# JUSTICE, JUSTICE SHALT THOU PURSUE

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*as an expression of gratitude of the Jewish Conciliation Board with whose services and leadership Dr. Mark has long been identified.*

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# LEGAL SANCTIONS FOR MORAL OBLIGATIONS

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In every society there is human behavior which is regarded as morally reprehensible but for which there is no legal redress. Yet creative judges, even in the absence of legislation, find ways to develop the law and provide either sanctions for, or deterrents of, the offensive acts. The legal order of the Jews and Judaism is no exception. Indeed, many writers on the Halacha often overlook this and blithely convey the erroneous impression that much evil is left to God, for Him to punish on an ultimate day of judgment, while human tribunals can offer only censure to the offender and solace to his victim. This paper will present a number of illustrations to demonstrate how responsive Jewish judges were to the need for making strict law fulfill equitable or ethical desiderata.

## 7. *Wrongs Which God Will Punish*

The Talmud lists a number of wrongs for which Jewish tribunals can provide no remedy but for which a man is deemed liable "by the laws of Heaven" (B. T. Baba Kama 55b and 56a). Thus a man who places fire in the hands of a child or an incompetent in order to burn his neighbor's property is not liable by the Jewish law of tort because it was the act of the intervening agent, the child or the incom-

petent, that caused the damage *(Gerama).* Similarly, he who places poison near his neighbor's animal is not liable because it was the animal's own act that killed it. Even a man whose testimony could have availed another in a lawsuit is not liable for his failure to testify though he violated a Biblical injunction. These are only a few of the instances of malfeasance and misfeasance in which a human tribunal awards no damages. In the eyes of Heaven, however, there is liability. From the point of view of morality, a wrong has been committed. Could the rabbis leave it at that? No, they provided legal sanctions for what they deemed morally reprehensible behavior.

Rashi suggests that liability by "the laws of Heaven" is of a punitive character rather than compensatory—and the tortfeasor is only encouraged to pay to avoid punishment by God (Baba Kama 104a). Rashi apparently does not regard the liability as liability to compensate so that failure to compensate might be deemed theft—withholding from another man what is his due. The Meiri holds differently (see also *Kezot ha-Hoshen,* 32a). For him, it becomes the duty of the court to tell the defendant that he ought to pay, and for failure to pay he is presumed a thief and, therefore, incompetent to testify in other litigation or to take oaths in lawsuits against him, with all the dangers described in the fourth section of this paper (see Hashlamah, Baba Kama, chap. 6:1, and Meiri, Baba Kama, 56a).

Furthermore, when one is liable by the laws of Heaven, the wronged party may in certain instances retain the property of the tortfeasor if he seized it forcibly. It may be that he may always do so (see Rashi, Baba Mezia, 9a). Others would limit the right to retain what was thus seized to cases where a Biblical command was violated, as in the case of withholding testimony, or where there is liability which even a human tribunal could impose but for the fact

that the defendant is liable to a greater punishment for the same act and the court cannot impose two punishments. (The authorities are collated and discussed in *Shevut Yaakov* 1:146.)

*II. Interference with Another's Gain*

"If a poor man is examining a cake and another comes and takes it away from him ... he is called a wicked man" (B. T. Kiddushin 59a).

This rule became the basis in Halacha for an extensive development with regard to precipitous grasping of economic opportunities that are still under consideration by another. Some authorities (see the Tosafists, ibid.) limit the condemnation to instances in which comparable opportunities are available to the offending party elsewhere. However, if what is involved is a trove, and this is a nonduplicable situation, then to act in self-interest is permissible and no moral turpitude attaches to the act. Other authorities are more demanding. (For a thorough analysis of the views, see Hasam Sofer, Hoshen Mishpat, 79.)

But for the purposes of this study, the key question is whether the rules are simply rules of morality or the basis for legal sanctions. The rules themselves make for some restraints on competition and unfair trading. They have even inspired a noblesse oblige in marketing and fishing.

Yet the Talmudic ruling that the offender is a *Rosho,* a wicked man, was regarded as requiring that a public pronouncement to that effect be made in the synagogue or other place of assembly. Thus the censure was formal and embarrassing. In a closed community the effect must have been devastating.

Second, at least one authority held that the rule was sufficient warrant to coerce the offender to return the object he acquired immorally by purchase or otherwise. Another

authority suggested that even this would not constitute atonement for the sin and further measures would be required (see Pithei Tshuvah, Hoshen Mishpat, 237).

And third, the *Rosho* may in some instances be deemed a *Masig Gevul* (see *Perisha* and *Aruch ha-Shulhan, Hoshen Mishpat,* (237:1), and thus may be incompetent to testify as a witness, with the damaging consequences described in Section IV of this study.

### *III. Proximate Cause*

Few areas of the Halacha have evoked more frustrating analyses than the problem of proximate cause in torts. The general rule was stated that the *Gerama* creates no liability. This was taken to mean that a tortfeasor pays only for injuries or damages which result immediately—and without any intervening agent—from his acts. If there is but one additional intervening cause, he may in some instances pay only half-damages. However, if there are several intervening causes, he is totally exempt from liability.

As early as the Tannaitic period, some torts were held to be actionable even though the damage was not immediately caused by the tortfeasor, and these were called cases of *Garmi.* What is the difference between *Gerama* and *Garmi?* To this question many authorities gave their attention. Some even felt that the terms were not meant to convey different types of acts. It was rather that when the rabbis relieved the defendant of liability they called it *Gerama,* and when they held the defendant accountable they called it *Garmi* (see Zevin, ed., *Talmudic Encyclopedia,* vol. 6, 461-97). This itself would mean that the rabbis created legal sanctions for such instances of indirect damage as they felt the circumstances warranted. They were not content with the basic rule and modified it by creating a new category—with liability. But they did more.

In those cases in which there was no liability, and for whose avoidance the tortfeasor had only a moral obligation, the rabbis also provided a legal sanction. They provided at least a mandatory injunction against the continuance of acts that might result in nonactionable damage.

Thus, for example, if a man should have a ladder on his premises and a weasel climbs it and jumps to his neighbor's fowl and devours them, the owner of the ladder is not liable for the damage done. However, the neighbor can enjoin the owner of the ladder from keeping it where it is likely to do the harm (B. T. Baba Batra 22b). The Talmud further illustrates the principle in connection with bloodletters who performed their work near a man's trees. The deposits of blood attracted birds who, after wallowing in the blood, flew to the trees and spoiled the fruit. The bloodletters had to discontinue using their own land for this purpose (ibid., 23a). The Meiri (on the aforementioned texts) sees no limitation on the rule unless there is an express agreement with the neighbors. Even long usage without protest may not create the presumption of an agreement or waiver in some cases. Thus neighbors can enjoin the use of property for purposes which create noxious odors or noises.

The rabbis enjoined when they could not award damages, and what might have been nonactionable unneighborly deportment acquired a legal sanction other than compensation.

### *IV. Incompetency to Testify Because of Dishonesty*

According to the Halacha, a man might be incompetent to testify in a lawsuit because he is related to one of the parties. In such a case no moral turpitude is involved. But a man might also be incompetent to testify because he is a thief or the beneficiary of illegal gains, such as a usurer or one who would eat tabooed foods to spare himself additional

expenditures (B. T. Sanhedrin 27a). There was a difference of opinion as to whether one who was honest but non-observant would be competent to testify—such as a man who ate pork not to economize but to defy the authority of Torah. The Talmudic conclusion is that even he is incompetent to testify (ibid.).

Yet despite this conclusion there persisted in Halachic analysis a difference between the two situations, which difference influenced responsa in this century. The man who is dishonest is far more apt to lie than he who is simply not devout. The Hasam Sofer *(Responsa, Hoshen Mishpat,* 36) takes notes of the distinction and resolves what would appear to be contradictions in some of the authorities (especially in the *Shock, Hoshen Mishpat,* 34:33 and 35:7). He holds that the penitence of the person who is not observant is adequate to make him competent to testify even with respect to events that occurred prior to his penitence, while the penitence and restitution of the dishonest man is to no such avail.

The Hasam Sofer suggests several reasons for the distinction, but from the Talmud itself (see Strashoun, on Sanhedrin 27a) it would appear that he is correct. A non-observant man does not feel that he is sinning—he simply denies the authority of Torah and perhaps the existence of God. However, he is not apt to testify falsely, and his recollection of events in the past would be without bias or fraud. Consequently, while Jewish law denies him competency as a witness because of the strictness of the law, his penitence removes that disqualification and he is presumed completely trustworthy. However, a man who was presumed dishonest at the time the events occurred beheld the facts in his state of dishonesty. His subsequent penitence will not guarantee an accurate report of what took place at an earlier date. There are even authorities who hold that

a witness is not competent to testify if he was an interested party at the time the events occurred even if he became detached at the time of testifying (see Hasam Sofer, ibid.).

Thus to enjoy a reputation for honesty and integrity all the time was most important. But our sages made this a value not only for social prestige or to insure competency as a witness. They added economic or legal sanctions.

A man who was presumed dishonest could not take an oath. This was a disability of major consequence. According to Jewish law, most oaths were taken by parties to relieve themselves of liability.

Thus, for example, if the creditor claimed money from the alleged debtor and had but one witness instead of two, the alleged debtor could take an oath that he owed nothing and that was the end of the case. Or if the creditor claimed more money than the debtor admitted owing, then the debtor took an oath that his obligation was less than that alleged. However, if the debtor was disqualified from taking the oath, his adversary could take it and collect his full claim (B. T. Shevuot 46b). Dishonest men were, therefore, at the mercy of claimants, and thus the Halacha created a very meaningful legal sanction for men to seek to retain their reputations as presumptively honest.

Furthermore, a man who was known to the judge to be dishonest or even suspect in the matter of oaths might be denied the right to take an oath to clear himself, and his adversary could take the oath as plaintiff and recover. It was simply dangerous for any man to forfeit his claim to a good name (see *Mishneh Torah*, *Hilchot Sanhedrin,* 24:1).

*V. The Rights of Redemption and Preemption*

Many texts in the Talmud refer to equity, known as *Lifnim mi-shurat Ina-Din*, and strict law, known as *Din.* In most of these instances, the higher standard of perform-

ance is described as normative only for those who aspire to live by more righteous norms than are applicable to the common man. And while judges did urge ail litigants before them to abide by the higher standard, they could not always coerce acceptance of their exhortations *(Aruch ha-Shulhan, Hoshen Mishpat,* 12:2).

However, there is a general mandate in the Bible—"And thou shalt do what is right and good in the sight of the Lord" (Deut. 6:18)—and this mandate became the basis for rules of equity that were applicable to all men, irrespective of their status. On the basis of this text the rabbis legislated rights of redemption and preemption. By not treating the verse in Scripture as if it were only moral exhortation, they accorded their own, and the community's, sense of justice a creative role in the development of new legal rights and duties which were enforceable in court.

A creditor, for example, who collected his debt by execution against the real estate of the debtor was compelled to return the property whenever the debtor was in a position to pay (B. T. Baba Mezia 35a). The right of the debtor to redeem his lost asset could only be cut off by the creditor's sale or gift of the property. The authorities are not unanimous as to whether the right might not also apply to movable property. Moreover, it was a right which the debtor's heirs could exercise.

Asheri—in opposition to the Tosafists (ibid.) and Maimonides *(Mishneh Torah, Hilchot Loveh u-Malveh*, 22:17)—held that though the applicable text in the Talmud might be interpreted as terminating the right with the death of the creditor, so that his heir would not have to return the reality, this was not the case. He interpreted the word *Urta* in the Talmud to mean "to give as a gift to one of one's heirs," either as a gift to take effect on death or as an increase in the intestate share of an heir. Thus it was only

an irrevocable sale or gift by the creditor that could terminate the debtor's right of redemption or that of his heirs. But if title did not vest in the purchaser or done before the right of redemption was exercised, it was not cut off. The ordinary automatic succession of heirs to the property did not destroy the right (see Asheri B. T. Baba Mezia 45a, and the *Tur, Hoshen Mishpat,* 103; *and the Bet Yosef,* ibid.).

In essence, what the law did was to say to the creditor: "So long as you are the owner of the realty, you are subject to the right of redemption. You can spite the debtor—and yourself at the same time—by divesting yourself of title. You will thus lose the usufruct until the exercise of redemption, which you would have been permitted to retain." The law did not deem it necessary to subject the purchaser or donee to the debtor's claim. The protection afforded the debtor was considered adequate so long as the property was subject to the claim while it was in the creditor's hands, and it would be a rare creditor who would harm himself only to harm the debtor.

In the case of the right of preemption, the rabbis were even more thorough. The right of preemption, *Bar Mizra,* gave a neighbor the prior right to buy any property adjoining his. The owner could not sell it to a non-neighbor until the neighbor had declined to purchase on the same terms. This right was derived from the same verse in Deuteronomy. That verse was the only warrant for its creation. And it applied to everyone.

However, in connection with this right the rabbis held that it was not cut off by any sale or gift or bequest (see *Shitah Mekubezet,* Baba Mezia 35a). A purchaser who violated the right of preemption of a neighbor could not cut off that right by a subsequent deal with another party. Why did the rabbis treat the right of preemption differently from

the right of redemption, although both derive from the same Biblical mandate? One difference is analytical; the other is functional.

In the case of the right of preemption, the first purchaser acquired title unethically—he subverted the right of the adjoining owner. Yet the law compels him to resell the property to the neighbor. It will do the same to those who succeed to his title. In the case of the right of redemption, the creditor acquired title lawfully—as a result of a lawsuit against the debtor. And the law simply imposes upon him alone an obligation to permit redemption so long as he has the title. This was the extent of the burden placed upon him (Ravad, ibid.).

Yet functionally the difference between the two is even clearer. As already noted, in the case of the right of redemption, the protection afforded the debtor was deemed adequate. The right could only be subverted by the creditor's action against his own interest. In the case of the right of preemption, however, the right could be destroyed easily if subsequent purchasers were not obliged to respect it. Any vendor could nullify the right by selling first to a dummy who would in turn sell to the real purchaser. The intermediate transaction would cut off the right and the rabbis' creative equitable achievement would have been in vain.

This is what emerges from two noteworthy illustrations of rabbinic action to translate moral obligation into legal duty. The rabbis did not leave to the heart alone the moral obligation of the creditor to help the debtor recover his land whenever he could repay his debt or the moral obligation of a neighbor to be neighborly. These moral obligations become enforceable legal duties.

### *VI. The Mi She-Pora*

For title to pass from a vendor to a purchaser of movable

goods, there must be, according to the Halacha, something other than the payment of money. Reish Lakish held that it was a Biblical requirement for the passing of title that the purchaser move the object, or perform some other physical act symbolizing his assumption of ownership. Rabbi Yohanan, on the other hand, held that from a Biblical point of view payment would accomplish the same result, but the rabbis required the physical act, lest after payment for the goods, with the vendor still in possession of them, the goods might then be threatened by fire or otherwise, and the vendor would hardly extend himself to save them. By giving each party the right to rescind until final delivery, the safety of the goods is enhanced. Therefore, the rabbis legislated that only the purchaser's seizure of the property is effective to pass title. In any event, according to both views, either party can rescind the transaction prior to the seizure of the goods, even if payment had been made (B. T. Baba Mezia 47b). However, the party so rescinding was punished with a curse.

Modern man may view such a curse as innocuous. In its time it was probably a most effective way to make it known that one was a bad credit risk. However, the rabbis went further and added legal sanctions to the religious ritual prescribed. They ruled that if it was the buyer who had the change of heart, he could not obtain the refund of his money until he subjected himself to the indignity that was his due, and in the interim the seller was not responsible for the money. And if it was the seller who had the change of heart, then he was to return the money and subject himself to the curse, and until the money was returned, he was an insurer of the coins delivered to him (Maimonides, *Mishneh Torah, Hilchot Mechira*, 7:2, 3). Thus liability to the curse became a legal "power" in the hand of the offended party

and created actionable duties. It was more than society's rebuke.

Furthermore, it would appear that until the money was returned the man subject to the curse was incompetent as a witness, with dire consequences to himself, as is described in Section IV of this paper (Nahlat Zevi, *Hoshen Mishpat,* 34:5).

## *VII. Conclusion*

That the judicial process is more than simply the logical extension of existing precedents and rules to new cases is now taken for granted by all students of law. This is also true of Jewish law. The rabbis were continuously creative in enriching the rules so that they would fulfill equity and satisfy the sense of justice of a community that was becoming more and more conscious of the need for law to sustain morality. This creative role must never be abdicated, especially in a legal system in which new legislation is rare.

Judaism has always relied less on preachment and more on law for the achievement of a just society—for brotherhood, neighborliness, and mutual responsibility for each other's welfare.

Therefore, the creative role of its judges must be proved to be historic and authentic even as Jewish judges are encouraged to continue this role in the present and future.

Yet one may ask why a revealed, God-given law should have need of such continuous upgrading. One would expect human law to be defective, requiring constant replenishment from ever-advancing conceptions of morality and justice. God's law one expects to be perfect *ab initio.*

A religiously committed sociologist might reply that since God endowed man with free will, it is inevitable that there will always be changes in man's political, social, and economic institutions. The unexpected is to be expected.

And to cope with such changes the revealed law provides for the exercise of equity and other rules for autonomous action by executives, legislators, and judges.

However, Jewish theology affords an even simpler reply. God made man His partner in continuous creation. He also made the Jew His partner in the continuous process called Torah. In the process, the Jew is more than God's obedient servant. He participates in the discovery of God's word for every situation and, therefore, his own needs must enter into the dialogue. One of those needs is the fulfillment of justice in society for man's own self-fulfillment.