

Episode 43

Shoftim

About seven or eight years ago, I worked in Philadelphia as an attorney. In one case, I was handling a case in which an elderly woman slipped and fell on some ice outside of a building. My client was a company which removed snow from the lady's building. The elderly woman wanted to sue my client for money to pay for her medical bills and loss in quality of life, etc. She also sued a bunch of other businesses—the apartment complex, the maintenance company, the company of the shoes she was wearing, etc. Let's get back to my client: the snow removal company. There was just one problem with the old woman's argument: on the day the old woman fell, my client and his company were working at a different building. So basically, there was no possible way in which my client could be responsible.

Even though this was obvious to everyone, it still required a lot of time, energy, work, documents, court appearances, phone calls, e-mails, to try to get my client out of the case. Finally, one day, my client and I went together to a major hearing for the case. I brought all documents with me. I met with my client before the case in Starbucks to coach him on exactly what to say in front of the judge. At the hearing, I had to be as charming and persuasive as possible to the judge, the other parties, and even the court reporter typing everything up on her keyboard.

Still, there was no guarantee that my client would be let out of the case. It required that all other parties to the case sign a document letting him out. And the other parties had no incentive to do this; it just meant that, in the end, they would probably have to pay more money. My client, the snow removal guy, was looking at me the whole time. I knew exactly what he was thinking: you'd better get me out of this case, Steve. What kind of lawyer are you if you can't get me out a case when I wasn't even there on the day the accident occurred? I shouldn't be here today, and I definitely shouldn't have to pay any money. Get me out, Steve. Get me out.

Well, somehow, the slip-and-fall law gods smiled on me that day. I got all of the other parties to sign the document, and I was able to go back to my client and say: you're out of the case. You don't have to deal with this circus anymore.

He smiled at me and shook my hand. We walked out of the courthouse together and down the court steps. We had a bit of small talk and finally reached his car—a giant snow plow truck. I shook his hand again and took my leave of him. Then, a humorous parting line suddenly occurred to me.

I said, perhaps with a twinkle in my eye, “now you can get back to work.”

Now you can get back to work.

I got into my car, feeling good about this victory and about making my client's life a little bit easier. But then I thought about it more on the drive back to the office. Now you can get back to work, I said. Now you can get back to work. I intended this remark to be humorous. But what was actually humorous about this remark?

It was humorous because my client's “reward” for this “victory” in the case was, in fact, absolutely nothing. His reward was just being able to go back to his normal life. In short, his reward was just being able to go back to work. That's not a reward. That's not a victory. That's not even justice. No—that's just your life sucking a little bit less for the time being.

Our culture romanticizes the ideas and institutions of law and justice. When you walk up to the U.S. Supreme Court building in Washington D.C., you might as well be walking up to the Parthenon or the Temple of Artemis. Eight lofty Corinthian pillars guard the entranceway. The

steps are made of marble and you can hear your feet echo off them as you ascend. There is a façade over the entranceway in which the sentence “EQUAL JUSTICE UNDER THE LAW” is inscribed. The building is surrounded by glorious statues like the Authority of the Law and the Contemplation of Justice. The doors to the courthouse are made of bronze. And inside, there are paintings of the most illustrious lawgivers in history: Hammurabi, Moses, Solomon, Augustus, Charlemagne, Sir William Blackstone, and Napoleon.

All of this fanfare so that the snow plow removal guy could just go back to work?

In all seriousness, though, much of the work the Supreme Court does is not very glamorous and wouldn't remind anyone of King Solomon or Charlemagne. In the 2010 case of *United States v. Stevens*, the Supreme Court decided that pornography for people with sexual foot fetishes should be allowed to be sold and distributed, because this shoe pornography was protected by the First Amendment—freedom of speech. In the 2011 case of *Brown v. Entertainment Merchants Association*, the Supreme Court ruled that video game stores should be allowed to sell violent video games to children.

Now, I'm not saying that I agree or disagree with these decisions. I am merely pointing out that they don't exactly warrant a marble statue of Hammurabi to be built.

But, indeed, the Supreme Court has reached more lofty decisions which have dramatically increased justice within the country and even the world. In the 1954 case of *Brown v. Board of Education*, the Supreme Court ruled that black kids and white kids should be able to go to school together. In 2015, in the case of *Obergefell v. Hodges*, the Supreme Court ruled that same-sex couples have the same rights to marriage as opposite-sex couples. With these decisions, the Supreme Court undoubtedly brought more justice into the world. But it's worth remembering that the only reason we needed a court to step in was because of the *injustice* already in place. The court didn't introduce *new ideas* of justice; it merely corrected a situation which had become embarrassingly prejudiced.

Courts are more like hospital emergency rooms than Plato's Academy. Courts are where you go when one person or a group of people have screwed up morality and justice really, really badly. The court is there to welcome you with open arms and say to you: let me make your life a little less awful; let me prevent you from choking on your own vomit; let me do what I can to surgically operate on your broken limb—but just know that, afterwards, there will be blood, there will be scars. Again, I'm not sure this type of work merits a bust of Confucius to be carved out.

Courts don't bring about justice any more than going to a doctor can make you healthy. If you are sick, and you go to the doctor, she may be able to help you from not being sick anymore. But she's not going to be able to get you in shape to run a 5k. Only you can do that. Your doctor may be able to give you a vaccine so that you don't get a disease. But she's not going to be able to get you to wake up refreshed and watch the sunrise with your loyal dog by your side as you bask in the wonder of nature.

In short, courts—and doctors—only appear when things have gone wrong in some way. Their job is just to get you as close to back to normal as possible—which often ends up being not very close at all. The phrase “an apple a day keeps the doctor away” originated because it's better to take care of your own health and *not* go to the doctor at all. Perhaps the Supreme Court building shouldn't have “Equal Justice under the Law” written across the top but rather “We're sorry you had to come here. Good luck.”

There is, in short, only so much the law can do. Sure, *Brown v. Board of Education* allowed blacks and whites to attend the same schools in the South. But the court couldn't fix the

thousands of other injustices blacks were dealing with. Courts couldn't change the way racist people viewed them; courts couldn't change the way in which segregation affected their parents and grandparents; courts couldn't change economic differences between the two groups. All the Supreme Court could say was: Hey. White public schools, stop absolutely forbidding black kids from studying in your institutions.

Sure, occasionally you go into a hospital and see a quote from Hippocrates hung up somewhere on the wall. But hospitals don't exactly look like the Temple of Zeus or the Palace of Versailles. When you meet with a doctor, you call him doctor so-and-so. You can even sometimes get away with calling him just "doc." But judges need to be addressed as "Your Honor."

In fact, the Supreme Court wasn't always so romanticized as it is today. As I've said in several other episodes of *The Schrift*, our culture romanticizes more than any previous culture in history. And this leads to some dangerous conclusions. Actually, the current Supreme Court building wasn't even built until 1935. Before that, Supreme Court justices needed to work in the Capitol building alongside other federal employees. Back then, they were seen more just as bureaucrats than as demigods.

One Jewish-German writer to deal frequently with courts, law, and justice was the Bohemian Franz Kafka. Kafka was also himself a lawyer. He worked as a governmental lawyer nearly every day of his adult life, six days a week, from eight in the morning until two in the afternoon (government employees had great hours).

Law is a major topic in Kafka's literature and thousands or perhaps millions of pages have been written about it by Kafka scholars. In Kafka's classic novel *The Trial*, a man named Josef K. wakes up one morning, simply wakes up, and finds two men standing in his apartment. They inform Josef K. that he is under arrest. But they do not tell him what his crime was or how he should go about defending himself. The remainder of the novel consists largely of K.'s interactions with this mysterious court.

One undeniable characteristic of this court is that it is *dirty*. The court offices are not in Greek-like temples or palaces but rather in the attics of apartment buildings in the slums of the city. The justices must work in cramped and unglorified conditions, much like the Supreme Court justices before the building of the Supreme Court in 1935. The law books lying around often have lewd pornography inside them. The court officers who arrest Josef K. notoriously eat K.'s greasy breakfast. And in a later scene, Josef K. will open up a closet door and find the two officers, and a third man with a whip, whipping the two officers in a moment connoting sadomasochism.

With these descriptions of the court, then, Kafka seems to be alerting us to the law's dark, grimy, unsavory, unromanticized side. There are various theories as to why Kafka would depict the law and the court in this way. One theory holds that Kafka saw the uncleanness of his own soul reflected back onto this mysterious court trying him. Another theory holds that *The Trial* satirizes the court system in which Kafka himself worked. This was the court system of the Austrian Hapsburg monarchy. The courts of Austria were also criticized as corrupt, sleazy, and outdated.

I would like to propose, however, that Kafka drew the court in this way to caution us from over-romanticizing the law and justice. As I mentioned, Kafka was working in the Austrian Empire when he wrote *The Trial*. But he was familiar with the legal system of the German Empire, just over the border. In 1871, when Germany became a united country under Bismarck, one of the first orders of business was to create a new legal code. This legal code had great

aspirations. The German code was to be constructed with painstaking precision and exactness. The point of it was to be able to apply scientific clarity when deciding how to punish criminals. The code was to be a kind of universe unto itself, in which a judge need only open the book, locate the crime in question, and then know exactly how to punish the criminal. In 1910, an American commentator would write: “The letter of the law is adhered to in Germany perhaps more than in any other country. The first question the judge asks himself is, ‘What does the code say?’ For the law ... has been codified, and crimes and illegalities with their respective punishments are laid down in black and white with absolute precision.”

In *The Trial*, when K. is arrested, he argues that he has not done anything wrong and that he has obeyed all of the laws of the state in which he lives. The court, however, is not persuaded by K.’s argument. The court says to K. “we don’t care about your state laws. We operate under a different set of laws than the ones you know.” There is a sense in which K. has been arrested under a different legal system than state law. The state law only has so much power, so much reach. When it comes to deeper moral questions, state law, no matter how perfected and precise its language, is insignificant.

When Germany drafted the 1871 legal code, the goal was to create law so perfect, so comprehensive, so precise, that morality would no longer be necessary. The code, aimed, in short, to replace traditional morality. This code became a kind of god. Secular, state law became, we might say, in allusion to episode 41, a foreign idol.

In *The Trial*, we might say Josef K.’s entire trial is a result of his confusing two systems of law—a higher transcendent law, and a lower secular law. His worshiping of state law is like the worshiping of a foreign idol. His belief that state law can save him creates a corruption and decay in his innermost being. This corruption then pollutes the higher, transcendent law, which arrests him. When we believe that state law can be our “savior,” this belief bleeds onto the system of higher, moral law, distorting and corrupting its virtue.

In the parsha for this week, *Shoftim*, Moses stands before the Israelites and explains to them how courts and evidence should function in their new land. But the laws given here do not have the same *gravitas* as the Ten Commandments Moses received from HaShem on Mount Sinai. When Moses stood on Mount Sinai and received the Ten Commandments, the moment was awe-inspiring and lofty. He stood in a cloud, lightning struck, he received on a tablet grand commandments like, “do not murder” or “pay honor to your mother and father.” This moment, in short, could not be more Romantic.

But in this week’s parsha, we see the other side of law—the dirty, uninspiring, messy side of law. One commandment we get this week, for example, is that if one witness gives a testimony, we should not believe him or her yet. Instead, two other witnesses need to confirm what the first witness said. But there is something strange about this law. The Torah doesn’t say two other witnesses; rather, it says two *or three* other witnesses. Which one is it? Two or three? The Torah doesn’t say. This is hardly the exactitude of, say, the 1871 German legal code. Two or three is the kind of language you might use in a cooking recipe—as in use two or three eggs. By saying “two or three,” the Torah subtly hinting to us that law is a messy, inglorious affair.

Another law promises that, if you kill someone by accident, there will be a city of refuge to which you can flee. This way, the family of the person you accidentally killed won’t be able to take revenge on you. But if it is discovered that you actually intended to kill the person you killed, then the town elders will haul you back from the city of refuge, and you, too, will be killed.

While this is, indeed, an important and thoughtful law, it hardly has the same gravitas as, say, do not steal or give ten percent of your earnings to charity.

Interspersed throughout the parsha this week are also commandments as to what the Israelites should do when they invade the land of Israel. They are told to kill every man, woman, and child. And when they invade cities outside the land of Israel, they are to kill every man, but take the women and children as slaves.

As we can see, the Torah is juxtaposing the most unglorified laws next to instructions to kill man, woman, and child when entering Israel. With this overlap, the Torah seems to be indicating that justice is not always so pristine and so simple. Law is filled with contradictions, hypocrisies, grey areas, and skeletons in the closet.

Interestingly, the Torah also gives laws about what to do with trees when you conquer land. The Torah explains that the trees are not trying to harm you—so you should not presume them to be enemies just because they are in enemy territory. You should not cut them down. But if they do not bear fruit, if they are not fruit trees, then it's okay to cut them down and use them for materials.

This is, indeed, not the kind of law that would inspire a young man to enroll in law school. It is grotesque, strange, and idiosyncratic.

In this parsha, the Torah seems to be alerting us that law has two sides: it can be inspirational and grandiose, but can also be bizarre and chaotic.

The Torah, I think, wishes to remind us that we should not become all starry-eyed when we think about law and justice. We should remember that law is, by its very nature, a swampy affair.

First, law is only needed to begin with because humans have screwed up in some way; things have gone awry. Law is more of a humble repairman than a fluttering angel. Law also must deal with matters which can be perverse, dull, quirky, and unique. It is only in rare instances that law attains the grandeur of Moshe's receiving of the Ten Commandments on Har Sinai.

When we romanticize law, we make things too easy on ourselves as well. To live a prolific, virtuous, bountiful life, following the law is not enough. It is, in fact, just the bare minimum of what we should do. Following the law, particularly state laws, will keep you out of court—but it won't do much else for you. This is the point, I think, that Kafka wished to make in *The Trial*. Josef K. was like the lawmakers of 1871 Germany. They naively believed that one could rely on the fulfillment of state law alone to live a fulfilling life.

But this is true not just for individuals but also across societies as a whole. How often do we believe that just changing or updating the laws will bring about justice? In fact, this is only the first step—sometimes it is even a backward step. When countries are fighting with each other, we put our confidence in lawmakers to create treaties establishing peace. How much better it would be if peace came about organically, not through laws, but through natural bonds formed between both sides?

When we look to the law to solve all of our problems, we engage in a fool's errand. Usually, even when the law is working at its best, all it can do is make your life suck just a little bit less. At best, it can just get you back to square one. The rest of your life comes down to taking your well-being into your own hands. And in order to improve society, society needs to go beyond its laws and actively work toward enhancement.

We tend to get frustrated when the law doesn't work for us, believing that we are entitled to more. The Torah conveys that, again, law is an imperfect institution which often needs to get

its hands dirty. But instead of seeing this from a negative lense, we can flip things around and turn it toward the positive. The stoic philosopher Epictetus wrote that you should never say “I have lost something.” Instead say, something has been returned. If you lose money, don’t say, I lost money, but rather, it has been returned. If you lose a loved one, don’t say, I *lost* him or her but rather, she or he has been returned. This advice allows us to see our entire life as a gift rather than an entitlement. It teaches us to be grateful for all which we have, and that which has been lost, just as a small fraction of the enormous package of gifts we’ve gotten for essentially doing nothing.

We can apply the same logic to law. If the laws of our society are deficient in some way, let’s not remain hyper-focused on them and feel as though we’ve lost something or something has been denied to us. Instead, let’s remember that law is just a fraction of our existence. Even if laws are letting us down in some way, we can keep in mind the sentiment of Epictetus. Of the thousands of gifts we have, we are *borrowing* from the universe, one has been returned. But the other gifts remain ours to enjoy.

You may ask: if law is so overrated, why does is it so worshiped by our society? Why does the Supreme Court building look the way it does, and receive so many tourists every year? Here, we have reached the crux of the problem with law. Law is not written in a vacuum. Who writes the laws? Lawyers. Who devises systems of law such that there will always be more work for lawyers? Lawyers do. And who ordained that on the western façade of the Supreme Court building “Equal Justice under Law” should be etched in stone? Almost certainly—a lawyer.