

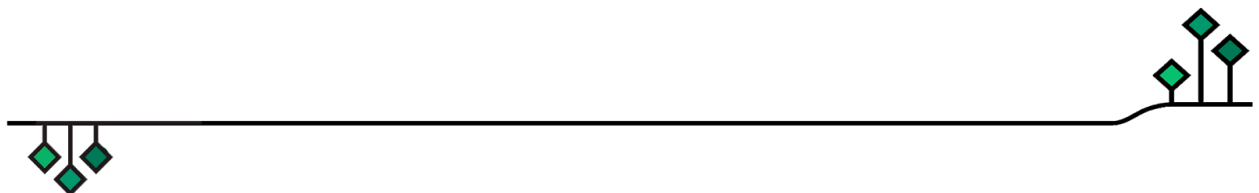
“Justice, Justice Shall You Pursue”

R. Yitz Greenberg – ygreenberg@hadar.org

Parashat Shoftim 5781

Parashat Shoftim, meaning Judges, instructs the Israelites to appoint judges who will always give righteous judgments. The principle the judges should follow is: “Justice, justice shall you pursue” (Deuteronomy 16:11). Thanks in part to the late Justice Ruth Bader Ginsburg, who framed this passage and displayed it in her Supreme Court office, this has become one of the most famous passages in the Bible. What can we derive from the fact that the word justice is repeated twice in the verse?

The Torah immediately explains that, to assure justice, the judges must not distort judgment, which might favor one side or another; must not favor persons—the rich and powerful often get favorable treatment; and must not take bribes. In Leviticus, the Torah states: “You shall do no injustice in your judgment. You shall not lift up (i.e. treat as superior) the person of the poor, nor shall you give [extra] importance to the person who is mighty. Rather judge your neighbors righteously” (Leviticus 19:15). This means that the rich, powerful, and well-connected should not get preferential treatment. Even in countries where all are equal before the law, the rich and powerful get better outcomes—whether it is because of better



lawyers, more access, or higher status. In Exodus, the Torah warns against this phenomenon, and asks for a special effort to assure we “do not pervert the judgment of the poor in his cause” (Exodus 23:6).

The Talmud applies this principle in the following way. If a poor person sues a rich person, or vice versa, the rich person cannot appear in court in clothes that are manifestly more dignified or impressive than those of the poor litigant. Either the rich person must enable the poor person to dress better, or he must dress down—lest the poor litigant be weakened by his manifest inferiority in dress, or the judge be affected by the imbalance to take the wealthy person’s statements more seriously (Babylonian Talmud Shevuot 31a). Similarly, the prophet Isaiah counts as one of the hallmarks of the Messianic age that the Messiah “will judge the poor justly and decide with equity for the meek of the earth” (Isaiah 11:4).

Is avoiding favoritism and being neutral in judgment enough by itself to assure justice? Clearly, no. If there is a significant imbalance in wealth or power between two litigants, then justice must reflect in some way the greater need of the needy one. In this vein, the Talmud tells the story of Rabbah, son of Rav Huna (Babylonian Talmud Bava Metzia 83a).¹ Some porters broke his barrels of wine after he had hired them to transport them, so he took their cloaks as payment for the lost wine. They complained to Rav. Rav told Rabbah to give them their cloaks back, ruling that, given their limited means, he should restore their cloaks which they needed. Presumably, given their poverty, one should give greater leeway to them and not penalize them for breaking the casks. Rabbah challenged this ruling. “Is this the

¹ The printed edition has Rabbah bar bar Hanan, but this name is not reflected in any of the manuscripts of the Talmud. The oldest and most reliable manuscripts from the Cairo Genizah have Rabbah bar Rav Huna.



halakhah? Is this what I have to do?" Rav answered, "Yes, as it is written, 'that you may walk in the way of good men' (Proverbs 2:20)."

The porters then said to Rav, "We are poor people and we toiled all day. We are hungry and have nothing (to buy food, etc.)." In response, Rav said to Rabbah, "Go and give them their wages." Rabbah challenged him again. "Is this the *halakhah*?" Rav's final ruling: "Yes, as it is written, 'and keep the paths of the righteous' (Proverbs 2:20)."² In other words, justice must consider equity, and the basic needs of the poor litigant have a weightier claim on the law. The same holds true in welfare laws. In the commandment to give *tzedakah*, the Torah says, "You shall grant him **what he needs that he lacks**" (Deuteronomy 15:8). The Oral law applies this principle that the welfare *tzedakah* grant preserves the dignity of the needy person, including special grants, if needed, to maintain his or her sense of dignity and self-respect.³

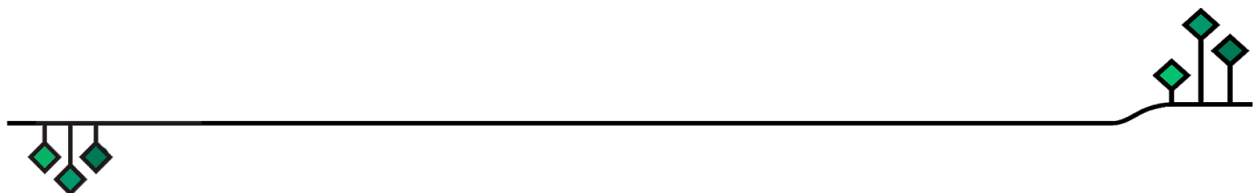
Thus, the Torah and Jewish tradition allow for affirmative action or extra benefits based on the deprivation level of the person. In such a case, exact equal treatment would not constitute justice, for it would leave the poor person without basic life needs.

Is there no limit to this special treatment of the poor? There is. If the judge is tempted to say, "The poor person needs it more, so, even though she is guilty, I shall absolve her;" or, if he is the plaintiff, "I will award the case to him unjustly"—this goes too far, and is a perversion of justice.⁴

² This is known in Jewish law as going *lifnei mishurat hadin* (going beyond the strict legalities), in this case, in order to give the poor litigator equity in the outcome.

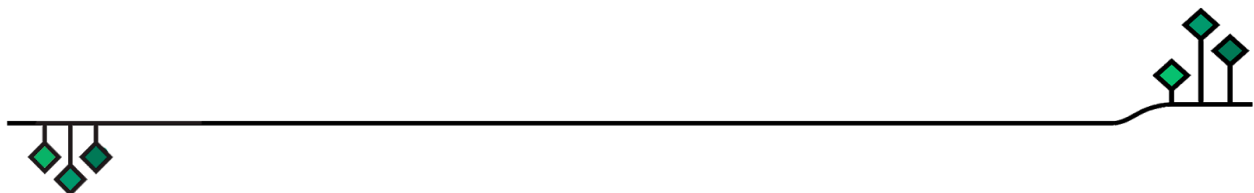
³ See Rambam, *Mishneh Torah*, *Hilkhos Matanos Ani'im* 7:3ff.

⁴ See *Jerusalem Talmud Pe'ah* 4:7.



There is another limit. The Torah rejects any ideological system in which the common person, the poor, or the proletarian is considered automatically right, and the wealthy or otherwise privileged are automatically wrong. The Torah says: "Do not favor (i.e. grant legitimacy only to) the poor in his cause" (Exodus 23:3). Despite the validity of affirmative action as special help for the poor, a system that no longer judges the legitimacy of behaviors and automatically rules in favor of the poor is a system that has broken down. It gives no justice to a whole section of the population. If justice is denied to whole classes of people—even privileged people—and favor is only given to people in a different category, then justice itself would be undermined. Eventually the favored class will also be mistreated, and there will be no justice system left to make this judgment.

The undoing of racial injustice in America should also be considered according to these rules that the tradition considers in light of poverty. The Jewish community must support affirmative action and extraordinary efforts by American society to try to undo the discrimination and deprivation inflicted on the African American community by systemic racism. This includes racist policies of the United States government in grants and opportunities to its citizens in land acquisition, in housing, in banking, and business lending practices, and so on. This effort must be on a grand scale, and it must take into account that the cumulative deprivation of the African Americans will not be overcome without a massive investment and effort by all of American society to break the historical cycle of discrimination, deprivation, and denial of dignity. In fact, we know that, in America today, African Americans, like the poor in Rabbinic terms, are at risk of automatically being treated worse before the law and in many other settings.



At the same time, I am sensitive to the risk that, under pressure to do justice, we may come to “favor the poor in his cause,” that is, to become too automatic in favoring those who are otherwise oppressed, regardless of the facts in a given case. Whenever it becomes the case that the justice system no longer makes judgments or partial judgments on the claims of one side, then justice for all is endangered. The justice system might come to be itself at risk in the opposite direction from its historic danger. If the justice system goes, then all will suffer—including the needy and deprived for whose sake it is proposed that the system of justice be set aside.

We must continue and improve the system of assessment, applying it even to the noble causes of fighting poverty or racism. Policies that give equity to African Americans and help overcome systemic racism, including negotiated divisions of the national economic pie based on a democratic consensus of the total community, are desperately needed and overdue. At the same time, this justice must integrate due process for all. Affirmative action, a powerful medicine, must be administered with controls and a process of integrity, lest it poison the patients as well as their relationships with the rest of society.

Based on this analysis, there are two additional possible meanings of “justice, justice, shall you pursue.” One is that justice should include equity. And second, that society must pursue justice justly, strengthening—and not undermining—the principles of justice for all. The system of law and legislation, which has some objective and fair processes, should not be undermined for a cause, no matter how noble.

