mandate to seek equity in order to ensure fair judgments for the marginalized members of their societies. They surely felt that the narrative of empathy was their own. Berkovits frames both the biblical worldview of justice and the response of the generations who inherited this tradition in this way:

A justice that never loses sight of the actual human situation with which it is benevolently concerned is never wholly objective. Its main concern is not what is due a person but what may hurt a person. . . . Justice is not done that justice prevail, but that life prevail; it is done out of concern with a concrete situation, in which life is endangered and calls for its salvation.⁷³

⁷³ *Ibid*, 205.

CHAPTER 2

EQUITY IN THE CLASSICAL RABBINIC ERA

Equity in Jewish Tradition

"Two Torahs were given on Mount Sinai – the Written Law and the Oral Law."⁷⁴ This belief was so strong that Joshua ben Levi taught that on Mount Sinai God had already communicated every Talmudic law to Moses.⁷⁵ Almost all ancient Jews believed that all Biblical and rabbinical laws were of Divine origin and not subject to modification. Nevertheless, as social, political, and economic changes occurred, a series of "alterations" and "innovations" were introduced. . . . Over the centuries modifications and innovations occurred in most areas of sacred and secular law. . . . The Pharisees . . . introduced the most far reaching changes in the *halakha*. They did this in order to provide a systematic legal base which would assure the welfare of everyone, but especially the welfare of the weaker classes.⁷⁶

Having explored the biblical worldview of justice and having concluded that it is a system that intended to protect the weak and argue for the marginalized and powerless members of society, we are left with the question of its evolution and its fulfillment. Did biblical law evolve to a point in which its abstract values were codified into law? Were its more troubling elements also codified into law? Was the fact of its divine reading a hindrance to its fulfillment? And finally, would the letter of the law or the spirit of the law prevail when these two components contradicted one another? Biblical law lent itself to the rabbis of the Talmudic period as a guideline, with the burden of concrete law left to the jurists, the legislators, and the rabbinic authorities of the Mishna, the Gemara, and the generations that would follow.

⁷⁴ Sifra Behukotai 8:11

⁷⁵ PT Peah 2:6

⁷⁶ Loewenberg, *From Charity*, 80.

Codifiers of law found themselves trying to commute the abstract values of the Bible into concrete results which would both adhere to biblical law and fulfill biblical intent. Given that there is a clear biblical mandate to judge for the weak, and to protect those who cannot protect themselves, the rabbis of the classical rabbinic period had to conceive of how one could, in practice and not just theory, guarantee an equitable justice for all members of society. They would come to struggle with the question of how to prevent the powerful from influencing rulings for their own benefit. Indeed, they would face the most critical question in the realm of justice: how could the strict letter of the law be upheld while the ultimate purpose of the law, the worldview of social justice laid out in the Bible, went fulfilled? Could the proverbial playing field actually be leveled so that correct and fair judgments could be made, and, if so, what precepts and procedures might compose such a legal framework?

There seem to be two basic directions that rabbinic authorities could, and in fact, did take. The first is the attempt to control and equipoise the appearances of all litigants coming before a judge so that the judge himself would view the litigants without prejudice. This ostensibly would make a good case for a fair adjudication, while allowing the judge to rule according to the letter of the law, in that the judge would not be swayed by either litigant's appearance, connections, social class, or background. Whether or not this responds to the biblical worldview of justice remains to be seen.

We find in BT Shevu. 30a, the extrapolation of the following verse, a verse that appears to comment on the matter of creating an opportunity for a judge to adjudicate fairly and without prejudice:

Leviticus 19:15

לא תעשו עול במשפט לא תשא פני דל ולא תהדר פני גדול
בצדק תשפט עמיתך:

You shall not render an unfair decision: do not favor the poor or show deference to the rich; judge your kinsman fairly.

Focusing on the last three words of this verse, the rabbis define what it means to “judge your kinsman fairly.” The standards of Lev 19:15 are turned into concrete legal procedure in the following manner:

BT Shevu'ot 30a

ת"ר "בצדק תשפוט עמיתך" - שלא יהא אחד יושב ואחד עומד, אחד מדבר כל צרכו ואחד אומר לו קצר דבריך.

The rabbis teach “Judge your kinsman fairly” - One party should not sit while the other party stands; one party should not be permitted to speak at length while the other party is admonished to be brief.

The *tanna kama* offers here a picture of faceless equality. If both litigants are without former identity, then it should follow, logically, that the facts of the case may come to light in a fair manner and the judge will not be predisposed to ruling one way or the other. Here, fairness is defined by the fact that each person is able to start with a proverbial clean slate in the eyes of the judge. These measures do seem to level the playing field from the court's perspective.

Maimonides, both codifier of law and philosopher, struggled with this issue as he codified the laws of fairness that would govern a courtroom in his day. He also had to consider what makes a trial fair, what a judge should do and see, and how a case must be presented. He had to take into consideration the nature of biblical justice and the

concrete examples of how it had played out through history. He wrote in his Mishneh Torah⁷⁷:

MT Sanhedrin 21:1-3

מצות עשה לשפוט השופט בצדק שנאמר בצדק תשפוט עמיתך, אי זהו צדק המשפט זה השוויית שני בעלי דינין בכל דבר, לא יהא אחד מדבר כל צרכו ואחד אומר לו קצר דברך, ולא יסביר פנים לאחד וידבר לו רכות וירע פניו לאחר וידבר לו קשות. שני בעלי דינין שהיה אחד מהם מלובש בגדים יקרים והשני מלובש בגדים בזויין אומר למכובד או הלבישהו כמותך עד שתדון עמו או לבוש כמותו עד שתהיו שוין אחר כך תעמדו בדיון. לא יהיה אחד יושב ואחד עומד אלא שניהם עומדים, ואם רצו בית דין להושיב את שניהם מושביין, ולא ישב אחד למעלה ואחד למטה אלא זה בצד זה.

A judge is positively commanded to judge with justice, as it is said "you shall judge your people with justice." What is a just sentence? It is treating both litigants equally in every way, that one should not speak all his needs while the other is admonished to keep his words short; and the judge should not explain (things) courteously to one and speak to him softly while (speaking) to the other meanly and harshly. Of the two litigants, if one is wearing expensive clothing, and the other is wearing disgraceful clothing, the judge says to the honorable litigant "either dress the other litigant as you are dressed until after the trial or you dress like him. When you are equal, you may stand for trial. It shall not be that one should sit while the other stands, rather both should stand, and if the court wishes to have them both sit, then they may sit, but one shall not sit above and the other below (lower), rather they shall be side by side.

Maimonides takes these principles one step further. He demands an active adherence to this law by the judge and by the litigants. Regarding the judge, it seems that Maimonides assumes that even with all of the safeguards established within the courtroom, the judge might himself act unfairly, regardless of what he sees before him. Noting the trouble with faulty humanity, he therefore demands fair behavior from the judge presiding over the case.

⁷⁷ Menachem Elon, *Jewish Law: History, Sources, Principles* (Jewish Publication Society of America, 1994), 168.

Maimonides also changes the sense of the law to be the responsibility of the litigants themselves, specifically of the well-off litigant. This nuance adds a great deal to the law in that Maimonides requires fairness of thought, action, and intention on the part of those arguing against one another. If there is to be a fair fight, then the fighters themselves must act fairly. Maimonides no doubt knew that forcing the litigant with the advantage of status to equalize the playing field would be onerous for that litigant, at best, yet he also knew that it was necessary for the litigants to buy into the system of equity if the trial were to be fair for both parties.

John Rawls, author of *A Theory of Justice*, addressed these issues as he sought to create a just society and construct how it would come to be. Rawls created what he calls "The Original Position," in which theoretical people work together to create their theoretical society. He places these players behind a "veil of ignorance" so that they have no information as to what member of society they each represent.

"They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations. It is assumed, then, that the parties do not know certain facts. First of all, no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like."⁷⁸

As Maimonides did, and as the *tanna kama* of BT Shevu. did before him, Rawls is attempting to level the playing field in the stages before the law is carried out, and in this case, before the law is even created. Rawls assumes that each person is inclined to act on his egotism and therefore create laws that would be to his advantage. If, however, he cannot know which laws will ultimately serve him in his place in society, he will be

⁷⁸ John Rawls, *A Theory of Justice: Revised Edition* (rev. ed; Cambridge: The Belknap Press of Harvard University Press, 2003), 118.

inclined to construct a just society that is most fair for those who have the least, a theoretical hedging of bets, as it were. This Rawls calls "The Difference Principle," and it represents the caution that each player in this theoretical game would exercise, knowing that he himself might be the worst off in the society.⁷⁹ His egotism, and therefore, his ability to judge for himself to the detriment of others, is tempered by his ignorance and desire for self-preservation.

While Rawls' theory is just that, theoretical, Maimonides and those on whom he bases his codification of the law, intended for the adjudicative veil of ignorance to be practiced in real courtrooms. Our judges, now blind to the societal differences of the litigants before them, can supposedly rule according to the strict letter of the law with the assurance that they rule without bias. There is one critical difference, however, between the laws of the Mishneh Torah and John Rawls. Rawls is creating a society that he believes will inevitably be just and fair due to the restrictions placed on egotism and other guidelines, while Maimonides is dealing with laws that already exist to help a judge rule fairly. In the latter case, the judge's veil of ignorance fails to address the potential unfairness of the existing laws, their effects on certain members of society, and the actual and existing identity of the very real litigant. John Kilcullen offers this clarification of Rawls' theory, furthering emphasizing how a judicial "veil of ignorance" would not be ideal in our case:

A . . . moral intuition guiding Rawls's construction of the Original Position is that people should not get more simply because of some 'accident of birth': There is an objection against any system that 'permits the distribution of wealth and income to be determined by the natural distribution of abilities and talents . . . distributive

⁷⁹ *Ibid*, 65.

shares [in such a system] are decided by the outcome of the natural lottery; and this outcome is arbitrary [therefore objectionable] from a moral perspective.⁸⁰

Surely the measures taken and expounded upon through the generations to ensure a fair trial had not only the best of intentions, but also served as a major part of creating a sense of fairness within the courtroom. However, assuring the litigants that the judge is unprejudiced and the trial is fair and equitable does not and cannot address the issue of the fairness of the law itself and how it plays out in the lives of disenfranchised members of society, either on a case by case basis, or for a group of people. Therefore, we come to the second method that the rabbinical authorities could utilize to turn abstract virtues into practical law. It is the manipulation of the law itself on which we will focus most diligently as it has had not only far reaching consequences for Jewish law and tradition, but it is also most revealing of the ethical mind and conscience of the rabbi as he confronts the strict letter of the law. In a word, we find here the principles of and the struggle to attain justice as equity.

John Rawls defines equity as an instance:

"... when an exception is to be made when the established rule works an unexpected hardship. But with this proviso: since there is no clear line separating these exceptional cases, there comes a point . . . at which nearly any difference will make a difference. In these instances, the principle of authoritative decision applies, and the weight of precedent or of the announced verdict suffices."⁸¹

Rawls understands that while there is the potential for the principle of equity to run amok and be abused, thereby disrupting or corrupting the law, there are instances in which it is necessary to abrogate the actual law in favor of carrying out the intention behind the law. We will add to this definition, based on the texts explored above and below, that for the

⁸⁰ John Kilcullen, "Rawls: The Original Position," n.p. [Cited 20 October 2005]. Online: <http://www.humanities.mq.edu.au/Ockham/y64113.html>.

⁸¹ Rawls, *A Theory of Justice*, 209.

rabbi, equity refers to leveling the playing field for the sake of litigants in a courtroom and members of society living within the framework of Jewish law. Equity in Jewish tradition, then, is the creation of a form of social justice which allows the subjective circumstances of one's identity and the evolving sense of what is truly fair to play a part in deciding what is just for an individual or a group of individuals. On an individual basis, this refers to equity in verdicts and judgment. On a group level, this refers to institutions established by the rabbinical authorities of a given time in the name of equality. Attesting to its place in Jewish tradition, Alexander Guttman explains: "The quest for equity, the concept of resorting to general principles of fairness and justice when existing laws prove inadequate, has been present in Jewish law from biblical time to date."⁸²

Before we confront which kinds of changes took place in the post-biblical attempt to retain the biblical charge of doing justice, it is worthwhile to note that change in Jewish law is not the same thing as rejection of law nor does it come easy. Change in Jewish law was, for the most part, done from within the system and not from outside of it. Those who instigated change and the tools used for change were and are themselves part of the system and those who initiate changes generally do so believing that they have found a more ethically correct interpretation of the law rather than simply abrogating it on a whim. While some rabbinic authorities are clear on the fact that there are things that take precedence over even Torah, others claim that they are merely correcting what was once mistaken or what now can be reinterpreted to reflect societal needs.

⁸² Alexander Guttman, "The Role of Equity in the History of Halakhah," in *Justice, Justice Shalt Thou Pursue: Papers Assembled on the Occasion of the 75th Birthday of the Reverend Dr. Julius Mark*. (ed. Rabbi Ronald B. Sobel and Sidney Wallach; KTAV Publishing House, Inc., 1975), 71.

Moshe Zemer extends this argument, claiming that Halakhah itself is an evolving system that responds to the needs of each generation, thereby not only claiming its tools of change, but also its history and evolution as potentially, if not inherently, equitable. Citing several problematic modern Halakhic issues (including *agunot*, *mamzerim*, egalitarian issues, and violence done to protect the sanctity of Shabbat), Zemer writes:

"Note that these are not external postulates, but principles inherent in Halakhah itself over the ages. In general, Halakhah has been an evolving process that deals with the changing reality of each generation. The elements of Halakhah rest on the ethics of the Torah and the prophets, and they manifest an extraordinary sensitivity to the weak and helpless."⁸³

While it is not my intention to argue the current ethical status of practical *halakhah* and while the reader may choose to agree or disagree with the statement that *halakhah* shows sensitivity to the powerless, surely this sentiment is correct in stating that ethical evolution of the laws is an aspect of the existing *halakhah* and that viable change must come from inside the system itself. Furthermore, Zemer causes us to ask the question: Given the "changing reality of each generation," is there, in fact, evidence of a rabbinic evolution and inclination toward equity for the weak and helpless?

Here, Zemer separates the ultimate purpose of *halakhah* from the laws themselves. There is a worldview that is intended to be structured by *halakhah* which is the worldview of the particular social justice laid out in the Hebrew Bible. And there is the manifestation of this intention which is reliant upon each generation, both on the community and its rabbinic authorities. As we shall see below, there seemed to be a relatively constant balancing act to make sure that the laws reflected such a worldview. It would be unrealistic to say that this ideal was ever fully realized or that it is realized

⁸³ Moshe Zemer, *Evolving Halakhah: A Progressive Approach to Traditional Jewish Law* (Woodstock: Jewish Lights Publishing, 1999), 4.

today, but the attempts to do so are evident and important in and of themselves, sharing with us a peak behind the curtain at the ethical mind of the rabbi, even as he was constrained by his own system.

In fact, the rabbis had only their system from which to work: an Oral Law that was supposed to manifest the precepts of the Written Law. While this invalidated the idea of change for some rabbinic authorities, others saw in this system a realm of freedom to rule according to the grand ideals of the Bible, even when it might be in conflict with the evolved *halakhah*. Joseph Albo (c. 1380-1444), wrote in *Sefer Ha-Ikkarim* 3:23:

"The Written Law cannot be understood except with the Oral Law; and the law of God cannot be perfect so as to be adequate for all times, because the ever-new circumstances of human relations, their judgments and their actions, are too numerous to be embraced in a book. Therefore Moses was given orally certain general principles, only briefly alluded to in the Torah, by means of which the Sages may work out the newly emerging particulars in every generation."⁸⁴

Albo makes a number of significant suppositions in this text. He, like many others, understands the Written Law only through the lens of the Oral Law, those rabbinical statements that seek to expound upon the Bible. Again, while this proves to be a restriction for some, Albo understands this as an opportunity to coax the Torah into saying what he knows it should say. If, in fact, the Torah is full of "general principles, only briefly alluded to," then it is in the hands of each rabbi or judge to interpret the full measure of the law, how it should be understood, and when these various and theoretical principles should be enforced in the practical world. Albo puts great power into the hands of the sages of each generation, assuming and, no doubt, encouraging, that they act according to the "ethics of the Torah and the prophets" of which Zemer speaks above.

⁸⁴ *Ibid*, 43.

One piece of evidence to the argument that Albo does indeed believe that the laws must be related to the human needs of the time is that he makes human relations primary in importance, even before God's ability to be omniscient. God could not, he asserts, foresee all issues that might come to light in human existence, but this does not mean that such issues have not been addressed. They have been addressed in the spirit of the law, interpreted according to the Sages' insight and a general sense of precedent.

This text assists our study in one other significant way. Albo alludes to both rabbinical forms of doing equity that we will explore within this chapter. First, he refers to the idea that there are "ever new circumstances" and the concept that the law of God could not possibly be adequate to address every single case. This type situation requires what we will refer to as adjudicative equity, implemented by a judge on a case by case basis. The measures taken in adjudicative equity imply that the general law is itself fair, but, due to mitigating circumstances based on the identities of the litigants, carrying out the strict letter of the law in this case would be, in fact, a perversion of justice as defined by the biblical worldview of what is just. Adjudicative equity does not set precedent for future cases and generally, or at least, ideally, does not do violence to existing law.

The second form of equity to which Albo alludes is found in his phrase "the newly emerging particulars in every generation." What appears fair or just in one generation, may well be found unjust in generations that follow. This can be easily observed in modern American life. Women's rights and civil rights for African Americans were, not especially long ago, considered unworthy of conversation, let alone, matters of justice. As society evolved, however, it became clear that women and African Americans are equal to Caucasian males and should be allowed to vote, enter the

workforce, and make decisions about their bodies and their futures. Questioning such ethical norms would today be seen as sexist or racist, and while accepted in some circles, would be in direct contrast to how the law has developed according to legal and ethical evolution. (Perhaps one day the ethical mind will so evolve that it will be just to equalize the salaries and actual opportunities of such minority groups with the more powerful and protected members of society). We will call this brand of equity legislative equity in that it is a preemptive legal action, it generally does not take place in a courtroom (although it could), it applies to a specific group (not an individual), and it does indeed set legal precedent. As Albo correctly asserts, what is equitable in one generation may be intolerable in the next, as we will discover below in the evidence of such ethical evolution in the rabbinical mind.

These two forms of doing equity are not without fault and certainly not without complication. They both have their opponents and are, at times, admittedly problematic. While proof of their very existence speaks volumes about how Jewish tradition viewed justice, so, too, does the complexity of the issues. Amidst the debate over the permissibility of doing equity came a disagreement over which of these forms was the correct and authentic form:

"One view is that only the legislature may relieve injustice to individuals resulting from the unfairness of legal rules in particular cases. According to this view, judges may not bend the law to make it more equitable in hard cases; they may only apply the law as it stands. Others take the opposite view and hold that a judge does have authority to avoid injustice to an individual in a particular case. Still others developed a separate judicial system designed to do equity to individuals to whom the rigid application of general rules of law would be unfair; and in the course of time the two systems of law and equity tended to merge so that the same judges administered both law and equity, with law subordinate to equitable principles."⁸⁵

⁸⁵ Elon, *Jewish Law*, 177.

Menachem Elon elucidates the conflict between the proponents of the two types of equity without coming to a particular conclusion regarding which type of equity is more common or authentic. It would indeed prove difficult to state which is the decisive viewpoint given that Jewish tradition is replete with examples of both legislative and adjudicative equity, despite sometimes loud opposition and the very real societal issues that such legal action could cause.

While these two forms of doing equity look different and surely require different procedures for them to come into being, there is an extremely significant similarity between them. "According to Rabbi Arama (1420-1494, Spain), equity in adjudication and equity in legislation have this in common: they are both the product of the deliberate attempt of the Rabbis to have the everyday administration of the Halakhah conform to the true meaning and the true endeavor of the Divine Legislator."⁸⁶ While they are legally in different categories, executed by sometimes different factions of society, these methods of doing equity are in the same category of fulfilling the biblical and, therefore, Jewish worldview of justice as intended and commanded by God, the archetypal model of and executer of social justice. Jewish tradition teaches that God does justice for the orphan and the widow, and provides the stranger with food and clothing and so commands God's people that they must also do so.⁸⁷

⁸⁶ Aaron Kirschenbaum, "Maimonides and Equity," in *Maimonides as Codifier of Jewish Law* (ed. Nahum Rakover; The Library of Jewish Law, 1987), 152.

⁸⁷ Deut 10:17-19

Equity in Adjudication: A Case by Case Basis

The idea of equity, as we have seen in Chapter 1, was not created or discovered solely by Jewish tradition, but rather was influenced by many different neighboring cultures. It follows logically, then, that the specific argument of case by case equity through adjudication also began long before the Talmud was written. Aristotle, born in a Greek colony in Macedonia in 384 BCE, wrote the following in his Nicomachean Ethics:

(Ethics 5:10) This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality. . . . When therefore the law lays down a general rule, it is then right, where the law's pronouncement because of its absoluteness is defective and erroneous, to rectify the defect by deciding as the lawgiver himself would decide if he were present on the occasion, and would have enacted if he had been cognizant of the case in question."⁸⁸

Aristotle makes two major assertions in this text. The second of these points is most related to equity as a theological issue. He asserts that the lawmaker would carry out his own law in an equitable manner if only he were present for this specific case. We can perhaps posit that the "lawmaker" in Jewish tradition, or at least the one to whom law is ascribed, is God. Aristotle would, then, regard a change in the law or a different application of the law as something that God would not only do, but would intend as the correct application of the law. The first point Aristotle makes is that the law is by nature a system of generality. There are times, he intimates, when such a generality results in the perversion of justice. At those times, it is legally correct, by the principles of equitable law, (if such principles are given priority in a societal system) to "rectify the defect" and rule in a more fair manner.

While Aristotle surely believes that a change in the general law is sometimes required and useful for a society, he offers a viable opportunity for true justice without

⁸⁸ Kirschenbaum, "Maimonides and Equity," 143.

legislative action. He insinuates that there are times when a law is just for the majority of cases, but must be abrogated in those cases in which an unfair verdict is delivered due to the generality and "absoluteness" of the law. One could either argue this from the side of the case or from the side of the law. It appears that Jewish tradition may have done both at different times, depending on the circumstances of the day. Guttman believes that the best way that rabbis found to argue for a just ruling in a specific case was to manipulate the details of the case itself:

Therefore, when the literal application of the laws was, in a specific case, at variance with our sense of equity, there was but one way of solving the question at hand: A learned rabbinical authority had to prove in a written responsum that the law in question, which would cause calamity and violate our sense of equity, did not apply in our case, since our case is not what it seemed to be at the outset."⁸⁹

This creative interpretation and finding of rabbinical loopholes no doubt saved many from an unfair verdict. The other kind, is, of course, not the redefining of the litigant, his actions, or the details of his case, but rather the manipulation of the general law itself. Here, a judge sitting on a case has the power to abrogate Torah law for the sake of doing justice for one individual. Menachem Elon explains why such a large degree of power should, in fact, be in the hands of the judge to do so:

According to the basic approach of equity . . . the protection of the individual is a judicial function: just as courts must adjudicate according to justice as expressed in the general rules of law, they must see to it that these general rules do not cause harm or injustice in the special circumstances of an individual case. This obligation to do equity is part of the inherent jurisdiction of a court.⁹⁰

Elon would assert that doing equity is simply the judge's job. "The general rules of law," as he calls them, are those that are meant to respond to most cases and in most

⁸⁹ Guttman, "The Role of Equity," 84.

⁹⁰ Elon, *Jewish Law*, 247.

cases, these are the laws of justice. In Rawls' theory of the Original Position discussed above, this would be the system of law that emerged from those behind the veil of ignorance. They would be the laws that reflected best the biblical worldview of justice. Yet, we do not live behind Rawls' veil of ignorance and we are far from an original position. Human flaws, including egotism and dangerously putting self-preservation above the needs of others in a society, cause anomalies not yet addressed in legal systems, even in the best legal systems. Moreover, even in an ideal world, scholars agree that this system of perfectly just general law would still not respond to the needs of some specific cases given that law itself is inherently and necessarily general. Elon explains:

The problem is that the very idea of a legal norm involves an inherent inconsistency: a legal norm achieves justice, but only by and large—which necessarily means that it causes injustice in some cases to certain individuals. The question, then, is whether it is possible within the framework of the legal norm to prevent this injustice in individual cases, and if so, how? The one who most keenly feels the tension of this inconsistency is the presiding judge who directly encounters the litigant caught between the pressures of the generality of legal rules, on the one hand, and the demand of justice for a fair result in the individual case, on the other.⁹¹

Elon claims here great responsibility and stress on the presiding judge, whose job it is to both uphold the law and assure that justice is carried out for each individual in his courtroom. He poses the question that we must also address: Is it possible to both work within the system of the general law *and* to rule fairly for a singular person whose case would prove such a law unjust?

While Elon spells out the issue and the major question expertly, I would argue his use of the word "inconsistency." It would seem that a legal norm is, in fact, only inconsistent if it is part of a system that does not allow for, insist on, and stand in favor of

⁹¹ *Ibid*, 176-7.

partiality and equitable decisions when that norm is most unjust. Based on the biblical worldview of justice, Jewish law is such a system and so legal norms and equitable rulings may stand side by side as equally established and accepted principles. In fact, Elon also states that "... the norms of equity have full force of the law."⁹² A "norm" is just that, something that normally works, but is not applied in those cases in which it does not work. In those cases, it is replaced by "the norms of equity," which are as enforceable and authoritative as general law in the system of Jewish law.

It would be as much a mistake, however, to put the principles of equity above those of general law as it would be to do the reverse. Both types of ruling must be counted as established and authoritative institutions with the power to correct for injustice. Both have their strong points and benefits for the litigants before the judge:

(T)wo fundamental qualities of every legal system are uniformity and stability, which are reflected in the generality of legal rules and in the predictability of the way they operate. Secondly, the goal of every proper and legitimate adjudication, the very soul of the law, is to do justice in each individual case presented for adjudication.⁹³

The generality of the law is not a negative aspect of any system of law. As Elon makes clear, this is the quality of law that allows for society members to know how to act and what is expected of them. The stability of such a system affords stability in and reliance on business deals and relationships, both public and private. We should, in general, know what to expect from our legislative bodies. There is a time, however, when we rely upon our legislators to look beyond the general to ensure that true justice be done.

As mentioned above, this kind of subjective ruling could not be something that simply ignores Torah law or rabbinical precedent. The right to do equity to a person in a

⁹² *Ibid*, 167.

⁹³ *Ibid*, 178.

court case must come from inside the tradition. The verse that is often quoted as giving rabbis their power to rule in the name of Torah is, conveniently, also the verse used as evidence of the right to avoid such rulings and give a verdict in the name of equity.

Deuteronomy 17:11

על פי התורה אשר יורוך ועל המשפט אשר יאמרו לך תעשה
לא תסור מן הדבר אשר יגידו לך ימין ושמאל:

According to the law which they shall teach you, and according to the judgment which they shall tell you, you shall do; you shall not turn aside from the sentence which they shall declare to you, to the right, nor to the left.

“Taking the last words of the verse as their point of departure, the Tannaim enunciated the following statement: ‘Even if they declare that left is right and right is left, obey them.’”⁹⁴ Kirschenbaum is here quoting Sifrei Deuteronomy on Deut 17:11. There is great discussion over what it might mean that the rabbinical authority, in this case, a judge, might declare that left is right and right is left. This verse obviously gives the power of adjudication to the judges, but Sifrei Deuteronomy raises an interesting point. What if it seems to an individual that the judge has misspoken or judged poorly?

Moshe Zemer questions the use of this verse as anything but stringent and in need of reinterpretation. He writes that:

“The . . . principle is that ‘great is human dignity, which takes precedence over a negative precept of the Torah’ (BT Ber. 19b) – specifically over the injunction ‘you must not deviate from the verdict that they announce to you’ (Deut 17:11), which is the basis for all rabbinic precepts. Accordingly, ‘on account of human dignity, so that an individual not be disgraced in public, it is permitted to transgress rabbinic prohibitions.’⁹⁵

⁹⁴ Kirschenbaum, “Maimonides and Equity,” 144.

⁹⁵ Zemer, *Evolving Halakhah*, 10.

Zemer assumes that Deut 17:11 means that the law must be carried out in its strictest sense and that there may be no subjective ruling on account of mitigating or, in this case, humiliating circumstances. Read without Sifrei Deuteronomy, this verse could certainly put a society at odds with inflexible authority figures applying a strict law with reckless abandon. While Zemer is also dealing with times in which one is not judged by the strict letter of the law, he makes, from this verse, a case for a person to transgress a law that is already established and is working inequitably against him. Reading Deut 17:11 with Sifrei Deuteronomy opens the door to other possibilities of doing equity rather than understanding this verse as an obstacle to change.

There is discussion about this text in Sifrei Deuteronomy that perhaps this statement of adherence to a verdict even when the judge calls what is right, left and what is left, right, means that even an error of a judge should be carried out. This would surely speak to the benefit of stability that a precisely followed general law might give to a society. Perhaps blind obedience to a rabbinic authority, whether they were correct or not, would teach a community discipline and give it structure. Yet Abarbanel's reading of this *midrash* tells a different story:

"Abarbanel thereupon offers the following interpretation. The laws of the Torah are general statements, just and fair. . . . There may be an individual case, with its peculiar circumstances, however, where the righteous application of Torah law in its generalized form would actually result in a miscarriage of justice. A tribunal faced with this quandary – where the fulfillment of the law denies justice and the fulfillment of justice violates the law – must turn to the . . . judges of the High Court in Jerusalem. For despite the fact that they have moved toward 'the right' although the letter of the law points to 'the left' . . . in the unique case at hand their 'right' is indeed the 'right' of the matter, the appropriate decision demanded by the peculiarities of the circumstances. By granting this authority to the Sanhedrin, the divine wisdom of the Torah is able to include and to cope with all people and all cases."⁹⁶

⁹⁶ Kirschenbaum, "Maimonides and Equity," 146.

It is Abarbanel's reading of this verse that is critical to understanding how the principle of equity works its way up through the system of Jewish law to be codified not as an extraordinary and un-Jewish issue, but as part of the expected nature of the system of law and justice. Here, the Torah itself is seen as able to respond to individual needs through the foresight and wisdom of God. This is in contrast to Albo's assertion that God's Torah could not be so perfect as to address all things at all times. Abarbanel reads Deut 17:11 through the lens of Sifrei Deuteronomy, to mean that an equitable ruling does not vitiate Torah principles, but rather causes them to be fulfilled in a different manner, but still a manner intended by God.

The need for such a warning to the people makes sense in light of Elon's explanation of the value of uniformity and stability of the law. Lest the people think that the judge, or in this case, the Sanhedrin, has become power hungry or has begun to reject Torah law, this verse comes almost as a consoling device. Rabbi Arama's words come to tell the confused individual: "don't worry, you might not understand this, but breaking the obvious law is, in this case, more fair than carrying it out":

Furthermore, God commanded that one may not deviate from their ruling to the right or to the left because even if their judgment does not accord with the letter of the general law, it is the *essential truth* (italics added) for this particular case. This is the meaning of the statement of the Sages, "Even when they say that right is left, and that left is right, and certainly if they tell you that right is right and left is left [you should follow their rulings] even though under the general rules it would at first sight seem that they are declaring right to be left and left to be right, yet for that specific case they are in fact judging right to be right and left to be left."⁹⁷

Arama's statement not only assures the wary members of society, but also declares that such a ruling is in fact the correct reading of the law and not a rejection of the law in

⁹⁷ Elon, *Jewish Law*, 249-250.

favor of something else. Just because what appears right is being called left, the individual should understand that right, in this one instance, is in fact right, and not at all left.

Arama adds another facet. He refers to "essential truth." That is to say, he refers to a truth that is higher or deeper than mere truth. We saw this concept emerge earlier in Chapter One as we discussed the various hendiadys used to connect word pairs which expressed a deeper sense of justice. While truth is an important concept in the same way that *mishpat* is a great value, so essential truth is a deeper notion in the way that *mishpat u'tzedakah* is a greater value. Beyond being biblically accurate, Arama is joined by other rabbis and scholars in his concept that there is something more true than truth. Many have struggled to define this notion of what is more just than justice. In some cases, this comes out in the hermeneutical tools used in the Talmud. In other cases, it is singular rabbis trying to make words work in new ways:

The conflict between strict adherence to the wording of the statutes and loyalty to the spirit of the law was examined by Rabbi Joshua Valk-Katz in his 16th century commentary on Tur Hoshen Mishpat . . . Commenting on the wording of the text, "any judge who adjudicated really true justice," Rabbi Valk-Katz writes: 'Adjudicating really true justice' means that the judge decides the case having regard to the special circumstances of time and place so that the decision will be *really* true. In other words, the judge must not always decide according to strict Tora (*sic*) law, for there are instances when the judge must rule according to principles of equity, taking into consideration the special circumstances of the time and place of the event. The decisions of a judge who does not act accordingly might be, legally, true, but they would fall short of *really* true justice.⁹⁸ (Bazak, 10-11)

Here, Rabbi Valk-Katz defines Torah law as "true justice," yet ruling in order to do equity, he calls "really true justice," which, at least semantically, is undoubtedly a higher form of justice and truth. To return us to this specific form of equity, however, Rabbi

⁹⁸ Bazak, "Justice and Righteousness," 10-11.

Valk-Katz is only referring to certain instances when an equitable decision is in fact more just than Torah law. He stops far short of saying that Torah law itself is not true and just, for this brand of equity, lest we forget, is meant for specific cases with specific circumstances and is not precedent setting.

Rabbi Moshe Isserles reminds us of this caveat as well. He says "[t]he need of the hour leads us to be lenient in such matters which are only a rabbinic prohibition, because such rabbinic prohibitory decrees were not meant to apply in times of emergency."⁹⁹ In this case, Isserles is referring to a case in which an orphan woman was permitted to get married on Shabbat to avoid having to bear the burden of shame for the rest of her life. On the one hand, it behooves us to read carefully the words "the need of the hour," and note that he is dealing with emergency situations only. Zemer responds to Isserles' statement, writing "[t]he bottom line is that in an emergency it is permitted to take ad hoc action that does not serve as a precedent."¹⁰⁰ Not only is this an emergency situation, but it will not have an impact on later cases. Yet on the other hand, we must recognize that the emergency in this case is the need to preserve the dignity of a woman. "Emergencies" are not just matters of life and death in Jewish tradition, but also matters of integrity, dignity, justice, and fairness. And they are reason enough to transgress the law.

Regarding transgression of the law, Ps 119:126 says "It is time to act for the Lord because they have violated Your Torah." The simple reading of this verse would cause us to imagine a punishment for those who break God's law, yet BT Ber. 63a chooses to read this verse "back to front." It is there understood "violate Your teaching and infringe

⁹⁹ Zemer, *Evolving Halakhah*, 11.

¹⁰⁰ *Ibid*, 12.

Torah law *because* it is a time to act for the Lord.” Rashi comments on this text: “when the time comes to do something for the sake of the Holy One, blessed be He, it is permissible to violate the Torah” (BT Yoma 69a, s.v. “a time to act”).¹⁰¹ Rashi is most straightforward regarding this form of equity. He pulls no punches and couches nothing in hidden language. He teaches that there are things greater than Torah even though doing them is still considered an act of violation of Torah. When they are done, he asserts, in those emergency situations, they are done for the sake of God.

We have seen in this section those who argue that adjudicative equity breaks Torah law, but is acceptable, laudable, and essential, and we have seen those who say that adjudicative equity is an aspect of Torah law itself, thereby abrogating nothing, rather carrying out the law as it was originally intended. This argument, while semantically interesting, does not seem to change the facts of what a juridical equity looks like when instituted. It is the deepest essence of biblical justice, which realizes the true spirit of the law, being executed on behalf of an individual requiring equity be done to him, in the name of God’s charge that God’s people create, live in, and preserve a world of justice for each person.

Equity in Legislation – Precedent Setting

Above, we explored the exception to the rule, the extraordinary case. We dealt with situations in which issues are addressed on a case by case basis and how a judge might abrogate established law for the sake of the spirit of the law, so that true justice might be done. In those situations, the law itself was understood as fair and just, but the circumstances of time, place, or litigant in one specific case would cause the perversion

¹⁰¹ *Ibid*, 27.

of justice if the strict letter of the law were carried out. What about the cases in which the law itself has evolved to be unjust? We now address how the rabbis dealt and struggled with issues that came up because the law itself had developed unfairly, not for one singular person in one moment in time, but for a group of people, at all times.

The equitable "gut feeling" assisted the judge in equity of adjudication. So it is that a certain sense of justice, a feeling about what is right, served rabbinical authorities when it came to legislative equity, a changing or manipulation of the established law.

Alexander Guttman refers to this sense below:

... The rabbis found methods that served the cause of equity whenever needed. The most potent among these has been, for many centuries, the interpretation and reinterpretation of laws that seemed to violate the rabbinical sense of equity and fairness. . . . they used interpretation also for modifying laws to make them conform to the generally awakening sense for equity.¹⁰²

He refers to a "sense" twice in this paragraph, once referring to the rabbis' mind and conscience and once referring to a critical and complex issue, the evolution of ethical thought. First, he writes of "the rabbinical sense of equity and fairness." An example of such a sense occurs in a case in which Hillel makes a bold legislative move and frees certain *manzerim* from such a degrading and problematic social status. Moshe Zemer writes of him "[t]here is no doubt that it was the dictates of his conscience that stirred him to take this audacious action."¹⁰³ Zemer attributes Hillel's actions to nothing more textual than his own conscience. This is more, however, than a Jewish Jiminy Cricket.

It is traditionally understood that the Sanhedrin, and, presumably, certain great rabbis, were divinely inspired.¹⁰⁴ Hillel's conscience is counted, then, not like my

¹⁰² Guttman, "The Role of Equity," 83.

¹⁰³ Zemer, *Evolving Halakhah*, 7.

¹⁰⁴ Elon, *Jewish Law*, 254.

conscience or your conscience, but as something with which he is imbued by God, something that guides his actions and thoughts to do not only what feels right, but what God wants. These rabbis have, we might say, a divinely inspired method to their madness. Eliezer Berkovits describes their methodology, saying "[t]he rabbis in the Talmud were guided by insight: God forbid that there should be anything in the application of Torah to the actual life situation that is contrary to the principles of ethics."¹⁰⁵ Zemer summarizes: "If a ruling is *halakhic*, it must be ethical. If it is unethical, it cannot be *halakhic*."¹⁰⁶ The kind of insight Berkovits discusses is based on the biblical charge that one must act ethically and so it follows that if Torah is currently being applied in an unethical way, rabbinical insight tells us that it must be adapted. Whether we choose to believe that the rabbis were acting with divine inspiration or intellectually basing their personal choices on the biblical worldview of justice, they did have a "sense" that their actions and the laws they created or ruled by had to reflect what they believed to be God's sense of justice.

The second "sense" about which Guttman writes is "the generally awakening sense for equity." This is a social commentary on the society in which these rabbis lived and, potentially, on the world. Guttman and others seem to infer from their studies that with the passing of generations, two things seem to change: what is considered equitable, and how important equality is to a society. Guttman here calls this an "awakening." We can assume, then, that not only was society, including the rabbis, moving more toward equality for various groups of people, but that the rabbis were willing to respond to this phenomenon within the framework of Jewish law *and* in the name of God.

¹⁰⁵ Zemer, *Evolving Halakhah*, 49.

¹⁰⁶ *Ibid.*

The rabbis, of varying generations and to varying degrees, uniformly take their cues from the biblical worldview of justice and equity, thereby being able to claim legitimacy for such realizations. Zemer writes:

What is the import of the term *ethical*? For the Sages, discrimination against the destitute, widowed, and orphaned, or exploitation of the weak persons, constitutes injustice. It is intolerable when a group of rabbis declares that the pedigree of a particular group of children is defective. It is immoral when people are dying of hunger, even though food is available, or when an orphan girl is prevented from marrying and would carry the shame for the rest of her life.¹⁰⁷

It is not a light thing that this evolution of thought and conscience inevitably meant that, as rabbis created new legislation, they would be refuting earlier rabbi's laws. That being said, again, it was far from difficult to find textual sources to support a modification of the law. Zemer continues:

The rabbis did not require philosophical or theoretical debates to realize this (that certain things are unjust). They knew what an immoral action is and what is meant by sin: "Because they have sold for silver those whose cause was just, and the needy for a pair of sandals. You who trample the heads of the poor into the dust of the ground, and make the humble walk a twisted course! . . . they recline by ever altar on garments taken in pledge." (Amos 2:6-8). They also knew that it is a moral act to right wrongs: "Share your bread with the hungry, and . . . take the wretched poor into your home; when you see the naked, . . . clothe him, and [do] not . . . ignore your own kin" (Isa 58:7). No further proof or reproof was required when the time came to take corrective moral action.¹⁰⁸

Rabbis who took part in this kind of "corrective moral action" did so leaning heavily on prophetic teachings, lending obvious authenticity to what could be perceived as a revolution of, rather than an amendment to the law. Moreover, as already mentioned, they were not altering someone else's law. For all of the verses from Torah or Bible that they could bring to support a move toward equity, they also knew that the unfair nature of

¹⁰⁷ *Ibid*, xxii-xxiii.

¹⁰⁸ *Ibid*.

some existing laws stemmed directly from Torah. Zemer describes here an extremely complicated question that the rabbis had to ask themselves:

(O)ur rabbis faced a grave dilemma, because some situations of injustice stemmed from the requirements of the codified Halakhah, based on a Torah precept or a regulation enacted by the Sages of antiquity. Is it possible to remain faithful to the prophetic imperative of justice while at the same time obeying the codified Halakhah that seems to discriminate against defenseless human beings?¹⁰⁹

Centuries of rabbis have offered answers to this challenge. An example of such a challenge arose in dealing with the Jubilee year. The laws of the Jubilee year included a forgiving of all debts. Any money owed by one Israelite to another was wiped away and everyone was able to start with a clean slate.¹¹⁰

On the surface, this law sounds like a way to make sure that people do not fall so deeply into debt that they become like slaves to one another, breaking society into a cast system whose lowest levels have no way to climb out of their low class status. This law was surely meant to avoid such an injustice. Unfortunately, it caused those who were accustomed to lending money to refuse to lend money in the sixth year because they knew they would not get paid back. Yet people still needed to be able to borrow this money. Hillel, therefore, created the *prozbul*, which transferred all debts to the court so they would not actually be cancelled.¹¹¹ Regarding this topic, Moshe Isserles wrote:

When something new has arisen that was unknown to earlier Sages, such as that there is reason to fear ruination or [the violation of] a prohibition, a fear that could not have existed in previous generations, it is certainly permissible to enact a rule, like all the enactments stated in the Talmud, because one can say that the earlier generations did not establish the prohibition with that situation in mind.¹¹²

¹⁰⁹ *Ibid.*

¹¹⁰ Deut 15:1-3

¹¹¹ See Chapter 3

¹¹² Zemer, *Evolving Halakhah*, 13.

Isserles does not, here, rule that the Torah or the previous rabbis were wrong, nor does he claim that the *halakhic* system was faulty. He claims new knowledge in his generation, something that the rabbis of former generations could not have foreseen. Something that once was fair, or was intended to be fair, is now causing injustices in the community, not for one person, but for every person and as Berkovits states above, God forbid the ethical Torah should be applied in an unethical way. Isserles explains that, given this new knowledge, the rabbinic authority of that new generation is obligated to make or change a law that better reflects a true justice and that sets a new precedent for the future which will respond to this previously unknown issue.

The laws that exist in one generation are like a pair of shoes. They fit that generation \ well and often there is some room for that generation to wiggle its toes a bit. Yet Torah is not intended to be passed down like a pair of shoes. As Isserles and others make clear, one generations' shoes may not and, if history teaches us anything, will not, fit the next generation. Sometimes the shoes need to be stretched, and sometimes an entirely new pair must be bought.

A British Rabbi, Louis Jacobs, explains this shoe metaphor through text. He recalls the Talmudic passage in which Moses finds himself sitting in Rabbi Akiva's classroom. Moses does not understand a word of what Akiva is teaching. Finally, a student raises his hand and asks from where Akiva knew the text he was teaching. Akiva answered that it came from Moses on Sinai. Rabbi Jacobs interprets this text to mean that the social, economic, political, and religious conditions were so different in Moses' time that the laws of Akiva's time appeared as if they were completely separate and

unconnected to the laws that Moses received.¹¹³ In other words, Moses' shoes and those of his people did not fit Akiva or his generation. As Guttman puts it: "man's sensitivity, his mode of evaluating whatever concerns him, his attitude pertaining to justice, constantly change . . ."¹¹⁴ This is what was previously termed an "awakening." Such changes, when they are related to the ways in which one lives one's very life, cannot be and, indeed, are not ignored.

It is by design that the rabbis were able to help the law evolve along with the changing notions of equality and fairness. Professor Seymour Siegel, writing about the tools that the Torah deliberately gives the rabbis so they could change the very laws that it inspired, believes the following:

(T)he ethical values of our tradition should have the power to judge the particulars of Jewish law. If any law in our tradition does not fulfill our ethical values, then the law should be abolished or revised. . . . Thus, if because of changing conditions, the specific laws no longer express the ethical values which Tradition teaches, . . . (W)e have the responsibility to revise the laws, rather than allow them to fall into desuetude.¹¹⁵

Siegel rests his case squarely on the biblical worldview of justice laid out in chapter one in order to demonstrate that the values of justice trump the particulars of a human-made and interpreted law. He is arguing for the primacy of the "big picture," or a cosmic justice. Yet he still demands that a revision of the laws is a sacred attempt, here a "responsibility," to save them, lest they are forgotten or rejected in their current unjust form. Their worth lies in their being part of the system of an evolving law and an evolving sense of justice which requires constant monitoring lest it either fall out of line

¹¹³ *Ibid*, 42.

¹¹⁴ Guttman, "The Role of Equity," 71.

¹¹⁵ Zemer, *Evolving Halakhah*, 49.

with accepted current ethical standards or out of line with the spirit of the biblical view of justice.

While this is not a work on how the modern day *halakhah* is or is not in line with the ethical character of the Hebrew Bible, a text written by the British Liberal rabbi, Rabbi John Rayner, helps make concrete issues of the need for the reliance on an evolving *halakhah*. Rayner writes: "(t)here are whole vast areas of Halakhah . . . predicated on assumptions unacceptable to us, for instance, regarding the inferior status of women, the hereditary privileges of the priesthood . . . the defiling effect of menstruation, and the legitimacy in principle of capital or corporal punishment."¹¹⁶ As we will see in the succeeding chapter, the same issues of equity that are being dealt with today, by modern rabbis, were the stuff of contention during the classical rabbinical period. The dignity of women, the status of women during menstruation, and the status of different types of people regarding inheritance laws are but a few of the issues that overlap in these eras.

As rabbis struggled to bring practical law in line with an ethical worldview then, so do many rabbis engage in that struggle now, as it has been passed down as part of the inheritance of the Torah. In his book, Zemer condemns modern rabbis who refuse to rule leniently out of what he calls cowardice. The system which makes room for such ethical instinct has reverted, in some ways, to earlier and less ethical laws, he claims, because of the fear that a stricter rabbi will criticize and denounce any attempt to rule liberally or fairly as weak and heretical.¹¹⁷ His words come as a reminder that not only is there precedent for ethical evolution based on the needs of the time and a deeper understanding

¹¹⁶ *Ibid*, 52.

¹¹⁷ *Ibid*, 38.

of what is fair in our generation, but that modern rabbis could rely on already standing precedents of leniency and equity without doing violence to Jewish tradition.

It is, however, not the modern day on which we will focus. In the chapter that follows, we will explore concrete examples of the equity we have just described, mostly in the classical rabbinic era, but some from the Bible itself. In the realm of adjudicative equity, there will be examples of specific cases in which the general law remained the same, but was abrogated in one individual case in order to do equity for the sake of the spirit of the law. In the realm of legislative equity, we will deal with institutions that were established to effectively change a law or set of laws that developed from a precept of the Torah in order to level the playing field and equalize the social status of people for whom the law is unfair.

CHAPTER 3

EXAMPLES OF EQUITABLE ADJUDICATION AND LEGISLATION

As we have seen, the rabbis and community leaders who came generations after the codification of the Hebrew Bible aligned themselves with the biblical worldview of social justice in their attempt to create fair legal systems and rule equitably for the most marginalized members of society. The evolving list of those who might fall into the category of marginalized people continued to change throughout history, although the difference between those dealt with in the Bible and those cases which the rabbis confronted is mainly contextual. Both the Bible and the rabbis who follow its codification dealt with the impoverished, women, children, the oppressed, and the stranger, a cadre of people who symbolically and actually represented the weaker, or marginalized, members of society.

Until now, we have dealt with biblical texts that come together as the fabric of a nascent but prevailing sense of social justice and the scholarly framework by which later generations of rabbis fulfilled this biblical worldview. In this chapter, we will explore texts that exemplify the fulfillment of the biblical legacy inherited by the classical rabbinic authorities. In some cases, we will return to biblical texts to further illuminate not the framework of biblical social justice, but explicit examples of institutionalized justice that realize the social justice directive illustrated in Chapter 1. The structure of this chapter will follow that of the two categories of equity defined in Chapter 2: first, examples of adjudicative equity, those rulings that take place within a juridical system on a case by case basis in which precedent for future rulings is not necessarily set nor

explicitly intended, and second, legislative equity, those laws that come to be understood as inequitable and are changed with the express purpose of setting precedent for future situations. In terms of adjudicative equity, we will explore cases in which a judge makes a decision to uphold the spirit of the law above the letter of the law. Regarding legislative equity, we will explore instances of large scale equitable institutions established in order to influence and shape society.

Whether the method used to create equity for a person is legislative or adjudicative, however, the priority of the value itself is made clear in the Babylonian Talmud. In BT BM 30b, there is a discussion regarding the exemption of a sage's obligation to return lost property. As the discussion comes to a close, a verse of Torah is parsed in which the last segment of it comes to mean that one is required to act both according to the letter of the law of Torah and also beyond the letter of the law of Torah. Rabbi Yohanah draws a connection to this interpretation with a teaching regarding the destruction of Jerusalem. This teaching contends that the city was destroyed because the people ruled according to Torah law:

BT Bava Metzi'a 30b

דאמר רבי יוחנן: לא חרבה ירושלים אלא על שדנו בה
דין תורה. אלא דיני דמגזתא לדיינו אלא אימא:
שהעמידו דיניהם על דין תורה, ולא עבדו לפני משורת
הדין.

Rabbi Yohanah says: The Temple was destroyed only because they ruled according to the law of Torah. Should they instead have ruled according to random and arbitrary law? Rather, it should say: That they established their laws according to the law of Torah, and did not act beyond the letter of the law.

The Gemara argues with the rationality of the statement that Jerusalem was destroyed because the people ruled according to Torah law, rhetorically asking whether

the people should have ruled instead according to random or arbitrary law. Rather, the Gemara continues, one should say that (the problem was that) they upheld Torah law, but did not go beyond the letter of the law. R. Arama explains that this text means that "their judgments were based on general truth, which they did not adjust when necessary."¹¹⁸ Blind execution of Torah law with no regard for who might be hurt in the process or for whom injustice might be done is harshly denigrated in this text. It is no small thing for the Gemara to pin the destruction of Jerusalem, the reason for living in exile, and an important motivating factor for the existence of the Gemara itself on the evils that a society can create by enforcing strict law with no room for subjectivity or partiality in the name of equity. This text intimates that those living in Jerusalem cared more about the law than they did about the people who lived by that law and at the mercy of that law.

The use of this hermeneutic, "*lifnim mishurat hadin*," tells us that at least for Rabbi Yohanan, law is one thing in theory, but a different entity in practice. Joshua Falk writes "it is incumbent upon a judge to rule on a matter in full conformity with the truth, rather than always inflexibly apply the law as it is set forth in the Torah. For sometimes a judge's decision must go *lifnim mishurat hadin* and reflect what is called for by the particulars of time and circumstance."¹¹⁹ In practice, one is to go beyond the letter of the law in order to fulfill the spirit of the law, for the results of not doing so are here named as destruction and exile. This is indeed a hermeneutic of bias and partiality and is not only incumbent upon human beings, but rather derives its force and value from the divine sphere.

¹¹⁸ Elon, *Jewish Law*, 250.

¹¹⁹ *Ibid*, 167.

One text that employs the use of this phrase demonstrates particularly well a similar framework for acting equitably to that which emerged from our exploration of biblical texts. Just as God imbued kings with the will and ability to act equitably and rule fairly, and just as God served as the ultimate model of social justice in the Bible, so too does God play that role in the BT, regarding this particular value. In fact, Rabbi Yohanan is again one of the rabbinic players who come to teach the primacy of the importance of judging beyond the letter of the law, acting "*lifnim mishurat hadin*," now on a divine scale.

BT Berakhot 7a

אמר רבי יוחנן משום רבי יוסי: מנין שהקדוש ברוך הוא מתפלל? שנאמר והביאותים אל הר קדשי ושמחתים בבית תפלתי, תפלתם לא נאמר אלא תפלתי, מכאן שהקדוש ברוך הוא מתפלל. מאי מצלי? אמר רב זוטרא בר טוביה אמר רב: יהי רצון מלפני שיכבשו רחמי את כעסי, ויגולו רחמי על מדותי, ואתנהג עם בני במדת רחמים, ואכנס להם לפני משורת הדין.

Rabbi Yohanan says in the name of Rabbi Yosi: From where do we know that Hakadosh Baruch Hu prays? That it is said: I will bring them to My sacred mountain and let them rejoice in My house of prayer. It does not say "their prayer," but rather "my prayer." From here (we know) that Hakadosh Baruch Hu prays. What is the prayer? Rav Zutra bar Tuvya says that Rav says "May it be My will that My mercy conquers My anger, that My mercy is revealed above all my attributes, and that I will act with my children according to the attribute of mercy, and that I will act beyond the letter of the law

The above discussion appears in BT Ber. 7a in which Rabbi Yohanan in the name of Rabbi Yosi asks from where we know that God prays. The Gemara draws on a verse from Isaiah in which God refers to God's own house of prayer.¹²⁰ The Gemara next wonders what words God says when God prays. Here, God is depicted as praying for

¹²⁰ Isaiah 56:7

control over God's own attributes and for the strength to err on the side of mercifulness and equity when judging God's people. The result of humanity carrying out the strict letter of the law is clearly destruction and exile. The result of God carrying out the strict letter of even God's own law is unspoken, but logically one can presume divine destruction. The statement that is apparently being made regarding this phrase and those to whom it applies is that even God knows that it is proper, appropriate, and valuable to do better than mere justice when a situation requires equity. Adin Steinsaltz explains that "(t)hough the Sages could not always compel someone to go . . . 'beyond the requirements of the law,' – they strongly advised it."¹²¹ In fact, they so encouraged it that they depicted it as God's prayer for God's own self.

Examples of Adjudicative Equity

As we recall, adjudicative equity occurs in those situations in which the law itself remains generally fair, but there is some mitigating circumstance regarding the identities of the claimant(s) which justifies the judge altering the law, even if it has developed directly from Torah law. In the following case, we see the most general symbolic example of a marginalized member of society: the case of the weak against the strong. For the weak, the odds are against him, whereas for the strong, the odds are in his favor. It is the literal case of the physically weak against the physically strong (or violent). This narrative plays out through history, with the Jewish people in the role of the weak. It is also a framework that rings true in its reflection of the biblical demands to care for those weaker members of society.

¹²¹ Adin Steinsaltz, *The Talmud, The Steinsaltz Edition: A Reference Guide* (New York: Random House, 1989), 209.

In the case of this weak litigant, he is also a stranger from out of town, unknown to the judge or other people in the city. In fact, one of the aspects of his character being tested in this courtroom is his status as stranger. An inequitable court would have little room or patience for an unknown entity without an ability to argue his case. As we will see below, the judge is not only lenient, but is willing to go far beyond the strict letter of the law in order to fulfill the intention of the law, even to the detriment of a known entity who clearly has physical strength and powerful friends. We should note that this seems to be a sanctioned form of partiality, seemingly ignoring such verses as those we encountered that demanded impartiality when dealing with the strong and the weak.

The following pericope appears in BT BM 39b and tells the story of a man named Mari bar Isaac from Ben Hozai and his distant brother who has inherited all of their father's money and property after their father's death:

BT Bava Metzi'a 39b

מרי בר איסק אתא ליה אחא מבי חוזאי. אמר ליה: פלוג לי! - אמר ליה: לא ידענא לך. אתא לקמיה דרב חסדא. אמר ליה: שפיר קאמר לך, שנאמר ויכר יוסף את אחיו והם לא הכירוהו מלמד שיצא בלא חתימת זקן ובא בחתימת זקן. - אמר ליה: זיל אייתי סהדי דאחוה את. - אמר ליה: אית לי סהדי, ודחלי מיניה, דגברא אלימא הוא. - אמר ליה לדידיה: זיל אנת אייתי סהדי דלאו אחוך הוא. - אמר ליה: דינא הכי? המוציא מחבירו עליו הראיה! - אמר ליה: הכי דיינינא לך ולכל אלימי דחברך. - אמר ליה: סוף סוף אתו סהדי ולא מסהדי! - אמר ליה: תרתי לא עבדי

A brother came to Mari bar Isak from Bei Hozai. He said to him: Split with me (the money of our inheritance)! He (Mari) said to him: I do not know you. He came before Rav Hisda. He (Rav Hisda) said to him: He responded properly to you, as it is said: And Joseph recognized his brothers, but they did not recognize him. This teaches that he went out without a complete beard, and came back with a complete beard. He (Rav Hisda) said to him (the brother): Go and bring witnesses that you are his brother. He (the brother) said to him: I have witnesses, but they are afraid of him for he is a violent man. He (Rav Hisda) said to him (Mari): you go

and bring witnesses that (say) he is not your brother. He (Mari) said to him: Is that the law? If one comes to take from his brother, the (burden of bringing) evidence is on him! He (Rav Hisda) said to him: This is how I rule for you and for all your violent friends. He (the brother) said to him (Rav Hisda) : Be that as it may, the witnesses will come, but they will not testify. He said to him: They will not commit two (sinful acts).

Mari bar Isaac has lived far from his father's home town and so he returns to claim his fair share of his father's wealth. His brother, a known citizen in the city, claims not to recognize him and so takes him to Rav Hisda's court so that he can argue that Mari is not his brother and therefore will not have to split the inheritance with him. Rav Hisda accepts the fact that his brother does not recognize Mari, citing Joseph's brothers not recognizing him after so many years because he had grown a beard. This seemingly unnecessary detail is critical for this thesis because it removes the possibility that Rav Hisda rules in Mari's favor because he assumes that the other brother is lying. All proceedings are accepted as truthful, leaving the only variable reason for Rav Hisda's equitable rulings in his modification of court proceedings to be the marginalization of Mari as physically weak, socially weak, and bearing the status of stranger.

As the case begins, Rav Hisda asks that Mari bring witnesses to testify on his behalf as the burden of proof is legally on the plaintiff.¹²² Mari, however, protests. He explains that he has witnesses that could testify to his relation to this man, but they are afraid of his brother because his brother is a man of violence: ודחלי מיניה, דגברא. אלימא הוא. The witnesses who could testify on his behalf are clearly intimidated and scared for their very lives, not just because the brother is strong, but in this case, is known for being violent. Rav Chisda is amenable to this argument and overturns the accepted

¹²² BT Bava Kama 46b

practice of law regarding the bringing of witnesses in order to allow a truer justice to be done. In essence, he levels the playing field in order to act equitably toward Mari.

A critical aspect of this text comes when the brother demands of Rav Hisda: “דינא הכי?” is this the law? He is implying that indeed it is not the law and Rav Hisda has made an egregious error. Yet Rav Hisda replies that his actions to go beyond the law were intentional, stating: *הכי דיינינא לך ולכל אלימי דחברך*. He says “this is how I judge you and the violent ones of your group,” which means that it is both his identity and Mari’s identity that has caused Rav Hisda to make this decision in this particular case. More important, however, is the second half of his statement, in which he does not merely make his decision based on the brother’s proclivity for violence, but also on his group of violent friends. This introduces the third symbolic aspect of Mari’s identity. First, he was the unknown stranger, unrecognizable by his own brother. Second, he was the weaker party, scared by the physical intimidation of his brother and his brother’s friends. And third, Rav Hisda points to his status in the community as being greater than Mari’s. The brother’s social connections cause this righteous judge to act in a way that will make the courtroom a fair domain for both parties.

The end of this *sugya* reveals that Rav Hisda finds in favor of Mari and demands that his brother share their father’s inheritance with him and also that he share from the vineyards and fields that the brother has cultivated from his father’s wealth.

Kirschenbaum writes:

(A) plain reading of the account yields a bold departure on the part of the judge from the established rules of procedure. A violent defendant may easily stifle all the testimony which is to his disadvantage. Thus R. Hisda did not hesitate

suspending the basic rule which places the burden of proof on the shoulders of the plaintiff and passing it instead to the defendant himself.¹²³

While Rav Hisda obviously found enough fault in the identity and actions of Mari's brother to change the rules to Mari's benefit, he stops short of enacting legislation that would declare that powerful or violent defendants must at all times and in all cases have the burden of proof placed on them. Kirschenbaum goes as far as to say that "(p)eople who live by violence are thereby put on notice that they may be subjected to suits in which they will have to provide proof of their innocence even if the actions are instituted by others."¹²⁴ While Rav Hisda is reluctant to adapt the law so that it will always respond to violent defendants in this way, his decision sends a message to society about the possible consequence for unacceptable behavior.

In the next text, the weak and marginalized members of society are neither the stranger nor the physically weak, but rather the financially weak. They, like Mari, are also socially weak given their financial status and require the help of an equitable judge to argue and rule on their behalf. There are some fascinating similarities between Mari's situation and the *sugya* below.

BT Bava Metzi'a 83a

רבה בר בר חנן תברו ליה הנהו שקולאי חביתא דחמרא.
שקל לגלימיהו, אתו אמרו לרב. אמר ליה: הב להו
גלימיהו. - אמר ליה: דינא הכי? - אמר ליה: אין,
למען תלך בדרך טובים. יהיב להו גלימיהו. אמרו ליה:
עניי אנן, וטרחינן כולה יומא, וכפינן, ולית לן
מידי. אמר ליה: זיל הב אגרייהו. - אמר ליה: דינא
הכי? - אמר ליה: אין, וארחות צדיקים תשמר.

Rabbah bar bar Hanan had an earthen jug of wine that was broken by the carriers of the vessel. He took their cloaks. They came and spoke to Rav. He (Rav) said to him (Rabbah bar bar Hanan): Return their cloaks! He

¹²³ Kirschenbaum. "Maimonides and Equity," 147-8.

¹²⁴ *Ibid*, 148.

said to him (Rav): Is this the law? He (Rav) said to him: Yes "in order that you follow the way of the good." He returned their cloaks. They said to him (Rav): We are poor people, we worked painstakingly all day, we are starving and have nothing. He (Rav) say to him (Rabbah bar bar Hanan): Go and give them their wages! He said to him (Rav): Is that the law? He (Rav) said to him: Yes, "and keep to the paths of the just."

The scenario here names Rabbah bar bar Hanan as the protagonist who has hired porters to presumably move his keg of wine. In payment for his loss, he takes their clothing: שָׂקָל לְגַלְיָמֵיהֶוּ. The laborers find this unfair, even though they are responsible for breaking his keg of wine and so take Rabba bar bar Hanan to Rav's court, looking for justice. Rav rules that Rabba bar bar Hanan must return their clothing to them. Our protagonist now mirrors Mari's brother's confounded and exasperated reaction, using the exact same language and rhetorically demanding: דִּינָא הֲכִי? "is this the law?" In this text, however, our judge does not leave the question unanswered or up for discussion. "Yes," he responds, and then brings the first half of a biblical verse:

Proverbs 2:20

לַחֲטֹן תֵּלֵךְ בְּדֶרֶךְ טוֹבִים

In order that you follow the way of the good . . .

Rav's prooftext calls for Rabbah bar bar Hanan to go above and beyond the letter of the law in order to walk the path of goodness. As a righteous person, he is expected to act not according to the law, but rather according to the spirit of the law. This analysis would be mere conjecture if it were not for Rashi's comment on the use of this verse within this *sugya*:

Rashi to BT Bava Metzi'a 83a

בְּדֶרֶךְ טוֹבִים - לְפָנִים מְשׁוּרָת הַדִּין.

The way of the good – Beyond the letter of the law

We are met with our familiar hermeneutical tool that calls for a righteous person to go beyond the letter of the law in order to do true justice and act equitably. In this case, this means that Rabbah bar bar Hanan is required to return to the impoverished workers their clothing, even though the law might permit him to take it from them as repayment for his broken keg of wine.

If it had not yet become clear as to why Rav had ruled in their favor, their marginalized status is now made apparent. They present a further aspect of their case to Rav, saying: עניי אנן, וטרחינן כולה יומא, וכפינן, ולית לן מידי, "we are poor, and we have worked all day, we are starving and we have nothing!" Clearly, their employer did not only take their garments, but he also refused to pay them their wages. As did Mari, these workers represent certain weak members of society found in our biblical archetypal lists of marginalized people. They are the poor and the hungry and they are the workers without recourse to defending their own rights.

Again, Rav rules on their behalf, demanding that Rabbah bar bar Hanan pay them their wages. And again, their employer asks: דינא הכי?, "is this the law?" Rav answers predictably, "yes," and brings the second half of Prov 2:20 as proof that indeed a righteous employer must pay the wages of the poor even if they do not fulfill their task, lest they starve and suffer for lack of payment.

Proverbs 2:20

וארחות צדיקים תשמר

... and keep to the paths of the just.

It may be the letter of the law that he does not have to pay their wages, but it is surely not the spirit of the law nor does it fulfill the biblical mandate of social justice. Simply stated, Rav rules that Rabbah bar bar Hanan must pay the wages of the workers

because he has money and they do not. They must be protected by the justice system and not hurt by it. Their poverty and hunger makes them worthy of equity and compassion, thereby helping them to potentially change their social status or, at the very least, not be trapped by it.

In the next text, we return to the Bible for an example of adjudicative equity. In this instance, the arbiter is first Moses and then God. The weak members of society in this text are women whose power is further weakened by their status as daughters as opposed to sons. These two categories are obviously connected, although they occupy two separate realms, one compounding the other, just as being a stranger and a physically weak person compounded Mari's issues above. Numbers 27:1-11 and Num 36 tell the story of Zelophehad's daughters. It should be noted that this text is widely discussed in feminist circles as being a text of power, rather than powerlessness, for women in the Bible.¹²⁵ While it is clearly a situation in which members of a weaker sector of society take a stand and fight for their own rights in a surprising and unique manner, the fact that it is a surprising and unique role for women to take belies such a one-sided reading. Without diminishing the strength demonstrated by Zelophehad's daughters in this narrative, they do clearly fall into the category of marginalized members of society and those whose rights need to be protected with a greater sense of equity than if they were mainstream citizens, in this case, men.

¹²⁵ Alice Ogden Bellis. *Helpmates Harlots Heroes: Women's Stories in the Hebrew Bible* (Kentucky: Westminster/John Knox Press, 1994), 106.

Numbers 27:1-7

(א) ותקרבנה בנות צלפחד בן חפר בן גלעד בן מכיר בן מנשה למשפחת מנשה בן יוסף ואלה שמות בנותיו מחלה נעה וחגלה ומלכה ותרצה: (ב) ותעמדנה לפני משה ולפני אלעזר הכהן ולפני הנשיאם וכל העדה פתח אהל מועד לאמר: (ג) אבינו מת במדבר והוא לא היה בתוך העדה הנועדים על יהוה בעדת קרח כי בחטאו מת ובנים לא היו לו: (ד) למה יגרע שם אבינו מתוך משפחתו כי אין לו בן תנה לנו אחזה בתוך אחי אבינו: (ה) ויקרב משה את משפטן לפני יהוה: (ו) ויאמר יהוה אל משה לאמר: (ז) כן בנות צלפחד דברת נתן נתן להם אחזת נחלה בתוך אחי אביהם והעברת את נחלת אביהן להן:

The daughters of Zelophehad, of the Manassite family -- son of Hephher son of Gilead son of Machir son of Manasseh son of Joseph -- came forward. The names of the daughters were Mahlah, Noah, Hoglah, Milcah, and Tirzah. ² They stood before Moses, Eleazar the priest, the chieftains, and the whole assembly, at the entrance of the Tent of Meeting, and they said, ³ "Our father died in the wilderness. He was not one of the faction, Korah's faction, which banded together against Adonai, but died for his own sin; and he has left no sons. ⁴ Let not our father's name be lost to his clan just because he had no son! Give us a holding among our father's kinsmen!" ⁵ Moses brought their case before Adonai. ⁶ And Adonai said to Moses, ⁷ "The plea of Zelophehad's daughters is just: you should give them a hereditary holding among their father's kinsmen; transfer their father's share to them.

Numbers 27:1-7 fall into the category of adjudicative equity. The five daughters come to Moses to plead their case before him. Since their father has died with no sons, they are afraid that they will lose their family's stake in owning land in Israel and that their father's name will be lost. Up until this point, women had no rights to inherit land, yet the facts of this case as presented to Moses are compelling enough so that he brings the case before God. In fact, in Sif Num 133, it is explained that the daughters intended to bring the case before God because they saw God as a righteous and merciful judge who, unlike human judges who are more merciful to males than females, God is merciful to all people equally. This text portrays God as the quintessentially righteous model of

judgment way to act as a judge in that God makes fair judgments for women and mean equally, which necessitates acting equitably toward women in a society in which their rights are already less than men's rights and their power already less than men's power. God must, then, be acting in a way which is deemed fair and equal by making the judgment that is made in this case.

Indeed, it would seem that in most cases, if a person is not entitled to land, then it would be reasonable to assume that bringing a case in which that person is requesting land that does not belong to him before a judge would cause no change in the inevitable verdict. Yet in this case, because of the obvious unfairness and the odds against the claimants due to their identity, here, their being women, the case is looked at from a different perspective – one of equity. As final judge on this case, God decides that for these claimants, enforcing the law as it stood would be unfair and so they are granted the land that they request. Yet God does not stop at adjudicative law in this case. Rather, it becomes clear that the law has indeed developed unfairly and must be changed for all people and for all time. The case of Zelophehad's daughters straddles our two types of equity. It begins as a court case, a situation in which a law is found unfair for specific individuals due to their powerlessness in society. Yet from Num 27:8-11, this becomes a case of legislative equity, in which the law itself is challenged as unfair.

Legislative Equity

Numbers 27:8-11

(ח) ואל בני ישראל תדבר לאמר איש כי ימות ובן אין לו והעברתם את נחלתו לבתו: (ט) ואם אין לו בת ונתתם את נחלתו לאחיו: (י) ואם אין לו אחים ונתתם את נחלתו לאחי אביו: (יא) ואם אין אחים לאביו ונתתם את נחלתו לשארו הקרב אליו ממשפחתו וירש אתה והיתה לבני ישראל לחקת משפט כאשר צוה יהוה את משה:

⁸"Further, speak to the Israelite people as follows: 'If a man dies without leaving a son, you shall transfer his property to his daughter. ⁹ If he has no daughter, you shall assign his property to his brothers. ¹⁰ If he has no brothers, you shall assign his property to his father's brothers. ¹¹ If his father had no brothers, you shall assign his property to his nearest relative in his own clan, and he shall inherit it.' This shall be the law of procedure for the Israelites, in accordance with Adonai's command to Moses."

The court decision named above is not in and of itself diuturnal. It is a one time decision based on the merits of the claimants. The perdurable nature of the law is only named after the adjudicative measures are taken. (note: There may be a statement within the order of this text that prioritizes direct action that will immediately alleviate pain over the legislative action that should follow in order to avoid future injustices.) Eberhard Klingenberg writes that "the fact that the rules are here stated for the future is a consequence of an independent command by God to Moses, to proclaim such rules for the future; it is not presented as an inherent effect of the decision in the case of the daughters themselves."¹²⁶ Two separate legal actions are taking place in this story, modeling for future generations the different powers given to the ruling authority to do equity.

Klingenberg explains that "in the same story, (Moses) fulfills both adjudicatory and legislative functions in a matter of social justice."¹²⁷ With God's guidance, Moses rules, then, on behalf of Zelophehad's daughters and any women who might later find themselves in a similar situation. Legislative equity of this sort requires a certain amount of foresight on the part of the ruling class of society. In this case, God, the one known for ultimate foresight, realizes that this case is not a simple anomaly, like the Mari case or the

¹²⁶ Klingenberg, "Law and Justice," 224-5.

¹²⁷ *Ibid*, 225.

case of the porters above. Rather, this issue and others like it will likely arise again as the people move into the land and take part in land ownership. Legislative equity also requires self-reflection and a body of law flexible enough to respond to the evolution of ideas and ethics. This text portrays God as the avatar of equitable flexibility within an evolving legal system, holding up legislative equity as a positive value.

When God is the force of equity, as in the case above, human beings need not question the authority of such decisions. Surely God is allowed to adapt God's own law or change God's own mind. God may even interpret Torah differently and no human being could truly contest that God's will was being carried out. Yet there are many more times in which it is not God's word, but man's word that carries out decisions of equity in Jewish law. In fact, the case we will now explore has as its foundation the power of human authority in Jewish law. It is one thing to claim that God makes a decision to make a situation more fair, and entirely another thing to take full human responsibility for such a bold move.

In this section, we will evaluate the options open for a woman who bears the status of an *agunah*. An *agunah* is a woman who wishes to divorce her husband, but is bound to him because he has not carried out or will not carry out the ritual of divorce required by Jewish law. In a word, he will not give her a *get*. This is a profound problem for her and it is a problem that begins with Torah:

Deuteronomy 24:1

כִּי יִקַּח אִישׁ אִשָּׁה וּבִעְלָהּ וְהָיָה אִם לֹא תִמְצָא חֵן בְּעֵינָיו כִּי
מִצָּא בָּהּ עֲרוּת דָּבָר וְכָתַב לָהּ סֵפֶר כְּרִיתָת וְנָתַן בִּידָהּ וּשְׁלָחָהּ
מִבֵּיתוֹ :

A man takes a wife and possesses her. She fails to please him because he finds something obnoxious about her, and he writes her a bill of divorcement, hands it to her, and sends her away from his house;

Deuteronomy 24:1 paints a picture of gender inequality in which the man has complete power over the status of his wife. A man is required to give a woman a writ of divorce if he no longer wishes to be married to her. The interpretation of what it means to find something obnoxious about her surely changed and grew throughout the generations, but the fact that it is the husband who must present the writ to the wife has not changed.¹²⁸ Legally, and unsurprisingly, this places all of the power of the marriage, certainly the power to terminate it, in the hands of the husband. This has two major inequitable implications. First, a husband is permitted to decide unilaterally when a marriage is over. Second, and more pertinent to this thesis, a wife, a symbol of marginality, but also a suffering human being, can find herself trapped in an unhappy, unsafe, or simply unwanted marriage, forbidden to remarry or free herself from the burden of her husband. She cannot choose when her marriage is over as she cannot legally compel her husband to present her with a *get*.

There are two major issues involved in this imbalance of power that are intimately related to this thesis. First, the issue of how a *get* was given to a woman became of major interest and concern to the rabbis in BT Git. because of the unfairness in the way this tradition evolved. Second, we will address the question of how an *agunah* who wished to be free from her oppressive or absent husband was dealt with in a socially just manner. In both cases, the rabbis come to the bold conclusion that the status of *agunah* as it has developed leaves a human being powerless and hurting in a way that was inconsistent

¹²⁸ There may have been some instances in pre-Tannaitic times in which a woman's request for a divorce from her husband was honored and some other instances in which a court could compel a husband to issue a *get* based on his actions or inactions regarding his wife. See Panken 71, and Katz 60.

with the worldview of social justice to which they were committed. The first issue is related to a husband who wavers over his decision to divorce his wife and in doing so, places her in danger of unintentionally committing adultery and potentially risking the legal status of her children that might be born of such an adulterous union. In the text that follows, we see a hint of what was once an unjust tradition that now the rabbis have worked to correct. In his recent book, *The Rhetoric of Innovation: Self-Conscious Legal Change in Rabbinic Literature*, Aaron Panken conducts a study of the term “*barishonah*,” which he calls “a reflective tendency” and understands as a tool by which the rabbis were able to change *halakhah* for the sake of an evolving ethic.

M Gittin 4:2

בראשונה היה עושה בית דין במקום אחר ומבטלו התקין
 רבן גמליאל הזקן שלא יהו עושין כן מפני תקון העולם
 בראשונה היה משנה שמו ושמה שם עירו ושם עירה והתקין
 רבן גמליאל הזקן שיהא כותב איש פלוני וכל שם שיש לו
 אשה פלונית וכל שום שיש לה מפני תקון העולם:

At first, he (the husband) would convene a court in another place, and cancel it (the *get*). Rabban Gamaliel the Elder enacted that they would not do this for the sake of *tikkun haolam*. At first, he would change his name or her name or the name of his city or the name of her city. And Rabban Gamaliel the Elder enacted that one would write (on the *get*) “Ploni and all names that he has,” “Plonit and all names that she has” for the sake of *tikkun haolam*.

At first, before Rabban Gamaliel the Elder came to fix the situation, it had been the case that a husband could decide to divorce his wife and send her a *get* only to change his mind and instead of intercepting the *get* before it reached his wife, he would simply convene another court and have the *get* cancelled legally. Meanwhile, his wife may have received the *get* and understandably assumed it was valid. She may then have married another man, unknowingly committed adultery, and conceived a child who will be faced with the stigma of being a *mamzer* (see below). “Since this problem arose not from her

own adulterous misdeeds, but from the confusion of her (possibly) ex-husband, it was a heavy and unjust price for her to pay for her and her new family. With such a possibility looming, it is no wonder that the rabbis altered law to prevent it."¹²⁹ The new law, instituted by Rabban Gamaliel the Elder makes logical and ethical sense, but was clearly a significant change in tradition as the law as it stood, while technically in keeping with Torah law, presented such unfair consequences to the powerless (ex-)wife, that he felt a need to completely alter tradition.

In the second case, a similar problem arises. Here, the husband can manipulate the *get* to make it invalid or unclear enough so that a divorce may or may not have taken place, again leaving his wife or ex-wife in an uncertain and untenable position. Again, for the sake of *tikkun haolam*, literally "for the reparation of the world" (or figuratively "for the preservation of communal welfare"), that is, to make things fair and just, Rabban Gamaliel the Elder tightens the laws of the *get* so that the husband cannot manipulate the system to his advantage nor to the disadvantage of his wife. Regarding these two statements of M Git. 4:2, Panken writes: "(i)n sum, then, we see that the rabbis have re-created their stance on this law to uphold social welfare, especially the welfare of the disadvantaged party."¹³⁰ As a woman and as a wife, the powerlessness of this member of society causes her to be marginalized. The rabbis, understanding the greater need for justice and the spirit of the law, rescue her for such potential injustices as could be placed on her by a vindictive, or merely vacillating, husband. Yet, what of the husband who is clear on his intentions not to give his wife a *get*, even if she so desperately wants to

¹²⁹ Aaron Panken, *The Rhetoric of Innovation: Self Conscious Legal Change in Rabbinic Literature* (New York: University Press of America, 2005), 72-3.

¹³⁰ *Ibid*, 74.

divorce him? She also finds herself in need of a legal rescue. And she, too, finds recourse through legal acrobatics and permissiveness on the part of the Talmudic rabbis.

There are times in which a woman is stuck as an *agunah* because her husband has disappeared and times in which she is stuck as an *agunah* because her husband will not grant her divorce. These two situations called for multiple responses from the rabbis.

First, for a husband who has disappeared without leaving his wife a *get*, leaving no alternative for his wife except a life of being bound to a dead man, the rabbis found ways to be exceedingly lenient with the laws. For example, even though the testimony of children in any other situation is deemed insufficient to prove fact, overhearing children saying that they went to or were going to a funeral of some woman's husband was enough proof for the rabbis to free her from her marriage.¹³¹ In fact, a woman's own testimony regarding the death of her husband would serve as sufficient proof that her marriage was legally over.¹³² Katz explains that "(t)he rabbis thoroughly realized the hard life of the deserted woman and the widow and endeavored to protect them."¹³³ It was surely a great reform and concession for the rabbis who made these decisions to make, but none are as bold as the ruling regarding a woman who is enslaved by a husband who refuses to give her a *get*.

BT Ketubbot 3a

כל דמקדש אדעתא דרבנן מקדש, ואפקעינהו רבנן לקידושי
מיניה. אחר ליה רבינא לרב אשי: תינח קדיש בכספא,
קדיש בביאה מאי איכא למימר? שויוה רבנן לבעילתו
בעילת זנות.

¹³¹ Mordecai Katz, *Protection of the Weak in the Talmud* (New York: AMS Press, 1966), 61.

¹³² *Ibid*, 61.

¹³³ *Ibid*, 62.

Anyone who betroths a wife, it is with the knowledge that his act is according to rabbinical law, and the rabbis annul his betrothal. Ravina said to Rav Ashi: This is understandable if he betroths her by money, but what if he betroths her by sexual relations – what can be said? The rabbis equate his sexual intercourse with promiscuous intercourse.

In order to effect change in the unfair and oppressive laws related to the distinction in the Torah that allows only men to issue a *get*, the rabbis asserted their authority over the marriage ceremony. During a marriage ceremony, the man says the following words: *k'dat Moshe v'yisrael*, according to the law of Moses and Israel. The law of Moses is the Torah, but the law of Israel is the law of the rabbis. From these words, they impose their authority upon the marriage itself, whether it exists or ever existed. In this case, we learn that the rabbis asserted their power to annul the wedding, as if it had never taken place. Rashi explains that in the above text, the rabbis decided that the ring, or item of value given to the woman as *kinyan* (acquiring) was meant as a mere gift and not with the intention of wedding her. The marriage is then retroactively annulled and the woman is freed. Similarly, if the man consecrated the marriage through *biah* (sexual relations), then the rabbis declared the intention of that act to be fornication and not marriage. This is truly a tremendous step forward toward making Halakhah more ethical and fair for a marginalized and oppressed member of society, in this case a wife. The precedent set in these rulings lasted only, unfortunately, until around the fifteenth century.¹³⁴ For all those years that this precedent was honored, countless women must have been saved from marriages in which they were trapped. The law had simply developed to a state that was unacceptable for women and thus unacceptable for the rabbis.

¹³⁴ Zemer, *Evolving Halakhah*, 18.

In the above case, the marginalized members of society in question are women because of their powerlessness in initiating and carrying out divorce proceedings with their husband. While the rabbis attempted to correct this injustice, there were plenty of instances in which a woman was unable to attain a *get* at all before remarrying. There were plenty of other instances in which women and men chose to have extra-marital relations, their decisions having little to do with the topic of this thesis. For the rabbis, one of the major problems with both a woman remarrying before attaining a *get* or having an extra-marital affair was that the children who were born from these unions suffered great societal consequences. A son or daughter born from this situation would have to carry the title of *mamzer*. Both sons and daughters, children and adults, had to face the consequences of carrying this stigma, including not being able to marry a Jew, without having committed any crime themselves. While the parents can simply repent and be forgiven for their misdeeds, their offspring remains eternally marked as a *mamzer* with no recourse to argue or change their plight.¹³⁵ The recipe is right for the rabbis to address such an obvious unfairness in the system.

It is important to note that, like the *agunah*, the *mamzer* is not technically on the biblical list of marginalized members of society. It is a later iteration of what it means to be powerless and treated unjustly. The term, however, does appear in our biblical text and can help us understand the locus of its stigma.

¹³⁵ Guttman, "The Role of Equity," 77.

Deuteronomy 23:3

לא יבא ממזר בקהל יקוק גם דור עשירי לא יבא לו בקהל
יהוה:

No one misbegotten shall be admitted into the congregation of Adonai; none of his descendants, even in the tenth generation, shall be admitted into the congregation of Adonai.

The JPS 1985 edition chooses to translate *mamzer* as "misbegotten," although in Zech 9:6, they translate the same word as "mongrel." Just dealing with Deut 23:3, The King James Bible, the 1917 edition of JPS, and many others, choose to translate this word as "bastard," while the new King James Bible translates *mamzer* as "one of illegitimate birth." The New Jerusalem Bible adds another level to the ambiguity of this term, translating it as "half-breed." The English Standard Version adds "one born of a forbidden union," while the Douay-Rheims American Edition of 1899 does what it can to preserve the true meaning of the term, allowing for its truly ambiguous nature to be retained, not translating, but transliterating this word simply as "*mamzer*."

Clearly, the term originally meant something specific to the writer having something to do with a child of problematic origins, but just what that was remains unclear and undiscovered. There were various attempts to define this term in rabbinic literature, making each of the attempts at clear translation above much more logical as they reflect the Talmudic debate that resulted from such equivocality. The understanding of this word came from both the verse above and Zech 9:6 in which it is intimated that a *mamzer* is some sort of foreigner or alien.¹³⁶ M Yev 4:13 records a discussion regarding who qualifies as a *mamzer*:

¹³⁶ Zemer, *Evolving Halakhah*, 89.

M Yevamot 4:13

איזהו ממזר כל שאר בשר שהוא בלא יבא דברי רבי עקיבא
שמעון התימני אומר כל שחייבים עליו כרת בידי שמים
והלכה כדבריו רבי יהושע אומר כל שחייבים עליו מיתת
בית דין

Who is a *mamzer*? Anyone who is a flesh and blood relationship of one who is defined by the verse "No one misbegotten shall be admitted into the congregation of Adonai" according to the words of Rabbi Akiva. Simeon the Temanite said: "anyone (who is the offspring of one) who is punishable by death according to God. The law is according to his words. Rabbi Yehoshua said: "anyone (who is the offspring of one) who is punishable by death according to the court.

In the first instance, Rabbi Akiva uses somewhat circular logic as he employs the terminology of Deut 23:3, above, to insinuate that a *mamzer* is anyone who is the offspring of a relationship in which the two people cannot enter into the congregation of God. This comes to be understood as the strictest of arguments, that a *mamzer* is anyone who is the offspring of a man and woman whose relationship is forbidden in the Torah. The second suggested definition in M Yev 4:13 is that of Simeon the Temanite, who defines a *mamzer* as someone whose parents would be punishable by death according to God. Rabbi Joshua explains that a *mamzer* is punishable by death at the hands of the Sanhedrin, or human court. Zemer sums up the results of these myriad opinions:

(T)he codified Halakhah follows the opinion of Simeon the Temanite. . . . Rabbi Joshua's opinion that a *mamzer* is the offspring of a union that makes its partners liable to capital punishment at the hands of an earthly court – such as adulterous relations involving a married woman – was adopted in Halakhah to supplement the definition of Simeon the Temanite.¹³⁷

A *mamzer*, then, became any child of a union that is punishable by God or by an earthly court, placing the most common type of *mamzer* as one who is the result of an adulterous

¹³⁷ *Ibid*, 91.

relationship involving a married woman who either did not acquire a proper *get* or had an extra-marital affair.

None of this would, of course, be an issue, if the stigma and societal burden placed on a *mamzer* were not so difficult for the individual bearing this title. Zemer states the matter succinctly: "A *mamzer* (feminine *mamzeret*), the offspring of an adulterous or incestuous relationship, may marry only a convert or another *mamzer/mamzeret*. All descendants of such persons until the end of time are deemed to be *mamzerim* and are subject to the same marital restrictions."¹³⁸ *Mamzerim* are second class citizens, withheld the marital rights of Jews, and destined to be tainted eternally. The worst part of the situation is the part that qualifies this issue for the rabbis as entirely unfair. The *mamzer* himself has committed no wrong. The sin is the parents' and the punishment is the child's. The rabbis, working diligently to fulfill their understanding of social justice, the biblical worldview of equity, clearly felt compelled to address such an obvious injustice. Alexander Guttman writes, however:

(T)here is not a single rabbi from Talmudic times to date who was able to find a direct straightforward way to change the status of the *mamzer*. We must emphasize the words *direct* and *straightforward*. The strong sense of the rabbis for letting equity prevail, even in this most difficult of instances, allowed them no rest until they found certain ways of alleviating the plight of most *mamzerim*.¹³⁹

Yet it is true that once a person is counted as a *mamzer*, there are very few things (albeit not nothing) that can be done to reverse his status. This is an instance, then, which teaches us how the rabbis could act in anticipation of events which would affect the status being placed on at-risk offspring. This is not a case of a singular individual in a courtroom, rather, this is a case in which an entire system of law needed to be changed in

¹³⁸ *Ibid*, 87.

¹³⁹ Guttman, "The Role of Equity," 77.

light of the future consequences of its application. Guttman writes: "(p)reventing the *mamzer* status of children in exceptional cases by exceptional means is not the main concern of the rabbis. They have been constantly in search of means to stop *mamzerut* on a large scale."¹⁴⁰ This seemingly irrational statement about the rabbis trying to figure out loopholes in their own law system must be understood in the context of the system of Halakhah, by which they felt themselves bound, as was discussed at length in Chapter 2.

There were, however, multiple ways in which the rabbis made some serious attempts to deal with the problem of *mamzerut*. One method was to correct the problem for the next generation, although this clearly had no bearing on the status of the *mamzer* at hand. A second major method was to try to alter the status of the would-be *mamzer* him/herself before birth. And finally, there was a more passive, yet more effective and ethically sound method which included a communal turning of a blind eye. In this type of legislation, the *mamzer* is relieved of his second class status through institutional laws of passivity.

The first attempt at equitable legislation is to end the eternality of the stigma.

While in this case, the *mamzer* remains a *mamzer*, his offspring will be free:

M Kiddushin 3:13

רבי טרפון אומר יכולין ממזרים ליטהר כיצד ממזר שנשא
שפחה הולד עבד שחררו נמצא הבן בן חורין רבי אליעזר
אומר הרי זה עבד ממזר:

Rabbi Tarfon says: it is possible for a *mamzer* to become purified. How? A *mamzer* who marries a female slave and gives birth to a slave that is set free, this child is found to be a free man. Rabbi Eliezer says: behold, this is just a *mamzer* slave.

¹⁴⁰ *Ibid*, 78.

Rabbi Tarfon explains here that he is about to propose a method for a *mamzer* to change his status. The Mishna asks: "how?" Tarfon explains that a *mamzer* who marries a female servant will give birth to a child who, when set free, will be without the stigma of his father. Rabbi Eliezer then comes to disregard this as untrue, explaining that the child will merely be a slave and a *mamzer*. Even with Rabbi Eliezer's objection, however, the *halakhah* rules according to Rabbi Tarfon.¹⁴¹ This solution, while fitting with our theme of finding creative solutions to legal problems, solves only the issue of the *mamzer's* progeny and not the *mamzer* himself. Furthermore, this moderate solution would only be useful in a time of slavery, thereby limiting its broad appeal. It is, however, a viable attempt at manipulating the law and so worth including in this thesis.

A different approach to the problem of *mamzerut* has been to nip the problem in the proverbial bud. The status of *mamzer* is so troubling and reversing it so complicated that one is better off nullifying even the possibility that a child is or ever was a *mamzer*. The rabbis found various methods for this type of legal sidestepping. While Zemer explains that the ginger nature of the issue of *mamzerut* is such that the rabbis prefer to speak of it broadly, thereby minimizing discussing of specific cases, and considering the fact that we are now in the "legislative equity" section of this chapter, I will veer slightly from both of these truths for just a moment. Similar to the case of Zelophehad's daughters, there is a case of *mamzerut* that begins as an adjudicative issue and then becomes an institutionalized legislative law. We learn of a case in which a woman gives birth 12 months after her husband has left town.¹⁴² Logic would indicate that the woman had had an extra marital affair, leaving the unborn child facing a lifetime of stigma.

¹⁴¹ Zemer, *Evolving Halakhah*, 98.

¹⁴² BT Yevamot 80b

Rabbi Tosfa'ah, however, rules that the child had been in the womb for 12 months, demonstrating that "(t)he rabbis were so distressed by the ethical dilemma of *mamzerut* that they were willing to accept legal fictions of this type as the only way to resolve an otherwise insoluble problem."¹⁴³ This moment of empathetic adjudication evolves into legislation when the text tells us "the *halakhah* is according to Rabbi Tosfa'ah." Furthermore, Rambam records this law in Mishneh Torah, saying that in all cases, a child can be in the womb for 12 months, but no more.¹⁴⁴ This one case falls into this section of our chapter because it is intended to be and is in actuality, precedent setting.

A similar issue is brought up in PT Kid. 3:12, in which it is taught that a *mamzer* will not live past 30 days. This summarily eradicates the problem of a *mamzer* marrying someone without *mamzer* status. Moreover, like the test of the bitter waters, one's life and health is proof of one's innocence and pure status. Like Rabbi Tosfa'ah above, this ruling is a preemptive equitable institution. Finally, regarding this method of solving the problem before it becomes one is found in BT Yev. 45b. Here, the rabbis create a process in which a step is taken even farther back from the *mamzer*. The status of the father is looked at carefully in order to determine whether he is indeed a Jew or even if it is possible to annul his conversion. This solution has multiple benefits as it reflects the meta-concept of social justice as we have been discussing. Here, the stigma is entirely taken off of the mother and placed on the mainstreamed member of society, the father, who retains the most power in this relationship. The field is symbolically, if not actually, leveled, for both the woman and the child who could bear the name *mamzer*.¹⁴⁵

¹⁴³ Zemer, *Evolving Halakhah*, 100.

¹⁴⁴ *Ibid*, 98-99.

¹⁴⁵ *Ibid*, p. 109-110.

One of the most passive, subversive, and successful forms of institutionalized equity appears in BT Kid. 71a. It seems normative that the rabbis would do *halakhic* somersaults like the ones named above to navigate their own law system. It is a different story entirely, however, for the rabbis to suggest ignoring their legal system. In a rabbinic “don’t ask don’t tell policy,” BT Kid. 71a allows *mamzerim* to assimilate into their community without having their histories be probed or their identities revealed. This text explains that a family who has assimilated into the community may remain assimilated. “This has been understood to mean that a family of questionable lineage must not be cast out of the community and that no effort should be expended to investigate whether its ancestry is tainted.”¹⁴⁶ This is the only means by which a *mamzer* already bearing such a status could have that identity effectively reversed, allowing him to return from the margins of society to again live a life in the mainstream, protected by the full measure of the law. This becomes codified *halakhah* according to Rabbi Moshe Isserles in his glosses to the Shulchan Arukh:

SA Even Ha’ezer 2:5

אבל משפחה שנתערב בה פסול, ואינו ידוע לרבים, כיון
שנטמעה נטמעה והיודע פסולה אינו רשאי לגלותה, אלא
יניחנה בחזקת כשרות, שכל המשפחות שנטמעו בישראל
כשרים לעתיד לבא.

With regard to a family with some blemish in its ancestry that is not known to the general public—once it has been assimilated, a person who knows of the blemish is not permitted to reveal it. Instead, he should leave it in its presumed fitness, since all families who have been assimilated into Israel will be fit in the Messianic Age.

Guttmann explains:

The ruling of the rabbis that if a person’s *mamzer* status has been forgotten, and he has been absorbed by the Jewish community, his blemish is eradicated and

¹⁴⁶ *Ibid*, p. 100.

cannot be revived, is a most important rule of equity. It can also be very effective, since a *mamzer* can move to a place where his origin is unknown and become part of his new community.¹⁴⁷

We have traced, then, a text from the Bible which caused injustice among a marginalized class, indeed defining said class as marginal. This issue then made its way into the conversations of the rabbis of the classical rabbinic period as they struggled to find loopholes and options to rescue those hurt by this text. Finally, we have settled on a medieval text, the law code of Joseph Karo, which records a commentary by Moshe Isserles, the composer of HaMapa. Isserles codified the rabbi's best attempt to level this particular playing field by allowing a person who already carries the stigmatic title of *mamzer* to return to a life of normalcy, against all odds, and certainly against the primary idea with which we began which stated that a *mamzer* may not enter into the community even until the tenth generation.¹⁴⁸ The Rabbis, up against the sacredness of their own tradition found loopholes, re-imagined text, meaning, and intentions, and, through silence and some risk taking, moved the Jewish world a little closer to fairness.

In the final example of legislative social justice for the sake of a marginalized member of society, we will explore the plight of the impoverished debtor. This is a person who has borrowed money from a wealthier Jew, thereby creating an obvious power differential. This particular story takes a number of different turns and is one of the better examples of how the rabbis adapted law based on their perception of fairness and the social milieu of their own generation. The issue with which we will begin is the commandment in the Torah that requires all debts to be nullified in the Sabbatical year, which occurs every seventh year, as per its name. While there are many other

¹⁴⁷ Guttman. "The Role of Equity," 79.

¹⁴⁸ Deut 23:3

agricultural and slave-related laws pertaining to the Sabbatical year, our focus will be on the cancellation of debt, meant to aid the poor and prevent them from being stuck in a lower class interminably. We begin with our Torah text in which we find the Sabbatical year referred to by its traditional name, "*shmita*":

Deuteronomy 15:2

וְזֶה דְּבַר הַשְּׁמִטָּה שְׁמוֹט כָּל בֶּעַל מַשֶּׁה יָדוּ אֲשֶׁר יִשָּׂה בְרֵעֵהוּ
לֹא יִגַּשׁ אֶת רֵעֵהוּ וְאֶת אַחִיו כִּי קָרָא שְׁמִטָּה לַיהוָה:

This shall be the nature of the remission: every creditor shall remit the due that he claims from his fellow; he shall not (exact money from) his fellow or kinsman, for the remission proclaimed is of Adonai.

Katz explains that:

(T)he aim of the Bible in enacting these laws for the annulment of debt in the Sabbatical year was to shield the impoverished debtor. Usually, the debtor was a poor farmer or laborer who had borrowed of his richer neighbor or his employer in order to buy seed, food, or tools, and who, in most cases, found himself unable to pay his debt. If he found himself unable to pay his debt before the Sabbatical year, his obligation was annulled as a matter of course.¹⁴⁹

It was considered morally reprehensible to keep a person in an impoverished state, particularly in this case in which it is a fellow Jew or even a family member from whom one is exacting payment. While being in debt or borrowing money in and of themselves are not evils of society, a long-term indebtedness begins to warp the Jewish community into one of unfair power relationships in which Jews become slaves to other Jews, something expressly prohibited in the Bible.¹⁵⁰

While people are expected to be willing to lend money to one another, it is the compounding of debt upon debt that threatens to create such a gap between the rich and the poor that the biblical ideal of social justice simply cannot be met. David Biale

¹⁴⁹ Katz, *Protection of the Weak*, 71.

¹⁵⁰ Lev 25:42

explains that "the laws pertaining to sabbatical remission of debts . . . were . . . designed to prevent the development of immutable economic classes." The ability to change classes, to be free from oppressive poverty, and merely to have the opportunity to be successful financially and socially appears to be an important value in biblical tradition. Furthermore, Loewenberg explains that "[t]his commandment benefited all borrowers, but it was of particular benefit for the poor. One of the consequences of this practice was that it tended to reduce the gap between rich and poor."¹⁵¹ While the existence of a gap between the rich and poor was not itself the main concern, as we have seen that Jewish tradition does not demand that each person has the same amount of each thing, this gap created a dangerous power differential which upset the cosmic balance. Newman explains:

These sweeping social rules prevent economic disparities from becoming permanent features of Israelite society. . . . There can be no permanent underclass, for every seventh year, those burdened by debt . . . are released. . . . When people act on this principle by redistributing wealth and privilege within society, they make it plain that the social order in this world must reflect the reality that all people are equally God's creatures.¹⁵²

The commandment to cancel all debts was intended to avoid such a stratified and immobile community of classes in which the haves and the have-nots were so distant from one another. While the biblical fear of the slippery slope of poverty could hardly be lost on today's generation, this solution did not prove to be without its faults.

With all of the good intentions of these generations, we return to a notion that we visited in Chapter 2, the possibility that there would arise a situation that the rabbis had never encountered which required a change in law and practice. Just such a situation in

¹⁵¹ Loewenberg, *From Charity*, 106-7.

¹⁵² Newman, *Jewish Ethics*, 89.

fact did arise and the issue was taken up by Hillel the Elder. Seeing the shortcoming of the sabbatical nullification of debt in his current society, Hillel enacted the *proshul*. As it happened, the evolution of debt nullification had become a reason for creditors to validly fear that their loans would not be paid back. As the sabbatical year got closer, Hillel observed that creditors would refuse to loan money to the poor. Understanding the implication of his enactment, Hillel dared to uproot this Torah law. We find one example of his action below:

M Shevi'it 10:3-4

פרוזבול אינו משמט זה אחד מן הדברים שהתקין הלל
הזקן כשראה שנמנעו העם מלהלוות זה את זה ועוברין על
מה שכתוב בתורה (דברים טו) השמר לך פן יהיה דבר עם
לבבך בליעל וגו' התקין הלל לפרוזבול: זהו גופו של
פרוזבול מוסר אני לכם איש פלוני ופלוני הדיינים
שבמקום פלוני שכל חוב שיש לי שאגבנו כל זמן שארצה
והדיינים חותמין למטה או העדים:

A (loan secured by a) *proshul* is not cancelled. This is one of the things that Hillel the Elder enacted when he saw that the people were refraining from lending one to the other and they were transgressing that which is written (Deut 15:9) Guard yourself lest there be a base thought in your heart, etc. (Therefore), Hillel enacted the *proshul*. This is the body of the *proshul*: I pass to you, Ploni and Ploni, the judges that are in place of Ploni, that all debt owed to me, I will collect at any time that I want to. And the judges sign below or the witnesses.

The above text includes several different aspects of the *proshul*. First, we discover that Hillel noticed a societal ill in which marginalized and weak members of society were being hurt. In trying to care for their own households, the wealthier members of society had ceased their lending. Hillel creates the *proshul*, then, both to stop the lenders from transgressing a torah law regarding evil intentions and also to aid the economically repressed recipients of their conservative financial decisions. Panken explains "this enactment was intended to help the poorest members of society survive

times of great duress, while at the same time encouraging the wealthy to continue making loans to poor comrades to fulfill their obligation to engage in *tzedakah*.”¹⁵³

The final part of this text, M Shev. 10:4 records the formula of the *prosbul*, in which the debts owed a single individual are passed over to the hands of the court as an institution. This is possible based on our original verse regarding the *shmita* year, which states that “every creditor” must cancel all of the debts owed to him. Hillel the Elder discovers a loophole in this language, allowing for an institution, like a court, to take possession of the loan.¹⁵⁴ The loan, then, stands, and must be repaid.

While it seems antithetical to this thesis to claim that burdening the poor with their heavy debts is just, it becomes clear that it is better, although not perfect, that the poor should be able to borrow money at all in their most difficult times rather than find all doors closed to them in the sixth year. Finding the balance within Hillel’s compromise, Panken explains:

“Without this *takkanah*, the economic situation of the poor would continue to degrade. It was only with the encouragement that this *takkanah* provided to the wealthy, and the positive reassurance that their precious loaned assets would not vanish during the seventh year, that the community could continue this important economic activity.”¹⁵⁵

If Hillel the Elder had not been able to see beyond the intentions of the Torah law, if he had refused to see how society had changed, making the originally socially just law itself unjust, then the weaker members of the community, and eventually the community entire, would have suffered. In upholding the spirit of the law while abrogating the letter of the law, Hillel’s *takkanah* ultimately enacted a greater social justice.

¹⁵³ Panken, *Rhetoric*, 192.

¹⁵⁴ *Ibid*, 193.

¹⁵⁵ *Ibid*, 198.

Throughout this chapter, we have explored just a few of the myriad examples afforded us by our biblical and rabbinic texts. We have witnessed a struggle in which the rabbis tried to balance upholding Torah law and doing what is fair and just for the actual people. The rabbis confessed through their actions that there is a great difference between theoretical law, that rational law that is written down on paper or parchment, and practical law, that law which affects real people with real emotions and real pain.

In the face of difficult biblical passages, the rabbis awarded the weak, the impoverished worker, the landless, trapped wives, *mamzerim*, and those deep in debt with freedom from their unjustly earned oppression. It is interesting to note that there was not just one uniform way in which to enact such changes. Perhaps the rabbis were not willing to make these changes so easy and commonplace that anyone could implement them at any time. Rather, separating out crises of social justice as the primary requirement for radical and heroic change in law prioritizes the cause of justice over all other amendments or modifications. It is from the midst of a crisis of justice that the rabbis will search for unorthodox ways of caring for the weak members of society.

We have explored two types of crises of justice in this chapter. Pelton refers to many of the biblical texts discussed in Chapter 1 and the singular acts of justice recorded in this chapter as adjudicative social justice as "justice as individual desert," saying that this "frame posits that in a just world people get what they deserve and deserve what they get."¹⁵⁶ Initially, this statement seems to go against the ideals espoused in the Bible and later rabbinic literature given the fact that perfectly good people are often subjected to unfair conditions, sometimes because of the sacred laws themselves. And surely it

¹⁵⁶ Leroy Pelton, "Biblical Justice," *Journal of the American Academy of Religion* 71/4 (2003): 749.

contradicts this thesis that has never claimed that hardship and oppression is related to what one deserves, has earned, or has been punished with.

Yet if this statement is read in a different light, then one must ask: What do people *qua* people truly deserve? If "getting what one deserves" assumes that each human being has the right to freedom, compassion, mercy, and dignity, then these acts of individual justice do indeed allow for the fulfillment of this claim. Each person, simply because he or she is a human being, then, deserves to be treated justly – not with the justice of deserts, but with the justice that is more than simple justice and with fairness that is more than simple fairness – with the justice of the Bible.

Yet if individual justice means that people get what they deserve, then what people get should be proof of what they deserve. Pelton continues his thought: "But, furthermore, this frame implies that if people do not get what they deserve, then it is up to society to ensure that they do."¹⁵⁷ Society, in this case, individual judges, must enforce the law in sometimes creative ways in order to uphold and realize the spirit of the Biblical worldview of social justice. These things, Pelton correctly asserts, do not always simply fall into place. This is also true regarding the second type of social justice discussed in this chapter – that type termed legislative social justice.

In discussing the history of the import of social justice in Jewish tradition, Eugene Borowitz lauds a particular aspect of justice. Writing about a time when the marginalized member of society was the Jew, he explains:

"(T)he Emancipation of the Jews did not come about by benignly waiting for internal developments, market forces, the private sector, or personal growth to grant Jews rights. It came by government initiative. Only in countries where government acted and formally granted Jews equality and then demanded, if

¹⁵⁷ *Ibid.*

slowly, that their often unwilling citizenries live up to that grant, did Jews truly enter society. Unless Jews are prepared to deny the experience of their own families and ethnic group, they must emphatically reject the notion that government has no proper role in the moral improvement of the social order.¹⁵⁸

To his list of *laissez faire* doctrines, we can add that social justice neither comes about by benignly waiting for God to make things right or for people to act out of the goodness of their hearts to do what is right. And to his challenge in the final sentence, we can add that not only would Jews be denying their families and ethnic group by arguing that government has no place in the moral evolution of law and society, but they would be disregarding hundreds of years of Jewish tradition in which government institutions guided the laws, directed the experience of the weak members of society, and purposefully created ways in which the ideals of social justice would be fulfilled. Idly waiting for the world to become just is simply not part of Jewish tradition.

¹⁵⁸ Eugene Borowitz, "The Critical Issue in the Quest for Social Justice: A Jewish View," in *Contemporary Ethical Issues in the Jewish and Christian Traditions* (ed. Frederick E. Greenspahn; Center for Judaic Studies at the University of Denver, 1986), 200.

CONCLUSIONS AND PROJECTIONS

As I set out to write this thesis, I found myself confronted with a world in which Jewish social justice has been relegated primarily to *tzedakah* collections and Yom Kippur canned soup drives. These few examples of direct service programs tended to take place in synagogues or similar institutions, unconnected by text, topic, or tradition to the greater fabric of Jewish life or to the intended goal of taking part in bringing about a socially just world. Due to a lack of understanding of the Jewish mandate of social justice, a lack of energy for it, and, likely, a feeling of being overwhelmed by injustice, these institutions are falling short of their great potential to wield major power in implementing a truer vision of Jewish social justice. I wondered, then, what it might look like if our congregations were to engage in a more authentic form of this type of work with action that more closely resembles the trajectory of Jewish history and is more relevant in terms of a modern way of realizing this legacy.

If social justice truly is the means toward redeeming an unredeemed world, then we are all obviously falling short of our responsibilities. Yet just what those responsibilities even are has become unclear. While the Jewish community has certainly been very successful in raising money for recent tragedies like the devastation wrought by Katrina, Rita, and the Tsunami, the work of systemic justice as it arises from our inherited tradition is largely going undone. Darfur remains in a state of genocide. AIDS, hunger, homelessness, homophobia, and other systemic issues that attack the marginalized and powerless members of society persist under the watch of the Jewish people and all people. I began this project with the belief that we are in need of a theology of social justice, direction, and inspiration, in order to know both what is

expected of us and of what we are capable. It was with this very personal and perceived communal need that I began searching for answers.

I wanted to discover the meanings of justice within Jewish tradition so that I could identify an authentic and useful way of proceeding forward as a socially conscious Jew. I first assumed that the concept of justice would have changed drastically over time, responding to new crises, situations, and environments in each successive generation. I expected to encounter a search for a true justice by unearthing hints as to how each generation of leaders and people interpreted justice in their day. I expected to find great differences between the generations, leaving me to interpret what our next step might be. What I found was something much greater and more profound. While the application of justice surely was reinterpreted through history, the overarching themes persisted. Through my research of scholarly texts and an honest dialogue with the Bible and classical rabbinic texts, I found a complete and connected fabric of Jewish social justice. While the players, laws, and ideas evolved, the concept of social justice as a manifestation of the biblical worldview of social justice remained intact.

Like a bridge or building built to sway in the wind, the Jewish mandate of social justice was constructed to withstand change in the environment without crumbling or endangering those who rely on it. Social justice has been the driving force behind *halakhic* innovation, yet has retained the same basic goals and purposes as it has had from its first construction. My findings furthered my desire to understand the essence of Jewish social justice in order to apply the system more responsibly and more actively in the world in which I live, a world in which too many of the intended benefits for humanity have been left by the wayside.

I began this thesis by identifying a general Jewish mandate for social justice, conscience, and responsibility. It is clear even from a folk understanding that Judaism both offers the world a moral structure from which to act and also holds itself responsible for acting ethically in relationship to others and the world. Yet this surface understanding does not nearly express the complicated nature of such a dynamic structure as was revealed to me throughout this thesis. In fact, it often seems to be just this whitewashing of social justice that allows our institutions to do small acts of justice without engaging in systemic models of change and innovation which would lead to a greater sense of humanity and would provide a path toward an end to oppression. Jewish social justice, however, is not about social band-aids. The picture is much bigger than that.

The Jewish system of social justice is, in fact, able to respond to the general needs of society and the specific needs of each human being. It finds value in an overarching system of laws and regulations which guide a community forward, standardizing their actions and relationships in generally fair ways. This generalized system of justice allows members of society to know what is expected of them. At the same time, this is a system which has built into it a compassionate flexibility allowing each individual to be served justly by the law in cases in which one's own situation causes the fulfillment of the law to contradict the deep meaning of social justice and equity. This aspect of the Jewish system allows for the concept that an otherwise just law might prove unfair for some individual at some point in time without having to know exactly what that issue will be in advance. This system, then, knows both its limitations and its loopholes.

Moreover, when the entire system has evolved to a place of unfairness or inequity for some identified group of society, the system has the ability to regenerate those sets of

laws into a new set of laws in which such a group is able to receive more fair treatment. I found that this can take place either when a Torah law has been interpreted unfairly, causing an injustice to go unchecked for some time, or when the essence of what justice truly is itself has evolved. In both cases of legislative equity, this type of evolution is one intended to set a precedent for the future and systemically change the law, at least until the next evolution. While brilliant, and something we need to utilize actively, I found that this system of flexibility within structure was not unique to Jewish law.

While Judaism has come to see its own role in society as a light unto the nations, its moral concern and social teachings come out of a shared society in the Ancient Near East. Having explored such terms as *Ma'at*, *Misharum* Edicts, and *andararu*, I discovered a wealth of societies struggling to realize a vision of social responsibility beyond a simple utilitarian doctrine of a functioning community. Having explored divinely mandated equity in Egypt, Mesopotamia, and Assyria, the picture of social justice in the biblical tradition came into focus. Many of these Ancient Near Eastern reforms and commandments, including those found in the Hebrew Bible, revolved around economic injustice and freedom for oppressed or enslaved individuals or groups who would otherwise be trapped in a persecuted social class. Within these traditions, there appeared to be an obvious dissatisfaction with an immobile class system which fed into itself while widening the gap between the rich and the poor, the haves and the have-nots.

As I explored the various terms used to express a state of justice in the Hebrew Bible, I found that the most common are *mishpat*, *tzdek*, and *meisharim*. While none of these words necessarily carry the deep meaning of the complex biblical worldview of social justice, used throughout various texts and in grammatical partnership with one

another, they come to tell a story of equity within a society whose laws are intended to be more just than simple justice. Especially in a hendiadys such as *mishpat u'tzedakah*, "justice and righteousness," these words work together to express a divine intention of the nature of relationships and responsibility, both of the king or ruling class, and of the people themselves.

When our communities today settle for only introducing members of our congregations to the word *tzedakah*, we ignore major aspects of our justice tradition. Our students continue to believe that *tzedakah* is charity in the most secular sense of the word. Yet *tzedek* is part of a much larger story, as we saw in this thesis. *Tzedek* is about equity and fairness for all members of society. It tells a story of God's own righteous actions and our capacity to take part in *imitatio dei*. Leaving out words like *mishpat* and *meisharim* from our teachings, we lose from our theology the idea of a cosmic balance of equity throughout the world. We lose a sense that there are certain mitigating factors found within the identities of real human beings that require a deeper understanding of fairness than that which comes from collecting twenty five cents from our Hebrew school children each week. In fact, we lose our connection to our history and settle for a blurry form of universalistic wishy-washy justice whose blandness threatens to extinguish any existing passion for real justice.

One aspect of social justice that our modern Jewish communities must learn to tap into if we are to fulfill a more authentic version of our own identity became apparent to me through this thesis. A major part of the biblical worldview of social justice is revealed through what we called "empathy statements." These are statements that recall not just the Exodus out of Egypt and the redemption of the people, but the emotions

elicited when recalling such a narrative. These verses remind the reader that she was once a stranger and a slave in the land of Egypt, oppressed with no recourse to action. This reminder is textually followed or preceded by a commandment to treat various members of society with compassion in either a broad way or with specific examples.

Without a slavery and redemption narrative, biblical social justice would look vastly different. As the Egyptian term *Ma'at* means both social justice and is the name of the god who metes out that justice, so is there some sense that the God of the Hebrew Bible has a relationship with God's people based on this moment in history. We experience both God and justice, at least at this moment, as one. It is here that the people learn from God the power of redeeming the other and hearing the cries of the oppressed. Yet it is also a communal memory which, when called upon, is intended to elicit great empathy in the reader who has experienced an oppression likened to the experience of others today. Without accepting this moment in time as the defining moment in the Jewish story of social justice, and without tapping into its power, we will continue to create Jews who are satisfied with writing a check to the Salvation Army, not because they are evil people, but because they have not been taught otherwise.

These empathy statements come together to identify which groups in fact are the oppressed members of society. As the reader is reminded of his identity, the identities of those who are his responsibility are also revealed. These marginalized members of society include the poor, the widow, the orphan, the slave, the stranger, the hungry, the imprisoned, and other categories of people who are oppressed. These terms employed specifically by Deuteronomy and the Prophets are, in fact, evolving archetypal titles symbolizing the powerless members of society. They become the focus of equitable law.

These categories of humanity were collected from evolving lists from the Bible through the classical rabbinic period. This evolution opened the door to what is likely our greatest task. We now must ask ourselves: "who are the marginalized members of our world"? We know that we are obligated to address their needs and work toward their freedom. We know that we are commanded to fight for their rights in ways that they themselves are unable to do. We know that this task presents itself as a means toward redeeming the world. Yet who are they?

Their true identities are, of course, ever changing. Identifying the oppressed and weaker members of society is one of the most important obligations of each generation of Jewish institutions, second only to actually acting on their behalf. I would argue that our generation's list of marginalized people would include homosexuals, immigrants, poor people living in the developing world, the homeless, children who have no access to education, people living with AIDS, women being used for sex trafficking, and any other oppressed group or individual who remains enslaved, waiting to be redeemed, currently powerless in their own situation. The few groups that I named above are surely just a fraction of the persecuted and suffering people who are in need of attention and even redemption. What matters most is identifying the criteria by which to identify those on the margins of society who do not have the power to act for themselves. This is done by farming the biblical empathy statements for meaning, understanding the relationship between those members of society and mainstream society in their era, and emulating what was done on their behalf, or at least what was commanded regarding their welfare.

It should be noted that many of those on the short list above are likely to be non-Jews. On the one hand, we can say that the biblical category of "stranger" opened the

door to this new iteration of social justice on a global scale, yet I would argue that we are not even constrained by such textual permission. Our generation calls for global responsibility in the same way that biblical texts called for care for the widow. These empathy statements demand our attention and even more, our action, in such matters as equal rights, the dangers of international free trade policies like CAFTA, seeking a solution to AIDS in Africa, grassroots change in the developing world, health care for immigrants, elderly, children, and middle class workers, and other current crises of justice plaguing our world entire. These texts recall our suffering not so that we can limit our compassion, but so that we awaken to the suffering in others. Just as we have found that it is not enough to give money, it is also insufficient to focus our attention on the Jewish community. The list of marginalized people, of weak members of society, has grown far past such simplicity. Our universe of obligation has reached the four corners of the world. In his introduction to Jeffrey Sachs' book *The End of Poverty*, Bono writes:

(F)ifteen thousand Africans (are) dying each and every day of preventable and treatable diseases – AIDS, malaria, TB – for lack of drugs that we take for granted. This statistic alone makes a fool of the idea that many of us hold onto very tightly: the idea of equality. What is happening in Africa mocks our pieties, doubts our concern, and questions our commitment to that whole concept. Because if we're honest, there's no way we could conclude that such mass death day after day would ever be allowed to happen anywhere else. Certainly not in North America, or Europe, or Japan. An entire *continent* bursting into flames? Deep down, if we really accept that their lives – African lives – are equal to ours, we would all be doing more to put the fire out. It's an uncomfortable truth.¹⁵⁹

The mandate of equality among people, of a cosmic balance of social justice in this globalized world can no longer be realized by working just within the Jewish community and those who dwell nearby. The very definition of "stranger" has been

¹⁵⁹ Bono, forward to *The End of Poverty: Economic Possibilities for our Time*, by Jeffrey Sachs (New York: The Penguin Press, 2005), xvi.

vastly extended and while the consequence of such expansion is a much greater call to action, it is well within the boundaries of Jewish social justice. These issues do indeed seem to fulfill an authentic aspect of Jewish social justice, yet they are very far from the specifics of biblical acts of justice. In fact, for the most part, these issues did not even exist in the biblical period. Yet through this thesis, I believe that I have found a template for change and risk-taking innovation that would allow for the interpretation of biblical texts to mandate Jewish action on the above issues and issues like them. The rabbis of the classical rabbinic period also felt compelled to seek out not just the letter of the law, but the true spirit of the law. Their times and their issues were also vastly different from those in the Bible, yet the basic structure of freeing the weaker members of society from their oppression remained a constant.

The rabbis made two major attempts to fulfill the biblical worldview of social justice. On the one hand, they established laws that would help fulfill the commandments to be impartial. This type of fairness took the form of creating the appearance of equality between litigants within a courtroom. Their intention was to make sure that the judge would not be biased by wealth or power. Here, the onus to equalize the parties was on the richer of the litigants to raise up his poorer counterpart and the weight of impartiality was placed squarely on the judge. Yet the rabbis clearly also knew that this was just one measure that could be taken to ensure a fair trial. Furthermore, they knew that impartiality was only one level of definition for the word "fair."

Besides placing the veil of ignorance over the judge in cases which called for such procedures, the rabbis also sought to fulfill the mandate of subjectivity for the sake of a true justice that even required that the identities of the parties be known. In one example,

I found that a judge made a concession in the law for the sake of a physically and socially weak party, while in a second example, a judge bent the law to rule for the sake of impoverished workers.

A second type of equity that the rabbis tried to create was that of legislative equity in which a law is changed for an entire group of people who have suffered an injustice because of the current legal system. These acts of equity were not done to one individual, but rather to a group of people and rather than being a one time exception, this new law became the rule. Under this rubric, some of the examples of injustices we explored were *agunot*, *mamzerim*, and indebted poor workers and their lenders. Some of these issues remain today. This category is rife with possibility for modern issues with which congregations can get involved.

As I mentioned above, one example of an issue that can be addressed under this rubric is that of CAFTA, the Central American Free Trade Agreement. In short, this is a foreign trade policy which would allow the United States to export produce to Central American countries without paying taxes on their goods. In return, Central American countries could ostensibly export their produce to be sold in the United States without having to pay taxes on their goods. On the surface, free trade seems to be fair. Yet a poor country like El Salvador will be overcome by the powerful and rich United States who will be able to sell their produce much more cheaply than local farmers can. Local farmers will lose their already meager livelihood and the local economy will be depleted. Free trade is unfair because the players do not start out on equal footing. This is what makes Fair Trade agreements just one critical issue of Jewish social justice that has almost nothing to do with Jews. The authentically Jewish ruling in this case would be to

assist the weaker party and level the playing field before any business is done between these two unequal parties. The authentically Jewish action would be to get involved with the debate, stand for the rights of the oppressed, and take part in a fair trade campaign or act politically for the sake of Central American impoverished farmers. Allowing even our own country to play the part of the bully is in direct opposition to Jewish law.

Furthermore, regarding this category of social justice, it is a tragedy that with all of the possible ways in which the Orthodox community could respond to *agunot*, an issue addressed, and to some extent solved, by rabbis in the classical rabbinic period, they choose not to. Modern rabbis who deal with this issue by and large choose to allow women to suffer such oppression. While the issue of *agunot* is a non-issue for progressive Jewish communities in America, the fact that it still exists makes it an issue for every Jew. There is clear precedent for how to resolve this problem for trapped women and yet unlike the rabbis of the classical rabbinic period, modern rabbis refuse to take such a risk. Some of the issues that this type of social justice may indeed compel Jewish communities to consider today are similar in structure to the problem of *agunot*, but entirely different in details.

Ultimately, whether a certain community feels compelled to argue for the rights of homosexuals to legally marry, or to work for condom distribution and AIDS education in African villages, or any other form of legislative equity can be left to each community to decide. This thesis does not argue for acting on liberal party line politics as a mandate, rather it calls for acting to redistribute power and goods fairly. The fact of Jewish communal engagement in such activities, however, can hardly be optional if a congregation is truly dedicated to doing social justice work. These types of action and

those outlined in the preceding chapters are, in fact, what defines Jewish social justice work.

As I have attempted to demonstrate in this conclusion, a thesis about equity and true social justice in the Jewish tradition can be written in the past tense for only so long. It can have no effect on the present unless the present is part of the discussion. Furthermore, it is merely an exercise in futility if it does not intend to affect the present. The following is an example of an authentic Jewish act of social justice in recent history. It is an example of a Jew who used his power to enact systemic change to free the oppressed from their suffering and begin a process of leveling the playing field:

To President John F. Kennedy, The White House, June 16, 1963:

I look forward to privilege of being present at meeting tomorrow at 4pm. Likelihood exists that Negro problem will be like the weather. Everybody talks about it but nobody does anything about it. Please demand of religious leaders personal involvement not just solemn declaration. We forfeit the right to worship God as long as we continue to humiliate Negroes. Churches and synagogues have failed. They must repent. Ask of religious leaders to call for national repentance and personal sacrifice. Let religious leaders donate one month's salary toward fund for Negro housing and education. I propose that you Mr. President declare a state of moral emergency. A marshall plan for aid to Negroes is becoming a necessity. The hour calls for high moral grandeur and spiritual audacity.

--Abraham Joshua Heschel¹⁶⁰

Besides being profound and passionate, there are several ways in which Heschel's telegram to President Kennedy serves as a quintessential model of modern Jewish social justice. First, he addressed his letter to the office of the President. "Speaking truth to power" is a reflection of the fact that so many of the biblical commandments about social justice are directed at kings. Also, we looked at two texts in which a prophet condemns

¹⁶⁰ Telegram sent by Heschel to President Kennedy, June 16, 1963.

the leadership for their inaction or unjust action (Isa 1:23 and Jer 5:28). Heschel demanded in this short, but powerful note that President Kennedy do his job as leader.

Heschel also demanded of himself that he have a certain relationship with that power. Regarding both Mesopotamia and Ancient Israel, Klingenberg writes that "circles associated with the courts . . . and with legislation are likely to have taken a positivist view (of law); those associated with religious institutions appear from the biblical texts to have adopted the covenantal model (of law).¹⁶¹ By writing "we forfeit the right to worship," Heschel aligned himself not with the secular legislators, but with the religious community. He cared about the outcomes of laws and so addressed the need for a more covenantal system of justice. Jewish tradition elsewhere understands the dangers of becoming too friendly with the government.¹⁶² The role of the Jewish community, instead, as Heschel demonstrated, is to be the voice of the prophet.

Second, Heschel directed his accusations at the religious community and its leadership. It was for him, and as we have revealed through this thesis, for the Jewish people, a religious, and not simply political or secular demand, that the biblical worldview of social justice be carried out. This is an issue of God. Heschel stated that by ignoring those commandments, the Jew nullifies her own prayer and may not even enter into discourse with a God who requires otherwise. As *Ma'at* was for Egypt, so the biblical God is also a God of justice. Heschel seemed to be accurate in his assessment that one who ignores social concerns of this magnitude does in fact surrender his relationship with that deity, in this case, God.

¹⁶¹ Klingenberg, "Law and Justice," 229.

¹⁶² Pirkei Avot 1:10

Third, Heschel called for personal sacrifice, something that many of our communities have lost today. Yet he did not call for sacrifice for futile ends. Rather, he called for it for the sake of the systemic justice found within biblical discourse. Instead of raising money and buying African Americans food or clothing, he demanded that their quality of life be addressed and that they be given the same rights and opportunities as White people had in that day. Heschel fought for education and fair housing, two sets of rights that create opportunities not just for greater wealth, but for freedom and self-actualization. While these projects would surely call for money from the community as he called for the very salaries of the clergy, this is not *tzedakah* as charity. This is *tzedakah* as social justice.

Finally, this simple telegram reflects the greatest values of Jewish social justice uncovered in this thesis by virtue of the fact that Heschel called institutions to act and to act institutionally. First, he called into question the many mission statements that congregations craft and print about their dedication to social justice. He demanded that there be no more "solemn declarations." Moreover, he did not call upon single individuals to donate or even show up to protest somewhere. Heschel understood power and so called upon the leaders of congregations who represented their communities. Much of the system of social justice in the Bible and in the classical rabbinic era is done on a communal level. President Kennedy ruling for equity carries with it the weight of the rabbis who ruled for equity, in both the adjudicative and legislative realms.

Abraham Joshua Heschel, writing in 1963, at the height of the civil rights movement, wrote in the voice of our present as well. He took the same kind of risk that our biblical authors took, that our rabbinic authors took, and that presents itself at our feet

today. Our issue is no longer the plight of "the Negroes," although true racial equality of a cosmically just degree is undeniably a fallacy. Jewish tradition, as understood by Heschel and purported by this thesis and the scholars upon which it draws, demands an unwavering institutionalized Jewish concern for all marginalized members of a now global society.

The details of what is just and equitable will forever be changing because people change, societies change, needs evolve, and ethical understanding grows. What remains the same are the texts, the spirit of the law, and the ethical evolution and innovation in *halakhah* and practice. There is a legacy of Jewish social justice that has been passed on from generation to generation. Today's communities are no less inheritors of the Jewish mandate of social justice than any other generation has been. Whether today's Jews will claim their legacy or not remains to be seen. As we have seen, taking such a tremendous risk as accepting this heritage and acting for the sake of the powerless is no small thing, yet the world's freedom from oppression lies in the balance.

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