

## Family Matters

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Academic talmudists are often asked, “Of what use are the findings of academic Jewish Studies to lay people? Can historical research inform our contemporary dialogue on the pressing issues of our day?” I propose that developments in family law from biblical to Rabbinic times have much to teach us in our evaluating the rapidly changing values and their accompanying changing laws in our own times.

I begin in an unlikely place: the curious set of verses in this week’s parashah, Ki Tetzei, about filial favoritism:

If a man has two wives, one loved and the other unloved, and both the loved and the unloved have borne him sons, but the first-born is the son of the unloved one—on the day he distributes his property to his sons, he may not treat as first-born the son of the loved one in disregard of the son of the unloved one who is older. Instead, he must accept the first-born, the son of the unloved one, and allot to him a double portion of all he possesses; since he is the first fruit of his vigor, the birthright is his due. ([Deut. 21:15–17](#))

Against the background of biblical inheritance practices, these verses seem to address a very specific issue: a man who favors the firstborn of one wife over the firstborn of another. It certainly may be that, according to these verses, when disposing of his assets a father had to preserve the double portion of the firstborn and the single portions of each other son. Alternatively, it may be that even though a father could not get around giving the firstborn a double portion due to a preference for one wife over another, he could reassign it due to a preference for one son over another. Elsewhere, such as in Genesis, despite the absence of explicit mention of the double portion, family feuds about who was the rightful firstborn – over the course of three generations – made their appearance. In each case a non-firstborn (to the father) prevailed. Abraham’s second born,

Isaac, replaced Ishmael. Isaac’s second son, Jacob, superseded his older brother, Esau. And, among Jacob’s 12 sons, Joseph, was favored. Admittedly, the relationship of Deuteronomy’s laws to these narratives is a complex one and the stories may not be at all representative of what later became considered biblical law (in Deuteronomy). Still, it remains significant that the role of the firstborn son in Genesis, unique to his station as family leader (see below), was central and simultaneously transferable.

The verses in Genesis and Deuteronomy are best understood against the background of the ancient Near East, the social and economic contexts in which the verses were originally authored. Within those contexts there were two intertwined aspects to the firstborn, and these are faithfully portrayed in the Bible: receipt of the mantle of family leadership over the extended family (in all likelihood children, their spouses and offspring, and possibly unmarried siblings), and acquisition of a double inheritance portion (probably to pay for the care of his widowed mother and parental burial arrangements). The verses in Deuteronomy relate to the double inheritance; the Genesis stories, to the family leadership. In the ancient Near East, there was some flexibility in assigning the firstborn’s leadership role and its accompanying extra inheritance to a son other than the firstborn. A father could deem a son other than the firstborn more qualified to carry out the duties of the family leader.

In the Mishnah (the original body of Rabbinic oral law), although the biblical requirement of the double portion is noted, the firstborn’s role as family leader is generally not mentioned. Furthermore, flexibility regarding the allocation of the double portion is exhibited in the Mishnah as well. For example, “One who apportions his property (to his sons) by word of mouth, gave much to one and little to

another or made the firstborn equal to them—his words remain valid” ([M. Bava Batra 8:5](#)). The line “made the firstborn equal to them,” explicitly assumes that the firstborn can indeed receive just one portion. (The line preceding it, “gave much to one and little to another,” implies that a son other than the firstborn can receive two portions.) In contrast to the biblical texts’ ambiguities, our Mishnah gives clear statements for allowing greater freedom for distribution of assets. In the absence of Rabbinic interpretation of the Torah to buttress the far-reaching implications of this Mishnah, can we assume that the text reflects its own presumed social and economic contexts, which differed from the contexts affecting the biblical texts?

Archeologists and ancient historians alike place the Rabbinic movement of the first centuries CE in Roman Palestine’s urban centers, with nuclear families (that is, parents and children) with private landholdings. If such assumptions about the relationship of Rabbinic texts to the social and economic contexts in which they are authored can be made then, yes, the laws of the Rabbis of the Mishnah exhibit an inherent flexibility in the assignment of the two portions of the firstborn because of the context in which they resided. Another contributing factor may include the absence in Greco-Roman culture of such a coveted role for the firstborn.

The study of Jewish legal history reveals the complex relationship between societal conditions and the development of law. In our case, that means the degree to which changing models of family structure may influence changes in the law. As Jews and as Americans we are experiencing rapid changes in the structure of the family that not only inform our social sensibilities but also affect our laws. New legal thinking and, perforce, laws, are the result of evolving family circumstances and, inevitably, lead to greater openness, rationality, and freedom in the law—something we should all welcome.

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