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EQUITY IN AMERICAN AND JEWISH LAW

*Itzhak E. Kornfeld, Ph.D.**

I. INTRODUCTION

This article examines the subject of equity in the laws of the United States and in Jewish law.¹ The equitable principles and remedies in the law of the United States are rooted in the common law of England. Their origins are more fully elaborated upon below. The equitable principles in Jewish law, as established in the Talmud, specifically in the Mishna and Gemara, are rooted in the Torah,² which

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¹ See Amihai Radzyner, *Between Scholar and Jurist: The Controversy Over the Research of Jewish Law Using Comparative Methods at the Early Time of the Field*, 23 J.L. & RELIG. 189 (2007); Assaf Likhovski, *The Invention of "Hebrew Law" in Mandatory Palestine*, 46 AM. J. COMP. L. 339 (1998); Michael Walzer, *The Legal Codes of Ancient Israel*, 4 Yale J.L. & HUMAN 335 (1992) (explaining the various codes); Izahk England, *The Problem of Jewish Law in a Jewish State*, 3 ISR. L. REV. 254 (1968), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/9B0B61FD5AAEC17F1BE174A387E9DEB/S0021223700001424a.pdf/problem_of_jewish_law_in_a_jewish_state.pdf.

With the increasing tendency in Israel to replace the old Ottoman civil law, the familiar question of the reception of Jewish (*sic*) (talmudic) law has once again become the subject of lively discussion . . . The forceful demand "to base the laws of the State on the Halacha" comes especially from the religious parties. [Footnote omitted] But representatives of the nonreligious parties also recommend the reception of Jewish law in those areas of private law [Footnote omitted] where no decisions on ideological grounds need to be made.

Id. at 254. The term "Halakha" refers to the collective body of Judaism's religious law, *i.e.*, rabbinic law, which includes the Torah, the Talmud, established rabbinic decisions, and customary law. Michael Walzer, *The Legal Codes of Ancient Israel*, 4 Yale J.L. & HUMAN 335 (1992).

² The Torah is the name that the Rabbis and Jewish people for millennia refer to as the Five Books of Moses (Old Testament), or the Pentateuch, the Greek for five. GEORGETOWN

is divided into two separate parts: The written Torah, referred to in Hebrew as the “Torah Shebichtav” (literally translated from the Hebrew, as the “written Torah”), and the oral Torah, or “Torah Sheba’al Peh,” (literally translated from the Hebrew, as the “Torah in the mouth”).³ Jewish tradition holds that Moses received both at Mt. Sinai and that over the course of the Israelites’ forty-year trek through the desert, he imparted it to the people and that these were passed down through the generations.⁴

The “Torah Shebichtav,” is comprised of the Tanakh⁵ or the Pentateuch (Five Book of Moses), the twenty-one books of the Prophets (beginning with Joshua and ending with Malachi), and the thirteen volumes of the “Ketuvim” or other writings, which include, the Psalms, Proverbs, Job, the Song of Songs and Chronicle I and II, for a total of thirty-nine volumes.⁶ The “Torah Sheba’al Peh,” encompasses the rules, interpretations, and explications of the Torahic laws, that were compiled and combined into the Mishna and Gemara, among others, following the destruction of the Second Temple in Jerusalem. The latter are elaborated upon *infra*. Suffice it to say, that a direct comparison between the procedural, or the substantive aspects of the common law of equity and that of Jewish law is not possible.

Nevertheless, they both have similarities, particularly given equity’s character. This fact will become quickly apparent to the reader, in the ensuing parts of the article. Indeed, one major reason that a direct comparison between the two systems is not possible is primarily due to their dissimilar internal adjudicative logic. Before

UNIVERSITY, BERKLEY CENTER FOR RELIGION, PEACE AND WORLD AFFAIRS, HALAKHA, (2020) <https://berkeleycenter.georgetown.edu/essays/halakha>.

³ The Oral Torah/Law expounds upon and explains what the laws of the Torah mean and how one is to follow them. For example, the Torah declares in the Ten Commandments (in Hebrew Asseret Ha’Dibrot, or the ten statements) “Remember the Sabbath day, and keep it holy.” *Exodus* 20:8-11; *Deuteronomy* 5:12-15. The Oral Torah specifies what that means and, for instance, defines exactly what work is, as well as the how to go about fulfilling the Commandment. See generally Rabbi Julian Sinclair, *Torah Sheba’al Peh*, THE JC (Mar. 6, 2009), <https://www.thejc.com/judaism/jewish-words/torah-sheba-al-peh-1.8061>.

⁴ *Oral Torah vs. Written Torah*, TORAH.ORG, <https://torah.org/learning/basics-primer-torah-oraltorah>. “Both have been with us, according to Jewish sources, for all of the past 3300 years. And without both, it is impossible to fully understand traditional Jewish teaching or thought. The Written Torah, (*sic*) mentions each of the Commandments, or Mitzvo[t], only in passing or by allusion. The Oral Law fills in the gaps.” *Id.*

⁵ The word “Tanakh” is an abbreviation of Torah, Neviim (Prophets), and Ketuvim.

⁶ With regard to the volumes of the Tanakh, see generally *Religion: The Tanakh*, JEWISH VIRTUAL LIBRARY (2019), <https://www.jewishvirtuallibrary.org/the-tanakh-full-text-te>

setting off on the exploration of equity, in both traditions, I provide a road map to this piece.

The article opens with Part II, a discussion of the common law of equity. Part III defines equity in the English and American courts; includes a discussion of its origins; and includes case studies of equitable remedies, including the injunctions and specific performance. Part IV addresses the Mishnaic Jewish law of equity, also providing cases or examples which include remedies. By necessity, the Hebraic law portion will be more thorough, as the author believes that this subject matter is less familiar to most readers.

II. COMMON-LAW EQUITY

A. The Origins of the Common Law

Following the Norman conquest of England in 1066,⁷ they introduced an entirely new legal system to govern the English. The new law was noteworthy, as it fostered the subsequent growth of English law. Indeed, the term ‘common law’ was established in the succeeding years, in order to denote the new system of legal principles founded by the English courts. Moreover, the Norman Kings, who now ruled over England, also created the Courts of King’s Bench.⁸ The decisions of the King’s Bench courts⁹ in interpreting various rights and obligations led to the dawning of the common law principles we

⁷ The assault and occupation of Britain by the armies of Norman, Breton, Flemish, and French soldiers was led by William the Conqueror, the Duke of Normandy. “The conquest saw the Norman elite replace that of the Anglo-Saxon and take over the country’s lands, [etc.]” Mark Cartwright, *The Impact of the Norman Conquest of England*, ANCIENT HISTORY ENCYCLOPEDIA (Jan. 23, 2019), <https://www.ancient.eu/article/1323/the-impact-of-the-norman-conquest-of-england>.

⁸ *Development of Equity in England*, LEXUNIVERSE, GLOBAL LEGAL INFORMATION (2008), <http://www.lexuniverse.com/trust-equity/uk/Development-of-Equity-in-England.html>.

⁹ Pennsylvania’s Supreme Court still maintains a King’s Bench jurisdiction. The Court has the power to consider any case pending in a lower court and even some matters not pending in the courts when it sees the need to address an issue of “immediate public importance.” When it does so, the Supreme Court exercises its “King’s Bench power” or its power of “extraordinary jurisdiction” as provided by the Pennsylvania Constitution and Pennsylvania law; *King’s Bench Power and Power of Extraordinary Jurisdiction: Can the Supreme Court Hear Any Case it Chooses?*, ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS, OFFICE OF COMMUNICATIONS (last revised Oct. 2013), <http://www.pacourts.us/assets/files/setting-2236/file-1741.pdf?cb=b40ffc>.

employ today.¹⁰ Nevertheless, if a decision of a common-law court was found to be unfair or unjust, the litigant had a right granted to her, to petition the King or Queen directly, by means of a writ. This

¹⁰ See, e.g., *Court of King's Bench records 1200-1702*, THE UNITED KINGDOM'S NATIONAL ARCHIVE, <http://www.nationalarchives.gov.uk/help-with-your-research/research-guides/court-kings-bench-records-1200-1600>.

What was the Court of the King's Bench?

The King's Bench was the most senior criminal court in England for most of its existence, exercising supervisory jurisdiction over all inferior criminal courts. It was based on the principle of pleas heard regularly and formally within the king's immediate purview even if not always in his actual presence.

The usual mechanism for bringing cases from local inferior courts to the King's Bench was by means of a writ of certiorari (requiring the record to be sent to King's Bench for review) obtained by an unsuccessful defendant.

There was an on-going conflict between the King's Bench and Common Pleas courts over their respective shares of civil litigation. This was only settled after 1660. However, the court's close association with the king meant it was superior to Common Pleas, taking from it cases where error was alleged.

The case law, or common law, was originated by both the King's Bench and Common Pleas in England, during the 13th and 14th centuries. See generally ARTHUR R. HOGUE, *ORIGINS OF THE COMMON LAW* (2010); THEODORE FRANK THOMAS PLUCKNETT, *CONCISE HISTORY OF THE COMMON LAW* (5th ed. 1956). Note that for some 460 years (1200 – 1640), both courts issued case law judgments on their own. These opinions would have needed to be merged.

procedure was similar to those employed by both Moses¹¹ and King Solomon.¹²

¹¹ *Exodus* 18:13 – 23, BIBLE GATEWAY (New International Version), <https://www.biblegateway.com/passage/?search=Exodus+18&version=NIV>:

¹³The next day Moses took his seat to serve as judge for the people, and they stood around him from morning till evening.¹⁴ When his father-in-law saw all that Moses was doing for the people, he said, “What is this you are doing for the people? Why do you alone sit as judge, while all these people stand around you from morning till evening?”

¹⁵Moses answered him, “Because the people come to me to seek God’s will.¹⁶ Whenever they have a dispute, it is brought to me, and I decide between the parties and inform them of God’s decrees and instructions.”

¹⁷Moses’ father-in-law replied, “What you are doing is not good.¹⁸ You and these people who come to you will only wear yourselves out. The work is too heavy for you; you cannot handle it alone.¹⁹ Listen now to me and I will give you some advice, and may God be with you. You must be the people’s representative before God and bring their disputes to him.²⁰ Teach them his decrees and instructions, and show them the way they are to live and how they are to behave.²¹ But select capable men from all the people—men who fear God, trustworthy men who hate dishonest gain—and appoint them as officials over thousands, hundreds, fifties and tens.²² *Have them serve as judges for the people at all times, but have them bring every difficult case to you; the simple cases they can decide themselves. That will make your load lighter, because they will share it with you.*²³ If you do this and God so commands, you will be able to stand the strain, and all these people will go home satisfied.” (emphasis added).

¹² 1 *Kings* 3:16-27 ; *The Brilliant Wisdom of King Solomon* (Baruch C. Cohen trans., 1998), <https://www.jlaw.com/Commentary/solomon.html>.

Two women [prostitutes,] came to King Solomon and stood before him. One woman (#1) said: ‘My Lord, this woman and I dwell in the same house, and I gave birth to a child while with her in the house. On the third day after I gave birth, she also gave birth. We live together; there is no outsider with us in the house; only the two of us were there. The son of this woman died during the night because she lay upon him. She arose during the night and took my son from my side while I was asleep, and lay him in her bosom, and her dead son she laid in my bosom. when I got up in the morning to nurse my son, behold, he was dead! But when I observed him (later on) in the morning, I realized that he was not my son to whom I had given birth!’

The other woman (#2) replied: ‘It is not so! My son is the live one and your son is the dead one!’

The first woman (#1) responded: ‘It is not so! Your son is the dead one and my son is the living one!’

They argued before King Solomon.

King Solomon said: ‘this woman (#2) claims “My son is the live one and your son is the dead one, “and this woman (#1) claims “Your son is the dead one and my son is the living one!”’

King Solomon said, ‘Bring me a sword!’ So they brought a sword before the King. The King said, ‘Cut the living child in two, and give half to one and half to the other’

Historically, a good deal of formal litigation in the English legal system occurred or was divided between two courts: “the common law” or “law” courts, and “the Chancery” or, “equity” courts.¹³ Although the two systems were complementary, the law and equity courts each had their own discrete procedural system, jurisprudence, and viewpoint.¹⁴ Indeed, a critical difference between a “court of law” and the “chancery courts” was that the law courts required juries,¹⁵ which the latter did not. Moreover, the common law procedure, which was more formalized, was consequently scorned, so much so that in the past, both the legal and lay communities were inclined to discount its expansion to meet the vital needs of the day.¹⁶ On the other hand, chiefly during the twentieth century, equity, in the United States, was promoted in a manner that obscured the principal shortcomings of its procedural model.¹⁷

B. The Juxtaposition of the Law and Equity Courts

The common law’s law courts had three distinguishing characteristics: (1) the writ, or formulary system, (2) the jury, and (3)

The woman (#2) turned to the King, because her compassion was aroused for her son, and said: ‘Please my Lord, give her the living child and do not kill it!’

But the other woman (#1) said: ‘Neither mine nor yours shall he be. Cut!’

The King spoke up and said: ‘Give her (#2) the living child, and do not kill it, for she is his mother!’ All of Israel heard the judgment that the King had judged. They had great awe for the King, for they saw that the wisdom of God was within him to do justice. [I Kings 3:16 – 217]. The woman was rightfully awarded custody of her son.

¹³ Stephen N. Seubrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 UNIV. PENN. L. REV 909, 914 (1987).

¹⁴ *Id.*

¹⁵ On the jury system and its development see GEORGE MACAULAY TREVELYAN, *A SHORTENED HISTORY OF ENGLAND* (1987). The authors of the United States Constitution preserved this right in the 6th Amendment, which provides in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and *public trial by an impartial jury*. . .”; and in civil cases the 7th Amendment states: “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury. . .” See *The Bill of Rights: What Does it Say?*, NATIONAL ARCHIVES, <https://www.archives.gov/founding-docs/bill-of-rights/what-does-it-say> (Oct. 12, 2016). A modern example of a chancery court is Delaware’s Court of Chancery. See, e.g., The Delaware Court of Chancery <https://courts.delaware.gov/chancery>.

¹⁶ Seubrin, *supra* note 13, at 914.

¹⁷ *Id.*

the single issue pleading.¹⁸ The “law” court’s procedures, as noted above, were inflexible and formalistic, while those in the chancery courts were not. Moreover, as noted above, unlike the law courts, the chancery courts had no jury trials – as they were not seised with the jurisdiction to hold jury trials – cases were heard by a chancellor. Each developed in Great Britain “between the thirteenth and sixteenth centuries and later influenced legal development in America. Each represented a means of confining and focusing disputes, rationalizing and organizing law, and applying rules in an orderly, consistent, and predictable manner.”¹⁹

As for equity, “[s]ubjects of the king, desirous of royal aid, would bring grievances to the Chancellor, who served as the king’s secretary, adviser, and agent. The Chancellor’s staff, the Chancery, sold writs, ‘royal order(s) which authorized a court to hear a case and instructed a sheriff to secure the attendance of the defendant.’”²⁰ Indeed, “[o]ver time, ‘plaintiffs could not get to the court without a chancery writ, and the formulae of the writs, mostly composed in the thirteenth century to describe the claims then commonly accepted, slowly became precedents which could not easily be altered or added to.’”²¹ Furthermore, these writs increasingly began to convey an idea of what factual circumstances would allow, or yield a given outcome or remedy. By the fourteenth century, a systematic body of substantive equitable principles evolved from the writs.²² Nevertheless, “[t]he contemporary English historian, Milsom, explains that one cannot find the precise beginning of the Equity Court, for, in a sense, it had been there all along.

Like all English colonies, the United States adopted the common law, also known as case law, as it was developed by judges in England. In so doing, it embraced a system, based upon the decisions and precedents established by those judgments.

¹⁸ *Id.* (citing S. F. C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 26-46 (1969)). “The three Central law courts were King’s Bench, Exchequer, and Common Pleas.” For a description of these courts, see *id.* at 20-22; see also THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 139-56 (5th ed. 1956).

¹⁹ *Id.*

²⁰ *Id.* (citing MILSOM, *supra* note 18, at 22).

²¹ *Id.* (citing MILSOM, *supra* note 18, at 25).

²² *Id.* (citing SIR HENRY SUMNER MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (1886)). (“[Indeed] so great is the ascendancy of the Law of Actions in the infancy of the Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure . . .”).

Consequently, during the seventeenth and eighteenth centuries, a separate common-law system evolved and developed in the United States. This unique body of rules of decision was anchored in judgments or verdicts based on precedents, or *stare decisis*.²³ However, the law courts in America, as in England, were not always competent to adjudicate certain classes of disputes. For example, when unusual questions come before a court, and it is unable to resolve it employing prevailing statutes or written rules of law, judges would have to turn to their sister equity courts for the resolution of the case. Today, however, that is not an issue, certainly not in the federal court system, as the law courts and equity courts were merged in 1938.²⁴

III. EQUITY DEFINED

Equity is a set of legal principles in jurisdictions that follow the English common law tradition.²⁵ Indeed, equity complements the law court's rules²⁶ and affords courts wide discretion in applying justice in

²³ See generally H.C. Black, *The Principle of Stare Decisis*, 34 THE AM. L. REGISTER 745, 745 (1886), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4147&context=penn_law_review:

REASONS AND IMPORTANCE OF THE RULE.-The policy of the courts, and the principle upon which rests the authority of judicial decisions as precedents in subsequent litigations, is embodied in the maxim, *Stare decisis et non quieta movere*-to abide by the precedents and not to 'disturb settled points. Its meaning is, that when a point of law has been once solemnly and necessarily settled by the decision of a competent court, it will no longer be considered open to examination, or to a new ruling, by the same tribunal or those which are bound to follow its adjudications.

Id.

²⁴ In 1934, Congress enacted the Rules Enabling Act of 1934, under that authority the United States Supreme Court, ratified uniform rules of civil procedure for the federal courts. One of the changes that the Court made in those rules, was the elimination of the two court system. The 1938 rules combined the rules of both, actions at law and actions in equity, into one body: The Rules of Civil Procedure. See *Federal Rules of Civil Procedure Merge Equity and Common Law*, FEDERAL JUDICIAL CENTER (Sept. 16, 1938), <https://www.fjc.gov/history/timeline/federal-rules-civil-procedure-merge-equity-and-common-law>; THE RULES ENABLING ACT OF 1934, ch. 651, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified at 28 U.S.C. § 2072).

²⁵ "The Common Law has changed a good deal since the beginning of our series of [Massachusetts] reports, and the search after a theory which may now be said to prevail is very much a study of tendencies." OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

²⁶ *Jurisdiction: Equity*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/courts/jurisdiction-equity>.

The framers of the Constitution granted the federal courts jurisdiction over both common-law actions and suits in equity. Equity was a centuries-old system of English jurisprudence in

accordance with natural law.²⁷ Equitable remedies originated in reaction to the inflexible procedures of the English “law” courts. Frustrated plaintiffs turned to the Norman Kings when they were unable to “procure” the outcomes that they required to continue living.²⁸ Consequently, at some point between the 11th and 12th centuries, the King established the Court of Chancery, so justice could be done when the law courts were unable to resolve an issue. However, the equity principles as administered in England were never intended to create a new body of law,²⁹ but rather, were introduced for the purpose of assisting and giving effect to the general laws of the realm. In fact, an essential maxim, which is frequently stated, is that “equity follows the law.”³⁰ Its Latin form is “*aequitas sequitur legem.*” A similar maxim is “equity follows the law, but does not control it.”³¹ The purpose of equity is to support the common law and carry it into practical effect³²

which judges-based decisions on general principles of fairness in situations where rigid application of common-law rules would have brought about injustice. Judges exercised equitable jurisdiction based on a distinct set of procedures.

Id.

²⁷ See generally PAUL HELM, EQUITY, NATURAL LAW, AND COMMON GRACE Chapter 12 (2004).

²⁸ Penny Tucker, *The Early History of the Court of Chancery: A Comparative Study*, 115 THE ENG. HIST. REV. 791 (2000); William Lindsay Carne, *A Sketch of the History of the High Court of Chancery from Its Origin to the Chancellorship of Wolsey*, 13 VA. L. REG. 391 (1927).

²⁹ See generally SNELL’S EQUITY (John McGhee ed., 32nd ed. 2010).

³⁰ *Hedges v Dixon County*, 150 U.S. 182, 192 (1893) (citing *Magniac v. Thomson*, 15 How. 283, 299 (1854), declaring “that wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim *aequitas sequitur legem* is strictly applicable.”).

³¹ See, e.g., *Beall v. The Surviving Executors of John Fox*, 4 Ga., 425 (1848).

The principles of equity, as administered in Great Britain, were never intended to create a *new lato*, but were introduced for the purpose of assisting and giving effect to the general laws of the realm. Equity follows the law, but does not control it. The office of Equity is to protect and support the Common Law, and carry it into *practical* effect, to secure its protecting influence for the benefit of the subject, whereby reason of its universality it would fail to accomplish that object.

Id.

³² *Id.* For example, the court held in *Willard v. Tayloe*, 75 U.S. 557, 569 (1869), that:

A party does not forfeit his rights to the interposition of a court of equity to enforce a specific performance of a contract if he seasonably and in good faith offers to comply, and continues ready to comply, with its stipulations on his part, although he may err in estimating the extent of his obligation. *It is only in courts of law that literal and exact performance is required.* (emphasis added).

Id.

Thus, in the 1927 decision of *Reel v. Combes*, the Ohio Court of Appeals explained equity as follows:

It is the general principles of equity, which are based upon the equalization of burdens and benefits. This principle is founded in the common law. This equitable obligation to contribute is unchallenged in the law . . . in all jurisdictions. Thus, it becomes a matter for determination by a court of equity, and the rule governing the courts, well established in all jurisdictions, is that recovery by way of contribution depends upon proportion of liability and benefit. Contribution in law is the equalization in proportionate sense of obligation incurred and the benefit received.³³

Other courts have also described the principles of equity. For example, in *Wells v. Pierce*,³⁴ the court observed that equity, as a great branch of the law of England, was brought over by the colonists and has always existed as a part of the common law, in its broadest sense, in New Hampshire. Likewise, in *Continental Guaranty Corp. v. People's Bus Line, Inc.*,³⁵ the court declared

[w]e are of the opinion that the principles of equity formed a part of the common law adopted at the time of the Revolution. These principles as administered in Great Britain were never intended to create a new law but were introduced for the purpose of assisting and giving effect to the general laws of the realm. Equity follows the law, but does not control it.”³⁶

Similarly, in *Campbell v. Colorado Coal & Iron Co.*,³⁷ the court noted “[w]e use the term ‘common law’ in its broader sense, as including those doctrines of equity jurisprudence which have not been expressed in legislative enactments.”³⁸ Finally, the Restatement (Third) of Restitution & Unjust Enrichment § 4(2) (2011) provides that “[a] claimant otherwise entitled to a remedy for unjust enrichment,

³³ *Reel v. Combes*, 25 Ohio App. 476, 479, 159 N.E. 133, 135 (1927).

³⁴ *Wells v. Pierce*, 27 N.H. 503, 512 (1853).

³⁵ *Continental Guaranty Corporation v. Peoples Bus Line*, 31 Del. 595, 117 A. 275, 279 (Del. Super. Ct. 1922).

³⁶ *Id.* at 31 Del. 605, 117 A. 279.

³⁷ *Campbell v. Colorado Coal and Iron Co.*, 9 Colo. 60, 64, 159 N.E. 133, n. 33.(Colo. 1886).

³⁸ *Id.* at 64, 10 P. at 250.

including a remedy originating in equity, need not demonstrate the inadequacy of available remedies at law.”

Accordingly, as utilized and defined herein, equity refers to a “sense of considerations of fairness, reasonableness, and policy often necessary for the sensible application of the more settled rule of law.”³⁹ Indeed, equity, by its nature, requires a balancing of interests.⁴⁰ However, the question should be, is the use of equity fair and reasonable to both parties? And, is the court or tribunal effective when it employs equity in resolving a dispute? The answer to that question is both yes, and no, depending on the facts of the case. Courts have, of course, demonstrated that they can be fair, reasonable, and sensible.⁴¹

Nevertheless, the principles of equity are not solely confined to the common law system. It is an essential doctrine that is routinely utilized by international adjudicative bodies, or quasi-international courts, e.g., the United States Supreme Court, when it adjudicates transboundary water disputes between the several states.⁴² “Indeed, equity is the hallmark of transboundary water disputes. For example, in adjudicating these conflicts, unless a treaty governs the allocation of the resource, the default mechanism is the equitable doctrine of equitable allocation.”⁴³

Moreover, recently introduced instruments, including the 1997 United Nations Convention on the Law of Non-Navigational Uses of International Watercourses, also include equity and equitable

³⁹ IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 25 (5th ed. 1998).

⁴⁰ Rell, *supra* note 33, at 479, 159 N.E. at 133.

⁴¹ BROWNLIE, *supra* note 39, at 25.

⁴² See, e.g., *Kansas v. Colorado*, 206 U.S. 46 (1907) (“As Kansas thus recognizes the right of appropriating the waters of a stream for the purposes of irrigation, subject to the condition of an equitable division between the riparian proprietors, she cannot complain if the same rule is administered.”) (emphasis added). For a discussion of the equities between Kansas and Colorado, see generally Itzhak E. Kornfeld, *Kansas v. Colorado: State Sovereignty and the Equitable Allocation of Water*, in WATER RESOURCE MANAGEMENT AND THE LAW (Erkki J. Hollo, ed. 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3168284; see also, Rhett B. Larson, *Law in the Time of Cholera*, 92 NOTRE DAME L. REV. 1271 (2017), <https://scholarship.law.nd.edu/ndlr/vol92/iss3/6>. (“Yet water law focuses primarily on two agendas. First, the ‘Blue Agenda’ aims to provide an equitable allocation of water to individuals and communities while encouraging sustainable water management. Second, the ‘Green Agenda’ aims to efficiently protect water in the natural environment from pollution.”) (emphasis added.)

⁴³ ITZHAK E. KORNFELD, TRANSBOUNDARY WATER DISPUTES: STATE CONFLICT AND THE ASSESSMENT OF THEIR ADJUDICATION 47 (2019).

principles, such as equitable and reasonable utilization.⁴⁴ These principles have also been incorporated in international case law.⁴⁵

A. Types of Equitable Relief

1. The Injunction

In *Guaranty Trust Co. v. York*, a 1945 case, the United States Supreme Court held, that in spite of the changes fashioned by *Erie Railroad Co. v. Tompkins*,⁴⁶ and its Erie Doctrine, “federal courts may continue to rely on these traditional principles of equity, in order to ascertain whether equitable relief, such as injunctions, is available even in cases arising under state law.”⁴⁷ “

In 2006, in *eBay Inc. v. MercExchange, L.L.C.*,⁴⁸ the Supreme Court expressed its now-familiar four-factor test for conferring injunctive relief, which the Court asserted resulted from principles traditionally utilized by the English Court of Chancery.⁴⁹

Writing for the Court, Justice Thomas, declared that:

According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate:

⁴⁴ 36 I.L.M. 700 (1997); G.A. Res. 51/229, U.N. GAOR, 51st Sess., 99th mtg., UN Doc A/RES/ 51/229 (1997) (Entered into force on 17 August 2014. GA Res. 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49)), at Art. 5, Equitable and Reasonable Utilization and Participation. *See also* Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1936 UNTS 269; 31 ILM 1312 (1992) at Art. 2(c) (To ensure that transboundary waters are used in a reasonable and equitable way . . .”).

⁴⁵ Krishna Water Tribunal II, *Report and Decision: In the Matter of Water Disputes Regarding the Inter-State River Krishna and the River Valley Thereof, Between 1. The State of Maharashtra; 2. The State of Karnataka; and 3. The State of Andhra Pradesh* 40 (2010) (“In equitable allocation, future uses requiring diversion of water outside the basin are relevant . . .”).

⁴⁶ *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), *overruling*, *Swift v. Tyson*, 41 U.S. 1, 18 (1848) (holding that where a federal court has diversity jurisdiction, and is adjudicating a state claim, it must apply the substantive common law of the state where it is sitting or, a state law from another state, *e.g.*, a contract is issued in another state and that state’s law applies). In addition, the federal judge hearing the case, must be guided by the following: state common law, the decisions issued by the state courts, as well as state practice, and cannot establish federal common law.; *Id.* at 78-79.

⁴⁷ Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217 (2018), <http://lawdigitalcommons.bc.edu/bclr/vol59/iss1/6>.

⁴⁸ *See generally* *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

⁴⁹ *Id.* at 391.

(1) that it has suffered an irreparable injury; (2) that remedies available at law are inadequate to compensate for that injury; (3) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. The decision to grant or deny such relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion.⁵⁰

Indeed, one commentator recently argued that the rules of federal equity ought to be reexamined and reassessed so that becomes a body of rules under which the courts can categorically and authoritatively function “in the absence of contrary federal statutory requirements when deciding whether to grant equitable relief under the U.S. Constitution or a federal statute.”⁵¹ For example, Congress may resolve to include or exclude certain statutory rights and how these should be enforced, *e.g.*, the Clean Water Act’s⁵² section 404 (s)(3), provides for the equitable remedy of injunctive relief⁵³ as a statutory entitlement.

2. *Specific performance*

During the evolution of the law of contract, equitable remedies were developed where damages were not an appropriate relief. One of these remedies is termed specific performance. Pursuant to that remedy, a court has the authority to compel a breaching party to perform a specific act, in order to honor its obligation under the

⁵⁰ *Id.* at 391.

⁵¹ Morley, *supra* note 47

⁵² 33 U.S.C. § 1344 (2018).

⁵³ *Id.* at § 1344(s)(3):

The Secretary is authorized to commence a civil action for appropriate relief, *including a permanent or temporary injunction for any violation* for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance.” (emphasis added).

Id.

contract.⁵⁴ Recall that the purpose of contractual remedies is to place the nonbreaching party in the same position had she not entered into the agreement.

Thus, Article II, § 2-716 of the Uniform Commercial Code provides that “[t]he decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.”⁵⁵ Indeed, courts may grant the equitable remedy of specific performance when damages will not provide suitable or sufficient compensation. Consequently, specific performance is regarded as exceptional relief, which is awarded at the court’s discretion:

[I]t must be remembered that specific performance is not a matter of right, even when the plaintiff’s evidence establishes a contract valid at law and sufficient for the recovery of damages. Ordering specific enforcement of a contract is a matter within the sound judicial discretion of the court [T]he plaintiff was required to show the good faith and equities of its own position, and the trial chancellor, in weighing the equities, was entitled to consider whether a decree of specific performance would work an unconscionable advantage to the plaintiff or would result in injustice.⁵⁶

The traditional case where the remedy of specific performance is conferred is in the sales of “unique goods,”⁵⁷ *e.g.*, land, a unique

⁵⁴ *See, e.g.*, U.C.C. § 2-716 (Buyer’s Right to Specific Performance or Replevin.). The section states, in part, Specific performance may be decreed where the goods are unique or in other proper circumstances. (2)The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.”).

Id.

⁵⁵ *Id.*

⁵⁶ *Public Water Supply Dist. v. Fowlkes*, 407 S.W.2d 642, 647 (Mo. App. 1966); *accord*, *Green, Inc. v. Smith*, 40 Ohio App. 2d 30, 39, 317 N.E.2d 227, 233 (1974). *See also* RESTATEMENT (SECOND) OF CONTRACTS (AM. LAW INST. 1981) § 357(1). (“[S]pecific performance of a contract duty *will be granted in the discretion* of the court against a party who has committed or is threatening to commit a breach of the duty.”).

⁵⁷ *See, e.g.*, *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33, 39-40 (8th Cir. 1972) (“It is axiomatic that specific performance will not be ordered when the party claiming breach of contract has an adequate remedy at law. . . . This is especially true when the contract involves

item, which is not capable of substitution, and where replacement damages are very difficult to calculate. For instance, in *Converse v. Fong*,⁵⁸ defendant Helen Fong rescinded the sale of her home to plaintiffs, and the latter sued for specific performance. The appellate court observed that “[i]f otherwise equitable, specific performance may be refused only if there is not sufficient assurance that the defendant will receive the performance promised to her.”⁵⁹

Alternatively, in *Pusey & Jones v. Hanssen*,⁶⁰ the U.S. Supreme Court reversed an order in which the lower courts granted equitable relief by appointing a receiver to monitor the specific performance of Pusey & Jones, as there was no equity jurisdiction. There, Hanssen – a shareholder and creditor, of Pusey & Jones, an insolvent company – held promissory notes issued by the company.⁶¹ Hanssen requested the appointment of a receiver, which the trial court approved, and the Third Circuit Court of Appeals upheld. But, in reversing the Supreme Court held that an:

unsecured simple contract creditor has, in the absence of a statute, no substantive right, legal or equitable, in or to the property of his debtor. This is true whatever the nature of the property, and although the debtor is a corporation and insolvent. The only substantive right of a simple contract creditor is to have his debt paid in due course.⁶²

Indeed, that has been the position of a number of circuit courts of appeal. For example, in the 1972 case of *Leasco Corp. v. Taussig*, the court observed that “[i]t is axiomatic that specific performance will not be ordered when the party claiming breach of contract has an adequate remedy at law.

personal property as distinguished from real estate.”); U.C.C. § 2-716, (“Buyer’s Right to Specific Performance or Replevin. (1) Specific performance may be decreed where the goods are unique or in other proper circumstances”).

⁵⁸ *Converse v. Fong*, 159 Cal. App. 3d 86, 205 Cal. Rptr. 242 (Ct. App. 1984).

⁵⁹ *Id.* at 91.

⁶⁰ *Id.* 491.

⁶¹ *Id.* at 495.

⁶² *Id.* at 497.

3. *The Affirmative Defense of Unclean Hands*

The doctrine of unclean hands states that “a party seeking equity must come to court with clean hands.”⁶³ The principle of “unclean hands” is all about basic fairness with the aim of preventing an unfair result. Therefore, the essence of an “unclean hands” affirmative defense is the avoidance of a result where a mischievous party is wrongly profiting in a lawsuit. Accordingly, a thief who slips during the course of robbing a fruit store would have no claim against the store’s proprietor for his stumble.

In another case, *Manufacturers’ Finance Co. v. McKey*,⁶⁴ the doctrine of “unclean hands” was utilized as an affirmative defense. There, the U.S. Supreme Court found that the petitioner had not itself come into equity with clean hands.⁶⁵ Moreover, the Court noted the following:

The insistence of appellant upon its claim for the full rate of interest plus attorneys’ fees at a preposterous rate, when it appeared that there was no more business to be done under the contract because of the receivership of the Company, *savors too much of the exaction of the pound of flesh from the creditors of the insolvent company to be enforceable in a court of equity.*⁶⁶

Moreover, the Court held that the:

‘maxim *he who seeks equity must do equity*’ presupposes that equitable, as distinguished from legal, rights, substantive or remedial, have arisen from the subject matter in favor of each of the parties, and it requires that such rights shall not be enforced in favor of one who affirmatively seeks their enforcement except upon condition that he consent to accord to the other his correlative equitable rights. But it is well settled, this Court said in *Hedges v. Dixon County*, 150 U. S. 182, 150 U. S. 189, ‘*that a court of equity, in the*

⁶³ Duhaime’s Law Dictionary, *Clean Hands Definition*, DUHAME, (accessed Mar. 16, 2020) <http://www.duhaime.org/LegalDictionary/C/CleanHands.aspx>.

⁶⁴ *Manufacturers’ Finance Co. v. McKey*, 294 U.S. 442 (1935).

⁶⁵ *Id.* at 446.

⁶⁶ *Id.* (emphasis added).

*absence of fraud, accident, or mistake, cannot change the terms of a contract.’*⁶⁷

4. *Equitable Distribution of Marital Property*

A number of states provide their courts with the jurisdiction to “equitably” distribute marital property between the spouses.⁶⁸ For example, New York Domestic Relations law provides that the trial court must “equitably” distribute property between the spouses.⁶⁹ Indeed, the equitable distribution is mandatory. The statute directs that “[m]arital property *shall be distributed equitably between the parties*, considering the circumstances of the case and of the respective parties⁷⁰

In the Commonwealth of Pennsylvania, the legislature, like New York’s, directed the courts in matrimonial actions to equitably divide marital property. For instance, in § 3502⁷¹ of the divorce code, titled, Equitable Division of Marital Property the legislature declared:

General rule.--Upon the request of either party in an action for divorce or annulment, *the court shall equitably divide, distribute or assign, in kind or otherwise, the marital property between the parties* without regard to marital misconduct in such percentages and in such manner as the court deems just after considering all relevant factors. The court may consider each marital asset or group of assets independently and apply a different percentage to each marital asset or group of assets.⁷²

Alternatively, Nevada’s legislature amended its Domestic Relations statute in 1993 to eliminate equitable distribution, replacing the term “equitable” with the term “equal.”⁷³ The legislature also

⁶⁷ *Id.* at 449 (emphasis added).

⁶⁸ See, e.g., Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory through the Dual Classification System*, 67 MISS. L.J. 115 (1997-1998); Martha L. Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, 23 FAM. L.Q. 279 (1989-1990); Sally Burnett Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C. L. REV. 247 (1983).

⁶⁹ N.Y. DOM. REL. LAW § 170(7) (McKinney 2018).

⁷⁰ N.Y. DOM. REL. LAW §§ 236(B)(5)(c) (McKinney 2018) (emphasis added).

⁷¹ 23 PA. CONS. STAT. ANN. § 3502(a) (West 2019).

⁷² *Id.* at § 3502(a) (emphasis added).

⁷³ NEV. REV. STAT. § 125.150(b)(1) (1989) (amending NRS 125.150(b)(1) (1989)) (amended by NRS 125.150(b)(1) (2017)) (requiring that the court, “to the extent practicable,

deleted the equitable factors that previously were required to be employed by the courts in making a ‘just and equitable’ disposition of community property.⁷⁴ Consequently, Nevada’s Supreme Court held that trial courts were prohibited from any further use of the term “equitable” and could no longer consider “equitable” factors.⁷⁵ However, a court could still make an unequal disposition of marital assets if it found a “compelling reason” to do so.⁷⁶

IV. JEWISH LAW AND EQUITY

The lives of the Jewish peoples have been governed by laws and rules since their reception of the Torah⁷⁷ at Mt. Sinai. Indeed, they have been said to be “the People of the Book.”⁷⁸ For thousands of years, “[their] culture, [their] traditions, and [their] values have been transmitted through [their] texts.”⁷⁹ For example, the issue of Abraham, Isaac, and Jacob are said to have to fulfill 613 commandments (mitzvot in Hebrew).⁸⁰ That number, which is not exact, was originally mentioned in a sermon by Rabbi Simlai in the third century of the Common Era and is recorded in Talmud Makkot 23b.⁸¹ The 613 mitzvot are divided into 248 positive commandments

make an equal disposition of the community property of the parties”). *See also Lofgren v. Lofgren*, 926 P.2d 296, 297 (Nev. 1996).

⁷⁴ NEV. REV. STAT. § 125.150(b)(2) (1989) (amended in 1993) (requiring that the court make a division of property “as appears just and equitable, having regard to the respective merits of the parties”)

⁷⁵ *Lofgren v. Lofgren*, 926 P.2d 296, 297 (Nev. 1996).

⁷⁶ *Id.*

⁷⁷ As utilized here, the Torah refers to what is commonly known in English as the Five Books of Moses, to wit, Genesis, Exodus, Leviticus, Numbers, and Deuteronomy.

⁷⁸ *See generally* Shraga Simmons, *People of the Book* (last visited Mar. 16, 2020), <https://www.aish.com/h/sh/tat/48969071.html>. (“Jews have long been known as the ‘People of the Book.’ Here’s Why.”)

⁷⁹ Sefaria, *About Sefaria* (last visited Mar. 16, 2020), <https://www.sefaria.org/about>.

⁸⁰ Mendy Hecht, *The 613 Commandments (Mitzvot)* (2020), CHABAD.ORG, https://www.chabad.org/library/article_cdo/aid/756399/jewish/The-613-Commandments-Mitzvot.htm. “The Talmud tells us (Tractate Makkot 23b) that there are 613 commandments (mitzvot) in the Torah; 248 Positive Commandments (do’s) and 365 Negative Commandments (do not’s). However, the Talmud does not provide us with a list of these commandments.”

⁸¹ Tzvee Zahavy, *The Talmud, Bava Metzia 23b*, 102, HALAKHA.COM, <https://halakhah.com/pdf/nezikin/Makkoth.pdf>

[THEREFORE GAVE HE THEM TORAH (TEACHINGS) AND MANY COMMANDMENTS . . .] R. Simlai when preaching said: Six hundred and thirteen precepts were communicated to Moses, three hundred and sixty-five negative precepts, corresponding to the number of solar days [in the year], and two hundred and forty-eight positive precepts,

(*i.e.*, dos) and 365 negative commandments (*i.e.*, do not).⁸² Orthodox Jews strive to fulfill each mitzvah or commandment.

Some of these commandments include the requirement to eat only certain kinds of mammals and fowl,⁸³ and from a solely kosher ritually slaughtered animals.⁸⁴ Furthermore, the blood of the animal must be drained, as the Torah prohibits the consumption of blood,⁸⁵ *e.g.*, “Moreover ye shall eat no manner of blood, *whether it be* of fowl or of beast, in any of your dwellings.”⁸⁶ There is also an edict regarding who may slaughter an animal. For example, the:

Ritual slaughter is known as shechitah, and the person who performs the slaughter is called a shochet . . . The method of slaughter is a quick, deep stroke across the throat with a perfectly sharp blade with no nicks or unevenness. This method is painless, causes unconsciousness within two seconds, and is widely recognized as the most humane method of slaughter possible.

Another advantage of shechitah is that it ensures rapid, complete draining of the blood, which is also necessary to render the meat kosher.

The shochet (ritual slaughterer) is not simply a butcher; he must be a pious man, well-trained in Jewish law, particularly as it relates to kashrut. In smaller, more remote communities, the rabbi and the shochet were often the same person.⁸⁷

corresponding to the number of the members [footnote omitted] 40 of man's body

Id.

⁸² Hecht, *supra* note 80.

⁸³ *See, e.g., Leviticus 11:1-3:*

1. And the LORD spoke unto Moses and to Aaron, saying unto them: 2. Speak unto the children of Israel, saying: These are the living things which you may eat among all the beasts that are on the earth. 3. Whatsoever mammal that has a split hoof, and is wholly cloven-footed, and chews its own cud, those beasts, you may eat.

Id.

⁸⁴ In order for meat to be kosher, it must be slaughtered according to *Deuteronomy 12:21*, which provides in pertinent part: “you may slaughter any of the cattle or sheep that the Lord gives you, as I instructed you; and you may eat to your heart's content in your settlements.”

⁸⁵ *Leviticus 7:26.*

⁸⁶ *Id.* (emphasis added).

⁸⁷ Judaism 101, *Kashrut: Jewish Dietary Laws, at Kosher Slaughtering*, JEWFAQ (2011), <http://www.jewfaq.org/kashrut.htm>.

These details regarding ritual slaughter are not part of the Torah. Rather, they were part of the oral law and were codified in the Talmud and later, in the Shulchan Aruch (literally the Hebrew for the “set table”), which is generally referred to in English, as the Code of Jewish Law.⁸⁸

Finally, the Talmud at Bava Metzia 32a prohibits the causing of pain to animals. It is referred to as cruelty to living things – Tza’ar Ba’alei Chayim, in Hebrew.

A. The Origins of the Talmud

In 967 B.C.E., at the age of 16, Solomon succeeded his father David and became king of Israel.⁸⁹ The construction of the Temple of Solomon (Beit HaMikdash - the House or Temple of Sanctification),⁹⁰ began sometime later, most likely in the tenth century B. C.E.⁹¹ That Temple – the first of two – was destroyed by the Babylonian King, Nebuchadnezzar II, during his army’s siege of Jerusalem in 586 B.C.E.⁹² At war with Egypt, Nebuchadnezzar was simply bound to invade Judea, as he was concerned about any potential threat to his armies.⁹³ The king exercised “a scorched-earth policy that sought to render conquered lands uninhabitable . . . the Babylonians cared only to depopulate peripheral regions,”⁹⁴ and thereafter to move the exiled

⁸⁸ The Shulchan Aruch was written by Rabbi Yosef Caro (1488-1575). Caro resided in the city of Safed (Tzfat in Hebrew), located in the upper Galilee in Israel’s north. See, e.g., Menachem Posner, *14 Facts About the Code of Jewish Law (Shulchan Aruch)*, CHABAD (2019), https://www.chabad.org/library/article_cdo/aid/4305141/jewish/14-Facts-About-the-Code-of-Jewish-Law-Shulchan-Aruch.htm.

⁸⁹ 1 Kings 1:46 *et seq.* See also Yisrael Shalem, *Jerusalem in the First Temple Period (c.1000-586 B.C.E.)*, BAR ILAN UNIVERSITY, INGEBORG RENNERT CENTER FOR JERUSALEM STUDIES, https://www.biu.ac.il/JS/rennert/history_3.html (Mar. 6, 1997).

⁹⁰ See 1 Kings 6:1 “In the four hundred and eightieth year following the departure of the children of Israel from Egypt, in the fourth year of Solomon’s reign over Israel, in the month of Ziv, the second month, he began to build the temple of the LORD.” (translation from the Hebrew by the author).

⁹¹ 1 Kings 5-9.

⁹² DAVID B. GREEN, *THE HISTORY OF THE JEWISH TEMPLE IN JERUSALEM* 4 HAARETZ (Aug. 11, 2014), <https://www.haaretz.com/jewish/.premium-history-of-the-temple-in-jerusalem-1.5256337>.

⁹³ Jill Katz, *The Relationship between the Jewish People and Yerushalayim: A Historical Account of the First 400 Years* 27 – 28, REPOSITORY.YU (Sivan 5773 – the given Hebrew Date – May 2013), http://repository.yu.edu/bitstream/handle/20.500.12202/4013/Katz_The_Relationship_between_the_Jewish_TTG%20Sivan5773.pdf?sequence=1.

⁹⁴ *Id.* at 27-28.

upper strata of each conquered land to Babylon.⁹⁵ Thus, they were able to add new vitality to the majesty of their core region.⁹⁶ Consequently, the Babylonians demonstrated no hesitation regarding Jerusalem or the Temple.

The Jewish peoples' sojourn in Babylonia lasted some forty-nine years (587 – 538).⁹⁷ In 538 B.C.E., following the fall of Babylon to the armies of the Persian emperor, Cyrus the Great, the Jewish people were allowed to return to the land of Israel.⁹⁸ Upon their return from Babylonian exile, the Israelites set upon rebuilding a temple, which was rededicated in 515 B.C.E.⁹⁹ That Temple was a precursor to the Grand Temple that King Herod built.¹⁰⁰ This second Temple was an enlarged and considerably enhanced edifice that was personally supervised by Herod himself under the watchful eyes of the Romans.¹⁰¹ The Second Temple was completed in approximately 20 B.C.E.¹⁰² However, this ornate structure remained standing for less than a century, as a consequence of the Israelites' revolt against the Romans, beginning in 66 C.E.¹⁰³ Four years later, in 70 C.E., Titus, the Roman general in charge of Jerusalem, pillaged the temple and razed it.¹⁰⁴

Following the destruction of the Second Temple during the First Revolt and the subsequent destruction of Jerusalem itself, accompanied by the exile of its inhabitants, during the Second Jewish Revolt, in 132-135, Judaism made a sharp turn from being a temple-based cult that relied on daily sacrifices to its god. It became a mobile faith that revolved around law and prayer, and whose members soon spread out around the Mediterranean basin, and later to more distant points. The synagogue replaced the single Temple, but recalled the sanctuary by always being physically oriented in the

⁹⁵ *Id.* at 28.

⁹⁶ *Id.*

⁹⁷ 1 *Kings* 5-9.

⁹⁸ David Green, *The History of the Jewish Temple in Jerusalem*, HAARETZ (Aug. 14, 2014), <https://www.haaretz.com/jewish/.premium-history-of-the-temple-in-jerusalem-1.5256337>; see also *Cyrus Helps the Exiles to Return*, BIBLE GATEWAY (Jan. 24, 2020), <https://www.biblegateway.com/passage/?search=Ezra+1-6&version=NIV>.

⁹⁹ 1 *Kings* 5-9.

¹⁰⁰ Green, *supra* note 98.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

direction of Jerusalem. Prayer took the place of animal sacrifices.¹⁰⁵

The Jewish people across ancient Israel were not only distraught, bewildered but also, perplexed, at the loss of the Temple, because that is where they celebrated the laws and rituals that governed their lives. They were now exiled again to Babylon, among other venues. The destruction of the Second Temple signified for the Jewish population that their lives were futile and inconsequential without it.¹⁰⁶ Consequently, for many of the Israelites, “the destruction of the Temple meant the destruction of Judaism.”¹⁰⁷

B. The Mishnaic Period

However, into this breach jumped Yochanan ben Zakkai, often abbreviated as Ribaz, an eminent Jewish sage, who lived during the period of the Second Temple, and a primary contributor to the Mishna, the principal text of Rabbinical Judaism.¹⁰⁸ Following the destruction of Jerusalem, he founded the Yeshiva¹⁰⁹ in Yavne.¹¹⁰ Yochanan is the father of Rabbinic Judaism and the person who “ensured the continued survival of the Jewish faith after the destruction of the Temple”¹¹¹

¹⁰⁵ *Id.*

¹⁰⁶ Alick Isaacs, *Jerusalem 3000: Lecture 7 - The Destruction of the Second Temple*, THE JEWISH AGENCY (Aug. 23, 2005), <http://archive.jewishagency.org/jerusalem/content/23693>.

¹⁰⁷ *Id.* at 2.

¹⁰⁸ CATHERINE HEZSER, *THE SOCIAL STRUCTURE OF THE RABBINIC MOVEMENT IN ROMAN PALESTINE 64-65* (1997).

¹⁰⁹ The yeshiva (plural : Yeshivot or Yeshivas) was originally established by the Rabbis of the first century of the Common Era, to train future Rabbis or, disciples of the Rav or Gaon, the head of the yeshiva, to study (or more correctly “to learn”) Jewish religious and legal texts, including the Mishna and Gemara. Originally, they were founded after the destruction of the Second Temple, along the coastal plain and the Galilee in Palestine/Israel, and in Babylon, e.g., the Yeshivot in Sura and Pumbedita. These continued in pre-World War II Europe and in the Levant, or Orient, which included among others, the countries of North Africa, Iran, Iraq and Yemen. Today, they are K-12 schools. With regard to American yeshivas and Jewish religious schools where the Talmud is intensely studied, see WILLIAM B. HELMREICH, *THE WORLD OF THE YESHIVA: AN INTIMATE PORTRAIT OF ORTHODOX JEWRY* (1982).

¹¹⁰ Ancient and modern Yavne are situated on Israel’s coastal plain, some 20 kilometers (12.5 miles) south of city of Jaffa.

¹¹¹ Isaacs, *supra* note 63; Jeremy Borovitz, *Yochanan Ben Zakkai and the Development of the Mishnah*, SEFARIA (2019), <https://www.sefaria.org/sheets/53250?lang=bi>.

Yochanan ben Zakkai was followed by Rabbi Yehudah HaNasi,¹¹² (Nasi was a reference to the presidents of the Sanhedrin),¹¹³ who with his students at the Yavne Yeshiva - a number of whom became famous Rabbis in their own right, compiled the Mishnah, during the period 200–220 of the Common Era. Initially, Rabbi Yehudah’s teachings were unpopular and rejected by the wider community. However, his persistence and approach to formulating post-Temple laws safeguarded and sustained - some would say the unrelenting - survival of the Judaism of future generations and of today.¹¹⁴

The teachings of Rabbi Yehudah, his contemporaries, and his disciples were transmitted by a long, long line of rabbis and sages,¹¹⁵ down the centuries and followed the crux of what has become known as Rabbinic Judaism,¹¹⁶ which still buttresses the structure of today’s

¹¹² With regard to the life of Rabbi Yehuda HaNasi, see RABBI YONASON GOLDSON, *DAWN TO DESTINY: EXPLORING JEWISH HISTORY AND ITS HIDDEN WISDOM* (2010); with an excerpt titled, Why Did Rabbi Yehuda Hanasi Decide to Codify the Mishna, OHR SOMAYACH INTERNATIONAL (2019) <https://ohr.edu/4695>. For a brief discussion of the Yeshivot in Sura and Pumbedita, see The Geonim of Sura and Pumbedita, at Gaon, JEWISH VIRTUAL LIBRARY (2019), <https://www.jewishvirtuallibrary.org/gaon>.

¹¹³ “The ancient Jewish court system was called the Sanhedrin. The Great Sanhedrin was the supreme religious body in the Land of Israel during the time of the Holy Temple” and for some time later. Shira Schoenberg, *Ancient Jewish History: The Sanhedrin*, JEWISH VIRTUAL LIBRARY (2020), <https://www.jewishvirtuallibrary.org/the-sanhedrin>. See also Philip Blackman, *INTRODUCTION TO TRACTATE SANHEDRIN OF THE MISHNAH* (1963).

¹¹⁴ Isaacs, *supra* note 63.

¹¹⁵ See generally PIRKEI AVOT, *English Ethics of the Fathers* chs. 1-2, https://www.sefaria.org/Pirkei_Avot.2?lang=bi; HEZSER, *supra* note 108, at 64.

¹¹⁶ See, e.g., Michael J. Cook, *Rabbinic Judaism and Early Christianity: From the Pharisees to the Rabbis*, 84 *REVIEW & EXPOSITOR* 201 (1987) (stating that the origins of rabbinic Judaism are found in the many “Judaisms” that coexisted during the Second Temple period in the land of Israel, when biblical and co-biblical texts were edited and interpreted. Classical rabbinic Judaism flourished from the 1st century B.C.E. to the closure of the Babylonian Talmud, c. 600 C.E., in Babylonia. Among the different Judaisms in antiquity, rabbinic Judaism held that at Mount Sinai God revealed the Torah to Moses in two media, the Written and the Oral Torah. The rabbis claimed they possessed the memorized or Oral Torah. Classical rabbinic Judaism is separated into different strata: tannaitic (until 200 C.E.), amoraic (200–500 C.E.), and saboraic (500 C.E.–7th century). The first stage of formative rabbinic Judaism is represented by the Mishnah, a law code that came to closure c. 200 C.E., after the destruction of the Second Temple of Jerusalem in 70 C.E. by the Romans and the suppression of the Bar Kokhba uprising of 132–135 C.E. Rabbinic Judaism interpreted the Torah, often in opposition to the priestly tradition, which was committed to the written tradition and the sacrificial cult of the Temple. However, at the end of the formative period, rabbinic Judaism synthesized the interpretive, messianic, and priestly traditions . . . Rabbinic Judaism continued to flourish in the Middle Ages in the diaspora. Today it represents “normative” Judaism, the Jewish religious expression of a substantial portion of the worldwide Jewish community.).

various branches of the faith.¹¹⁷ Alternatively, the Gemara was compiled through debates, discussions, and deliberations by various Rabbis in Palestine and Babylonia – who are known as the Amorim in Hebrew¹¹⁸ – during the three hundred years following the Mishna’s compilation. The focus of the Jewish sages, both in Israel and in the largest diaspora community of Babylonia (modern-day Iraq), was on illuminating the opinions of the Tannaim.¹¹⁹ However, to a good extent, neither Talmud is chiefly a commentary to the Mishna. Rather, they are an independent, or stand-alone and all-inclusive composition of Halacha and Aggadah.¹²⁰ Aggadah is the Hebrew word, which literally translates as “lore or narrative,” which subsumes “the portions

¹¹⁷ These include the branches of Orthodox Judaism: the non-Hassidic, Vilna or Mitnagdim – those who oppose Hassidism – group, which subsumes modern Orthodoxy and the Mizrahi movements, the Haradi movement, and the various sects of Hassidic Judaism. The other groups/factions include the Conservative, Reform and Reconstructionist movements. The main difference between the non-Hassidic movements is their interpretation of Rabbinic Judaism. For example, in its simplest description, Orthodox Jews believe in the separation of men and women during prayers in the Synagogue, while others hew to what is referred to as Mehadrin – from the Hebrew to praise or exalt, but used to define an orthodox person who is painstakingly scrupulous in the observance of religious rites and rituals, and who believes in a strict or enhanced observance – where men and women will not only not sit next to each other in public prayer, but at all times. Thus, on Mehadrin buses, there is complete and absolute segregation of men and women. As for Hassidic Jews, they fit into the Orthodox division, but hew to their leader’s, or Rebbe’s, teachings.

¹¹⁸ See, e.g., ISIDORE SINGER & CYRUS ADLER, *THE JEWISH ENCYCLOPEDIA: A DESCRIPTIVE RECORD OF THE HISTORY, RELIGION, LITERATURE, AND CUSTOMS OF THE JEWISH PEOPLE FROM THE EARLIEST TIMES TO THE PRESENT DAY* 527-8 (1916); *Ancient Jewish History: Amoraim*, JEWISH VIRTUAL LIBRARY (2019), <https://www.jewishvirtuallibrary.org/amoraim>.

¹¹⁹ Nissan Hindel, *The Mishnaic Age—The Tannaim: 3488–3950 (273 BCE–190 CE)*, CHABAD (2019), https://www.chabad.org/library/article_cdo/aid/115257/jewish/The-Mishnaic-Age.htm; See also LOUIS JACOBS, *A CONCISE COMPANION TO THE JEWISH RELIGION* (1999).

¹²⁰ See generally *Study Jewish Thought, Sages & Scholars, Halakhah and Aggadah*, MY JEWISH LEARNING (2019), <https://www.myjewishlearning.com/category/study/jewish-thought/sages-scholars> (stating that according to Rabbi Abraham Joshua Heschel, Judaism has a traditional division of Jewish textual material into halakhah (legal materials) and aggadah (legendary materials) and restates the division as Jewish behaviors (halakhah) and the reasons/motivations for those behaviors (aggadah) . . . Halakhah represents the strength to shape one’s life according to a fixed pattern; it is a form-giving force. Aggadah is the expression of man’s ceaseless striving that often defies all limitations. Halakhah is the rationalization and schematization of living; it defines, specifies, sets measure and limit, placing life into an exact system. Aggadah deals with man’s ineffable relations to God, to other men, and to the world. Halakhah deals with details, with each commandment separately; aggadah with the whole of life, with the totality of religious life. Halakhah deals with the law; aggadah with the meaning of the law. Halakhah deals with subjects that can be expressed literally; aggadah introduces us to a realm that lies beyond the range of expression. Halakhah teaches us how to perform common acts; aggadah tells us how to participate in the eternal drama. Halakhah gives us knowledge; aggadah gives us aspiration.

of the Talmud and Midrash which contain homiletic expositions of the Bible, parables, stories, maxims, etc., in contradistinction to Halachah”¹²¹ (also spelled Halakhah) which “refers to Jewish law. Per its literal translation, ‘the way,’ *halachah* guides the day-to-day life of a Jew.”¹²²

C. History of the Talmud

Talmudic history begins following the destruction of Jerusalem and the second Temple by Titus in the year 70 of the Common Era. During the post Temple period, there were two hubs of Jewish life – Palestine and Babylonia – the latter had the majority of Jews, who escaped following the Temple’s obliteration. These two locales are where Rabbinic Judaism formed, *i.e.*, the post-Temple Judaism; the one that has been practiced for over 1,850 years and continues today.¹²³ These two settings were also where two versions of the Talmud were composed.

They are, the predominant Babylonian Talmud, known in Hebrew, as the Talmud Bavli, which includes the Mishnah and the Gemara authored and compiled by the Jewish sages of Babylonian, - as well as other commentaries - and the lesser utilized Jerusalem Talmud or the Talmud Yerushalmi,¹²⁴ as it is referred to in Hebrew and composed in the Galilee. In comparing the Bavli, or Babylonian Talmud to its counterpart, Yerushalmi Talmud, some “scholars have frequently pointed out that the discussions in the Bavli are more long-winded and discursive, involving extensive explanation and abstract conceptualization, forced interpretations of early sources, and so on.”¹²⁵

The laws transmitted orally from Sinai were organized by Rabbi Yehuda HaNasi into six orders containing 63 tractates, called “[masechtot]” in

¹²¹ *Aggadah*, CHABAD (2019), https://www.chabad.org/search/keyword_cdo/kid/10816/oq/Aggadah/jewish/Aggadah.htm.

¹²² Menachem Posner, *What Is Halakhah (Halachah)? Jewish Law*, CHABAD, (2019), (https://www.chabad.org/library/article_cdo/aid/4165687/jewish/What-Is-Halakhah-Halachah-Jewish-Law.htm).

¹²³ HERMAN L. STRACK, *INTRODUCTION TO THE TALMUD AND MIDRASH* (Markus Bocksmuehl ed., trans., 2d ed. 1996).

¹²⁴ Also referred to as the Talmud di Venei Ma’arava, The Talmud of the Group of the West. See *Jerusalem Talmud*, THE JEWISH VIRTUAL LIBRARY (2019), <https://www.jewishvirtuallibrary.org/talmud-jerusalem>.

¹²⁵ *Id.*

Hebrew. The Hebrew acronym for the entire Six Orders is called “the Shas”, the acronym for “Shisha Sedarim”—the Hebrew for the Six Orders.¹²⁶

As in the previous common law section, I will discuss Hebraic equitable principles by example.

1. *Mishna Bava Metzia*

My focus here will begin with the Talmudic tractate, or treatise, of Bava Metzia in the Babylonian Talmud. It is the second tractate of three, dealing with harms or damage to property, and is under the Hebrew heading *Nezikin*.¹²⁷ The Bava in Bava Metzia is the Aramaic for “Gate.” Thus, Gate of Finding Chattel, or Gate of Lost Objects. The three tractates include Bava Kama – damages: Bava Metzia – property rights and Bava Batra – real estate and other transactions. The three are the volumes in the fourth of the six Sedarim (orders), referred to as *Nezikin*. I will concentrate on civil harms or damages, *i.e.*, torts.¹²⁸ We open with the tractate Bava Metzia page 2a, and the following Mishnah¹²⁹:

¹²⁶ The six tractates are:

1. Zera'im (Seeds), dealing with prayer and blessings, tithes and agricultural laws (11 tractates);
2. Moed (Festival), relating to the laws of the Sabbath and the Festivals (12 tractates);
3. Nashim (Women) concerning marriage and divorce, some forms of oaths and the laws of the nazirite (7 tractates);
4. *Nezikin* (Damages); dealing with civil and criminal law, the functioning of the courts and oaths (10 tractates);
5. Ke'doshim (Holy things), regarding sacrificial rites, the Temple, and the dietary laws (11 tractates) and finally;
6. Tehorot (Purities), pertaining to the laws of purity and impurity, including the impurity of the dead, the laws of food purity and bodily purity (12 tractates).

¹²⁷ In Hebrew, the root word for *Nezikin* is “*nezek*,” which translates to harm or damage.

¹²⁸ See generally Rabbi Jack Abramowitz, *The 63 Tractates of Shas*, ORTHODOX UNION (2019), https://www.ou.org/torah/mitzvot/taryag/the_63_tractates_of_shas_-_part_i. (“The laws transmitted orally from Sinai were organized by Rabbi Yehuda HaNasi into six orders containing 63 tractates, called “[*masechtot*]” in Hebrew.”) The “Shas” is the Hebrew acronym for “Shisha Sedarim”— Hebrew for the Six Orders. *Id.* Rabbi Yehuda HaNasi, known in English as Judah the Prince, lived from 135 CE-219 CE. See *Yehuda HaNasi (Judah the Prince)*, THE JEWISH VIRTUAL LIBRARY (2019), <https://www.jewishvirtuallibrary.org/yehudah-hanasi-judah-the-prince>.

¹²⁹ The Mishnah’s origin is disputed. The minority view is that the oral law was redacted in 189 C.E. See HEINRICH GRAETZ, 6 HISTORY OF THE JEWS 105 (1898). The alternative or prevailing view is one expressed in the *Encyclopaedia Judaica*, which posits that the oral law

a. **Case 1: Tractate of Bava Metzia 2a**¹³⁰

Mishna: Two [persons appear before a court] and are holding a tallit [*i.e.*, a garment]. One of them [John] states “I found it” and the other [Jane] says “I found it”. One of them [John] says “it is entirely mine” and the other [Jane], says “it is entirely mine”; then shall the one swear that his share of the garment is not less than half, and the other shall swear that [her] share in it is not less than half; and [the value of the garment] shall then be divided between them.

If one says ‘it is all mine’, and the other says, “half of it is mine”, he who says, “it is all mine” shall swear that his share in it is not less than three quarters, and he who says, “half of it is mine” shall swear that his share in it is not less than a quarter. The former then receives three quarters [of the value of the garment/chattel] and the latter receives one quarter.

The Mishna is interpreted and discussed by numerous commentators. Among them were various Rabbis and Tannaists (Tannaim in Hebrew)¹³¹ who wrote and compiled the Mishna. One of the most prolific commentators, centuries after the Tannaim, was Rabbi Solomon ben Isaac (Shlomo Yitzhaki), known as “Rashi” (based

was redacted at the beginning of the third century C.E. See 14 ENCYCLOPAEDIA JUDAICA, at 319 (Fred Skolnik, ed., 2nd ed. 2007), <https://ketab3.files.wordpress.com/2014/11/encyclopaedia-judaica-v-14-mel-nas.pdf>. The Mishnah also preserved the teachings of earlier rabbis and reveals the marks of an amalgamated editing.

¹³⁰ Rav Moshe Taragin, Shenyaim Ochazin Be-Talit: Splitting a Disputed Talit, VBM The Israel Koschitzky Virtual Beit Midrash, <https://www.etzion.org.il/en/shenyaim-ochazin-be-tallit-splitting-disputed-tallit> (last visited Mar. 18, 2020) (“This ruling makes the first mishna in Bava Metzia a bit surprising. The mishna describes the well-known scenario in which two people are jointly clutching a disputed article of clothing, and the mishna rules that the two parties split the clothing . . .”).

The above three paragraphs are from Tzvee Zahavy, *Talmud Baba Metzia*, HALAKHA.COM, https://halakhah.com/pdf/nezikin/Baba_Metzia.pdf. I have separated the text into two separate paragraphs, each with its own case. Zahavy’s original text contains three cases in one paragraph. His version also capitalizes the entire Mishna. The third section of the Mishna and the section that was left out has to do with riding an animal that was found. Its logic is the same as the two paragraphs above and therefore will not be addressed here.

¹³¹ The *Tannaim* were teachers of the Oral Law, who lived from approximately, 70 C.E. to 250 C.E. and are said to be direct transmitters of an oral tradition passed from teacher to student, until they and Judah HaNasi codified these laws in the Mishnah, among other compilations. See S. Safrai, *The Era of the Mishna and Talmud (70 - 640)*, in *A HISTORY OF THE JEWISH PEOPLE* (Haim Hillel Ben-Sasson, ed., George Weidenfeld & Nicolson Ltd. Eng. Trans., 1976).

upon an acronym of his Hebrew initials), who lived in France during the tenth century of the Common Era.¹³² In his elucidation of this Mishna, Rashi observes that the claimant to half the garment concedes that half belongs to the other claimant so that the dispute revolves solely around the second half.¹³³ Consequently, each of them receives half of this disputed half - or a quarter each. Recall, that originally each claimed ownership of the entire garment. This is the Rabbis' use of equity.

In its commentary on the foregoing, the Gemara¹³⁴ asks: Why must the Mishnah declare that [John] says "I found it", and so does [Jane]; [John] says, "it is mine", and so does [Jane]? Does it not suffice for each to make one claim? In a response the Tosafists¹³⁵ answer as

¹³² Rashi, is one of the most significant Jewish commentators of the entirety of the Torah, Prophets and Ketuvim (the Jewish Scriptures comprise three books of five books of Moses, the prophets, and the collected writings, e.g., Psalms, Proverbs, Job and the Song of Songs) and the Talmud, in the history of Judaism. Rashi was born in 1040, in the northcentral French city of Troyes and passed away in the year 1105 C.E. Unlike Rashi's commentary, the Tosafot (additional commentaries), were Rashi's students and medieval commentators of the Talmud. Their writings took the formulation of analytical and illuminating annotations, which are printed, in most Talmud editions, alongside Rashi's outer margin commentaries, are more comprehensive, often serving as an amplification of the Talmudic dialogue itself, and sought to explain the text in a sequential manner. In many instances, we find the Tosafot quoting parallel texts so as to reconcile apparent contradictions. In the Talmud the location of Rashi's and the Tosafists' commentary changes depending on the page. On one page, Rashi's commentary appears on the right side of the Mishna and the Tosafists' commentary is on the left. It reverses on the next page and returns to the original order on the next. The foregoing is based on the author's long-standing knowledge. For a more formal explanation of Rashi's life, see AVIGDOR BONCHEK, RASHI: THE MAGIC AND THE MYSTERY 1-2(2015); AVRAHAM GROSSMAN, RASHI (Joel Linsider trans., the Littman Library of Jewish Civilization) (2012); Hila Ratzabi, *Sages & Scholars, Who Was Rashi*, MY JEWISH LEARNING 1-4 (2019), <https://www.myjewishlearning.com/article/who-was-rashi/>, (last visited Jan. 21, 2020). See also VBM The Israel Koschitzky Virtual Beit Midrash, Dr. Avigail Rock, Lecture #4: Rashi (Part I), <https://www.etzion.org.il/en/lecture-4-rashi-part-i> (last visited Mar. 18, 2020). ("It is impossible to exaggerate Rashi's importance in shaping the worldview of the Jewish People; it may be said that after Tanakh and Talmud, Rashi's commentaries are next in line in terms of their influence. One expression of this phenomenon is the fact that the first Hebrew book ever printed (Rome, 1469) was the Torah with Rashi's commentary.").

¹³³ Sefaria, Rashi on Bava Metzia 2a, at 2:a2, https://www.sefaria.org/Rashi_on_Bava_Metzia.2a.1?lang=bi (last visited Mar. 18, 2020). ("He admits that the half belongs to his friend and we only judge him on his half (which he is claiming). Therefore, (when) this one says 'all of it is mine' he swears etc. like the first verdict [i.e: the first case in the Mishnah] what they judged on him (meaning) they both swear that each one has at least half of it and each one takes his half.")

¹³⁴ See Zahavy, *supra* note 132, at 1.

¹³⁵ The Tosafists, as noted in note 134, are additional commentators. They were chiefly Rashi's students and successors, who lived during the 200 years following Rashi's death, i.e., from approximately 1100-1368. See generally Nissan Mindel, *The Tosafists*, CHABAD.ORG,

follows: indeed, each holder of the garment makes *only one claim*. Each states, “I found it, and it is mine.” Accordingly, the plea “it is all mine” is added, in order to clarify that seeing alone does not constitute or make a claim. However, why would one think that it could be assumed that one who has only seen the garment could plead “I found it”?¹³⁶

The Gemara acknowledges that the Torah’s use of the term ‘found’ infers having taken hold of.¹³⁷ However, the Tanna¹³⁸ utilize “popular language,” in which, upon seeing an item on the road, a potential claimant could use the term “found it,” given the prevalent belief that one acquires a lost object by sight alone. It was, therefore, essential to add the plea “it is all mine,” and therefore, to highlight that merely seeing an ownerless item cannot constitute a claim for possession.

Indeed, there is a reason why the Mishna stresses the plea “it is all mine.” Had it not specified that plea, one could have rightly declared that elsewhere in the Talmud the word “found” is used to denote “seen,” and therefore one would have drawn the conclusion that

https://www.chabad.org/library/article_cdo/aid/112332/jewish/The-Tosafists.htm. (last visited Jan. 21, 2020).

¹³⁶ On Rashi’s commentary on Bava Metzia 2a, see generally ADIN STEINSALTZ, THE TALMUD: THE STEINSALTZ EDITION, VOL. I: TRACTATE BAVA METZIA, PART I at 9 (1989); THE SCHOTTENSTEIN EDITION OF THE TALMUD BAVLI, VOL. I: TRACTATE BAVA METZIA, (2a), Ch. 1-3 (Rabbi Hersh Goldwurm, ed. 1992).

¹³⁷ See generally, Sefaria, *Mishnah Bava Metzia I*, https://www.sefaria.org/Mishnah_Bava_Metzia.1?ven=The_Mishna_with_Obadiah_Bartenura_by_Rabbi_Shraga_Silverstein&lang=bi.

By law, they should divide without an oath; but the sages ordained that neither of them takes anything without an oath, so that a man should not go and take hold of his neighbor’s garment and say: “It is mine!” And it was necessary for the tanna to apprise us both of “I found it” — (an instance of) finding a lost object, and: “It is all mine” — (an instance of) buying and selling. For if only the first were taught, I would say that it is only in that case that the Torah imposed an oath, one being apt to rationalize to take a lost object unlawfully, viz.: “My friend will lose nothing. I will go and seize it and divide it with him.”

¹³⁸ Rabbi Louis Jacobs, *Who Were the Tannaim and Amoraim?: The Great Sages of the Mishnah and Talmud*, MY JEWISH LEARNING 1 (2019) <https://www.myjewishlearning.com/article/tannaim-amp-amoraim>.

The Talmudic rabbis whose views are recorded in the Talmudic literature are called *Tannaim* . . . [The term is] . . . also found in the Talmud in connection with learning activity. In this context, a *Tanna* (‘rehearser’ or ‘teacher’) was a functionary who rehearsed opinions and statements of the teachers of the first two centuries . . . [of the Common Era].

Id.

mere sight establishes an entitlement to possession.¹³⁹ Accordingly, the Mishnah first states “I found it” and then “it is all mine” so that we might conclude from the additional phrase that merely seeing an object does not indicate a claim for possession.

The Gemara asks a succeeding query: Should it not suffice for us to accept as evidence, the statement “I found it”?¹⁴⁰ We would then know that he/she claims, “it is mine”! The response is: had the Mishna only imparted “I found it,” one could have assumed that he/she meant “I saw it”; and therefore he/she acquired the garment solely by seeing it. Therefore, the Mishna demonstrates that “it is mine,, in order to explain that a garment, or any similar chattel’s holder, does not acquire possession solely through seeing it alone.¹⁴¹

In this Bava Metzia Mishna, we are presented with two cases that address the finding of a garment – or indeed, any chattel – by two people, who each claim to have found it and to have total ownership over it. The Mishna’s description of the facts and the court’s equitable division of the garment resolve the dispute, *i.e.*, Each receives the share that they swore they owned. Note, however, that “equitable” does not mean “equal.” Nevertheless, hidden in the text are a number of issues that the Mishna – and a judge – has to tackle and a range of fundamental rules which she must confront. First, how is “possession” defined? How is it established? And, under what conditions will possession lead to ownership? Second, by administering oaths to the claimants – assuming that they are not lying – the judge is ruling out that one or both of the claimants is a thief who stole the garment. Third, we are provided with an exegesis of the logic that the Rabbis employed in resolving issues related to lost objects.

***Masechet/Tractate. Baba
Metzia 2b***

In chapter two of Bava Metzia,¹⁴² the Gemara states that:

¹³⁹ *Talmud - Mas. Baba Metzia 2a*, at 1 (2019), HALAKAH.COM, https://halakhah.com/pdf/nezikin/Baba_Metzia.pdf.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 4.

¹⁴² Mishna Bava Metzia 2, Sefaria (Dr. Joshua Kulp ed.), https://www.sefaria.org/Mishnah_Bava_Metzia.2?lang=bi.

if the Tanna had dealt solely with the case of finding I [an unknown commentator]¹⁴³ might have said that only in such a case would the Rabbis impose an oath, because each disputant might permit himself [to claim the garment] by saying to himself, ‘My neighbour loses nothing through my action [as it cost him nothing to acquire the garment]; I shall go and take hold of it and share it with him.’¹⁴⁴

A footnote to the above states that “[t]he oath would then act as a deterrent, [because] even if he did not hesitate to put forward a wrong claim he would not be ready to commit perjury.”¹⁴⁵ Of course, the sages who argued their various positions and drafted the Mishna and the Gemara were assuming that the claimant feared G-d and would not lie. Other tractates in the Talmud address false testimony.¹⁴⁶ That subject is beyond the scope of this article.

b. Case 2: Marriage

The Torah offers little direction with regard to the practices of marriage. For example, what is the method for a man of finding a spouse, the dowry, the type of marriage ceremony, and the like. These were likely part of the oral Torah, since the Talmud fully addresses and explains the character of the marital relationship.

For instance, the Mishnah’s tractate of Kiddushin ch.1:1, specifies that a wife is acquired in three ways: (1) through money; (2) via a contract; or via sexual intercourse. Generally, all three of these conditions are satisfied, even though only one is required to achieve a valid marriage. In Judaism, the marriage is a contractual relationship

¹⁴³ Zahavy, *supra* note 132, Baba Metzia 2a, at the bottom of page 1, text accompanying footnote 6, refers to “Kadi, replied.” Footnote 6 provides: “This word may also mean ‘an unknown authority’”.

¹⁴⁴ *Id.* at 2.

¹⁴⁵ Bava Metzia 2b at note 1. See BABYLONIAN TALMUD: TRACTATE BABA MEZI’A, BABA MEZI’A 2A, Chapter I (2019), http://www.come-and-hear.com/babamezia/babamezia_2.html.

¹⁴⁶ Jewish law provides techniques to urge a witness not to lie. For example, the Ten Commandments, provides: “You shall not bear false witness against your neighbor.” Exodus 20:16. The peril, or caution that is provided prior to a person’s testimony, for example, determining the witness’s competence to testify, or that the witness has not tampered with or manipulated the evidence, as well as *voir dire* by the judge. Indeed, caution of the legal penalties that will be exacted that a witness receives, for instance, in financial suits is touched upon in Mishnah Sanhedrin 3.6, and considered at length in Sanhedrin 29a.

between the prospective bride and the prospective husband. The contract is called a Ketubah¹⁴⁷ – which in Hebrew is a writing.

The equity issue turns on the view that the ketubah is a contract wherein both parties are said to participate equally, thereby endeavoring to dismiss the appearance of the wife as the husband's property. However, a number of critics have challenged this view, arguing that marriage is a *kinyan mamon*—a monetary contract, which defines marriage, as a relationship whereby the woman becomes an acquired object.¹⁴⁸

The next example of the use of equity deals with an estate of a deceased husband. The mishna dealing with the marriage contract, Ketuboth, provides the following:

Mishna: Ketuboth 93a

If a man who was married to three wives died, and the kethubah [the marriage contract] of one was a maneh [valued at a one hundred zuz dowry], of the other two hundred zuz, and of the third three hundred zuz, and the estate was worth only one maneh [one hundred zuz], they divide it equally.

If the estate was worth two hundred zuz, the claimant with the kethubah of the maneh receives fifty zuz, while the two other claimants of the two hundred and the three hundred zuz each receive three gold denarii (worth seventy-five zuz).

If the estate was worth three hundred zuz, the claimant of the maneh receives fifty zuz, the claimant of the two hundred zuz receives a maneh (one hundred zuz) and the claimant of the three hundred zuz receives six gold denarii (worth one hundred and fifty zuz)... Similarly, if three persons contributed to a

¹⁴⁷ Elon Gilad, The Ketubah, or Jewish Wedding Contract: Traditionally written in Aramaic, the ketubah details the groom's obligations toward his future wife, HA'ARETZ Aug. 23, 2015, <https://www.haaretz.com/jewish/the-ketubah-or-jewish-wedding-contract-1.5390222> (last visited Mar. 18, 2020). ("Under Jewish law, the traditional wedding ceremony process starts with the signing of the ketubah (Hebrew for 'written thing'), which is the marriage contract . . . The ketubah is traditionally written in Talmudic-era Aramaic. More modern versions can be written in Hebrew, English or other languages. As the groom is unlikely to be fluent in Aramaic, the rabbi will read the ketubah aloud and explain what it stipulates.").

¹⁴⁸ See generally MOSHE MEISELMAN, JEWISH WOMEN IN JEWISH LAW 96-97 (1978).

joint fund and they had made a loss or a profit they share in the same manner.¹⁴⁹

| Distribution of the Estate | | | |
|-----------------------------------|----------------|----------------|-----------------|
| Estate value | Wife #1 | Wife #2 | Wife # 3 |
| 100 | 33 1/3 zuzim | 33 1/3 zuzim | 33 1/3 zuzim |
| 200 | 50 zuzim | 3 Gold Dinarii | 3 Gold Dinarii |
| 300 | 50 zuzim | 100 zuzim | 6 Gold Dinarii |

What should be evident, is that the authors of the Mishna and Gemara were aware that each woman will, or may have to, fend for herself, if for example she has no parents. Consequently, they divided the estate equitably, based on the original contract between the two parties.

D. Circling Back to Basics

One must also remember that the Mishna and Gemara always “circle back” to the Torah or halakha,¹⁵⁰ *i.e.*, Jewish Law, since the Torah is what is being interpreted in the oral law. That is, these texts are not studied in a vacuum. Indeed, they illuminate, expand and build upon Torahic laws. As regard found objects, these are referred to in Leviticus 5:21-24, which declare, in pertinent part:

¹⁴⁹ The ketubah, or the marriage contract, is a requisite part of every Jewish marriage. It sets forth the husband’s obligation, pursuant to Jewish law, to his future wife during the marriage, and his monetary duties upon death or divorce. Indeed, two witnesses are required to verify, in writing, that the groom executed the ketubah. In most run of the mill, standard form ketubot (plural for ketubah), the groom declares that as a husband he agrees to obligate himself to provide his wife, in the amount of 200 zuz and 200 zekukim of silver upon the occurrence of either death or divorce. The groom places a wedding band on his betrothed finger, and declares the following from the ketubah, “After all, you are sanctified unto me [to be my wife], with this ring, pursuant to the laws of Moses and Israel. And, I shall work, respect, provide for you, and sustain you in harmony with the customs and traditions of Jewish husbands who have worked, respected, provided for, and sustained their wives with faithfulness. And I will furnish you with 200 zuzim as dowry. Where the woman was previously married – divorced or widowed – or she is a convert to Judaism, the amounts of the dowry and additional support are halved, *i.e.*, 100 zuzim. However, the bride is also given a supplementary amount, for clothing, food, and other needs, “according to the way of the world.” Note, that beyond dowry, the husband will generally leave his estate to his wife.

¹⁵⁰ See Walzer, *supra* note 1, for the definition.

Leviticus 5:21, “The Lord spoke unto Moses saying, if any one sin, and commit a trespass against the Lord, and deal falsely with his neighbour in a matter of . . . robbery . . .; ²² or have found that which was lost, and deal falsely therein, and swear to a lie; in any of these that a man does, sinning therein; ²³ Then it shall be, *if he has sinned, and is guilty, that he shall restore that which he took by robbery . . . or the lost thing which he found,* ²⁴ Or anything about which he has sworn falsely, he shall even restore it in full, and shall add the fifth part more thereto; unto him to whom it appertaineth [appertains or belongs] shall he give it, in the day of his being guilty. [*i.e.*, on the day when he makes voluntary acknowledgment of his guilt . . .] ¹⁵¹

The foregoing is quite different from a common law equity claim. Common law equity is employed where there is no statute or rule to guide the court. However, even though one reads and analyzes the cases in the Mishna, as many students of the Talmud do – particularly when they begin its study – even without referring to the Torah, they are aware that its rules are always in the background. That is, because the Mishna, the Gemara, the Shulchan Aruch, and the many other commentaries on Jewish law, fill in the missing elements for a rule. The following examples may work to clarify the point.

Part of the Torah’s Ten Commandments, located at Exodus 20:1-17, contains the commandment, which declares “You shall not murder” (alteration added). Reading that commandment, one ought to be cognizant of numerous questions, including: (1) what constitutes murder; (2) how does one prove murder? (3) is murder a crime? (4) is it a tort? (5) how many judges are required to adjudicate a murder case? (6) how many witnesses are required (eyewitnesses or other witnesses who are competent to testify)? (7) are the witnesses testifying truthfully, or are they lying, or coerced, or are they colluding for their own gain? (8) is the act punishable at all? and (9) if so, what punishment, if any, should be meted out to the murderer? These issues and numerous others are the province of the Talmud, and they are settled in the Mishna and Gemara in order to make a reasoned equitable finding. The authors of the Talmud fill in these lacunae, utilizing

¹⁵¹ DR. J. H. HERTZ, C.H., THE PENTATEUCH AND HAFTORAS 422-23(Soncino Press 2d ed. 1980) (emphasis added).

equitable remedies. The use of equitable processes and how remedies are reached is addressed below.

For example, the Torah at Numbers 35:16-20 provides illustrations of acts constituting murder. In the Mishna, Makkot (Lashes), which is part of Nezikin (Damages), the Rabbis address the issue of murder. However, they also address what is not murder. In this, they are directed by the Torah, specifically, given Numbers 35:10-13.¹⁵² That section discusses sanctuary/refuge cities. Here, the Rabbis parse out what constitutes involuntary manslaughter. The discussion in the Mishna shifts to accidental killing, and will be the focus here, to demonstrate the Rabbis' equitable thinking. Recall that in Biblical times six cities of refuge existed.¹⁵³

If a person accidentally killed another, the killer was given the opportunity to escape to the cities of refuge where he was protected from the revenge of the victim's family, until the court could judge and release him from the death sentence. Again, utilizing the Torah, as one must, the sages move on to determine whether a particular defendant on trial for murder should be put to death. Note, how the discussion begins with text from the Torah, regarding murder, and as the sages proceed to parse out remedies, they arrive at an equitable remedy, based on the various factual scenarios.

c. Case 3: Murder v. Negligent Homicide

Mishna Maakot Ch. 1-2, 7b:17

The main objective of the following is to point out how utilizing the logic of equity, the authors of the Mishna arrive at the equivalent of the crime of involuntary manslaughter.¹⁵⁴

¹⁵² Numbers 35:10-13:

¹⁰Speak to the children of Israel and say to them, When you cross the Jordan to the land of Canaan,¹¹ you shall designate cities for yourselves; they shall be cities of refuge for you, and a murderer who killed a person unintentionally shall flee there.¹² These cities shall serve you as a refuge from an avenger, so that the murderer shall not die until he stands in judgment before the congregation [and repent].emphasis added.

Id.

¹⁵³ The cities were the Galilean city of Kedesh, Schechem (Nablus), Hebron, Bezer, Ramot and Golan. See Exodus 21:13 and Joshua 20:7-8.

¹⁵⁴ MAKKOS 2a-24b The Soncino Babylonian Talmud 23 (Reformatted by Reuven Brauner, 5772 in the Hebrew calendar, 2018 in the Gregorian),

MISHNA: These are the people who go into banishment, [*i.e.*, are exiled to be given the chance to seek sanctuary in a city of refuge]. Anyone who kills in error, [internal note 13: *i.e.*, accidentally, without premeditation.] Whether one is liable to be banished depends on the particular circumstances of the case: If one was rolling a roller to smooth the covering of mortar that he applied to [seal his roof] [internal note 14: Eastern roofs are flat; they are plastered to make them water-tight and give them the necessary slope. The leveling is done by a log (or smooth flat stone) to which a long handle attached, by which it is pushed backwards and forwards.] and it [the roller] [slipped over] fell down and killed somebody, or if one was lowering a barrel from the roof and it fell on a person and killed him, or if he was descending a ladder and he fell on a person and killed him, in all these cases he is banished. But if one was pulling a roller toward him and it fell from and it fell from his hands upon a person and killed him, or if one was lifting a barrel and the rope was severed and it fell upon a person and killed him, or if one was climbing a ladder and he fell upon a person and killed him, that unintentional murderer is not banished. *This is the principle: Any murderer who kills unintentionally through his downward motion is exiled, and one who kills not through his downward motion is not exiled.*¹⁵⁵

Examining the case with the rope and barrel, we note that the first example states: “lowering a barrel from the roof” is not punishable by banishment. The reasoning must be that this is the expected mode, or custom, of moving the barrel from the roof to a lower elevation. Certainly, once a job of constructing or repairing a roof is done, the barrel must be removed. Thus, the negligence in that scenario suggests that the barrel’s handler was acting in the mode that others, who are similarly situated, would lower a barrel. However, in the second example: “lifting the barrel with one rope, may be inherently riskier,

<https://halakhah.com/rst/nezikin/38%20-%20Makkos.pdf>. The capitalized words are from the Mishna. Note, the difference between Makkot and Makkos is one of pronunciation. In modern/Israeli Hebrew the word is Makkot.

¹⁵⁵ *Id.* at Ch. 2 (emphasis added).

and may not have been the custom, or that one rope may not have been sufficient to raise the barrel. Consequently, the lowering a barrel from the roof becomes an issue.”

As will become clear from Gemara’s analysis, the key here is what we refer to today as negligence. If the killer is negligent then he has the right to escape to a city of refuge. If the murderer is not negligent, then he does not. It turns on custom or intent, as can be gained from the following:

GEMARA. R.[abbi] Abbahu asked R. Johanan: If while a person is going up a ladder, a rung giving way under him comes down and kills somebody, how would this be taken? Was the death to be considered [a result] of an upward or a downward movement? [internal note (14)] The man moves upward, the rung moves downward; which is the determining factor here as regards the law of banishment, the man’s movement or that of the rung? — He replied: You have indeed laid your finger on [an accident resulting from] a downward motion as a prerequisite of an upward movement. To this R. Abbahu objected [from the Mishnah]: This is the general principle: Whenever the death was caused in the course of a downward movement, he goes into banishment, but if [caused] not in the course of a downward movement, he does not go into banishment. Now, [what kind of case would be included in the general] terms of the latter principle — but if [caused] not in the course of a downward movement . . . if not an instance of this kind? — [R. Johanan replied:] Following your opinion, what instance would you include in the general terms of the first principle — whenever. . . in the course of a downward movement . . . [You could give] but one, namely, that of a butcher; and that instance is also within the terms of the latter principle, as it is taught: If a butcher whilst chopping meat killed somebody [there are four different versions of the case]. Version A [internal note (15)) Lit., ‘One Tanna teaches ‘ . . . and another Tanna teaches.] has it: If he killed a person in front of him, he is liable to go into banishment; if behind, he is exempt. Version B: If behind him, he is to go into banishment; if in front, he

is exempt. Version C: Whether in front of him or behind, he is to go into banishment. Version D: Whether in front of him or behind, he is exempt. And [continued R. Johanan], it is really not difficult [to explain these diversities], thus: In Version A: If he killed in front by a downward stroke [he goes into banishment]; if behind him by an upward swing [of the chopper], he is exempt. [internal note (16) Although the upward swing behind is the beginning of the downward stroke in front.] In Version B: If he killed in front of him by the upward swing [he is exempt]; if behind him, by the downward [back] movement [he goes into banishment]. [internal note (17) Although the downward back movement is but a continuation of the upward swing in front.] In Version C: If he killed either in front or behind him by the downward movement [he goes into banishment]; and in Version D: If he killed either in front or behind him by the upward swing [he is exempt].¹⁵⁶

The foregoing is somewhat complicated, if for no other reason, because attempting to translate Hebrew – sometimes archaic – and Aramaic is difficult at times. Nevertheless, when dealing with the cities of refuge for inadvertent murderers, one of the key issues is: what constitutes an unintentional, or unintended killing? Under the law, the members of the family of the person who was killed are allowed to exact revenge, including killing the killer, with impunity, if the killer does not escape to a city of refuge. However, once the killer finds her way into a city of refuge, the victim's family cannot touch the killer, as she is provided refuge. Accordingly, it is critical to determine the proper punishment: banishment to a city of refuge versus death. Thus, in order for the Talmud to be fair, impartial, or even handed, *i.e.*, equitable, the Rabbis must construe what kind of act is excusable and worthy of a right to seek refuge.

IV. CONCLUSION

Equitable principles are not an inflexible or rigid set of rules – which is the law's province – rather, they are general principles from

¹⁵⁶ MAKKOS 2a-24b, *supra* note 149, at 23.

which deviation may occur in specific cases. Indeed, pursuant to the common law “[e]quity will not suffer a wrong to be without a remedy.” That is why the common law fashioned the doctrine *ubi jus ibi remedium*, or “where there is a wrong, there must be a remedy.” In the Talmudic tradition, as seen above, the sages who compiled both the Mishna and the Gemara, also do not have hard and fast rules, whether dealing with lost objects, intestate estates, or killing of a human being. Each scenario is governed by the facts of the case. In these two modes, the American and the Jewish principles are quite similar, even given the thousands of years between their separate development. However, the Mishnaic or Talmudic tradition represents a methodology employed by the Sages’ interpretations, which are grounded in the Sages’ exegesis of the Torah.¹⁵⁷

Indeed, for decades secular Jewish and non-Jewish lay people and scholars, who may not be familiar with Jewish law, “have had the misconception that Jewish law is overly formal, that it gives slavish obedience to the letter of the law, and that it is oblivious to practical consequences hermeneutics [sic] of the oral Torah and an interpretation as well as the running commentary of the text of the Torah.”¹⁵⁸ However, in distinction to the formalism of the examination and study of Jewish law, its scholars, particularly Professor Aaron Kirschenbaum,¹⁵⁹ “demonstrate[] that the resolution of an actual dispute is an equitable activity. It is not an abstract exercise in reasoning but a practical resolution of a problem. The goal is to reconcile the parties.”¹⁶⁰

The goal, therefore, is not to simply expose the truth at any price, but to settle the dispute in a way that mends the wounds between the litigants and within the wider community.¹⁶¹ In closing, the unquestionable difference between Jewish and American courts that employ equity is best described in the following:

¹⁵⁷ See, e.g., MICHAEL WILLIAMS *ET AL* (EDS.), *INNOVATION IN RELIGIONS TRADITIONS* 128-29 (1992).

¹⁵⁸ Steven F. Friedell, *Aaron Kirschenbaum on Equity in Jewish Law*, 1993 *BYU L. REV.* 909, 909 (1993), <https://digitalcommons.law.byu.edu/lawreview/vol1993/iss3/6>.

¹⁵⁹ Rabbi Professor Aaron Kirschenbaum, an eminent law professor at the University of Tel Aviv’s Buchmann Faculty of Law, was “one of the greatest Jewish law scholars of the modern era.” Radzyner School of Law, *Conference Held in Memory of Prof. Aaron Kirschenbaum z”l*, IDC HERZLIYA [Israel] (Mar. 6, 2017), <https://www.idc.ac.il/en/whatsup/pages/kirschenbaum-memorial.aspx>.

¹⁶⁰ Friedell, *supra* note 158, at 912.

¹⁶¹ *Id.*

Jewish courts can proceed under the method of strict law or by the method of compromise if authorized by the parties. Compromise means that the court will impose a solution that differs from the requirements of strict law and will respond to the “equities” and special features of the particular case. [Footnote omitted]. Unlike the American system of trial, which considers the adversary system to be the best method for uncovering the truth, the Jewish system is more dubious about the ability of witnesses and fact finders to determine what actually happened. In addition, the Jewish system recognizes that the dispute over what happened may play only a small part in the complex relationship between the parties.¹⁶²

¹⁶² *Id.* at 912-13.