

THE ETHICAL DIMENSION IN THE HALAKHAH

Robert Gordis

In memory of Dr. Michael Higger, on his twentieth yahrzeit.

THE CHARACTER AND EXTENT of the ideological "pluralism" prevalent in Conservative Judaism today—which unsympathetic critics might describe as chaos and lack of direction—are highlighted by two papers that appeared in the Spring 1971 issue of CONSERVATIVE JUDAISM, Rabbi Seymour Siegel's article "Ethics and the Halakhah," and Rabbi Abraham Goldberg's article "Jewish Law and Religious Values in the Secular State."

Basic to Dr. Siegel's paper is the principle he enunciates: "If any law in our tradition does not fulfill our ethical values, then the law should be abolished or revised. This point of view can be supported historically and theologically." He buttresses his standpoint with the biblical doctrine of man having been created in the image of God and therefore being commanded to imitate the Divine virtues.

This position may be supported by a theology of Torah as well. It is clear that all the greatest teachers of Judaism during the most creative periods of our history would have found it unconscionable to admit that the Torah, the eternal Revelation of an eternal God interpreted by the masters of tradition, could prove unworkable or irrelevant in any period or society. Nor would they ever have found it possible to countenance any exposition of Torah which could perpetuate, let alone create, patterns of conduct that would work cruelty or injustice upon any of God's children. Their conviction had been stated by the Patriarch Abraham, "Shall the Judge of all the earth not do justice?" (Genesis 18:25).

In spite of the differences prevailing among them, the Rabbis always found it possible to bring the demands of *halakhah* into harmony with the dictates of justice, equality and peace. Elsewhere we have documented this basic characteristic of the Jewish normative tradition, which operated most powerfully in the creative eras of the Mishnah and the Talmud.¹ Even in the Middle Ages, albeit with reduced vigor due to the increasingly critical conditions confronting Jewish life,² *halakhah* continued to reflect this capacity for development and growth.

1 Cf. "The Nature of the Jewish Tradition," *Judaism For the Modern Age* (New York, 1955) pp. 127-152, 166-185.

2 Cf. "Simhath Torah—The Triumph of the Democratic Spirit," *ibidem*, pp. 192-203.

Robert Gordis is Professor of Bible at The Jewish Theological Seminary of America and Professor of Religion at Temple University.

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Rabbi Siegel cites two illustrations of the revision of *halakhah* in the light of ethical values, one Tannaitic and Palestinian, the other Amoraic and Babylonian. According to biblical law, a woman was obligated to bring an offering to the Temple after each birth. Because the price of pigeons rose drastically one year, Rabban Simeon ben Gamaliel ordained that a woman was required to bring only one offering to the Temple after several childbirths.³ The second instance came from a later period, in Babylonia. The people were accustomed to discard their ordinary pots before Pesah, thus creating a high demand for crockery after the holiday. The hardware merchants took advantage of the increased demand and raised prices exorbitantly. The Amora Samuel threatened to accept and proclaim Rabbi Simeon's view that the *hametz* pots did not need to be broken before Pesah, in order to bring down the price.⁴

These two instances are highly interesting, for they reveal the ethical sensitivity of the Sages and their responsiveness to contemporary conditions. But in each case the situation they sought to meet was of limited scope in time and space, affecting one locality at a specific period. Their morally courageous actions did not represent any change in the accepted body of ethical attitudes. Fleecing the poor for personal gain is as old as human society, and denunciations of this evil fill the pages of the Prophets.⁵

Even more significant is the clear evidence of growth and development in *halakhah* in the light of new ethical insights which represent movement beyond earlier positions. Moreover, in these instances the *halakhah* did not hesitate to establish new legal norms, not local or temporary in character, but universally and permanently binding. We shall adduce only two instances that are eloquent testimony of the unremitting effort of the Sages to view the Torah in the light of their ethical insights and of the dynamic character of their ethical consciousness. Both cases are derived from the same biblical passage, Deut. 21:15-21.

The Lawgiver sets down two provisions of family law side by side. The first is concerned with the law of inheritance (Deut. 21:15-17), the second with the law of "the stubborn and rebellious son" (Deut. 21:18-21). Both paragraphs are expressed in the identical casuistic style⁶ and were clearly meant to be regarded as normative law. Yet it is noteworthy that the provisions sustained radically different treatment in Rabbinic Judaism, neither being treated literally.

In Deut. 21:15-17, the Torah ordains that the eldest son in the family receive as his inheritance *pi-sh'nayim bekol asher yimatze lo* which can have only one meaning, "two parts (out of three)," that is, two-thirds of the entire estate. Thus, when at the translation of Elijah to heaven the young Elisha asks: *veyehi nah pi-sh'nayim beruhakhah eylai* (II Kings 2:9), he is obviously not demanding that he receive double the Divine Spirit granted to his master, but two-thirds.

3 *M. Keritut*, Chap. 1, end.

4 *B. Pesahim* 30a.

5 Cf. e.g., Amos 2:6-8; Isa. 3:13-15; Micah 3:1-4, to cite some well-known passages, where even their familiarity has not blunted their edge.

6 Cf. opening words v. 15 and v. 18, and the use of the protasis and apodosis in both sections (vv. 15-16 and 18-19).

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The meaning is even more explicit in Zechariah 13:8: "In the whole land, says the Lord, two thirds shall be cut off and perish, and one third shall be left alive."⁷

THE RABBIS HAD AN INCOMPARABLE KNOWLEDGE of the Bible in its minutest detail. They were adept in invoking a *gezerah shavah*, two similar or identical usages in language, however remote from one another in theme. Now the text in Deuteronomy (21:15-17) is clear, and the passages in Kings and Zechariah remove any possible vestige of doubt about the meaning of *pi-sh'nayim*. Yet, the Rabbis do not invoke the parallel usages. Instead they engage in a casuistic discussion which demonstrates that they were well aware of the meaning of the phrase in question: "Does the Torah mean double any other brother's share, or two parts (out of three) in all his possessions? You may argue it as follows: Since the eldest son inherits at times with one other brother and at times with five, just as he receives double when there is one other brother, so he receives double any other portion if there are five. Or follow another line of reasoning—since he receives two parts of the estate when there is one other brother, he should receive two parts of the entire estate when there are five! The verse instructs us 'In the day that he gives an inheritance to his sons.' The verse has added *to his sons* (and made the sons the measure of the inheritance.)"⁸ Some other Biblical verses are then adduced (Gen. 48:22 and I Chron. 5:1f) in support of the conclusion that the first-born receives twice the share of any other brother, but the clear-cut passages in Kings and Zecharia are passed over in silence.

The *halakhah* ordained that if there be four sons, his portion is forty percent, not two-thirds of the estate, and each of the other brothers receives twenty percent, not eleven percent. In this moderated form, the Rabbis found the verse in conformity with their standards of equity, or at least not in violent conflict with them.

Quite different was the fate of the adjoining provision dealing with "the stubborn and rebellious son." To be sure, the law in Deuteronomy requiring a trial for the son before the elders of the city at the gate (21:19) represents a great step forward in the protection of the young. In other cultures, the *patria potestas* was virtually unlimited, so that a father could beat or even kill his child without being answerable for the act. However, in talmudic times, even the more moderate provision in the Torah no longer was in harmony with the moral consciousness of the Rabbis.

They therefore proceeded to apply a series of drastic casuistic limitations to the text in *Deuteronomy* which made the law totally inoperative. Thus, to cite only one set of restrictions out of many, if either parent was deaf, mute or blind,

⁷ We believe that the vocable *pi* occurs in another passage, describing the tariff that the Philistines imposed on the Israelites for sharpening their implements (I Sam. 13:21). The term *p-y-m* has been found in archeological excavations in Israel. It is generally transliterated *pim*. We believe it should be given as *payim*, the dual form, "two parts (of three) of a sheqel." "Note the reference to a third of a sheqel in the LXX of the verse." Cf. our paper, "A Note on I Samuel 13:21" in JBL, 1942.

⁸ Sifre *Devarim* (ed. Finkelstein) see 117, p. 250. In B. *Baba Bathra* 122b, 123a, the same reasoning is presented in slightly different form.

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crippled or a dwarf, the law did not apply.⁹ Perhaps the most remarkable statement is the *baraita*: "Rabbi Judah says, If his father and his mother are not identical in voice, appearance and height, he cannot be treated as a stubborn and rebellious son!"¹⁰ As a result, the Rabbis declared that the biblical ordinance regarding "the stubborn and rebellious son," like that ordaining the total destruction of "the idolatrous city" (Deut. 13:13 ff.), never was and never was destined to be," but was placed in the Torah merely to stimulate the hermeneutical skill of the Sages and as a warning to possible sinners.¹¹

HERE WE CAN SEE the genius of Rabbinic Judaism at work. In one case, the law is modified to meet the demands of justice as the Sages understood it. In the other, the law is completely set aside because the Rabbis could not reconcile it with their ethical stance and their fundamental faith that the Torah was designed to teach men to practice justice and mercy. In both instances, and in many others in the Mishnah and the Talmud, this ethical dynamism is clearly evident. Nevertheless, the goal of "righteousness and justice, lovingkindness and mercy" (Hos. 2:21) remains constant from the Bible to the Talmud and beyond.

To be sure, there are some few instances where practical needs made it impossible for rabbinic law to attain to the full moral grandeur of biblical legislation. Such is the case where Rabbinic law restricted the prohibition against returning slave to his master only to cases where the slave was sold to a Gentile or where the bondsman fled to the land of Israel.¹² By and large, however, the Rabbis' perception of how the ideal was to be embodied in law deepened with time, and in cases such as those we have cited, went beyond the attitudes embodied in biblical law.

This understanding of the spirit of Jewish law in its most creative periods has important implications for the problems confronting *halakhah* in the modern age.

WHEN WE TURN TO THE PAPER by Rabbi Abraham Goldberg, "Jewish Law and Religious Value," we find ourselves in a totally different universe of discourse. The author's wholehearted commitment to Jewish law is, beyond question, admirable. It is his conception of *halakhah* which is disturbing.

No longer are the Torah and the *mitzvot* a palace in which man can dwell and fulfill the goals of the enhancement of life and the promotion of human welfare. *Halakhah* is a beleaguered city attacked by ruthless foes on all sides. The defenders are commanded to resist every effort to breach the walls. If some ground must be yielded to the enemy, delaying tactics must be employed to the utmost, so that the extent of loss of territory be as small as possible. In this view, *halakhah* is ideally a monolithic structure of prohibitions unchanged by conditions and unchangeable, unmoved by human needs and aspirations and unmove-

⁹ Sifre *Devarim* (ed. Finkelstein) sec. 218, 219, pp. 251-252; *M. Sanhedrin*, chap. 8 passim.

¹⁰ *M. Sanhedrin* 8:5.

¹¹ *B. Sanhedrin* 71a.

¹² Deut. 23:16f. and see *Sifre*, sec. 259 (ed. Finkelstein) p. 282; *B. Gittin* 45a.

able. When harsh reality obtrudes upon the ideal state and some relaxation of the prohibitions can no longer be denied, the *heter* should be as limited in scope as possible, restricted in time and space and hedged in by complicated procedures. Even when the *heter* is finally allowed, the praiseworthy procedure is not to utilize it, for, classical doctrine to the contrary notwithstanding, *koah de'issura adif*, "the power of prohibition is preferable." The Law cannot serve man; man can only strive to preserve the Law.

In the State of Israel, where most Jews are indifferent if not hostile to *halakhah*, the only significant function of the custodians of Jewish law is to safeguard it against challenge.

In Rabbi Goldberg's presentation, the ethical dimension of *halakhah*—let alone its dynamism—is totally absent. The problems of civil marriage and divorce, the status of Reform practice, the recognition of Conservative Judaism in *gittin* and *quiddushin*, birth control and abortion, *mamzerut* and intermarriage, do not exist. There is no moral agony in the *agunah* problem, whether the deserted wife whose husband cannot be found or has been lost in action, or the all-too-frequent instance where malice or greed motivate his refusal to issue a *get*. All issues, including those arising in a technological civilization, are to be decided by *halakhah* exclusively in formal terms—the human beings involved have faded from sight.

It is undeniable that there are many complex problems involved in the interpretation of *halakhah*, particularly in the field of personal status and family law. It is not easy to reckon with human needs in this most intimate and important area of concern. But Rabbi Goldberg offers a solution to the problem of a *Kohen* marrying a divorcee—the complete evasion of *halakhah*. Those who cannot afford the passage to Cyprus have only to embark on a permanent course of public violation of the standards of Jewish family morality by setting up "common law" homes outside of wedlock. Thus Jewish law is not only "safe," it is even "liberal." As Mark Twain once said, "A headache is a delightful experience. You feel so good after it is over." *Halakhah* is wonderful—it can be flouted or ignored, *veshalom al yisraell*

Fortunately, there are some, not only in the ranks of our movement but elsewhere as well, who cannot rest with so easy a solution. For them, an arduous road stretches ahead, the need to explore the full resources of *halakhah*, and thus reveal the way of life of Judaism which rests upon its uncompromising faith in the righteousness of God and His law: "The Lord in the midst [of Jerusalem] is righteous;" "He can do no wrong. Every morning He brings justice to light without fail" (Zephaniah 3:4). God's purposes are set forth in the Torah, which Israel is commanded to exemplify in its life. Of all the *taryag mitzvot*, none is greater than the injunction: "You shall do what is good and right in the eyes of the Lord thy God" (Deut. 12:21.). And the prophet Micah has added: "He has told you, o man, what is good and what the Lord demands of you, to do justice, to love mercy and to walk humbly with your God."

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