

2006

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Recommended Citation

45 J. Cath. Leg. Studies 455 (2006)

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LOOKING BEYOND THE MERCY/JUSTICE DICHOTOMY: REFLECTIONS ON THE COMPLEMENTARY ROLES OF MERCY AND JUSTICE IN JEWISH LAW AND TRADITION

SAMUEL J. LEVINE[†]

INTRODUCTION

In one of his earliest encyclicals, *Dives in Misericordia*, Pope John Paul II explored the concepts of mercy and kindness, with a focus on notions of divine love and compassion.¹ Although the encyclical relies, of course, primarily upon Christian sources and theology, the Pope dedicated a section of the work specifically to a discussion of the importance of mercy in the Hebrew Scriptures.² In this section, the Pope addressed the complex

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This Essay was prepared in connection with the Conference on the Jurisprudential Legacy of Pope John Paul II, St. John's University School of Law, March 23-24, 2006. I thank Mike Simons and Susan Stabile for inviting me to participate in the conference, and I thank Fraida Liba, Yehudah, Aryeh, and Rachel for continued encouragement.

¹ See JOHN PAUL II, ENCYCLICAL LETTER *DIVES IN MISERICORDIA* *passim* (1980) [hereinafter *DIVES IN MISERICORDIA*]. The pope further developed these themes in later years, including two important addresses in January of 2002. See John Paul II, Message for the Celebration of the World Day of Peace 2002, *No Peace Without Justice, No Justice Without Forgiveness* (Jan. 1, 2002), available at http://www.vatican.va/holy_father/john_paul_ii/messages/peace/documents/hf_jp-ii_mes_20011211_xxxv-world-day-for-peace_en.html; John Paul II, Address to the Representatives of the World Religions on the Day of Prayer for Peace in the World (Jan. 24, 2002), available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2002/january/documents/hf_jp-ii_spe_20020124_discorso-assisi_en.html.

² See *DIVES IN MISERICORDIA*, *supra* note 1, at ¶ 4 (quoting 2 *Chronicles* 30:9; *Esther* 4:17; *Exodus* 3:7; 4:22; 34:6; *Hosea* 2:3, 21-25; 11:7-9; 14:5; 15; *Isaiah* 1:18; 45:21; 49:15; 51:4-16; 54:6-8, 10; 56:1; 63:9; 63:16; *Jeremiah* 31:3, 20; *Job*, *passim*; *Judges* 3:7-9; 1 *Kings* 8:22-53; *Micah* 7:18-20; *Nehemiah* 9; *Numbers* 14:18; *Psalms* 40:11; 86; 98:2; 103; 145; 2 *Samuel* 11; 12; 24:10). Referring to several of the Pope's encyclicals, Eugene Fisher suggested that the Pope "attempted over the years to integrate into his overall teachings the insights he [] derived from his contacts with Jewish leaders and his continuing meditation upon the meaning of Jewish

issue of the relationship between mercy and justice—attributes of both divine and human conduct that often seem in tension, if not in direct conflict with each other.³ Indeed, the Pope first observes that in Scriptures, “mercy is in a certain sense contrasted with God’s justice, and in many cases is shown to be not only more powerful than . . . justice but also more profound.”⁴ Upon further reflection, however, viewing mercy and justice in connection with the attribute of love, the Pope suggests that “[l]ove, so to speak, conditions justice and, in the final analysis, justice serves love.”⁵ In addition, he writes, “[t]he primacy and superiority of love vis-à-vis justice . . . are revealed precisely through mercy.”⁶ Therefore, reformulating his depiction of the relationship between mercy and justice, the Pope concludes that, ultimately, “[m]ercy differs from justice, but is not in opposition to it.”⁷

Building upon these observations, and drawing extensively on the work of Rabbi Joseph Soloveitchik and other scholars of Jewish law and philosophy, this Essay briefly considers the complementary roles of justice and mercy in Jewish tradition. Toward that end, the Essay places these concepts in a broader perspective, viewing mercy as representative of attributes such as kindness, compassion, love, and peacefulness, while understanding justice in terms of more exacting principles, such as strict adherence to truth and objective logic.

In particular, the Essay begins with a look at the figure of Abraham, the father and founder of the Jewish nation, who embodied the characteristic of kindness, but exercised it within

tradition for Catholic thought.” Eugene J. Fisher, *A Commentary on the Texts*, in POPE JOHN PAUL II, *SPIRITUAL PILGRIMAGE: TEXTS ON JEWS AND JUDAISM*, 1979–1995 xxxix (Eugene J. Fisher & Leon Klenicki eds., 1995).

³ See, e.g., Stephen P. Garvey, *Is It Wrong to Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319, 1321–22 (2004). Garvey describes the view that mercy should be understood as “the partial or complete remission of deserved punishment,” *id.* at 1321, and therefore posits that retributive justice and mercy “necessarily conflict . . . because justice means giving an offender the punishment . . . deserve[d],” *id.* at 1321 n.17. Cf. Robert Weisberg, *Apology, Legislation, and Mercy*, 82 N.C. L. REV. 1415, 1415 (2004) (observing “widely disparate views of legal scholars on the relationship between mercy and justice—i.e., whether mercy is consistent with, entailed by, or actually subversive of justice”); see also *infra* note 62 and accompanying text.

⁴ See DIVES IN MISERICORDIA, *supra* note 1, ¶ 4.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

the context of the pursuit of justice. The Essay then examines the role and character of communal leaders, who sometimes must resort to elements of strict justice, but at other times may also require the capacity to temper justice with mercy. Finally, the Essay turns to the juridical setting, considering the possibility that an ideal form of justice might incorporate a meaningful and appropriate measure of mercy.⁸

I. ABRAHAM: MERCY AND JUSTICE IN THE FOUNDING OF THE NATION

The Biblical figure Abraham occupies a unique position in the Book of Genesis and, more generally, in Jewish thought, serving as father and founder in the emergence of the new nation that will play a central role throughout the Bible. In fact, Abraham's imprint on the defining characteristics of the nation proves so profound as to render anachronistic references to Abraham as a member of the "Nation of Israel" or the "Jewish Nation," titles that derive from the names of Abraham's grandson and great-grandson, respectively. Similarly, because Abraham's relationship with God predated by hundreds of years the giving of the Torah at Mount Sinai, Abraham's service to God was primarily based not in the observance of specific laws and rituals later revealed to the nation, but rather in broader principles of *imitatio Dei*, following in God's ways.⁹

Indeed, as the Talmud¹⁰ understands the imperative of *imitatio Dei* in the context of the Biblical description of God as "*rachum v'chanun*,"¹¹ exercising mercy and kindness,¹² Jewish

⁸ For a helpful discussion of approaches in American legal scholarship aimed at reconciling the apparent conflict between justice and mercy, see Garvey, *supra* note 3, at 1321–22 n.17 (2004).

⁹ See YITZCHAK HUTNER, PACHAD YITZCHAK: SHAVUOTH 59–60, 100 (1999). For a discussion of the imperative of *Imitatio Dei* in Jewish thought, see Samuel J. Levine, Halacha and Aggada: *Translating Robert Cover's* Nomos and Narrative, 1998 UTAH L. REV. 465, 490–92 & nn. 130–35.

¹⁰ See TALMUD BAVLI, *Sabbath* 133b.

¹¹ *Exodus* 34:6 (New American).

¹² See JOSEPH B. SOLOVEITCHIK, OUT OF THE WHIRLWIND: ESSAYS ON MOURNING, SUFFERING, AND THE HUMAN CONDITION 207, 207–209 (David Shatz et al. eds., 2003) (stating that "the categorical norm within our ethical system, *imitatio Dei*, is correlated with the ideal of [c]hesed," as "God's act of creation manifested the attribute of [c]hesed," and explaining that, although *chesed* is often translated as "loving kindness," it more accurately denotes "[s]elf-transcendence and the surge toward the other").

tradition identifies the same qualities as the most prominent of Abraham's attributes.¹³ Moreover, through a close analysis of Abraham's behavior, Jewish ethical literature has emphasized that Abraham's caring and compassion went beyond the noble conduct of responding when a situation of need was brought to his attention.¹⁴ Instead, Abraham initiated the pursuit of opportunities to perform acts of kindness, seeking out and finding situations in which he could assist others.¹⁵

One of the most powerful manifestations of Abraham's profound desire to help others is illustrated in the hospitality he shows the three "men" or angels who appear at his tent,¹⁶ an episode that Jewish exegetical tradition understands as paradigmatic of Abraham's kindness.¹⁷ Elaborating on the Biblical text, the Midrash paints the picture of an old man recovering from surgery, sitting at the door of his tent in the heat of the day with the hope that he will observe passersby. When he sees three apparent idolaters walking near his tent, he interrupts an encounter with God,¹⁸ runs to greet his prospective guests, ushers them into the tent, prepares with great alacrity an elaborate meal to fit their tastes, and stands at their service while they eat, offering both spiritual and physical sustenance.¹⁹ Thus, rather than waiting for others to approach him, Abraham eagerly sacrifices his own comfort, literally running from his tent to attend to the needs of complete strangers.

Perhaps more strikingly, Abraham's expressions of mercy extend to those who seem least deserving of such kindness.

¹³ See, e.g., 2 ELIJAHU DESSLER, MICHYAV M'ELIJAHU 178–79 (Aryeh Carmell & Chaim Friedlander eds., 1963); 1 CHAIM YAAKOV GOLDBICHT, ASUFATH MA'ARACHOTH 129–54; HUTNER, *supra* note 9, at 59–60, 100; ADIN STEINSALTZ, IN THE BEGINNING: DISCOURSES ON CHASIDIC THOUGHT 123–29 [hereinafter STEINSALTZ, IN THE BEGINNING] (Yehuda Hanegbi ed. and trans., 1992).

¹⁴ See DESSLER, *supra* note 13, at 178–79.

¹⁵ See *id.*

¹⁶ Genesis 18:2.

¹⁷ See DESSLER, *supra* note 13, at 178 (citing sources).

¹⁸ Indeed, the Talmud derives from Abraham's conduct the principle that hospitality to guests is "greater" than accepting God's presence. See TALMUD BAVLI, *Sabbath* 127a. For an analysis of this principle, see DESSLER, *supra* note 13, at 180; HERSHEL SCHACHTER, MIPNINEI HARAV 271 (2001). For a discussion of the importance of hospitality in Jewish thought, see RABBENU BACHYA BEN ASHER, *Kad Ha-kemach*, in KISVEI RABBENU BACHYA 35–40 (Chaim Dov Chavel ed., 1995).

¹⁹ For a discussion of the significance of Abraham's standing at the service of the guests, see RABBI CHAIM YAAKOV GOLDBICHT, ARBA'A MA'AMRIM B'AGGADA 21–31 (1984).

Immediately following the visit of the three angels, God informs Abraham of the impending destruction of Sodom and Gomorrah, a punishment warranted by the cruelty and selfishness that epitomize these cities.²⁰ Abraham responds in petition and prayer, pleading with God to allow the cities to survive if there live within them righteous individuals who can lead the people to repent.²¹ Abraham's plea for mercy, in behalf of those whose past conduct stands diametrically opposed to the essence of his own values, captures the essential kindness that he embodies.²²

In fact, Jewish tradition portrays Abraham's behavior vis-à-vis Sodom and Gomorrah in stark contrast to Noah's attitude toward the people in his generation, who are killed in the Flood as punishment for their sinful behavior toward one another.²³ Notwithstanding the Torah's description of Noah's righteousness, through which he merits survival from the Flood,²⁴ there remains a degree of ambivalence toward Noah's character, both in the Biblical text and among its expositors.²⁵ Notably, unlike Abraham's impassioned attempts to elicit God's mercy for the wrongdoers of Sodom and Gomorrah, Noah appears to accept without protest God's decree that his entire generation will be sentenced to death.

On a certain level, Noah's response to God's decree seems understandable, if not, to some extent, correct. After all, the Torah repeatedly describes in unusually strong terms the moral and spiritual depths to which the Earth's inhabitants had fallen, prompting God's judgment that they were utterly corrupt, thus deserving of destruction.²⁶ As God's decision was both inherently fair and fully warranted, Noah's sense of justice may have precluded him from lodging any objection to an appropriate

²⁰ See *Genesis* 18:20.

²¹ See *id.* at 18:23–33.

²² DESSLER, *supra* note 13, at 181–82; see also RABBI NAFATALI TZVI BERLIN, HA'EMEK DAVAR, *Introduction to Commentary on Genesis*.

²³ See, e.g., DESSLER, *supra* note 13, at 181–82; SCHACHTER, *supra* note 18, at 168–69.

²⁴ See, e.g., *Genesis* 6:8–9.

²⁵ See, e.g., Samuel J. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism*, 47 AM. J. LEGAL HIST. 1, 33, 34 n.176 (2005) (describing, and applying in a contemporary context, ambivalence in the Jewish tradition toward Noah's character).

²⁶ See *Genesis* 6:5–12.

punishment.²⁷ In Abraham's perspective, however, despite the manifest justice of God's decree, perhaps a deeper form of justice is realized when tempered by a suitable measure of mercy.²⁸ Therefore, when Abraham encounters the prospect of a just but harsh punishment for the cities of Sodom and Gomorrah, he suggests that justice will be served if the members of the cities are spared on account of true and sincere efforts to repent for their wrongdoing.²⁹

Although Abraham's pleas ultimately prove unsuccessful, apparently because he has overestimated the possibility of repentance among the people of Sodom and Gomorrah, his approach anticipates and reflects accurately the complementary principles of divine justice and mercy in Jewish thought. Indeed, repentance and atonement, which serve as powerful manifestations of mercy, play a crucial role in Jewish law and philosophy, informing justice rather than opposing it.³⁰

²⁷ See DESSLER, *supra* note 13, at 181–82.

²⁸ See *id.* Notably, in his pleas for mercy in behalf of the cities of Sodom and Gomorrah, Abraham expressly appeals to and invokes God's judgment and justice. See *Genesis* 18:25.

²⁹ See DESSLER, *supra* note 13, at 181–82.

³⁰ See Samuel J. Levine, *Teshuva: A Look at Repentance, Forgiveness and Atonement in Jewish Law and Philosophy and American Legal Thought*, 27 *FORDHAM URB. L.J.* 1677, 1678–80 (2000). For applications of these concepts to the American legal system, see, e.g., Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 *YALE L.J.* 85, 87–90 (2004); Stephen P. Garvey, *Punishment as Atonement*, 46 *UCLA L. REV.* 1801, 1804 (1999); Erik Luna, *The Utah Restorative Justice Conference*, 2003 *UTAH L. REV.* 1, 3–4 (2003); Michael A. Simons, *Born Again on Death Row: Retribution, Remorse, and Religion*, 43 *CATH. LAW.* 311, 330–31 (2004); Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 *VAND. L. REV.* 1, 33–36 (2003); Symposium, *The Role of Forgiveness in the Law*, 27 *FORDHAM URB. L.J.* 1347, 1356, 1369 (2000).

Perhaps the most dramatic example of divine mercy, forgiveness for the sin of the Golden Calf, serves as a model for the operation of atonement. See *Exodus* 32:30–34:10. In Jewish tradition, God granted forgiveness on the tenth day of the seventh month, a date that would thus function for future generations as Yom Kippur, the Day of Atonement. See ABRAHAM R. BESDIN, *REFLECTIONS OF THE RAV: LESSONS IN JEWISH THOUGHT*, ADAPTED FROM LECTURES BY RABBI JOSEPH B. SOLOVEITCHIK 51–52 (1981). In depicting God's response to the nation's sincere repentance, the verses describe God as *rachum v'chanun*, exercising mercy and kindness. *Exodus* 34:6. Fittingly, these are the very qualities that likewise served as the basis for Abraham's fulfillment of *imitatio Dei*, leading him to found the nation through the practice of mercy and kindness toward all others. See *supra* notes 10–13 and accompanying text.

II. MERCY AND JUSTICE IN COMMUNAL LEADERSHIP

While Abraham epitomized mercy and kindness, those who followed him as leaders of the nation were characterized by a variety of qualities, often differing significantly from one another. In fact, Jewish interpretive tradition provides a complex understanding of the three founders of the nation, Abraham, Isaac, and Jacob, as serving complementary functions, each representing and establishing an essential aspect of national identity and consciousness.³¹ To oversimplify—perhaps inevitably—it appears that in carrying forward Abraham’s widespread legacy, his son Isaac exercises a more introverted approach, lending a seemingly crucial element of strength and stability to Abraham’s revolutionary movement.³² In turn, Isaac’s son Jacob serves yet a third foundational role, synthesizing the outgoing kindness of his grandfather with the inward focus of his father, thereby laying the groundwork for both continuity and expansion.³³

As Abraham’s descendants grew into a nation of millions, their leaders likewise began to evolve, producing models of leadership beyond the paradigms represented by the founders. Throughout much of Jewish history, the nation has been served by what Rabbi Joseph Soloveitchik described as a form of “dual leadership.”³⁴ Rabbi Soloveitchik delineated a typology of leadership, corresponding to the justice/mercy dichotomy—or, to use his terminology, the “*chesed-emet* dialectic.”³⁵ One type of leader emphasizes the aspect of *emet*, truth, thus “demand[ing] unbending justice.”³⁶ Such a leader engages in “criticizing,

³¹ See DESSLER, *supra* note 13, at 160–65.

³² See *id.* at 204–10; GOLDVICHT, *supra* note 13, at 155–64; SOLOVEITCHIK, *supra* note 12, at 213–14; STEINSALTZ, IN THE BEGINNING *supra* note 13, at 130–32; ADIN STEINSALTZ, BIBLICAL IMAGES 35 [hereinafter STEINSALTZ, BIBLICAL IMAGES] (Yehuda Hanegbi & Yehudit Keshet eds. and trans., 1984) (“Isaac is the symbol not of the power that breaks through limitations and creates, but of the power that conserves and maintains things in their place” and that Isaac “showed a marked inclination toward stability.”).

³³ See DESSLER, *supra* note 13, at 211–16; GOLDVICHT, *supra* note 13, at 165–89; STEINSALTZ, BIBLICAL IMAGES, *supra* note 32, at 37 (stating that Jacob “was a synthesis, an integration of both Abraham and Isaac” and that he was thus “the keeper of tradition who was also an innovator”).

³⁴ BESDIN, *supra* note 30, at 160.

³⁵ JOSEPH B. SOLOVEITCHIK, DIVREI HAGUT VE-HA’ARACHA 205 (1981). Robert Weisberg has referred to this tension as the “justice-mercy conundrum.” Weisberg, *supra* note 3, at 1416; see also *infra* note 62.

³⁶ BESDIN, *supra* note 30, at 165.

exhorting, holding people accountable for transgressions and failures,”³⁷ because strict justice requires that “[o]ne must be rewarded according to one’s merits.”³⁸ The second type of leader “is primarily guided by *chesed*, limitless compassion and overflowing kindness.”³⁹ This kind of leader personifies “unqualified love,” a love “gratuitous as well as boundless.”⁴⁰

In Rabbi Soloveitchik’s framework, these competing models of leadership differ in both style and substance. For example, the leader whose focus is truth and justice “rebukes the sinner in harsh language,” “loudly scorns iniquity,” and “fights for truth through exhortation and instruction,” presenting sermons “often harsh, saturated with prophetic indignation.”⁴¹ In contrast, the leader whose emphasis is mercy and kindness “sheds a tear of sympathy for the sinner,” “speaks softly,” and “reproach[es] the sinner the way a loving mother reproaches a mischievous child,” offering sermons that are “subdued, saturated with prophetic love.”⁴²

Through further analysis, however, Rabbi Soloveitchik concludes that in practice, neither model of leadership succeeds in isolation or in its purely idealized form. In particular, he explains, a leader who acts entirely out of love and mercy will arguably “betray truth, [] encourage mediocrity, and [] allow the inauthentic to distort the teachings of God.”⁴³ Conversely, “to be absolutely truthful is to love only some people and to alienate many who are genuine in their hearts and who are earnestly searching.”⁴⁴

In Jewish thought, the conundrum presented by these concerns proves so formidable as to compel the acknowledgment that complete “reconciliation of the attribute of strict justice and the attribute of compassion is achieved only in God.”⁴⁵ Humans, nevertheless, may and must resort to “a relative solution to this dilemma, depending upon [the] temperament and outlook” of the

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 166.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 166–67.

particular leader, tending toward either mercy or justice.⁴⁶ Thus, in response to the inevitable problem, “both [kinds of leader] have discovered a formula to harmonize *chesed* and *emet*,” although “one emphasizes *emet* and the other *chesed*.”⁴⁷ In short, “[t]hey both love and are committed to the truth, yet they act differently.”⁴⁸

Significantly, according to Rabbi Soloveitchik, the two approaches ideally complement one another, through a form of combined leadership that incorporates both “teaching . . . by instruction” and “warm and friendly guidance.”⁴⁹ Tracing the course of Jewish history, Rabbi Soloveitchik identifies repeated instances of dual-natured leadership, beginning with the very first leaders of the independent nation, Moses and Aaron.⁵⁰ To be sure, “[b]oth of them enlightened minds, molded characters, and propagated the word of God. Both led their communities along righteous paths and made sacrifices for their welfare.”⁵¹ At the same time, however, “their methods, their approaches, the media they employed were different.”⁵² Specifically, Rabbi Soloveitchik cites Talmudic depictions contrasting Moses’ insistence on strict justice and truth with Aaron’s tendency toward kindness and peace.⁵³ Thus, “[i]n terms of ultimate objectives, they were very close to each other, but their emphases varied.”⁵⁴ Notably, rather than favoring a particular leader or method of leadership, Midrashic teachings acknowledge the necessity and importance of both Moses and Aaron, each playing a vital role in the life of the nation.⁵⁵

Likewise, turning to an analysis of modern times, Rabbi Soloveitchik finds a parallel dialectic in the different rabbinic models of the Lithuanian *Rav* and the Eastern European Chassidic *Rebbe*. The former emphasizes *emet*, primarily “engag[ing] the intellect, analyzing, classifying, clarifying, and

⁴⁶ *Id.* at 166.

⁴⁷ *Id.* at 167.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 160, 167; see also SCHACHTER, *supra* note 18, at 262–65.

⁵¹ BESDIN, *supra* note 30, at 161.

⁵² *Id.*

⁵³ *Id.* at 167; see also STEINSALTZ, BIBLICAL IMAGES, *supra* note 32, at 73–78.

⁵⁴ BESDIN, *supra* note 30, at 161.

⁵⁵ See *id.* at 168 n.13. For a discussion of the different roles of Moses and Aaron, see RABBENU NISIM BEN REUBEN GERONDI, DERASHOT 35–43 (Leon A. Feldman ed., 1973).

transmitting the details of [Jewish law] with precision,"⁵⁶ while the latter relies upon *chesed*, focusing on "the invisible, intangible soul of the Torah, . . . communicat[ing] with the heart" and teaching "to feel, not only to understand."⁵⁷ Nevertheless, Rabbi Soloveitchik observes, "[n]owadays, . . . the contemporary [*Rav*] has absorbed many qualities of the *Rebbe*, not only teaching but coming close to [the] people,"⁵⁸ while the *Rebbe* "now also emphasizes scholarship and the teaching role."⁵⁹ Thus, "[t]he classic differences are still there, but the lines of demarcation are at times blurred."⁶⁰ Ultimately, he concludes, "Jewish leadership is most effective when it combines the mind and heart in the worship of God."⁶¹

III. MERCY AND JUSTICE IN THE JURIDICAL CONTEXT

In addition to the vital role mercy has played in the founding of the Jewish nation and in the conduct of its leadership, the centrality of mercy in Jewish thought manifests itself, perhaps most strikingly, in the juridical context. At first glance, principles of mercy appear inconsistent with, if not antithetical to, the discipline of legal decision-making. After all, unlike the communal leader who prudently exercises mercy, when appropriate, to balance and temper the demands of justice, the very basis of judicial responsibility requires the administration of strict justice, seemingly without resort to notions of mercy.⁶²

⁵⁶ BESDIN, *supra* note 30, at 161.

⁵⁷ *Id.* at 162–63. For a helpful introduction to this aspect of Chassidic thought, see ARYEH KAPLAN, *THE LIGHT BEYOND: ADVENTURES IN HASSIDIC THOUGHT* 1–25 (1981). To illustrate this approach, both Rabbi Soloveitchik and Rabbi Kaplan quote a famous Chassidic tale:

A teamster in Berdichov was saying his morning prayers, and at the same time, was greasing the wheels of his wagon. He was indeed an interesting sight, praying with his grease-covered hands, and townspeople snickered, "Look at this ignoramus. He doesn't know better than to grease his wagon wheels while he is praying." The great [Chassidic *Rebbe*] Levi Yitzchok then came along and said, "Master of the universe, look at Your servant, the teamster. Even while he is greasing his wagon wheels he is still praising Your great and holy Name."

Id. at 5; see also BESDIN, *supra* note 30, at 166.

⁵⁸ BESDIN, *supra* note 30, at 168.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² As Professor Weisberg puts it, the concept of a "jurisprudence of mercy" proves "paradoxical." Weisberg, *supra* note 3, at 1415. Specifically, he explains that

Indeed, the Talmudic discussion of the concept of *peshara*, a form of settlement through arbitration, reflects the inherent tension underlying the relationship between exercising mercy and meting out justice.⁶³ According to one view in the Talmud, *peshara* is prohibited, as it works a distortion of God's law.⁶⁴ Although advocates of this position recognize the value of mercy and peace in interpersonal relations,⁶⁵ they insist on a legal

"mercy has a jurisprudence only if it fits within some theory of law or is rooted in some internal legal principle." *Id.* At the same time, however, "the most fundamental question raised by any act of pardon or commutation is precisely whether mercy is part of, or at least consistent with, justice." *Id.* In short, "[i]s mercy an act outside justice, in a separate realm[,] or is it an act of *injustice*?" *Id.* (italics in original).

An extensive body of literature has emerged among American legal scholars addressing the apparent tension between, and possible compatibility of, justice and mercy. For a discussion of the application of mercy to criminal justice, often focusing on capital punishment, see, e.g., *A Colloquium on the Jurisprudence of Mercy: Capital Punishment and Clemency*, 82 N.C. L. REV. 1279 (2004); *Clemency and Pardons Symposium*, 27 U. RICH. L. REV. 177 (1993); Symposium, *Forgiveness & The Law: Executive Clemency and the American System of Justice*, 31 CAP. U. L. REV. 139 (2003); Symposium, *The Law and Politics of the Death Penalty: Abolition, Moratorium, or Reform?*, 81 OR. L. REV. 1 (2002); Anthony V. Alfieri, *Mercy Lawyers*, 82 N.C. L. REV. 1297, 1297 (2004); Stephen P. Garvey, "As the Gentle Rain from Heaven": *Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 989-92 (1996); Garvey, *supra* note 3, at 1323-24 n.19 (citing sources); Samuel J. Levine, *Playing God: An Essay on Law, Philosophy, and American Capital Punishment*, 31 N.M. L. REV. 277, 277-78 (2001); Samuel J. Levine, *Portraits of Criminals on Bruce Springsteen's Nebraska: The Enigmatic Criminal, the Sympathetic Criminal, and the Criminal as Brother*, 14 WIDENER L.J. 767, 774-76, 783 (2005); Daniel Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1421-23 (2004); sources cited *supra* note 30.

Likewise, a number of law review articles have discussed the application of mercy to criminal justice in the Jewish legal system, in particular in the context of capital punishment. See, e.g., Samuel J. Levine, *Capital Punishment in Jewish Law and its Application to the American Legal System: A Conceptual Overview*, 29 ST. MARY'S L.J. 1037, 1037-38 (1998); Levine, *supra* note 30, at 1677-79; Suzanne Last Stone, *Justice, Mercy, and Gender in Rabbinic Thought*, 8 CARDOZO STUD. L. & LITERATURE 139, 139 (1996); Irene Merker Rosenberg & Yale L. Rosenberg, *Guilt: Henry Friendly Meets the MaHaRal of Prague*, 90 MICH. L. REV. 604, 614-18 (1991); Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955, 956 (1988); Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Liberal Musings on "Eye for Eye" and the Death Penalty*, 1998 UTAH L. REV. 505, 508, 510, 515 (1998) (stating that under Jewish law, capital punishment is very difficult to impose); Irene Merker Rosenberg & Yale L. Rosenberg, *Of God's Mercy and the Four Biblical Methods of Capital Punishment: Stoning, Burning, Beheading, and Strangulation*, 78 TUL. L. REV. 1169, 1170, 1174-75 (2004).

⁶³ See TALMUD BAVLI, *Sanhedrin* 6b.

⁶⁴ See *id.*

⁶⁵ Thus, some commentators on the Talmud explain that under this view, although Moses served as a judge and accordingly applied strict rules of law, Aaron,

system that operates strictly on the basis of principles of law. Nevertheless, the prevailing view in the Talmud understands mercy as informing justice rather than opposing it.⁶⁶ Under this view, *peshara* becomes not merely permissible, but meritorious, preferable to the dictates of a stricter form of justice.⁶⁷

Similar to his analysis of the roles of different types of communal leaders,⁶⁸ Rabbi Soloveitchik articulates the complementary, rather than contradictory, functions of mercy and justice in the Jewish legal system. Again delineating a dialectic more than a dichotomy, Rabbi Soloveitchik first poignantly portrays the setting of strictly legal procedure as

pit[ting] one party against the other. The [judge] analyzes the relevant facts of the case and applies the appropriate legal sanctions as prescribed by [] the codes. The law is administered with cold impartiality and its decisions are dictated by objective data. One party emerges the victor, [its] case vindicated. The plea of the other is denied. Discord and resentment persist even as the court docket is cleared and the case is closed. The legal issue has been resolved, but human bitterness continues to fester.⁶⁹

In contrast, Rabbi Soloveitchik suggests, in the exercise of *peshara*,

social harmony is the main concern of the [judge]. The fine points of the law and the determination of precise facts are of secondary importance. The goal is not to be juridically astute but to be socially healing. The psychology of the contenders, their socio-economic status

who did not function in a judicial capacity, resolved disputes through the exercise of more peaceful settlements. TOSAFOT, Commentary on TALMUD BAVLI, *Sanhedrin* 6b; see also *infra* Part II (distinguishing between the roles of Moses and Aaron).

⁶⁶ See TALMUD BAVLI, *Sanhedrin* 6b.

⁶⁷ See *id.*; MAIMONIDES, MISHNE TORAH (Code of Law), Laws of Sanhedrin 22:4. The attitudes underlying the Talmudic debate are echoed in contemporary American legal scholarship relating to civil settlement and alternative dispute resolution. Compare, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1073, 1075 (1984) (providing a contrary view that "settlement is a capitulation to the conditions of mass society and should be neither encouraged or praised") with David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2619–20 (1995); Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1665–67 (1985); Carrie Menkel-Meadow, *Practicing "In the Interests of Justice" in the Twenty-First Century: Pursuing Peace as Justice*, 70 FORDHAM L. REV. 1761, 1762–63 (2002); Jeffrey R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881, 886–87 (2004) (believing negotiation to be a "credible alternative to litigation").

⁶⁸ See *supra* Part II.

⁶⁹ BESDIN, *supra* note 30, at 53–54.

and values, as well as the general temper of society, are the primary ingredients employed in the *peshara* process. These considerations are evaluated within the broad [legal] parameters of the [codes], and the final resolution of the conflict is a delicate and sensitive blending of both objective legal norms and subjective humanistic goals. For this reason, *peshara* is the preferred alternative.⁷⁰

Significantly, Rabbi Soloveitchik emphasizes that the administration of *peshara* serves as part of the legal system rather than independent of it; *peshara* “does not contradict the law but is its preferred and finest fulfillment.”⁷¹ Therefore, he notes that “[n]umerous . . . strictures establish the legal structure wherein *peshara* operates.”⁷² As in other legal cases, for example: a judge presides over the proceedings; the parties effect a formal legal agreement “obligat[ing them] to abide by the outcome and establish[ing] the status of the presiding court”; and, like other legal proceedings, *peshara* takes place only during daylight.⁷³

Moreover, as Rabbi Soloveitchik observes, the Talmud cites two Biblical verses to support the institution of *peshara*, each of which illuminates the place of *peshara* in the legal system. The first verse cited in the Talmud, from the book of *Zechariah*, quotes God’s command to “execute the judgment of truth and peace in your gates.”⁷⁴ The Talmudic exegesis of this verse initially finds an apparently paradoxical obligation to exercise a form of justice that incorporates both truth and peace. As the Talmud formulates the problem, “where there is strict justice there is no peace, and where there is peace, there is not strict justice.”⁷⁵ Elaborating on the Talmud’s question, Rabbi Soloveitchik explains that “[w]here there is strict adherence to [justice], there is justice but no [peace], because one of the parties is humiliated and antagonized. The immediate issue is resolved but the conflict persists, with ensuing social discord.”⁷⁶

⁷⁰ *Id.* at 54.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* See generally Rav Moshe Taragin, *The Role of Peshara Within the Halakhic Judicial System*, <http://jlaw.com/Articles/roleof.html> (last visited Sept. 21, 2006) (giving a general overview of *peshara* and noting the different opinions of what *peshara* actually means).

⁷⁴ *Zechariah* 8:16.

⁷⁵ TALMUD BAVLI, *Sanhedrin* 6b.

⁷⁶ BESDIN, *supra* note 30, at 55.

The Talmud resolves the apparent contradiction, however, concluding that the legal procedure of *peshara* provides a form of justice that synthesizes truth and peace.⁷⁷ In Rabbi Soloveitchik's view, the Talmud's resolution provides a valuable insight into the roles of both justice and the judge in the Jewish legal system:

[T]he Torah . . . wants the [judge] to be not only a magistrate but a teacher and a healer . . . seek[ing] to persuade both parties to retreat from their presumed points of advantage, and [] preach[ing] to them about the corrosive personal and social effects of sustained rancor. [The judge's] responsibility is primarily to enlighten, rather than to render decisions on points of law.⁷⁸

Thus, Rabbi Soloveitchik explains, the Talmud understands the Biblical verse as "project[ing] the social welfare of society and the happiness of individuals as primary ideals, as being truly a higher form of justice. *Peshara* is socially and morally preferred, even if the strict [justice] is neutralized. In its highest sense, justice obtains when people are reconciled."⁷⁹

The second Biblical verse quoted in the Talmud, from the book of *Samuel*, reports that King David "executed justice and righteousness toward his people."⁸⁰ The Talmud is initially troubled by a seemingly inherent tension between the virtues depicted, stating that "where there is strict justice there is no righteousness, and where there is righteousness there is no justice."⁸¹ According to Rabbi Soloveitchik, the Talmud premises

⁷⁷ See TALMUD BAVLI, *Sanhedrin* 6b.

⁷⁸ BESDIN, *supra* note 30, at 55–56; see also Aviam Soifer, *Covered Bridges*, 17 YALE J.L. & HUMAN. 55, 78 n.109 (2005); AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP* 167–75 (1995); see generally Robert A. Baruch Bush, *Mediation and ADR: Insights from the Jewish Tradition*, 28 FORDHAM URB. L.J. 1007 (2001).

⁷⁹ BESDIN, *supra* note 30, at 56.

⁸⁰ 2 *Samuel* 8:15.

⁸¹ TALMUD BAVLI, *Sanhedrin* 6b. The analysis in the text translates the term "*tzedaka*" in the Biblical verse as "righteousness." An alternate translation of "*tzedaka*" as "charity" yields a somewhat different analysis, as the Talmud's question is then triggered by the verse's praising the seemingly incompatible virtues of justice and charity. The Talmud's resolution then offers *peshara* as a means of accomplishing both justice and charity.

Notably, the word "*tzedaka*" is rooted in the word "*tzedek*," often translated as "justice." Accordingly, although the obligation in Jewish law to help those in need of assistance is often translated as "charity," the root of the word "*tzedaka*" may suggest "social justice" as a more meaningful and accurate translation. Indeed, the existence of formal—and legally enforceable—obligations to assist those in need

its question on the understanding that “when two litigants present opposing claims, only one can be right.”⁸² If so, “[s]trict logic demands the application of [strict justice] whereby the claim of the righteous party will be vindicated while the other party will be discredited.”⁸³

Again, however, the Talmud reconciles the apparent conflict, identifying *peshara* as a means of providing justice along with righteousness.⁸⁴ Expanding on the Talmud’s response, Rabbi Soloveitchik suggests that Jewish law “believes that absolute right and wrong can be realized only in heaven. In dealing with imperfect [humans], we posit that no [one] is totally wrong or right and that, in the case of the litigants, both are partially right and wrong.”⁸⁵ In fact, “each [litigant] has some responsibility for the situation and is partially guilty of the misunderstanding, for misleading innuendos, and for contributing indirectly to a climate in society which places others at a disadvantage.”⁸⁶

reflects the place of “*tzedaka*” in the system of justice. JOSEPH B. SOLOVEITCHIK, YEMEI ZICHARON 43–45 (1996) (citing TALMUD BAVLI, *Baba Bathra* 8b; MAIMONIDES, GUIDE FOR THE PERPLEXED 3:53); see also MEIR TAMARI, WITH ALL YOUR POSSESSIONS: JEWISH ETHICS AND ECONOMIC LIFE 248–62 (1987).

Thus, *tzedaka* may serve as an illustration of the emphasis on obligation as a fundamental component of the Jewish legal system. See, e.g., SOL ROTH, HALAKHA AND POLITICS: THE JEWISH IDEA OF THE STATE 97 (1988); Steven F. Friedell, *Aaron Kirschenbaum on Equity in Jewish Law*, 1993 BYU L. REV. 909, 913 (1993) (book review); Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TUL. L. REV. 527, 544–45 (2003) [hereinafter Levine, *Taking Ethics Codes Seriously*] (citing Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65, 65 (1987); Moshe Silberg, *Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 306, 313–14 (1961); see also Samuel J. Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations: A Preliminary Study in Comparative Hermeneutics*, 15 CONST. COMMENT. 511, 512 (1998).

For applications of a similar approach to areas of the American legal system, see, e.g., Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1112 (1986); Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1395 (1991–1992); Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation*, 37 IND. L. REV. 21, 43 (2003); Levine, *Taking Ethics Codes Seriously*, *supra* note 81, at 544–45.

⁸² BESDIN, *supra* note 30, at 56.

⁸³ *Id.*

⁸⁴ See TALMUD BAVLI, *Sanhedrin* 6b.

⁸⁵ BESDIN, *supra* note 30, at 56; see also Joseph Blau, *Rav Chesed v’Emet*, in Y’KARA D’CHAIM: A MEMORIAL VOLUME IN HONOR OF RABBI CHAIM YAAKOV GOLDWICHT 83–84 (Daniel Feldman et al. eds., 1996).

⁸⁶ BESDIN, *supra* note 30, at 57.

Thus, the Talmud acknowledges the limitations of strict justice, which “take[s] account [only] of obvious surface conditions[,] fail[ing] to perceive subtleties underneath, which dilute our certainty about the right and wrong of the litigants.”⁸⁷ In short, “[s]trict justice deals with plain facts and salient reality; real responsibility, however, goes much deeper and is obscured from the scrutiny of the court. Metaphysically, no one is entirely absolved in situations of conflict.”⁸⁸ Ultimately, then, righteousness “is truly realized only through *peshara*, which declares the parties both winners and losers. . . . The principle of [righteousness] demands that [justice] reflect the existential condition of [humans] inevitable imperfection.”⁸⁹

CONCLUSION

In an Essay dedicated to both the jurisprudential legacy of Pope John Paul II and an examination of the place of justice, mercy, and reconciliation in Jewish thought, it may be fitting to close on a note of appreciation for the Pope’s historic efforts at reconciliation in Catholic-Jewish relations. Indeed, countless voices in Jewish communities worldwide⁹⁰ have expressed their

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See, e.g., Rita Ciolli, *Pope John Paul II: Reaching out to Jews*, *NEWSDAY*, Apr. 6, 2005, at A37 (quoting positive reflections of Stephen Savitsky, president of the Union of Orthodox Jewish Congregations of America, and Professor Jacob Neusner); Glenn Frankel, *Pope Reconciled with Many but Made Special Efforts with Jews*, *WASH. POST*, Apr. 8, 2005, at A17 (quoting Rabbi Elio Toaff, former Chief Rabbi of Rome, who recalled the Pope’s 1986 visit to the Great Synagogue in Rome, and noting that Rabbi Toaff was one of only two living people mentioned in the Pope’s will); Herb Keinon, *Israel Mourns Pontiff Who Remade Catholic-Jewish Ties*, *JERUSALEM POST*, Apr. 3, 2005, at 9 (quoting the statement of Israel’s Foreign Minister Silvan Shalom that “Israel[,] the Jewish people[,] and the entire world today lost a great champion of reconciliation and brotherhood between the faiths[,]” and that “[t]he State of Israel joins all those who mourn his loss”); Lisa Palmieri-Billig, *Jewish Delegation Helps Celebrate ‘Life of Man Who Touched Millions,’* *JERUSALEM POST*, Apr. 10, 2005, at 6 (quoting Haifa Chief Rabbi Shear Yashuv Cohen stating that the Pope was “the first to say that our Biblical Covenant was eternally valid and not outdated or replaced by the New Covenant of the Christians—‘because Our Lord does not take back His promises.’ He went to the synagogue[,] came to Israel[, and] asked for forgiveness”); *id.* (quoting Rabbi Israel Singer of the World Jewish Congress, stating that “[t]hrough the remarkable will and acts of this [P]ope[,] relations between Catholics and Jews have improved more in the last 20 years than between Jews and the rest of the world” and that the Pope “made it possible for Orthodox Jews to participate in the [Catholic-Jewish] dialogue by not ignoring their [religious] requirements”); *id.* (quoting Rabbi David Rosen of

admiration for the Pope's words and deeds vis-à-vis the Jewish religion, Jewish history, and the State of Israel.⁹¹

Through these efforts, the Pope exhibited a profound interest in the pursuit of justice and truth, together with an abiding fidelity to mercy, love, and compassion. As this Essay aims to demonstrate, the significance of these qualities manifests itself not only in areas of personal conduct and communal leadership, but also in the proper and righteous administration and application of legal principles and policies. Thus, viewed in the perspective of this Essay, Pope John Paul II's attitudes and actions toward Jewish communities and concerns established an important element of his jurisprudential legacy, one that deserves to be recognized, honored, and emulated by those who follow.

the American Jewish Congress, speaking of the Pope's "remarkably positive attitude towards Jews and Judaism[,] his visit to Israel, and that the Pope "enshrined the positive new theology concerning the Jewish people and Judaism into the very fabric of the Catholic Church"); Douglas Turner, *Jews Mourning Loss of Revolutionary Pope*, BUFF. NEWS, Apr. 11, 2005, at A6 (quoting Abraham H. Foxman, national director of the Anti-Defamation League, stating that the Pope "repaired the history of pain, anguish[,] and contempt of 2,000 years").

⁹¹ See *DIVES IN MISERICORDIA*, *supra* note 1, *passim*.

