

What Makes Legal Loopholes Religious?

1. Gilgamesh XI, Stephanie Dalley, Myths from Mesopotamia: Creation, the Flood, Gilgamesh, and Others, Oxford: Oxford University Press (1989) 110

Far-sighted Ea swore the oath (of secrecy) with them,
So he repeated their speech to a reed hut, "Reed hut, reed hut, brick wall, brick wall, Listen, reed hut, and pay attention, brick wall:
(This is the message:)
Man of Shuruppak, son of Ubara-Tutu, Dismantle your house, build a boat.

Leave possessions, search out living things.
Reject chattels and save lives!
Put aboard the seed of all living things, into the boat.
The boat that you are to build
Shall have her dimensions in proportion, Her width and length shall be in harmony, Roof her like the Apsu."...

שופטים כא 2.

21:16 Then the elders of the congregation said: 'How shall we do for wives for them that remain, seeing the women are destroyed out of Benjamin?' 17 And they said: 'They that are escaped must be as an inheritance for Benjamin, that a tribe be not blotted out from Israel. 18 Howbeit we may not give them wives of our daughters.' For the children of Israel had sworn, saying: 'Cursed be he that giveth a wife to Benjamin.' {S} 19 And they said: 'Behold, there is the feast of the LORD from year to year in Shiloh, which is on the north of Beth-el, on the east side of the highway that goeth up from Beth-el to Shekhem, and on the south of Lebonah.' 20 And they commanded the children of Benjamin, saying: 'Go and lie in wait in the vineyards; 21 and see, and, behold, if the daughters of Shiloh come out to dance in the dances, then come ye out of the vineyards, and catch you every man his wife of the daughters of Shiloh, and go to the land of Benjamin. 22 And it shall be, when their fathers or their brethren come to strive with us, that we will say unto them: Grant them graciously unto us; because we took not for each man of them his

טז ויאמר מרדכי קנייה עדה מה-נעשה לנותרים
לבנים כי-נשמדו מביני מן אשה יז ויאמר
ירשת פליטה לביני מן ולא-ימחה שבט
מישר אל יח ואנחנו לא נכלל לתת להם נשים
מבנותינו כי-נשבעו בני-ישראל לאמר ארור
תן
אשה לביני מן {ס} יט ויאמר הנה חגי-הזה
בשלו מימים ימימה אשר מצפונה לבית-אל
מזרחה שמשל למסלה העלה מבית-אל שכ
מה
ו. מנגב לבונה כ ויצו (ויצו) את-בני ביני מן
לאמר לכו וארבתם בפרמים כא וראיתם והנה
אם-יצאו בנות-שילן לחול במחלות ויצאתם מן
הפרמים וחתפתם לכם איש אחת מן בנות שילן
והלכתם ארץ ביני מן כב והיה כפי-באובותם
או
אחיהם הרוב (לריב) אלינו ואמרנו אליהם
חננו
אנתם כי לא לקחנו איש אחת מלחמה כי לא
אתם נתתם להם כעתך אשמו {ס} כג ויעשו
כן בני ביני מן וישאו נשים למספרם מן-המח
ללות
אשר גזלו וישובו אל-נחלתם ויבנו את
הערים וישבו בהם כד ויתהלכו משם בני
ישראל בעת ההיא איש ל שבטו ול משפחתו
ויצאו
{ משם איש לנחלתו } פ

wife in battle; neither did ye give them unto them,

that ye should now be guilty.' 23 And the children of Benjamin did so, and took them wives, according to their number, of them that danced,

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whom they carried off; and they went and returned unto their inheritance, and built the cities, and dwelt in them.

3. Aristotle, Nichomachean Ethics 5.10

This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality...it is then right, where the law's pronouncement because of its absoluteness is defective and erroneous, to rectify the defect by

deciding as the lawgiver would himself decide if he were present on the occasion, and would have enacted if he had been cognizant of the case in question.

4. Fraus Legi: Justinian's Digest 1.3.29-30

29. Paulus, On the Lex Cincia: To do what the law prohibits violates the law, and anyone who evades the meaning of the law without disobeying its words, is guilty of fraud against it.

30. Ulpianus, On the Edict, Book IV: Fraud is committed against the law when something is done which the law did not wish to be done, but did not absolutely prohibit; and the difference between fraud against the law and violation of the same is that between speech and opinion. To do what the law prohibits violates the law, and anyone who evades the meaning of the law

5. Justinian's Digest 40.9.7.1

Injustice often arises also through chicanery, that is, through an oversubtle and even fraudulent construction of the law. This it is that gave rise to the now familiar saying, "More law, less justice." Through such interpretation also a great deal of wrong is committed in transactions between state and state; thus, when a truce had been made with the enemy for thirty days, a famous general went to ravaging their fields by night, because, he said, the truce stipulated "days," not nights...

Back to Chazal: Cunning and Prudent?

(משנה מעשר שני ד:ג (כ"י קאפמן 6.

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מערימים על מעשר שני כיצד הילך את המעות האילו²

או' אדם לבנו ולבתו הגדולים לעבדו ולשפחתו העברים

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ופדה לך את המעשר הזה אבל לא יאמר כן לבנו ולבתו הקטנים לעבדו ולשפחתו הכנענים מפני שידן כידו

[We/they may] act prudently/cunningly regarding the secondary tithe. How? One says to his adult son or daughter or to his Hebrew man-servant or maid, "Take these coins and use them to redeem this tithe." However, one may not say this to one's minor son or daughter, or to one's Canaanite man-servant or maid, for their hand is like his.

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¹ The parallel tosefta explicitly states החומש מן לפוטרו. Tosefta may preserve the older text that was shortened by the mishnah, or the mishnah may preserve the older text which was then clarified by the tosefta. For a discussion about which preserves more ancient text generally, Mishnah or Tosefta, see Shamma Friedman, Tosefta 'Attiqta. This will be quite relevant to our discussion of the following ha'arama regarding the animal firstling.

² Some point out that the idea of a Hebrew indentured maid redeeming secondary tithes is surprising, given that all Hebrew maids are minors (they are freed at age 12). Therefore, Ra'avad and the meyuhas la'Rosh suggest that there must have been a Sinaitic tradition that a person may redeem tithes from the age of 9 and 1 day; Maimonides (Laws of Secondary Tithes 5:8-9) suggests instead that even minors may redeem tithes according to rabbinic law.

³ This term לך indicates that the recipient of the money was meant to keep it and in return be willing to allow the consecration of the fruit to devolve upon the money. Thus, the money would only be permitted to be used for Temple purposes. According to Lieberman, the word לך is absent in a Geniza MS of the Mishna; it is likewise absent from all extant Tosefta MSS, the parallel PT sugya, and bGit. 65a. Therefore, Lieberman argues that this word was not in the original version of the mishnah but was emended based on the discussion in the PT which clarifies:

מה נן קיימין, אם בשאמר לו צא ופדה לי שלוחו הוא. צא ופדה לך שלו הן. אלא כי נן קיימין: בשאמר לו פדה לך משלך, פדה לך משלי, ותני כן פדה לך משלך, פדה לך משלי אינו מוסיף חומש. א"ר יוחנן כל מעשר שאינו הוא ופדיונו משלו (Lieberman, Tosefta Ki-fshuta, ad loc. 766). אינו מוסיף חומש
Additionally, the parallel tosefta in all extant MSS adds בהן

אותו ואת בנו שנפלו לבור ר' אליעזר אומ' מעלה את הראשון על מנת לשוחטו ואינו שוחטו והשיני עושה לו פרנסה במקומו בשביל שלא ימות ר' יהושע אומ' מעלה את הראשון על מנת לשוחטו ואינו שוחטו ומערים

ומעלה את השיני⁴ רצה שלא לשחוט את אחד⁵
מהם הרשות בידו

If an animal and its offspring fell into a pit on a festival day, R. Eliezer says, "One raises up the first on condition to slaughter it but does not slaughter it, and, for the second, one provides food while it is in its present location, so that it does not die." R. Joshua says, "One raises up the first on condition to slaughter it but does not slaughter it, and, acting cunningly/prudently, one then raises up the second. [If] he wanted to slaughter neither one of them, he has the right [to refrain]."

משלי א:א-ד. 8.

יִשְׂרָאֵל בְּלִדְעָתָהּ כְּמָה וּמִסֹּרֶת לְהַבִּין אֶמְרֵי בִנָּהּ. גִּלְקַחְתָּ מִסֹּרֶת לְמַהֲבֵן-דָּוִד מִלֹּא מִשְׁלֵי שֶׁ
הַשִּׁכְלָצֶדֶק וּמִשְׁפָּט וּמִשְׁרִים. דָּלִתָּ לְ
פְתָאִים עֲרָמָה לְנֶעֱרֵד עֲתוֹ מִזְמָה

The proverbs of Solomon the son of David, king of Israel; to know wisdom and instruction; to comprehend the words of understanding; to receive the discipline of wisdom, justice and right, and equity; to give prudence to the simple, to the young man knowledge and discretion.

(ירושלמי פסחים ג:ג, ל. ביצה ג:ה, סב. (כ"י ליידין. 9.

משנה (כ"י קאפמן) כיצד מפרישין חלת טומאה ביום טוב רבי אליעזר או' אל תקרא לה שם עד שתיאפה בן בתירה או' תטיל לצונים אמר יהושע לא זה הוא חמץ שמזהרים עליו בל יראה ובל ימצא אלא מפרשתה ומנחתה עד הערב ואם החמיצה החמיצה

גמרא... כיצד יעשה? על דר' אליעזר מערים וא' (וזו אני רוצה לוכל וזו אני רוצה לאכול) ואופה את כולה וכשהוא רודה מערים וא' זו אני רוצה ליישן זו א' ילני רוצה ליישן ומשייר אחת... אותו ואת בנו שנפלו לבור ר' אליעזר או' יעלה את הראשון על מנת לשחוט וישחוט והשיני עושין לו פרנסה שלא ימות. ר' יהושע או' יעלה את הראשון על מנת לשחוט ולא ישחוט ויערים ויעלה את השיני א' ע'פ' שחישב שלא לשחוט אחד מהן מותר. ר' בון בר חייא בעי מחלפה שיטתיה דר' אליעזר תמן הוא אמ' אסור להערים והכא הוא אמ' מותר להערים? הכא בון בר חייא בעי מחלפה שיטתיה דר' יהושע תמן הוא אמר מותר להערים? אמ' ר' אידי כאן

מחלפה שיטתיה דר' יהושע תמן הוא אמר מותר להערים? אמ' ר' אידי כאן
שבות וכאן חיוב חטאת. א"ר יוסה ביר' בון תמן כדי לחוס על ניכסיהן של ישראל
?!הכא מה אית לך

Mishnah: How [on the Festival] do they set apart the dough-offering [if the dough is in a state of] uncleanness? R. Eliezer says, "She should not designate [the dough=offering] before it is baked." R.

⁴ MS Erfurt, MS London and Venice Ed. add: לשחוט מנת על

⁵ Thus, MSS Vienna and Erfurt, but MSS Leiden, London, Venice Ed. read: רצה אחד לשחוט שלא רצה בידו הרשות מהן אחד לשחוט שלא רצה (לשחוט רצה) See also 'Ittur, Laws of Festivals, Part III, 140; Shibbolei Ha-Leket Ha-Shalem Laws of Festivals chapter 252). PT and BT both read differently, an issue that will be considered further below.

Judah b. Betera says, "She should put it into cold water." Said R. Joshua, "This is not the sort of leaven concerning which people are warned under the prohibitions, 'Let it not be seen' (Ex. 13:7), and 'Let it not be found' (Ex. 12:19). But she separates it and leaves it until evening, and if it ferments, it ferments.

Gemara: ...How should [a person] act according to R. Eliezer?

One acts shrewdly and says: "This I want to eat and this I want to eat;" and one bakes all of it, and when s/he removes it from the oven, s/he acts with shrewdness and says: "This I want to store away and this," and leaves one which is then designated as hallah in the oven.

...

An animal and its offspring that fell into a pit on a festival - R. Eliezer says, "S/he raises up the first with the plan to slaughter it, and the second; s/he feeds it in the pit so that it does not die." R. Joshua says, "S/he raises up the first one with the plan to slaughter it but does not slaughter it and, acting prudently/cunningly, s/he raises up the second. Even though one does not plan to slaughter either one of them - this is permitted.

R. Bun bar Hiyya asked: "Is not R. Eliezer's logic reversed? There he says it is forbidden to act prudently/cunningly while here he says it is permitted. Here he is permissive because of the ban on seeing and finding leaven. There, is there any comparable justification?

R. Joshua's logic is reversed. There he says it is permitted to act prudently/cunningly while here he says it is forbidden. Said R. Idi, "Here it is a matter of a shevut while here there is liability for a sin-offering.

Said R. Jose b. R. Bun: There, artifice is warranted to show compassion to the property of Israel; here, is there any such loss justifying the use of an artifice?

