

Not by Power: On Restoring Faith in the Law

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Parashat Shoftim 5783
August 18, 2023

Today is the first day of the Hebrew month of Elul, the month that leads into Rosh Hashanah, which begins exactly four weeks from tonight.

We know that because the science of astronomy enables us to determine the calendar with accurate precision.

But in the Mishnaic period, during the early part of the first century of the Common Era, the Jewish calendar was not determined by astronomy but, rather, by testimony about sightings of the moon.

Witnesses would come before the Great Sanhedrin, the rabbinic court that sat in Jerusalem, and testify that they had seen the New Moon on such-and-such day. If the court found the testimony believable, it would declare that the new month had begun, and the dates of the month would be calendared accordingly.

For example, Rosh Hashanah is the first day of the month of Tishrei and Yom Kippur is the tenth day—so the date of Yom Kippur is entirely dependent on the date on which the month of Tishrei was declared by the court to have begun.

Well, right after outlining this whole process, the Mishnah, in characteristic Jewish fashion, tells a story about a time when there was a disagreement about when the new month had begun.

The disagreement was between Rabban Gamliel, the head of the Jewish community at the time, and his top deputy, Rabbi Yehoshua.

The long and short of it is that Rabban Gamliel accepted the testimony of two witnesses who some of the other sages, including Rabbi Yehoshua, could tell were obviously lying. Consequently, Rabban Gamliel declared that the new month had begun on, say, Monday, while Rabbi Yehoshua and his allies believed it had begun on Tuesday.

And this was a big deal because it meant Rabban Gamliel and Rabbi Yehoshua disagreed on the proper date of Yom Kippur.

When Rabban Gamliel heard that his top deputy was going around saying that the Big Boss had gotten it wrong, he was none too pleased. So, he summoned Rabbi Yehoshua to his office.

"Come see me," he said, "on the day *you* think is Yom Kippur. And be sure to bring your walking stick and your money with you."

Now, remember: Rabban Gamliel believed that the new month had begun a day earlier than Rabbi Yehoshua thought it had, so the day Rabbi Yehoshua calculated to be Yom Kippur was one day *after* Yom Kippur in Rabban Gamliel's accounting.

Since carrying things like a walking stick and money is forbidden on Yom Kippur, Rabban Gamliel was forcing his subordinate to make a choice: "Either properly observe the day you think is Yom Kippur and defy my order—or answer my summons and violate the sanctity of the holiday."

It was an awful dilemma for Rabbi Yehoshua, and he fell into a terrible funk.

In the end, on the advice of counsel, he made the hard decision to submit to Rabban Gamliel's authority and show up at the time and with the items he was told to.

When he arrived, Rabban Gamliel greeted him warmly. "Come in peace, my teacher *and* my student," he said. "My teacher because you are wise, and my student because you accepted my decree."¹

See, I think Rabban Gamliel had realized that Rabbi Yehoshua's calculation was actually the correct one and that he had made an error. But no matter: Rabban Gamliel was the boss, so whatever *he* declared to be true was, well, *true*—even if it was false.

The message is brutal but clear: Ultimately, the law is not determined by some objective reality; it is determined by *power*.

And Rabban Gamliel wanted to make sure Rabbi Yehoshua and the whole community understood that.

The story of these two sages is a story about the tension that sometimes exists between truth and power in adjudicating the law.

It can help us understand our parashah this week, Shoftim, which emphasizes the importance of judges being unbiased and rigorously avoiding showing favoritism toward one litigant or another based on any factor other than the law itself.

This is a major issue in contemporary legal theory as well. The questions scholars ask are: What constrains judges and lawyers in their practice of the law? Do the rules in the law books determine their actions, or do they use the rules in the books to reach the outcomes they want?

One school of thought, known as Critical Legal Theory, argues that, ultimately, the law books are just too vague and too open to interpretation to mean anything in an objective sense. Creative judges and lawyers can make them mean anything they want them to mean—and that's exactly what they do.

For critical legal theorists, the answer to the question of what constrains judges and lawyers is: nothing; they do whatever they want to do and use the language of law to justify it.

So, if this view is right and the practice and adjudication of law is really *not* about applying objective laws and principles, what *is* it about?

According to critical legal theory, law is simply politics by another name; it's a tool that lawyers and judges use to pursue their own political goals. This means that the law is not that higher arbiter of truth and

justice we've been taught to revere; instead, it's an instrument of power that those who have access to it can use as a cudgel to dominate opponents and advance their own vision for society.

This is a cynical view of the law, to be sure. Maybe that's why critical legal theory fell out of favor a few decades ago.

But in my view, it's making a comeback—maybe not in academic literature or in law schools but in the minds of many ordinary people.

Public polling shows that significant segments of our country look at things like the recent Supreme Court decisions on abortion and affirmative action, the mounting indictments of former President Trump, and the Hunter Biden investigations and plea deal and special-prosecutor appointment as fundamentally *political* in nature—having less to do with the law than with destroying political opponents and winning elections.

You may agree or disagree. My guess is that you probably think some of things I listed are just political while others are faithful to the rule of law. That's how most people see it these days—though, of course, which ones you put into which category is a function of which side of the political aisle you sit on.

But reason and history would suggest that it doesn't break down so neatly every single time, where one side is always good and innocent, and one side is always villainous and guilty. The idea that it does is a delusion, a story we believe because we *want* to believe it not because it's objectively true.

And that's precisely the point. I have talked before about how I think our society has fallen into a toxic idol-worship of politics—and that this idolatry threatens to destroy us.

Now, this toxicity has infected the law—or, at least, our perceptions of it.

The law is supposed to transcend partisanship, but today many people believe it has become a *tool* of partisans.

Whether they're right about that or not, the fact that they believe it is a very scary and dangerous development.

Judaism is a religion based on law, and it teaches that the legal system is the foundation of society.

Rabban Shimon ben Gamliel, the son of Rabban Gamliel from the story, taught in Pirkei Avot: "The world is sustained by three things: by *din* (which is application of the law), by *emet* (which is truth), and by *shalom* (which is peace)."²

The famed 16th-century halakhic scholar Rabbi Joseph Karo explained that the legal system depends on judges judging fairly and accurately based on the *law* (that's *din*), witnesses testifying truthfully (that's *emet*), and litigants accepting verdicts magnanimously and giving up the fight once the case is done (that's *shalom*).³

These things sustain the world because when they are present, they cause the community to *trust* the integrity of the legal system.

But when they are absent, people are likely to question the reliability of the system. And this can have a snowball effect—because as people lose trust in the fairness and objectivity of the justice system, they lose their incentive to participate in it in good faith.

If a critical mass of the community begins to distrust the legal system and believe that power and politics, rather than justice and truth, decide the law, it will become a self-fulfilling prophecy, and *shalom* in society will be unattainable.

This is how a legal system collapses and a society devolves into chaos.

I am concerned that we are plunging headlong toward that abyss.

But the month of Elul has begun, and we have the opportunity to change course.

The social forces are so strong, and it's hard to see how any one of us can turn the tide.

But we have to do our part. And it starts by abandoning our toxic idolatry of politics.

That, each of us *can* do. And maybe if we do it, we'll influence others to do the same.

And we have to insist on the three things of Rabban Shimon ben Gamliel: the fair and just application of the law, even when it disfavors our side; legal action based on truth, not politics or power; and *shalom*, acceptance of the outcomes that *din* and *emet* produce, even when those outcomes are not the ones we would prefer.

1 M. Rosh Hashanah 2:9

2 Pirkei Avot 1:18

3 R. Joseph Karo, *Beit Yosef*, HM 1:1