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TITLE JUDAISM BEYOND AUTONOMY: A PHILOSOPHY
OF HALAKHA FOR LIBERAL JEWS

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JUDAISM BEYOND AUTONOMY: A PHILOSOPHY
OF HALAKHA FOR LIBERAL JEWS

Clifford E. Librach

Thesis submitted in partial fulfillment
of the requirements for Ordination.

Hebrew Union College - Jewish Institute of Religion

1986

Referee, Prof. Jakob J. Petuchowski

DEDICATION

This thesis is dedicated to the partners of Taft, Stettinius & Hollister; men and women with whom I have been associated for four years, who are exemplars of the finest of human virtues, among which their exceptional integrity, industry and loyalty are surely worthy of my everlasting respect, affection and thanks.

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DIGEST

This Rabbinic thesis is an examination of the relationship between liberal or Reform Judaism and Halakha, or Jewish law. It begins with the premise that liberal Judaism is a corrective, but nevertheless a continuation of historical Judaism with which other Judaisms also have significant affinity. In this context, Reform Judaism is distinguished by its concern for the historical process of encounter by which an inherited tradition is refined and corrected, and further by its tolerance of non-conforming behavior. Thus is it liberal.

The thesis then proceeds, in its first chapter, to a review of Halakha as it has been traditionally understood, containing both a conservative tendency and dynamic element. The American Reform position concerning Halakha, emphasizing the 20th century and especially the period since 1945, is then examined in Chapter 2. Five major positions (Mihaly, Freehof, Petuchowski, Borowitz and Plaut) are critically assessed in addition to those of others who have offered some attempt at articulating a relationship between Reform and Halakha.

Chapter 3 contains an analysis of authority and autonomy as factors in the reconciliation of Halakha and Reform. It argues that authority in Judaism has always been essentially consensual and conditional, and that autonomy is the means by which any Jew "does" the Judaism that can be viewed as authoritative for him or her.

Chapter 4 undertakes an overview of the relationship between morality and Halakha as it has been traditionally understood. Chapter 5 then explores this topic in greater detail, giving careful attention to the Talmudic concept of lifnim mishurat ha-din, usually rendered "beyond the letter of the law" but, it is contended, more correctly meaning "within the limit of the law" or "the law within The Law."

This is established by a critical analysis of each instance in which the expressions "shurat hadin" or "lifnim mishurat hadin" appear in the Mishnah, Gemara and Tosefta.

Chapter 6 addresses the same question: the relationship between morality and law, from the point of view of modern moral philosophy and analytical jurisprudence. The works of H. L. A. Hart, John Rawls, Alasdair MacIntyre, Stuart Hampshire and Ronald Dworkin are used to present the "coherence theory" of modern jurisprudence in which law is seen as the analogue to literary criticism, with the practitioner of each trying to articulate the most coherent and best justification of the work or line of precedent at hand.

The thesis concludes with Chapter 7, in which a liberal Judaism is described which is beyond autonomy, leading to a coherent system freely chosen as authoritative. This projection of Judaism as the coherence of an inherited tradition defies orthodoxy in its open use of the concept of past mistake, and in its refusal to indulge in communal coercion. The latter is justified only when it advances the opportunity of each Jew to understand or articulate a coherent Judaism. This is the first axiom. The second is that normative correction in Judaism must be based upon an articulated coherent Judaism as opposed to intuitionism. Finally, six constitutive principles are offered, giving contour to coherent Judaism and providing a critical basis by which to examine the proffered coherence of others.

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SOME DEBTS

"Pride slays thanksgiving," Henry Ward Beecher once wrote, "but a humble mind is the soil out of which thanks naturally grow."

I begin with my late father, Max M. Librach, z"l, who once, when I was a tad of ten or twelve, claimed insufficient time to answer my open query "what is Judaism?"

"It is," he replied as if on one foot, "a way of life."

From such a sentimental acorn this sapling, which I hope is indeed a tree of life, has grown.

Along the way, it has been nurtured by some extraordinary teachers and exemplars. The greatest accomplishment of teaching is not reflected or measured in mimicry but advancement: we honor our teachers by our reliance on their foundation as we further knowledge or its refinement. Among those whose insight, scholarship and infectious enthusiasm have brought me to this point are Rabbi Martin E. Katzenstein, z"l, Norman Redlich, Ronald Dworkin, Joel Gross, Rabbi Herbert Chanan Brichto, Dr. Eugene Mihaly, and Dr. Ben Zion Wacholder. Most especially do I thank Dr. Jakob J. Petuchowski whose careful reading of this manuscript hardly begins to account for the service he has performed in inspiration, intellectual discernment and guidance. He, with the aforementioned, are together my teachers and my friends, and I pray that my life's work reflects their highest dreams for me.

I also thank, on a more practical level, my extraordinary typist, Mrs. Linda Humason, who has endured the (mis)fortune of outrageous slings and (editorial) arrows. I am very grateful to her for her technical skill and emotional stamina, and proclaim her newly-discovered expertise in Hebrew transliteration.

My work for some years now has always reflected the careful critique of my best friend and partner, Miriam, who inspired and endured above and beyond all others. Of course, as hers were the last eyes to review this manuscript, any errors contained herein are necessarily hers alone.

Clifford E. Librach
February 26, 1986

ABBREVIATIONS

- | | |
|-----------|--|
| 1. AZ | Babylonian Talmud, tractate
<u>Avodah Zarah</u> |
| 2. BB | Babylonian Talmud, tractate
<u>Babba Batra</u> |
| 3. Ber | Babylonian Talmud, tractate
<u>Berakhot</u> |
| 4. BK | Babylonian Talmud, tractate
<u>Babba Kamma</u> |
| 5. BM | Babylonian Talmud, tractate
<u>Babba Mezia</u> |
| 6. CCAR | Central Conference of
American Rabbis |
| 7. Guide | M. Maimonides, <u>Guide to the
Perplexed</u> |
| 8. Hor | Babylonian Talmud, tractate
<u>Horayot</u> |
| 9. HUCA | Hebrew Union College Annual |
| 10. Hul | Babylonian Talmud, tractate
<u>Hullin</u> |
| 11. JQR | Jewish Quarterly Review |
| 12. J. T. | Jerusalem Talmud, page
references are to the
Krotoschin edition. |
| 13. Ket | Babylonian Talmud, tractate
<u>Ketubot</u> |
| 14. M. | <u>Mishnah</u> |
| 15. Meg | Babylonian Talmud, tractate
<u>Meggilah</u> |
| 16. Men | Babylonian Talmud, tractate
<u>Menachot</u> |
| 17. M.T. | M. Maimonides, <u>Mishneh Torah</u> |

18.	Ned	Babylonian Talmud, tractate <u>Nedarim</u>
19.	Pes	Babylonian Talmud, tractate <u>Pesahim</u>
20.	RH	Babylonian Talmud, tractate Rosh Hashanah
21.	San	Babylonian Talmud, tractate <u>Sanhedrin</u>
22.	Shab	Babylonian Talmud, tractate <u>Shabbat</u>
23.	Suk	Babylonian Talmud, tractate <u>Sukkot</u>
24.	Tos.	Babylonian Talmud, <u>Tosafot</u>
25.	UAHC	Union of American Hebrew Congregations
26.	Yev	Babylonian Talmud, tractate <u>Yevamot</u>

A NOTE ON TRANSLATIONS

All translations of passages from The Bible are from the New Jewish Publication Society Series, The Torah (1962), The Prophets (1978), and The Writings (1982), unless otherwise indicated.

All translations of passages from the Babylonian Talmud are from The Babylonian Talmud (I. Epstein, trans. and ed.) London: Soncino Press, 1952, unless otherwise indicated.

CHAPTER 1

THE TRADITIONAL NATURE OF HALAKHA

The emancipation of the Jew from the confines of the ghetto and other insular self-contained and self-governed polities yielded, among other things, a great tension which has not abated to this day.^{1/} That tension is between the authority of what is often understood as objective, heteronomous and God-authored Jewish Law (Halakha) and a willful embrace of Kantian autonomy with its concomitant challenge to any heteronomous norm.

Emil Fackenheim has effectively muted the presumed tension between Jewish Law as revealed by God and the authority of autonomy as understood by Kant^{2/} but a sub-philosophical tension continues to flourish as most recently exemplified by the statement of Rabbi (and UAHC President) Alexander M. Schindler that "on theological problems, either you accept Halakha or you are outside Halakha. We have chosen to be outside."^{3/} Schindler was attempting there to

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- ^{1/} "When the ghetto disappeared and the period of emancipation began . . . a group of Jews . . . decided that it was time to unfreeze the tradition and attempted the long-overdue and the long dammed-up adjustments." A. Feldman, "What is Reform Judaism?" 24 Keeping Posted 1:3 (1978).
- ^{2/} E. L. Fackenheim, "The Revealed Morality of Judaism and Modern Thought: A Confrontation with Kant," in A. J. Wolf (ed.), Rediscovering Judaism: Reflections on a New Theology (1965) pp. 51-77.
- ^{3/} A. Goldman, "Rabbinical Dialogue: Branches of Judaism Open Talks," New York Times, July 2, 1985, at 9. W. Gunther Plaut has essentially made the same point "Can we not recover halacha today for ourselves?" he asked rhetorically. "My answer is no." Plaut, "Can We Speak of Reform Halakha?" in E. L. Stevens (ed.), Rabbinic Authority (1982) p. 64 (emphasis in original).

disassociate liberal Judaism from its more traditional interpretations.

As such, Schindler offers no reconciliation between Halakha and liberal Judaism, but sees a breach as the consequence of emancipation. Others have argued that some reconciliation is available, at least on a theoretical basis, and that the instruments for such are embedded in the very tradition from which Rabbi Schindler avers alienation.

Before undertaking an explication of a reconciliation, it is critical to identify the salient characteristics of Halakha itself. Indeed, it is possible to define Reform or Liberal Judaism in such a way as to exclude Halakha as a source of tension, challenge or reconciliation.^{4/} In contrast, we offer a definition of Reform or Liberal Judaism which identifies itself as a lineal descendant of an ancient process which it has inherited as its own:^{5/}

Judaism is an integrated system of life leading to universal human redemption, whose source of ultimate values is God, the creator and master of the world. God speaks to Israel, a nation chosen as witness and exemplar, in language of covenant, obligation and opportunity, principally through Torah, the record of God's

4/ A. J. Reines, Elements in a Philosophy of Reform Judaism (1976). This presentation by Dr. Reines articulates a definition of Reform Judaism as a polydoxy which, in essence, regards any rationally conceived, religiously motivated (that is, responsive to life's finality or, in Kaplan's terms, invested in soteriology) act as worthy of endorsement as a valid expression of Reform Judaism (polydoxy) which is a loosely-structured confederation of autonomous individuals.

5/ Cf. A. Feldman, op cit. supra at 3 ("we are not speaking of a new kind of Judaism").

revelation to Israel. Torah is itself comprehended through a continuing historical process of encounter by which the best way of life (Halakha) is understood, followed and transmitted.^{6/}

Orthodox Judaism is not inconsistent with this definition, but in consideration of it, focuses its attention on the content of Torah itself, positing a division between a written Torah, dictated by God to his amanuensis (Moses) and a concurrently-revealed oral Torah which Moses and his successors to this very day have used to interpret, give meaning and life to the frequently opaque terms and dictates of the written Torah.

Conservative Judaism also is not inconsistent with this definition, but in consideration of it, focuses its attention on the "continuing historical process of encounter" which it considers to have been calcified by a reactionary traditionalism of the 17th and 18th centuries.

6/ Cf. David Aronson's contention that there are three basic elements in Judaism:

- (a) The faith that the world is not a purposeless accident, but that there is a conscious, eternal spirit concerned with justice among men, that man is endowed with a spark of that spirit, with the choice and therefore the responsibility to organize the world in that spirit.
- (b) The consciousness that the Jewish people has assumed a special role in seeking to understand the divine will and in endeavoring to implement it.
- (c) The Halakha, a planned and disciplined way of life which reflects that will and that search.

He concludes that in Judaism, therefore, "Halakha and faith are inseparable." D. Aronson, "Faith and Halakha," 21 Conservative Judaism 36-37, 45 (Fall 1966).

Reform Judaism, as well, is not inconsistent with this definition of Judaism, but in consideration of it, focuses its attention on the "continuing historical process of encounter" and is further enriched by a concern for the autonomy of the individual and the correlative tolerance for non-conforming behavior. Finally, Reform Judaism is comfortable with an "entry level" self-consciousness, by which those without knowledge or who are uninitiated in the rites and lore of Judaism can be welcomed and introduced to the same.

I.

Halakha, thus, is "a means for expressing and applying to each circumstance God's will and authority; emotionally, it becomes authority itself; authority in which God and man are, as it were, partners."^{7/} Here the tension, as introduced above, is further defined. That is, the traditional conflict is not between the authority of an autonomous individual and the revealed law. Rather, the conflict concerns the authority for determining the content of revealed law. Traditionally, Halakha has been only that which the rabbis, or a majority of them, specifically have declared to be Halakha.^{8/}

^{7/} M. Roshwald, "Authority, Scepticism and Dissent In Judaism," 40 Jewish Social Studies 192 (Summer-Fall 1978).

^{8/} See BB 130b (Halakha is only that which the rabbis specifically declare to be Halakha); BM 59b, San 3b and Hul 11a (the law follows the majority opinion of the rabbis); see generally K. Stein, "The Problem of Halakha In Reform Judaism," CCAR Journal 12 (June 1960).

It is nevertheless crucial that Halakha be understood, in its traditional formulation, as a divine mandate. It is nothing less than

the unum necessarium of the Jew committed to Tradition, in which, as a commanding presence, magisterial to the point of personification, it is regarded as prescribing the way of life, in which, as with the terms Torah and Hazal, Halakha and its Giver frequently become interchangeable.^{9/}

It is God's chosen way of life for us, imparted in "a practical guide to human behavior which endeavors to embed in each individual who accepts its normative mandate the characteristics of hesed (kindness) and gevurah (heroism) in a constructive tension."^{10/}

The normative Orthodox position on the nature and function of Halakha is simply that it not only governs our behavior in many situations, but influences (or should) our attitudes to life. Further, most situations can, in this view, be normatively and unambiguously determined through a thorough application of Halakhic dialectic.^{11/} The practical implementation of this claim leads either to an obliviousness toward changes in the historical situation, or to a broadening of the concept of Halakha that

^{9/} A. Lichtenstein, "Does Jewish Tradition Recognize An Ethic Independent of Halakha?" in M. Fox (ed.), Modern Jewish Ethics (1975) p. 82.

^{10/} M. D. Angel, "A Sephardic Approach to Halakha," 21 Midstream 66, 67-68 (August/September 1975); See N. L. Rabinovitch, "Halakha and Other Systems of Ethics: Attitudes and Interactions," in M. Fox, (ed.), Modern Jewish Ethics (1975) pp. 92-93.

^{11/} J. D. Bleich, Contemporary Halakhic Problems (1977) pp. xiii - xvi.

illuminates the formalistic aspects of Jewish law.^{12/} Its comprehensive applicability to our lives is as crucial an a priori assumption as is its divine deriviation. Indeed,

unless one is prepared to accept the traditional view which establishes an organic connection between the Written and the Oral Law, regarding the latter not as a subsequent modification but a concomitant ellucidation of the former, one cannot help but impune either the intellectual honesty or competence of the framers of the Oral Law [and thus the Halakha itself].^{13/}

One school of thought concerning the nature of Halakha can be classified as "Halakhic Positivism." This is defined as "claiming sovereignty only in the realm of practice pursuant to which the Halakha is supposedly content to leave the domain of ideology entirely to the subjective whim and personal preference of the individual."^{14/} It is a purely formal legal structure, completely indifferent to intellectual, ethical or aesthetic values. Its only concern is, to organize the rules of all of human life against a background of positive law, the aim of which is the service of God.

^{12/} S. Carmy, "Halakha, Tradition and History," 13 Tradition 161, 162 (Winter, 1973). Note that philosopher Nathan Rotenstreich rejects this vision as "a Quixotic attempt at the moralization of all life situations in all their details." Id. at 163.

^{13/} W. S. Wurzburger, "The Oral Law and the Conservative Dilemma," 3 Tradition 85 (Fall 1960).

^{14/} W. S. Wurzburger, "Meta-Halakhic Propositions," in M. M. Kasher, N. Lamm, and L. Rosenfeld, (eds.), The Leo J. Jung Jubilee Volume (1962) pp. 211-213. Under such a theory, the burden of supplying the Jew with a philosophy of life is thus assigned to the non-Halakhic components of Judaism. Id. This is in conformity with the famous Talmudic dictum that the reasons for the commandments are not and should not be revealed, Pes 119a, San 21b. See S. B. Freehof, "There Should Be More Conservative Responsa," 27 Judaism 493 (Fall 1978).

A forthright Orthodox theory of Halakha has been articulated by Professor J. David Bleich of Yeshiva University's Cardozo School of Law. Bleich is essentially a proponent of Halakhic positivism.^{15/}

Bleich quotes a midrash^{16/} to the effect that the "mitzvot were given to Israel solely to purify [le-tzaref] creatures." Le-tzaref

is refining, purifying, as in metallurgy. It is not the function of Halakha to seek an accommodation with society, but to refine and purify it. The ultimate goal may well be utopian, but that does not release man from the obligation of endeavoring to reach it. Perfection is always illusive, but it is the telos which makes excellence a possibility.

The application of normative, unchanging legal canons to multivarious situations is not at all a process 'change.'

[The] use of the Hegelian triad as a paradigm for the Halakhic process is unfelicitous . If a philosophical model must be sought for the description of the type of 'development' which does take place, it is to be found in the Kantian notion of a synthetic a priori. The proposition '7+5=12' is not usually regarded as an empirical generalization. It is a proposition whose truth transcends human experience. Yet, bereft of a physical universe containing objects grouped in sets, the proposition '7+5=12' would never present itself to the human mind.

The experience of separately counting the members of two distinct sets, then recombining both sets and finally counting the members of the resultant new set triggers the intellect and serves as an empirical stimulus for the contemplation of what is essentially an a priori truth.

15/ D. Novak, "Another View of Jewish Law," 27 Judaism 496 (Fall 1978).

16/ Leviticus Rabbah 13:3.

All of Halakha is inherent in the original revelation at Mt. Sinai .'. . it is synthetic only in the sense that it requires a stimulus to prompt the investigation which serves to reveal that which has already been available to the human mind anytime in any age.

I am not prepared to believe that the Sages of the Talmud were either charlatans or ignoramuses. Since the only Judaism I know is the Judaism which they have bequeathed to me I must either accept it in toto or reject it all together. If they taught that Halakha does not change, I must either accept this principle or reject the Halakhic process in its entirety.^{17/}

Bleich's position is both stark and rigid without apology. It sets the outer limit on a traditional approach to the nature of Halakha. One need not embrace the full extent of Bleich's sense of inheritance to value nevertheless the Halakha as the instrument that proves that "Jewish piety is not episodic and subjective. [And] that Jewish religiosity is expressed, at least on its minimal level, in an ordered, structured and predictable form."^{18/}

Other thinkers have concentrated on the dialectical character of Halakha, seeing it as "a coincidence of opposites:

prophecy and law, charisma and institution, mood and medium, image and reality, the thought of eternity and the life of temporality. Halakha

^{17/} J. D. Bleich, "Halakha as an Absolute," 29 Judaism 30-32 (Winter 1980). Bleich softens his stand somewhat later in his essay when he states that "acceptance of a doctrine of 'twin fonts of revelation' entails the notion that Scriptural texts, in many cases, are not to be accepted in a literal vein." Id. at 35.

^{18/} S. Siegel, "Kaplan and Jewish Law," 30 Judaism 64 (Winter 1981). Siegel, a Conservative thinker, continues that "we do in order to gain religious depth; we continue to do even when we are in a spiritual desert, hoping that the continuous doing will lead us to an oasis." Id. Cf. S. Carmy, "Halakha, Tradition and History," 13 Tradition 165 (Winter 1973).

itself, therefore, in its own behalf, demands the coordination of inner meaning and external observance--and it is most difficult to comply with such a demand and sustain such a delicate, highly sensitized synthesis.^{19/}

This notion of Halakha as a "coincidence of opposites" is suggested by Harvard's Nathan Littauer Professor of Hebrew Literature and Philosophy Isadore Twersky. Twersky argues further that any legal code, of which he considers the Shulkhan Arukh to be the finest, is justified merely in order to "provide a measure of religious uniformity."^{20/} To him, such a code

only charts a specific way of life, but does not impart a specific version or vision of meta-Halakha. [This] because the latter is to be supplied and experienced independently [E]very person spices his food differently, and every wise person will find a different reason or taste in the Law, and this reason should not be codified or legislated.^{21/}

This contemplation of a conceptual framework within Halakha to be "supplied and experienced independently" in the same fashion as is the spicing of our food, introduces an extraordinary commitment to human autonomy embedded in the traditional notion of the nature of Halakha, the essential character of which "insists

^{19/} I. Twersky, "The Shulhan Aruk: Enduring Code of Jewish Law," 16 Judaism 157 (Spring 1967). Cf., Shulkhan Arukh Yoreh Deah 335:4, which, for example, explicitly tells us that the external action of bikkur holim without a concomitant feeling of compassion and the inward action of prayer for the recovery of the sick person, does not constitute fulfillment of the commandment. On the "coincidence of opposites," see also T. Friedman, "The Problem of Halakha Today: A Symposium," 34 Reconstructionist 14 (March 8, 1968).

^{20/} I. Twersky, op. cit. supra at 142-143.

^{21/} Id. at 157-158.

that the subjectivity of a personal faith operate in dialectical tension with objectively binding Halakhic norms."^{22/}

Finally, there is a difference in character of halakhot understood to have been revealed at Sinai in written form (de-orayta) and those which have been created and instituted in the wake of temporal situations, namely halakhot de-rabbanan. In this distinction, the tradition generally holds that those practices which are de-orayta (from Sinai) are of greater importance and value than those which are "merely de-rabbanan."^{23/}

II.

No description of the traditional definition of Halakha would be complete without mention of Halakha's internal conservative

^{22/} W. S. Wurzbürger, "Plural Models and the Authority of the Halakha," 20 Judaism 392 (Fall 1971). In this essay, Wurzbürger goes on to say that "not all religious obligations derive from Halakha. There is a wide area of behavior which is not governed by its rules." Id. at 394. Such issues as Soviet treatment of Jews, apartheid, or one's choice of occupation, all involve intuitive judgments based on Torah, but not in their essence Halakhic judgments. These are thus "covenantal imperatives: extra-Halakhic religious obligations . . . which must be resolved upon the basis of a personal encounter with God. The individual must act according to what he experiences as the demand of his God who claims his total commitment to His service." Id. at 395. Cf. W. S. Wurzbürger, "Law as the Basis of a Moral Society," 19 Tradition 51-52 (Spring 1981); W. S. Wurzbürger, "Covenantal Imperatives," in G. Appel, ed., Samuel K. Mirsky Memorial Volume (1970) pp. 3-12. Note that this description of "covenantal imperatives" comports with the definition of Halakha itself as suggested by Reform thinker Eugene Mihaly in "Reform Judaism and Halakha: The Contemporary Relevance of the Mishneh Torah of Maimonides," 64 CCAR Yearbook 214-226 (1954).

^{23/} Shab 128b. Note that the relationship of halakhot which are de-orayta to those which are de-rabbanan is 1:100. See Y. D. Gilat, "The Halakha and Its Relationship to Social Reality,"

(footnote continued on following page)

tendency. This, at least in the modern era, has been the source of great challenge and controversy. For though it is possible to articulate a liberal Halakhic tradition of rabbinic interpretation^{24/} it is nevertheless axiomatic that it advances in a matrix of limits and restraints, for

no system of law can ever set forth specific legislation for every possible case. The legal process is one in which the principles of the law must be applied to new situations often such as were unanticipated, and even unimagined, by earlier Halakhic authorities. . . .

We can have a sound theory of Jewish law thus only if we can extrapolate from the law itself the principles which guided the legislators.^{25/}

(footnote continued)

13-14 Tradition 69 (Spring-Summer 1973). Despite this, it must be said that the great liberal influence on the Halakha (whatever its status may be in contemporary reactionary circles) is embedded in the Talmudic tradition as halakhot de-rabbanan; such, for example, as that prohibiting human pain and suffering, Ket 60a, or that transgressions of de-rabbanan laws are approved when necessary to preserve human dignity or avoid public embarrassment, Men 37b; or those which prohibit a deliberate enmity with Gentiles, AZ 6b, 26a and BM 26b; or finally, the authority to proceed with extraordinary leniency in an emergency situation, Ber 9a. This is not, however, to say necessarily that "later developments are always superior or binding upon former standards to the contrary." Gilat, supra at 72. Maimonides, for example, upholds the Talmud over later Geonic takkanot and says that creditors cannot attach immovables of orphans in payment of their father's debts. His position is simply that no rabbinic ordinance (takkanah) can work to nullify the ethical imperatives of Judaism. M.T. Hilchot Malveh Ve-Loveh XI:2.

^{24/} See text infra pp. 15-23; Y. D. Gilat, "The Halakha and Its Relationship to Social Reality," 13-14 Tradition 73-83 (Spring/Summer 1973).

^{25/} M. Fox, "Conservative Tendencies In The Halakha," 29 Judaism 12-13 (Winter 1980) (emphasis added).

Thus, for example, the Talmudic principle Halakha v'ein morin kein^{26/} (this is the law but it is not so taught) is superficially a permissive or liberal doctrine if one is concentrating on the content of "the law." But in its Halakhic context, this principle is used to demonstrate the very conservative tendency of which note is taken here.^{27/} That is, the principle is invoked to limit publicity of acknowledged "permissive" rulings, for fear of subsequent abuse. The paramount concern here is with order and predictability.

This conservative tendency is not merely a reactionary preoccupation of those in Halakhic authority.^{28/} Indeed though any thesis of a "dynamic Halakha" can hardly be challenged inasmuch as historical precedents of change are ample,

one could also make out a very good case for the antithesis: [namely] the Halakha resists contemporary values and tries not to yield to them. It would like to change the conditions that it finds rather than change itself; and, above all, it does want to change the world and especially human nature. . . . [Thus] both [a liberal theory of a dynamic Halakha] and its antithesis are poles. The Halakha approves of both.^{29/}

It is thus clearly embedded in the process of the Halakha itself, and is not to be confused with the contemporary reactionary quality of much of Halakhic Judaism.

26/ M. BM IV: 2; Shab 12b.

27/ E.g., Betzah 28b; Shab 12b, 153b; Menahot 36b.

28/ See text of footnote 42 infra.

29/ E. Rackman, "The Principle of Polarity," 29 Judaism 9 (Winter 1980).

Concerning this, surely it cannot be gainsaid that there has been an extraordinary "fanatic intransigence" of those Halakhic authorities in the 19th and 20th century "who decried the slightest innovation, no matter how well intentioned, as bordering on apostasy."^{30/} Liberal Jewish thinker Eugene Mihaly is thus on solid ground when he challenges the contemporary "encrusted literalism" of present day Orthodox Halakha. Mihaly justifies his own radical approach (calling for a "heroic revival of genuine Oral Law" to correct Halakha's "calcified distortion of our historic faith"^{31/}) by insisting that the situation of the Jew in America today is so utterly different from any situation which previously obtained for the Jew, that a new order--a new Judaism-- is imperative.^{32/}

The contemporary, traditional Halachist is enchained by an all-embracing 'Written Law' as well as by his own timidity--the result of many dark centuries of precarious existence in a dominant environment determined to dehumanize the Jew and to brand him a grotesque, devil-possessed monstrosity.

In these circumstances Halakha kept the Jew human and helped him achieve an amazing--a miraculous dignity.

The rigid discipline . . . was the major factor in the survival of the Jew and produced generations of scholars, saints and martyrs who daily sanctified God's name and who bore witness to the possible and to the vestige of humanum

30/ E. Mihaly, "Halakha is Absolute and Passe," 29 Judaism 69 (Winter 1980).

31/ Id. at 72, 74.

32/ E. Mihaly, Responsa on Jewish Marriage (1985) p. 57.

which persists even in a world steeped in
profanum.^{33/}

British Chief Orthodox Rabbi Dr. Immanuel Jakobovitz
attributes this contemporary conservative tendency of Halakha to
three factors, namely:

- (1) the Holocaust: Here, he says, the Orthodox religious community suffered in far greater proportion than any other element of k'lal yisroel. Its resultant "sense of insecurity [led to] an uncompromising determination to preserve, consolidate and expand the tiny remnants" of its religious community and integrity.
- (2) Newton's Law that every action produces an equal and opposite reaction. Here Jakobovitz asserts that the "massive drift to the left . . . [and] rampant growth of secularism, religious indifference, assimilation and intermarriage" has yielded an "equal and opposite reaction" of stridency and reactionary determination.
- (3) Finally, Jakobovitz cites the "widespread disillusionment with the sham values of our contemporary society" as justifying this conservative tendency in contemporary Halakha.

There are therefore, he says, "only a handful of Orthodox rabbis advocating Halakhic innovation and religious dialogues with the world . . . around them [and they] find themselves in splendid isolation, incurring severe and hostile opposition."^{34/}

^{33/} E. Mihaly, "Halakha is Absolute and Passe," 29 Judaism 71-72 (Winter 1980). Mihaly says that now, however, this noble strategy of survival has become a "strategy of irrelevance and bankruptcy and may even be suicidal in an environment of freedom." Id. See fn. 169 infra.

^{34/} I. Jakobovitz, "Halakha In Modern Jewish Life," 29 Judaism 5-6 (Winter 1980). Note the irony in Jakobovitz's assertion that, nevertheless, "today they (the ultra-Orthodox) are the only tribe among our people which is neither vanishing nor worried about survival." Id.

III.

Despite the well-supported and documented assertion supra that traditional Halakha contains within it a conservative tendency which has been, for whatever reason, exacerbated in the 20th century, there remains in Halakha a

certain dynamic element which posits the maximum flexibility in the application of the law to practical cases so as to 'permit the forbidden for 150 different reasons.'^{35/}

Thus we have the famous tradition regarding disputes which are said to "both be the opinions of the living God."^{36/} Or, of perhaps greater fame, the classic Talmudic tale wherein God Himself (in the guise of a Voice from Heaven) interjects His opinion in a legal dispute which is rejected by the majority of the assembled authorities. There, Rabbi Joshua exclaims to the Heavenly Voice "it (the Law and the right to interpret and declare it) is not in Heaven!", quoting Deuteronomy 30:12.^{37/} It must also be

^{35/} J. J. Ross, "Morality and the Law," 10 Tradition 10 (Winter 1968). The quotation is from San 17a-b. See generally D. Hartman, A Living Covenant: The Innovative Spirit in Traditional Judaism (1985); L. Jacobs, A Tree of Life: Diversity, Flexibility and Creativity in Jewish Law (1984); E. Berkovitz, Not in Heaven: The Nature and Function of Halakha (1983).

^{36/} Eruvin 13b.

^{37/} Though this text is routinely offered as a text of liberal tolerance and dynamism in the Halakha, e.g., J. J. Petuchowski, Our Master's Taught: Rabbinic Stories and Sayings (1982) pp. 43-44, in its context it may be understood as a tale of remarkable intolerance and insensitivity, inasmuch as Rabbi Eliezer, the tale's protagonist who called upon the Heavenly Voice, was ultimately put in herem by his colleagues. BM 59b. Petuchowski himself has observed that "this story, at first sight, created the impression that Reason is being championed against Revelation." J. J. Petuchowski, "The Dialectics of Reason and Revelation," in A. J. Wolf (ed.), Rediscovering Judaism: Reflections on a New Theology (1965) p. 36.

acknowledged that the very nature of Talmudic discourse is such as to lend credibility to a de-centralized legal system. Can there be any other reason for the inclusion of the daat yachid (individual opinion as opposed to the majority ruling) other than that the local posek could rely upon such opinions when necessary in his fusion of the inherited Law with the reality he faced? It was and is this posek, the rabbinic decisor, upon whose shoulders the dynamic character of the law is carried. And his effectiveness has been and continues to be related to his fame, piety, personality and charisma.^{38/} The Law thus has within it not only the seeds of a conservative tendency but of a dynamic de-centralized character as well.

It is possible to "cover" this dynamic character with appeals to philosophical or Talmudic arguments positing a perfect and complete revelation of all truth to Moses at Sinai. Thus all subsequent dispute resolutions are merely refinements and not novellae.

This argument can be based upon the Talmudic references to the claim that every eventuality was revealed to Moses at

^{38/} Emanuel Rackman has argued that saintliness and piety as virtues of authority were given greater weight than reason alone. "Piety was at least as much the hallmark of authority as genius, and unless religious experience is involved in Halakhic exegesis, this requisite makes no sense" E. Rackman, "Israel and God: Reflections on Their Encounter," 11 Judaism 236 (Summer 1962).

Sinai^{39/}. It can also be based upon such endeavors as Rabbi J. B. Soloveitchik's volume Halakhic Man^{40/} which is

a crude adaptation of the Kantian approach which argues for the existence of a synthetic a priori judgment. . . . Halakha is a universal truth independent of the senses since any sense experience would not be able to refute it. [It is also not left to analytical discussion because it is founded on experience or inherent in existential reality and not analytical relation.]

[This is an] attempt to characterize Halakha in Kantian terms and thus to grant Halakha a validity which Kant gave to epistemological processes.^{41/}

Whether these Talmudic or philosophical arguments are indeed "covers" or are rather the theoretical foundation for a true liberal Halakha is not our instant concern. Rather, our concern here is merely to posit that Halakha has a history--a human-bound dialectic.

Thus change itself, the authority for which exists in Deuteronomy 17:11 ("You shall act in accordance with the instructions given you [by the authorities in your time] and the ruling handed down to you; you must not deviate from the verdict that they announce to you either to the right or to the left"), is axiomatic in any description of Halakha. In so saying, we do not suggest that change is itself a Halakhic value but rather that it is evidence of Halakha's inner tendency to dynamism, flexibility and openness. At times change has been advocated and approved lest

39/ Eruvin 21b; Megilla 19b; J.T. Peah II:6, p. 17a. Cf. Sota 47b (Halakhic "innovations" are only rediscoveries).

40/ J. B. Soloveitchik, Halakhic Man (1983) (L. Kaplan, trans.).

41/ R. Shihor, "On The Problem of Halakha's Status in Judaism," Forum 146, 149, 154 (Spring/Summer 1978).

more radical change come about.^{42/} Such fears frequently identified a conflict between rabbinic authorities, on the one hand, and the communities which they served, on the other. Jacob Katz has suggested, for example, that the historic pose of traditional rabbinic authorities in conflict with their communities has put the former on the side of the dynamic, open and liberal tendency in the tradition.^{43/}

Change also can be the result of a Talmudic authority making a more cogently argued moral claim by which he is forced to reconcile the full meaning of the letter of the Halakha. Such was the case when Hillel was forced to choose between the two evils of sacrificing the welfare of the poor of his community or sacrificing the literal meaning of scriptural law concerning the charging of interest. The Gemara^{44/} implies a distinction between the literal meaning of a scriptural law and the obvious or true meaning of the

42/ E.g., Suk 36b; See W. S. Wurzbarger, "Is Sociology Integral to the Halakha?" 29 Judaism 30 (Winter 1980). Certain aspects of positive commandments may be permanently abrogated when there is an overwhelming need to protect the major institutions of Judaism or to preserve persons from great hardship and distress. See Yev 89b. Though no mitzvah aseh (positive commandment) may be totally abrogated, negative commandments (mitzvot lo ta'aseh) may be temporarily abrogated in part for the same above-stated reasons. M.T. Hilchot Mumrim II:4; Yev 88a (Tos. s.v. mitoch) and 89b (Tos. s.v. kevan). It is perhaps ironic that these principles and procedures are not employed today for fear--admittedly justified--of their misuse.

43/ J. Katz, Goy shel Shabbat (1983) p. 179. Nevertheless, manifold are the cases of minhag garooa (faulty custom of the people) finding their way into the Halakha. See D. W. Pearlman, "The Halakha--As The Authority of the Past," 66 CCAR Yearbook 235 (1956).

44/ Git 36a.

same. And Hillel, in perhaps the most famous case of "change" in Jewish Law, chose the "evil" of sacrificing a literal meaning^{45/}.

Other examples of such "changes" abound:

- (a) the nullification of laws regarding the rebellious son and communal apostasy;^{46/}
- (b) the right of the sages to nullify biblical laws involving non-feasance;^{47/}
- (c) the refusal to yield to the Heavenly Voice;^{48/}
- (d) the principle of majority rule;^{49/}
- (e) the derivative power of the Beth Din;^{50/}
- (f) the restriction of land-based mitzvot only for the Land of Israel;^{51/}
- (g) the "end" of biblically-mandated (at least literally) practices involving the red heifer, the sota and the yibbum;^{52/}
- (h) the Talmudic principle dina de-malchuta dina;^{53/}
- (i) the Talmudic principle hefker beth din hefker;^{54/}

45/ Id., M. Shevut X:3; cf. Arakhin 28b.

46/ M. San VII:4; San 71a.

47/ Git 36b; Yev 90b .

48/ BM 59b; Ber 52a; Eruvin 7a; Pes 114b; Yev 14a.

49/ M. San I:6; San 36a.

50/ M. Rosh Hashanah II:9; RH 28b; Cf. Hullin 6b-7a.

51/ M. Kid I:9.

52/ M. Sota IX:9; Yev 39b.

53/ Git 10b.

54/ Yev 89b.

- (j) the hatra'ah (warning) required for all crimes for which capital punishment would be administered;^{55/}
- (k) the acceptance of a single woman's testimony in matters of death.^{56/}

These and other post-Talmudic examples amply demonstrate, in a general sense, (1) the necessity to respond to external, social, economic, political and cultural conditions and (2) that the need to establish new legal norms on the basis of novel ethical insights and attitudes was and is the source of a fundamental dynamic character in Halakha.^{57/}

To be sure, "easy references to developing ethical standards" or other contemporary norms are inadequate to explain how Jewish law developed and why the literal word of Torah was kept in some cases, and explicitly or subtly set aside in other cases.^{58/} There have been numerous modern attempts to explain or justify the dynamic element of Halakha.^{59/} Conservative legal theorist Seymour Siegel has suggested, for example, that

if the [Halakhic] precedent is deficient in meeting the needs of the people, if it is clearly foreign to the group of law-observers in the community, if it is offensive to our ethical sensitivities, or if we do not share its basic scientific, economic and social assumptions, then the law can be modified either by outright

^{55/} San 8b.

^{56/} Nazir 43b and Tos. ad loc. s.v. amar ri.

^{57/} R. A. Gordis, "A Dynamic Halakha: Principles and Procedures of Jewish Law," 28 Judaism 263-282 (Summer 1979).

^{58/} M. Fox, "Conservative Tendencies In The Halakha," 29 Judaism 17 (Winter 1980).

^{59/} See footnote 35 supra and sources cited therein.

abrogation, or by ignoring it, or by modifying it.^{60/}

Others have attempted to articulate a central biblical basis for Halakhic change.

Robert Gordis, another Conservative thinker, understands the admonition in Deuteronomy 16:18 to "to do what is good and right in the eyes of the LORD" as an all-encompassing rubric by virtue of which legal change is necessitated.^{61/} Jacob Chinitz sees in the text of Deuteronomy 17:8-13 ("if any cases arises . . .") an authority for a process of amendment to Jewish law whereby the same is not a violation of its divine character. Such changes should perhaps more appropriately be called corrections. To Chinitz they "do not occur by changing the letter to conform to the

60/ S. Siegel (ed.), Conservative Judaism and Jewish Law (1960) p. xxiv. Reform thinker Eugene Mihaly makes the same essential argument. Mihaly, however, argues that the dynamic of reform in the Halakha is embedded in it, and it is only a matter of the classic process of re-interpretation which will result in an appropriate "Halakha" (in its broadest sense) for our time. Mihaly would expand Siegel's options of "outright abrogation, ignoring it, or modifying it," by suggesting as options (a) a recapitulation of the deeper tendencies to be found embedded in the classical literature; (b) the re-categorization of Halakhic rules, rubrics and procedures; (c) the process of ethical weighting, that is, articulating an ethical theory which requires a certain preference in a given ethical choice; (d) an expansive embrace of the classic Jewish doctrine of Messianism; and (e) "rejection" of a Halakhic norm by, again, the classic rabbinic process of textual exegesis or interpretive re-definition. This approach was articulated by Dr. Mihaly in an unpublished lecture entitled "The Rabbi as Moreh Hora'ah" on December 16, 1985. We argue, infra, that unless it is by the classical process of interpretation cum exegesis or eisegesis, that "rejection" or "outright abrogation" tends to objectify the Halakha and our relationship to it. That relationship becomes not one of inheritance but academic inquiry.

61/ R. A. Gordis, "The Ethical Dimension in the Halakha," 26 Conservative Judaism 74 (Spring 1972).

spirit but by changing the spirit to accommodate the letter" of the traditional text.^{62/}

Jacob B. Agus sees three technical manifestations of change within the traditional process of Halakha which, he argues, can be given life anew today. These are takkanot, or ordinances of conduct initiated by the spiritual elite;^{63/} aggadot, or new ideas that arise either out of Judaism or out of universal culture; and minhagim, or customs initiated by the people and concurred in by the spiritual elite.^{64/}

Traditionalists such as David S. Shapiro insist that all "changes" which can be identified in Halakha as it has been developed through Jewish tradition, were all the while in accordance with the true meaning and essential ethical thrust of the Biblical

62/ J. Chinitz, "Amendment to Jewish Law," 34 Conservative Judaism 28-31 (July/August 1981).

63/ We are grateful to our teacher, Dr. Ben Zion Wacholder, for sharing his insights concerning the role and functioning of takkanot in Jewish law with us. Takkanot were in the nature, essentially, of Halakhic legislation. They were usually issued for stated reasons of tikkun olam ("for the sake of good order") or darkhei shalom ("for the sake of peace"), "in order that the Torah, its ways and precepts, should not become strange to the Jewish people." M. Elon, "Takkanot," 15 Encyclopedia Judaica 717 (1972). See J. J. Petuchowski, "The Limits of Self-Sacrifice," in M. Fox (ed.), Modern Jewish Ethics (1975) p. 111 ("basically, this is the tendency of the whole tractate of Gittin.")

64/ J. B. Agus, "A Theological Foundation for the Halakha," 29 Judaism 61 (Winter 1980). As we are told in Pesachim 66b that we are not prophets but the sons of prophets, the Talmud has several notes of honorific regard for popular will. E.g., Minhag mevattel halacha (custom nullifies law), M. BM 1:1; Hul 136b. Of course, when the Talmud admonishes authorities to "go out and see what the custom of the people is and rule accordingly," Ber 45a and Eruvin 14b, it contemplates a halachically oriented community. See footnote 225 infra.

mandate. For example, the Mishnah reports that the eglah arufah was abolished not in contravention of the Torah's mandate, but because the Torah limited its application to murder without evidence of the perpetrator, thus "from the time that murder was on the increase, the rite of the eglah arufah was abolished." So, too, the trial by ordeal for the sotah was abolished because the text in Numbers 5:31 stipulates that the practice is only to apply when the husband is free of sin. Its abolition was not therefore an abrogation but an application of the Biblical mandate. Shapiro makes the same point regarding the rebellious son of Deuteronomy 21:18-21, where the text itself contains qualifying conditions, and Rabbenu Gershom's ban against divorcing a wife without her consent, which "may have been prompted by misuse of this Halakhic prerogative which certainly was always regarded as contrary to the Jewish moral conscience."^{65/}

65/ D. S. Shapiro, "No Abrogation," 29 Judaism 20-24 (Winter 1980); W. S. Wurzbarger, "Is Sociology Integral to the Halakha?" 29 Judaism 28 (Winter 1980). On the Jewish moral conscience by virtue of which a woman should not be divorced against her will, see Git 90b and San 22a. Note should also be taken of the point made by Louis Jacobs that

The Talmud itself is overused as a legal corpus, when its literary and academic function, which is central, is lost. That three things are always deduced from a mishnah or baraita and never two, four or five is proof of its literary and intellectual character--it is not a 'real attempt to obtain guidance for the conduct of life.' In the light of this it is as precarious to derive principles and procedures for the dynamics of the Halakha from the Talmud itself as it would be to try to obtain information about Danish Court life in the past from Hamlet.

L. Jacobs, "The Talmud as the Final Authority," 29 Judaism 46 (Winter 1980).

A concomitant of any dynamic quality to Halakha must obviously be its intrinsic pluralism. Indeed, in Jewish law "diversity acquires its legitimacy from norms that are inherent in, or derivative from, the tradition."^{66/} Jakob J. Petuchowski has thus noted the co-existence of Ashkenazim and Sephardim and the antecedent Babylonian and Palestinian traditions as being evidence of a minimal pluralism.^{67/} Petuchowski, in articulating a pluralistic model for Jewish law wherein several communities following different legal traditions co-exist, essentially avoids the issue of Halakhic change. This is because he contemplates a living Jewish legal confederation, whereby varying interpretations of Jewish law are all given equal validity, with the coordinate requirement for mutual tolerance of the same. "Liberal" to him, thus, is not an invitation to reexamine and reform Halakhic norms, rather it is a signal of tolerance for non-conforming (to the general popular practice) behavior.

In addition, what "liberal" does not mean to Petuchowski is a rhetorical device by which you separate Halakha from its divine moorings. It is necessary a priori, he says, to accept the divine authorship of Torah or, at least, its divine character if "pluralism" is to have any meaning at all. To be included in a Halakhic community, you must "ascribe the origin of Halakha to an

^{66/} D. Polish, "The New Reform and Authority," 23 Judaism 19 (Winter 1974).

^{67/} J. J. Petuchowski, "Plural Models Within The Halakha," 19 Judaism 77 n.6 (and sources cited therein) (Winter 1970).

act of divine revelation (however that 'act' may be imagined), and . . . feel the need to live [your] life according to the pattern of divine imperatives (mitzvot) which [you] seek, not least, in the classical sources of the Halakha."^{68/}

This thought on the qualifications of one "to be included in the process" is, indeed, a critical threshold which must also be included in this discussion of the traditional nature of Halakha. Petuchowski's concern with the qualifications of those who are to be "included" has been mirrored by others. Robert Gordis, for example, has said that "only those who vote have a voice in changing America" and so only those who participate and actively inherit the Halakha as their own can be heard to complain about its failure to change or its inapplicability in our time."^{69/} There was indeed "a significant correlation between one's commitment to and knowledge of the Halakha, on the one hand, and his ability to be a meqil (permissive decisor) on the other. The meqil functioned within the system, not outside of it."^{70/}

^{68/} Id. at 87; Note the challenge to Petuchowski from Isaac Chavel on the absence, in Petuchowski's system, of any sense of issur or limits beyond which a Jew must not act. 19 Judaism 333 (Summer 1970). Gunther Plaut says that Reform Judaism must "fall back" to mitzvah from an unobtainable Halakha, the former "the basis on which we . . . have formed a consensus." Plaut, Can We Speak of Reform Halakha?" in E. L. Stevens (ed.), Rabbinic Authority (1982) p. 65. The impulse to perform mitzvot, however, can only derive from the authority and inspiration of Almighty God. "All thy actions," Hillel said, "are to be performed for the sake of Heaven." Avot 2:19; Betzah 16a.

^{69/} quoted in W. Jacob, "Conservative Judaism and Halakha: A Review Article," 26 Journal of Reform Judaism 19 (Winter 1979).

^{70/} J. J. Petuchowski, "How 'Relevant' Can Judaism Be?" Jewish Affairs 6 (September 1969).

But whether mequill or rigid mahmir, in the modern era the function of the posek has changed from mediation between the Halakha of the traditional sources and a common or popular practice, to presentation of "ideal models of behavior for those who would accept it."^{71/} As such, the dynamic dialectic of the Halakha cannot function without both of its poles, namely one pole occupied by one who would present an ideal model and the other by those who would accept it. Whether there is room for visible or viable Halakhic development when one pole is missing is indeed quite problematic. It is surely clear that Judaism does not equate vox populi with vox dei, whereby "the standardization of religious practice can be drawn from data furnished by a more-or-less de-Judaized generation."^{72/} Though non-observance has always been important and has had an impact on Halakhic development^{73/} it is nevertheless true that "rabbis, like other legislators, operate the law primarily for those who submit to its jurisdiction."^{74/}

Indeed,

one of the factors which impedes the advocacy for change in our time is the fact that many of the progressive elements who most keenly feel the need for change have seceded altogether from the Halakhic community. Some have joined the camp of the secularists, while others have embraced

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- ^{71/} S. Morell, "The Role of Popular Religious Attitudes in the Shaping of Halakha," 37 Conservative Judaism 99 (Summer 1984).
- ^{72/} J. J. Petuchowski, "Problems of Reform Halakha," 4 Judaism 345 (Fall 1955).
- ^{73/} S. B. Freehof, "Non-Observance and Jewish Law," 32 Judaism 41-42 (Winter 1983).
- ^{74/} I. Jakobovitz, "Halakha in Modern Jewish Life," 29 Judaism 7 (Winter 1980).

religious ideologies which have renounced the authority of Halakha. The result has been that the custodians of Halakha have come largely from the circles of extremists who are so rooted in the past that they persist in ignoring the claims of the present.^{75/}

The choice for the modern Jew who finds ethical challenge and dilemma throughout the traditional Halakhic network is thus either objectification and radical resistance or active inheritance and positive assimilation from the culture in which we live. The latter, particularly as it has vexed the thinkers and rabbis of Reform Judaism in the post-war era, must now be examined.

^{75/} B. Z. Bokser, "The Struggle for Change," 29 Judaism 44 (Winter 1980). Note that though he makes the same point, Conservative legal theorist Seymour Siegel has written that "the newer leaders [of Reform Judaism] who have a growing appreciation of Halakha should now be included in the Halakhic community, working together with others to make Jewish observance the norm of Jewish living." S. Siegel, "Kaplan and Jewish Law," 30 Judaism 66 (Winter 1981).

CHAPTER 2

REFORM JUDAISM AND THE HALAKHA: THE ISSUES

Any attempt to conflate the salient character of both Reform Judaism and Halakha must undertake an analysis of the extant Reform position, or positions, vis-a-vis Halakha. In this chapter, we will explore various attempts to define Reform Judaism over against its more traditional 20th century models. Thereafter, we will explore a historical overview of the relationship between Reform and Halakha. Addressing more specifically the post-World War II era, the chapter will then analyze the contributions of several individual thinkers who have articulated a relationship between Reform and Halakha.

I.

We have earlier^{76/} articulated a definition of Judaism, followed by working definitions of its Orthodox, Conservative and Reform variations on its central theme. This concept of Reform Judaism as a matter of difference in emphasis rather than in kind from its Orthodox and Conservative alternatives, is not universally accepted. It is, however, true that all recent attempts to qualify the uniqueness of the Reform movement in Judaism converge on "the Reform principle of the autonomy of the individual."^{77/}

76/ See pp. 2-4, supra.

77/ E.g., E. Rosenstock, "Diversity Within Unity, The Hallmark of Reform." 24 CCAR Journal 31 (Spring 1977). The quotation also appears in the CCAR Centennial Statement.

Part of the analytical problem in the concentration on so-called autonomy is its nebulous character when put against a vast and complex system of normative rules and guidance for behavior, which Judaism is. Thus those who emphasize "autonomy" as the lodestar of Reform Judaism frequently articulate a definition of Reform which is notably vague.

Rabbi Elliot D. Rosenstock, for example, was a member of the Centennial Statement Committee of the CCAR in 1975-76. Rosenstock has written that Reform Judaism "does not merely tolerate, but engenders diversity;" having grown out of a "uncertain historical situation . . . we stand open to any situation thoughtfully and conscientiously advocated in the spirit of Reform Jewish beliefs." Continuing,

While we may differ in . . . interpretation and application . . . we accept such differences as precious and see in them Judaism's best hope for confronting whatever the future holds for us. Yet in all our diversity we perceive a certain unity and we shall not allow differences in some particulars to obscure what binds us together.

[That] is our collective determination to live with uncertainty, to affirm God and reread Torah, to facilitate the continuation of Judaism and the Jewish people. Every Reform Jew is a microcosm of the macrocosm of Reform Judaism and Reform Judaism is a clear refraction of our space-time. We have not turned our backs on the world as some might claim; nor have we neglected ourselves as others might assert. We have seen a particularism in our universalism and a universalism in our particularism in individual as well as communal decisions.^{78/}

Rosenstock's attempt amply demonstrates how difficult it is to define a modern liberal religious movement. His impenetrable statement raises more questions than it answers.

^{78/} Id. at 31-35.

Many others have offered fragmentary definitions which have been, in essence, descriptive statements as opposed to theoretical justifications. For example, Mordecai Podet has emphasized Reform's "openness to reason, preeminence of ethics, and flexibility in forms"^{79/} by which he attempts to distinguish Reform from Orthodox and Conservative style and behavior, which he implies is rigid, formal and myopic. Others have been negative in their approach, that is, describing Reform by that which it is not as, for example, Abraham Cronbach, who wrote that

We have placed [and described], at one end of our yardstick, the Jewish persons who observe all of the rituals and accept all of the tenets. At the other end are those who observe none of the rituals and reject all of the tenets or have never heard of those rituals or tenets. Between these two extremes, stand Jews of all gradations, Jews retaining some of the rituals but not others, favoring some of the doctrines but not others. The portion near the one end we have called Orthodoxy, the portion somewhat short of the other end we call Reform.^{80/}

The much-vaunted concept of "autonomy" has been attacked not only by traditionalists for its denigration of God,^{81/} but

^{79/} M. Podet, "Autonomy and Authority: The Dilemma of Reform," 92 CCAR Yearbook 33 (1982).

^{80/} A. Cronbach, Judaism for Today (1954) p. 50.

^{81/} E.g., W.S. Wurzbarger, "Law as the Basis of a Moral Society," 19 Tradition 51 (Spring 1981). Quoting Hillel that "all thy actions are to be performed for the sake of Heaven," Avot 2:19; Betzah 16a, Wurzbarger asserts that Judaism and "Jewish morality reject autonomy because of its [Judaism's] theocratic (rule of God) orientation." Furthermore, "Judaism repudiates the notion of autonomy not only because of the undue emphasis upon the first half of the term--the 'auto' (the stress on the self) but also because of the 'nomy' aspect--the complete identification of the moral good with that which is prescribed by law (whatever its source may be)." W.S. Wurzbarger, "Covenantal Imperatives" in G. Appel, ed., Samuel K. Mirsky Memorial Volume (1970) p. 8.

from the left as well as, for example, by Harold S. Jaye, writing in 1979 that

The essence of Reform never has been, nor is it now, the concept of personal selection based solely on personal meaning If 'personal meaning' is my criterion, then what is implied if I suddenly become enamored of rosary beads or holy water? . . . Why have an organized religion if the group's standards are inferior to those of individuals? . . . Individuality has its place, but so does community. The Reformers debated the matter of ritual many times, and, though individual rights were respected, there were clearly defined areas where group standards applied. . . . The idea that organized liberal Judaism means 'pick and choose' rituals on the basis of individual preference is just not true.^{82/}

Jaye's basic attitude is mirrored in the claim of others that "Reform Judaism is desperate for direction"^{83/} and "in need of a philosophy--a meaningful ani maamin in this time and space."^{84/} For, it is said that

We have so modified the classical mold of Reform, which is all to the good, that we have gone to the opposite extreme and cultivate an openmindedness to all sorts of traditions (e.g., Bar Mitzvah, Torah reading) without rhyme or reason.^{85/}

Much of the attempt at definition has been defensive in nature. Joseph Narot and Maurice Eisendrath endeavored to define

82/ H. S. Jaye, "Dinner Table Dilemma," Brief: The Quarterly of the American Council for Judaism 1, 5 (Winter/Spring 1979). Jaye went on to say that kashrut has no place whatsoever in American Reform Judaism.

83/ E. E. Pilchik, "Towards a Philosophy of Reform Judaism," CCAR Journal 17 (April 1958).

84/ Id. at 14.

85/ H. Essrig, "The Creative Approach to Liberal Judaism," CCAR Journal 13 (April 1959).

Reform by drawing a caricature of its ideological competition. The "mitzvot of our Torah," Eisendrath wrote,

were designed to become daily, oftentimes humble and homely visible symbols of an inward and spiritual commitment, reminders of the awesome law of the Lord, the 'frontlets between thine eyes,' the ever-present human means to the Divine. These means oftentimes became confused with the ends and ever served as substitutes for them, but it is to the glory of the pioneers of Reform Judaism that they dared, against what was too frequently the most fanatical of opposition, to cast aside such of those means as had lost their meaning, as had become frozen into empty forms and had on occasion degenerated into rigid and spiritual idolatry.

Thus Reform Judaism overcame the peccadilloes of priestly pomp and pageantry rather than the pursuit of justice and the passion for the living God.^{86/}

Narot, calling Reform "the dominant, if not the majority religious way of life in Judaism," concluded that mitzvot "no longer have their authoritarian, arbitrary border implied in it, but the 'good deed.' We cannot," he said, "bow to the . . . longing on the part of some to return to the old mysteries."^{87/}

Still others have attempted a definition of Reform Judaism by viewing the concept of "autonomy" critically, from a traditional point of view. Kenneth E. Stein, in analyzing Reform's attitude to the tradition, noted that "we honored Geiger's memory, but we are solidly in Frankel's camp."^{88/} The reference is to Zacharias

^{86/} M. N. Eisendrath, "The Form and Substance of Reform Judaism," CCAR Journal 10-11 (April 1958).

^{87/} J. R. Narot, "Is Reform Judaism a Sect?" CCAR Journal 38-39 (January 1960).

^{88/} K. E. Stein, "The Problem of Halakha in Reform Judaism," CCAR Journal 19 (June 1960).

Frankel, now generally understood as the ideological founder of what became American Conservative Judaism. Frankel argued strenuously that changes in traditional practice should be undertaken with a careful view to the impact of those changes on the future of the Jewish community, the present state of Jewish practice and affairs, and the relationship with the Jewish past. Echoing Stein's conclusion, philosopher Emil Fackenheim has argued that

not infrequently having fought vigorously against the enemies of liberalism, [Reform] stands bereft of vital, concrete commitments the moment this fight is over. Instead . . . it offers innocuous platitudes.

Let us consider the significance of 'Torah.' Does it commit us to the practice of Halakha in the traditional sense? Within liberal Judaism, certainly not. Does it, then, at least commit us to the observance of moral commandments, understood as the commandments of God? Again it appears that the answer must be in the negative; for a divine Commandment presupposes revelation, and not all Liberal Jews believe in revelation. Does 'Torah' mean at least acceptance of specific Commandments, regardless of whether their origin is human or supernatural? Here, too, the answer seems to be in the negative, if much liberal Jewish preaching is to be believed. For it appears that, prior to committing ourselves to anything that may be found in the Torah, we must have standards in the light of which to interpret it. The standards that are often used are found in Jefferson, Dewey, and Freud. . . . Thus, the normative Reform Jewish position seems to be that a good person is all that is required. And, Torah serves little purpose beyond supplying the Rabbi with quotations by which, on suitable occasions, he can dramatize objectives--immensely important, but accepted and valid quite independently of the Torah. The danger is, therefore, that Reform Judaism's sole religious mission will have been . . . to fight against superstition, tyranny and obscurantism. It will become 'religion' for the comfortable and self-satisfying. Those in search of vital

loyalties and commitments [will be required to] look elsewhere.^{89/}

Fackenheim is there arguing for a new Reform Judaism which, if adopted, would clearly validate Stein's perhaps less-than-historical claim that Reform is "solidly in Frankel's camp."

Finally, a most telling approach regarding the definition of Reform Judaism has come from an examination of its educational values as opposed to those known in Orthodox Judaism. It has been said, in this regard, that Orthodox institutions have as their educational goals "information and training necessary for full observance of traditional practices whereas Reform institutions emphasize cultural Judaism rather than observances, problems of relationships between Jews and non-Jews and problems of ethics and character building."^{90/} This focus, and all that it implies, may be the most critical qualification on "autonomy" as the centerpiece for the Reform movement in Judaism. It is a qualification, that is to say, only if "autonomy" is initially understood as an opportunity and a celebration of one's own capacity to reconcile Jewish tradition and modern life.

II.

Many who have described the history of the Reform movement in Judaism have endeavored to demonstrate its traditional roots,

^{89/} E. L. Fackenheim, "Liberalism and Reform Judaism," CCAR Journal 1-3 (April 1958).

^{90/} D. P. Crystal, A Course in Modern Jewish Theology for the Adult Learner. (unpublished HUC-JIR Rabbinic Thesis) (1985) p. 99.

foundation and basis^{91/} though others have seen a more radical rejection of revelation as the basis for Reform. It is generally, however, agreed by those offering a historical justification for Reform that "Halakha ceased to function well because the world moved at too fast a pace from the 17th century onward, ending corporatism and moving to nationalism and liberalism. In addition, Sabbatianism and Frankism [two messianic Jewish movements] were so devastating as to color Rabbinic Judaism's approach to secular learning as a whole."^{92/} This traditional Jewish resistance to "secular learning" served as the antecedent basis - or springboard - for Reform's outreach to secular scientific scholarship as the ground of a new representation of Jewish tradition.^{93/}

After its early radical rejection of the Jewish legal tradition, as embodied in the 1885 Pittsburgh Platform, American Reform Judaism moved into an era during which it reformulated its fundamental principles. That era culminated in the adoption of the Columbus Platform in 1937, wherein a more positive attitude to Jewish tradition and Jewish law was pronounced. The first calls for a comprehensive code of Reform Jewish practice were made in the later stages of this period of reformulation, namely 1925, 1931 and

91/ A. S. Green, "Religion and Life," 66 CCAR Yearbook 242 (1956); see also B. Bamberger, "Revelations of the Torah After Sinai," 11 HUCA 383 (1949); J. R. Raisin, "The Reform Movement Before Geiger," 20 CCAR Yearbook 197 (1910).

92/ D. W. Pearlman, "The Halakha--As The Authority of the Past," 66 CCAR Yearbook 237 (1956).

93/ J. R. Narot, "Is Reform Judaism a Sect?" CCAR Journal 38 (January 1960).

briefly in 1937.^{94/} In 1938 the CCAR Commission on Synagogue and Community adopted a resolution read to the convention plenary that "the time has come for the responsible leaders of Liberal Judaism to formulate a code of observances and ceremonies and to offer that code authoritatively to Liberal Jews."^{95/}

This call for an authoritative code or Halakha for Reform Jews, which would not be the first, was defeated by the CCAR Executive Board in 1940.^{96/} Writing in 1941, Reform posek Solomon Freehof suggested Orthodox offense (i.e., "they are acting like Karaite Jews") as an important reason for delaying any publication of an authoritative code of practice. Freehof insisted that Reform prayer and worship were already "codified" and other observances could be so in the publication of a Union Home Prayer Book. Responsa, by which individual questions were answered in the traditional form, could be indexed and published but "only used as guidance." Finally, "a clear-cut code which shall have the effect of law for us should be promulgated," Freehof opined, "on marriage, conversion and divorce."^{97/}

94/ A. Arian, Reform Rabbis and the Movement For Official Authority: The Abrogation of Modernity? (unpublished Brown University Masters Thesis) (1971) pp. 15-23 [hereinafter Arian].

95/ R. Marx, "The Problem of Authority in the American Reform Rabbinate," CCAR Journal 65 (June 1958).

96/ Arian, op cit. at 37.

97/ Id. at 24-25. These are obligations to minimal order and integrity that Jakob J. Petuchowski calls "commandments between Jew and Jew," J. J. Petuchowski, "Plural Models Within the Halakhah," 19 Judaism 83 (Winter 1970), and David Polish calls "public sector issues," D. Polish, "The New Reform and Authority," 23 Judaism 19 (Winter 1974) as to which traditional adherence is commended by both.

Freehof thus took the position in 1941 that a definitive code for Reform Jews--Halakha--was necessary only in areas of ishut. This position, exactly as expressed by Freehof, was adopted by the CCAR Committee on a Code of Practice in 1942.^{98/} The Committee went further, however, and recommended to the Conference "that a Special Committee of the Conference be charged with the task of preparing a Manual of Jewish Religious Practice." The resolution was adopted by the Conference plenary without, however, any subsequent action.^{99/}

Freehof had argued that in all respects other than ishut, the law must be the consequence of a developmental process. He was considered a leader of those calling for the publication of individually-authored codes or guides and continued resistance of any presumptive "movement-wide" reach for authority. The individual codes would not be a matter of the "movement" enacting an official doctrine or Halakha, but rather various individuals (in consonance with the traditional Jewish practice in this regard) constructing both descriptive and prescriptive normative guides which would then fuel the debate and encourage the development of more movement-wide normative behavior. Freehof, writing in 1946,^{100/} did not, however, deny the need for religious norms as law, saying that "we have lived, as did this country for a while, under the Declaration

^{98/} Report of the Committee on a Code of Practice, 52 CCAR Yearbook 123 (1942).

^{99/} Id. at 124.

^{100/} S. B. Freehof, "Reform Judaism and the Halakha," 56 CCAR Yearbook 286 (1946).

of Independence; it may be that now the time has come for creating a new Constitution. We have liberty. Do we not now need law?"

The argument for some kind of code, guide, or publication either by individuals or under the imprimatur of the national institutions of Reform Judaism developed along three lines: one aspect was the general need of the Reform Jewish community for guidance; a second was the apologetic and defensive rejection of Reform Judaism as minimalist, itself a reaction to the modern American rise of neo-Orthodox Judaism; and thirdly, the "scholarly argument" to the effect that the legal tradition has been at the very heart of all that calls itself Judaism.^{101/} Against these arguments was put, continually and forcefully, the image of the "autonomous" Reform Jew and Reform Rabbi who would not conform his or her behavior to any standard or norm absent personal emotional and rational commitment. In addition, there were others, like Freehof, who disdained the notion of an "official" code, preferring the traditional vehicle of individual codes which would then define or effect behavior on the basis of persuasion rather than imposition.^{102/}

Following Freehof's statement in 1946, others charged that the time had come for some statement, guide or code of normative liberal Jewish behavior. HUC Professor Samuel Cohon wrote that "we

^{101/} Arian, op cit. at 40-45.

^{102/} Cf. M. Bial, Liberal Judaism at Home: The Practices of Modern Reform Judaism (1967) p. 1; S. B. Freehof, Reform Jewish Practice and Its Rabbinic Background (1963) p. 15; F. A. Doppelt, and D. Polish, A Guide For Reform Jews (1957) p. v; A. J. Feldman, Reform Judaism: A Guide For Reform Jews (1953) p. 3.

need a small hayye adam if not a Shulchan Aruch, written for the average man and woman."^{103/} In 1950, then CCAR President Jacob Rader Marcus said that "the rabbis need this guidance. God knows the laymen need it."^{104/}

In 1954 the CCAR Committee on Changes in Reform Jewish Practice noted that "there was a common agreement that a guide must be a description and not a prescription, that we must avoid the threat of a Reform Shulchan Aruch that would be binding and authoritative, and that the problem required much further study." Nevertheless, the committee agreed that a guide for rabbis and laymen would bring a required degree of "reasonable uniformity" to Reform practice.^{105/}

^{103/} S. Cohon, "Reform Judaism and the Halakha: Discussion," 56 CCAR Yearbook 304 (1946).

^{104/} J. R. Marcus, "President's Message," 60 CCAR Yearbook 240 (1950). Marcus' call was frustrated by delaying parliamentary tactics by the Committee on the President's Message led by Emil Leipziger. The conference later overruled the Committee and resolved to have a committee appointed to draft a guide, but the same was never appointed. See Arian, op cit. at 30-34. The experience of 1942 was, it seems, repeated.

^{105/} 64 CCAR Yearbook 127 (1954). The debate in 1954 on the wisdom of a code or guide was particularly sharp. Alvan D. Rubin opposed any such undertaking for fear that Reform would become "a new orthodoxy." Alfred L. Friedman countered that the need was critical because of pervasive "ritualistic anarchy." Id. at 126. Frederic Doppelt, who would later publish (with David Polish) A Guide For Reform Jews (1957) said there should be an official code or guide and its criterion should not be aesthetic appeal, Jewish national survival or ethical ramifications. Rather it should consist, he argued, of a) mitzvot "related to an encounter with God;" b) halakhot "or accepted ways in which we should proceed to do the mitzvot which rest with rabbinical authority and derive from the principle of majority rule;" and c) minhagim, or "folkways" as the creative activity of a people." Id. at 127.

Balfour Brickner wrote in 1956 that "we no longer can straddle this question . . . of the relationship between Halakha and Reform Judaism. It must be answered."^{106/} At that year's CCAR convention, there was a full discussion of the merits of a new guide or code for Reform Jews under the aegis of the Committee on Public Scope and Role of the Responsa Committee.^{107/} Its chairman, Jacob J. Weinstein, had called for the embrace of "self-imposed restraints which a community must adopt if it is to grow organically, deepening its roots while pruning its fruit."^{108/} There, Freehof was joined by Israel Bettan, Leonard Mervis and Norman Diamond in arguing that there should be no official authoritative movement-wide guide, code or discipline. Rather, there should be individual pronouncements on major issues by the CCAR, together with various guides issued by individual rabbis without the imprimatur of the CCAR.^{109/}

In opposition to this position, Frederick Doppelt argued that there indeed should be a comprehensive Reform guide, in large part because of the state of Reform Jewish practice which, he argued, bordered on hefkerut, or anarchy.^{110/} HUC Professor Eugene Borowitz suggested that the Responsa Committee of the CCAR be expanded, and that the same be urged to publish majority and minority opinions, the former being "binding" on all rabbis only if

^{106/} B. Brickner, "Inside the CCAR," CCAR Journal 3 (April 1956).

^{107/} Report of the Committee on the Public Scope and Role of the Responsa Committee, 66 CCAR Yearbook 112 (1956).

^{108/} Id. at 115.

^{109/} Id. at 112.

^{110/} Id. at 112-13.

unanimous.^{111/} Finally, Robert Kahn urged the adoption of a movement-wide "normative guide" with individual congregational glosses to the same, thus preserving the congregation-based motif of Reform Jewish practice.^{112/}

Freehof carried his position that there should be no authoritative Reform code of Jewish practice to a debate with then UAHC President Maurice Eisendrath at the UAHC biennial assembly of 1957. Eisendrath argued essentially that an authoritative code would be shield against those who view Reform as minimalist Judaism. In the biennial resolution which followed the debate, Freehof's position prevailed.^{113/}

Calls for some reconciliation between Liberal Judaism and Halakha nevertheless continued throughout Reform institutions. In 1958 Ely Pilchik called for annual month-long conclaves of at least seventy men "for a sitting down and a talking out and a thinking through of the essentials of Reform Judaism."^{114/} In the same year, CCAR President Jacob P. Rudin pushed for the publication of an authoritative guide of practice. He appointed a committee to develop such a guide, and argued for its continuation in 1959, but was undercut by a panel discussion at the 1959 convention on the self-same subject the outcome of which "was inconclusive."^{115/}

^{111/} Id. at 113-14. This practice is, in fact, the modus operandi of the Conservative Commission on Law and Practice.

^{112/} Id. at 114-15.

^{113/} Arian, op cit. at 34.

^{114/} E. E. Pilchik, "Towards a Philosophy of Reform Judaism," CCAR Journal 15 (April 1958).

^{115/} Arian, op cit. at 34.

In that debate, Max Schenk argued strenuously that the Reform movement needed a guide "because of chaos."^{116/} Citing the same chaos, or hefkerut, Selwyn D. Ruslander said that publication of a guide would therefore be premature.^{117/} Theodore H. Gordon said of Reform Jews that "we do not fear the content of Halakha, but only the rigid authority of Halakha," and thus asked for a guide which would identify the "reasons for the commandments."^{118/} Coincidentally, that same convention heard a call from HUC Professor Jakob J. Petuchowski for the "recovery of the revelatory occasion and idea" in Reform Judaism as a precondition to any renewed Jewish legal tradition.^{119/}

^{116/} R. I. Kahn (moderator), "A Guide for Judaism," 69 CCAR Yearbook 264 (1959).

^{117/} Id. at 266.

^{118/} Id. at 268, 273.

^{119/} J. J. Petuchowski, "The Concept of Revelation in Reform Judaism," 69 CCAR Yearbook 218 (1959). The justification for Petuchowski's insistence on a nexus between Halakha and God's revealed will is clear. Greek thought, for example, "took for granted that that which is reasonable is obligatory. Thus ethical behavior was reasonable behavior. But reason can only analyze and differentiate between good and evil. It cannot produce obedience, for which 'will' is required. . . . Divine law (Halakha) must be validated by human reason but reason alone does not yield the obligation to perform. For this, acceptance of the will of God is the sine qua non." E. Berkowitz, God, Man and History (1965) pp. 99-100. Petuchowski had earlier said that "history and its God is the conditio sine qua non of any continuity within Judaism," J. J. Petuchowski, "Problems of Reform Halakhah," 4 Judaism 349 (Fall 1955), but wisely cautioned that "it is one thing to pass expedient resolutions in favor of ceremonies. It is quite another to reinstate the God of Israel as the 'Giver of Torah' when the very raison d'etre of Reform, as a 'denomination,' is represented as the emancipation from this belief." Id. at 351.

Following upon this same general notion, W. Gunther Plaut said in 1962 that the "philosophical problem of mitzvah is primary." He argued for a new commitment to ordered Jewish life, based upon the ancient Jewish standard of God and God's will, which the Jew acknowledges and affirms in daily life.^{120/}

Two years later, Joseph Klein asserted that "Halakha means nothing more than 'the right and acceptable way' and no movement or organization can possibly function unless it sets standards that inform its members of the right and acceptable way Our chief problem with Halakha in Reform Judaism," he said, "has been our failure to clarify fundamentals."^{121/}

Plaut continued his call for some authoritative guide or code in a series of addresses to the CCAR in 1965, 1967 and 1969.^{122/} Under Plaut's editorship, the CCAR issued its A Shabbat Manual in 1971, and followed with the publication of its Gates of Mitzvah in 1977 (Simeon J. Maslin, editor) and Gates of the Seasons in 1983 (Peter S. Knobel, editor).

Nevertheless, a sense of unresolved tension remained, as evidenced by the resolution of the CCAR Committee on Long-Range Planning in 1982, that the "future agenda of this conference must include the need to grapple with questions of Halakha as a movement."^{123/}

^{120/} W. G. Plaut, "Problems of Bar Mitzvah and Bas Mitzvah: Recorder's Report," 72 CCAR Yearbook 164 (1962).

^{121/} J. Klein, "Editor's Comments," CCAR Journal 79-80 (April 1964). Klein said that the Union Prayer Book, Rabbi's Manual, ritual circumcision, Shabbat, and the Jewish calendar were all "elements of Halakha and not arbitrarily determined." Id.

^{122/} Arian, op cit. at 36. See discussion infra pp. 67 - 69.

^{123/} 92 CCAR Yearbook 153 (1982).

III.

A.

Of the many contributions to the discussion within modern Reform Judaism concerning Halakha, several have been built upon the assumption that Reform distinguished the essence of Judaism from its superficial form: the usual image invoked in this is the husk and chaff.^{124/} It is argued that

ethics takes precedence to ritual in God's eyes, and worship and ceremony without moral conduct is not acceptable to Him. With this view of the religious origins of ritual, Reform can understand changing its forms as authentic responses to God in changing circumstances. Hypocrisy is therefore the cardinal sin to a Reform Jew. To do an act, but not believe in its meaning or value is, so to speak, to deny God and His role in human affairs.^{125/}

The analytical problem here is simply, as noted by Eugene B. Borowitz, that Jewish tradition "did not make any distinction in Torah between ethics and ceremony."^{126/} Indeed,

Both were God's will. To make such a distinction hard and fast now would be untrue both to the Jewish past and to the full spectrum of religious living which includes both the Sabbath and the prohibitions against blasphemy as well as murder. Thus, those who seek Torah for today should have knowledge of the Torah tradition . . . , [for] to reject in advance what the geniuses of religion have learned of God must be termed the sin of arrogance . . . , the sin of pride and usually that of laziness as well.^{127/}

^{124/} E.g., M. N. Eisendrath, "The Form and Substance of Reform Judaism," CCAR Journal 11 (April 1958); L. S. Kravitz, "Some Problems of a 'Liberal' Jewish Theology," CCAR Journal 13 (April 1960).

^{125/} E. B. Borowitz, "Toward a Theology of Reform Jewish Practice," CCAR Journal 28 (April 1960).

^{126/} Id.

^{127/} Id. at 28, 30.

Halakha is thus understood as a comprehensive or inclusive Jewish expression -- "a term designating distinctly Jewish (post-Biblical) laws and practices that are rooted in the past and are necessarily particularistic,"^{128/} as opposed to a basically universalistic moral law the satisfaction of which hardly calls for an ethos of sacrifice in the face of convenience.^{129/}

Borowitz's assertion that "both [ritual and moral law] are God's will" defies the more classical Reform self-conception, where it is seen as a religious system providing for a "process of informed free choice"^{130/} wherein

Only the great moral and ethical principles of Judaism are divine; the legal instrumentalities for effecting those principles are not. Therefore Jews are, or should be, free to choose from the past those usages and practices which enhance the high ethical principles of Judaism and neglect those which, in the best judgment of those in a position to know, do not. The denial of the validity of a specific body of law is certainly not to deny the importance nor the necessity of law Since the divinity of the law, express or implied, was denied, Jewish legal and ritual practice of the past was held to be the result of human effort, molded by conditions of time and place.^{131/}

He sees this line of reasoning as reminiscent of the earliest legal theory within Reform Judaism, which he suggests is now wholly inadequate.

^{128/} A. Guttman, "The Moral Law as Halakha in Reform Judaism," 68 CCAR Yearbook 252 (1958).

^{129/} Id. at 254; see Shab 130a on sacrifice as a basis for the maintenance of Halakhic norms.

^{130/} S. M. Passamaneck, Reform and Halakha, (HUC-JIR Founders' Day Address) (1967) p. 5.

^{131/} Id.

Early in his career, Borowitz saw American Reform Judaism as preoccupied with a dissatisfaction of earlier forms and patterns of religious life, resulting in an absence of form in liberal Jewish religious life. This void ultimately yielded to a pendulum-like increasing adoption of more traditional forms, and a concomitant desire for an authoritative code of guide.^{132/} Later, he maintained, Reform became the theoretical apotheosis of covenantal theology, where God is manifest in the world "through the historic people, Israel . . . [which] provides for the continuity of Israel in His service, for it [Reform Judaism] is based not only on the Jewish past but seeks to assure the Jewish future out of its creativity."^{133/} Borowitz repeated the oft-stated canard that Reform "is far harder than the most stringent orthodoxy" because of its commitment to autonomy and free choice. Perhaps for this reason, he observed that despite its elaborate theoretical justification and foundation, there are but "signs, perhaps deceptive, that the Reform Jew is ready to take Judaism seriously."^{134/}

His critical perspective became more acute as time went on. He chastised Reform Jews for "loving their autonomy" and forsaking Halakha, the "most appropriate expression" of "the need

^{132/} 64 CCAR Yearbook 125 (1954).

^{133/} E. B. Borowitz, "Toward a Theology of Reform Jewish Practice," CCAR Journal 33 (April 1960).

^{134/} Id.

for freedom and transcendent standards."^{135/} The "Jewish equivalent of the Death of God," he wrote

has been the end of mitzvot. . . . Minhag has become so much a matter of whim and caprice that the integrity of Jewish living seems fragmental to the point of eventual dissolution. All Jews, however, value law as the primary expression of the Jew's relation to his God. The tradition emphasized the importance of the deed by making it, rather than thought, subject to authority and discipline. Halakha, then, is demanded not only to integrate our present diversity but to direct it on the one authentic path of Jewish existence. Jewish law may thus be the antidote to Jewish emancipation.^{136/}

Borowitz articulates five possible relations of the Reform Jew to the authority of Jewish tradition.^{137/} The first relation posits the tradition as "fully compelling." The second, that it is "authoritative, except for very substantial reason;"^{138/} the third that it has "as much influence as do the insights of modern culture;" the fourth that it is but a "valuable guide when read through modern eyes." His fifth relation understands that Jewish

^{135/} E. B. Borowitz, "Subjectivity and the Halakhic Process," 13 Judaism 217, 219 (Spring 1964).

^{136/} Id. at 211.

^{137/} E. B. Borowitz, "Reading the Jewish Tradition on Marital Sexuality," 29 Journal of Reform Judaism 3 (Summer 1982).

^{138/} We contend that Borowitz's first and second relations are, in fact, integrated in the traditional scheme, particularly when "very substantial reason" can be understood as an antecedent Biblically-based moral value which trumps, at least in a specific and appropriate case, the prevailing positive Halakha to the contrary. This understanding renders much of contemporary Orthodox Judaism a caricature of itself, at least in its self-projection as the exclusive inheritor of traditional Judaism.

tradition "can often supply useful resources to motivate Jews to live by freely selected values."

Where earlier Borowitz found himself operating at the level of his fourth or fifth--or occasionally his third level of relation to Halakha and tradition, now, he says

I have broken with the older liberal practice of subordinating Jewish teaching to general culture, whether that is done rigorously, as by our Reform "Unitarians," or only in considerable measure, as by most American Jews. I have less trust in contemporary wisdom and more in Judaism's independent validity than they do. I am also too critical of the Jewish tradition to accept it as Halakha, that is, as heteronomous discipline. Despite this reservation, I understand Judaism to be, at the minimum, as good a guide to living as is our civilization. It therefore is as much a legitimate critic as a beneficiary of today's understanding of the generally human. For me, Jewish teaching regularly, but not always, functions more significantly in my decision-making than does western culture, at least as far as values and grounding are concerned. These I interpret in a fundamentally personalistic [*i.e.*, autonomous] way. That is, I share Judaism's historic meta-Halakha, the covenant relationship between God and the people of Israel, out of which Torah arises . . . which makes me more 'liberal' than the Halakhists and less universalistic and anarchic than the pure autonomists.^{139/}

In projecting "Judaism's historic meta-Halakha" as "the covenant relationship between God and the people of Israel," Borowitz also has concentrated on the subjectivity inherent in the Halakhic process. In this, Borowitz has come to celebrate autonomy--that is, self-perception and self-authorization--as a critical linchpin in the process by which law is changed and embraced.

^{139/} E. B. Borowitz, "Reading the Jewish Tradition on Marital Sexuality," 29 Journal of Reform Judaism 4 (Summer 1982).

"Why," Borowitz asks

[do] poskim read and combine the same texts in such differing ways? Why do some of them come to quite individual conclusions? To be sure their texts, their times, their community, their Halakhic peer group, all channel their rulings. So much might be "objective." But why do they see this in their text, times, community and peers? In their personal form of piety? Some may say, in faith, Judaism teaches that is how God instructs us. But one might agree that God works through persons and mean that to say that who the sage is will powerfully affect his rulings. Conceal it as one will under layers of institutionalized erudition and piety, the creativity of the self still operates. Law arises first in the independent will responding to God in Covenant--that seems undeniably obvious to the modern eye. To trust the sages, in this view, is not merely to entrust one's self to God but, to a considerable extent, to the person of this or that sage. In many instances that is a fulfillment--and thus the appeal of contemporary Orthodoxy in its several forms of withdrawal from contemporary fashion. But, I contend, the rest of us increasingly realize that 'many instances' is too small a promise to warrant a surrender of the self.^{140/}

Borowitz speaks of a world of "autonomous Jewish selves" wherein two or more conflicting opinions can be inherent in Torah.^{141/} In order to be an "autonomous Jewish self" Borowitz requires a "personal sense of involvement with God" and a "serious concern with the community which is so great a part of its [his or her] selfhood" such that "much of what other Jews once did is likely to commend itself to [the autonomous Jewish self] as what [such a

^{140/} E. B. Borowitz, "After 15 years--My View," 15 Sh'ma 158 (November 1, 1985); see his "The Autonomous Jewish Self," 4 Modern Judaism 39 (February 1984).

^{141/} R. A. Daum, "Two Views on Authority: Bleich and Borowitz," 33 Journal of Reform Judaism 58 (Winter 1986).

person] ought to do."^{142/} Such an approach maximizes individual claims to Jewish correctness based upon a self-perceived encounter with God. It is as if to say, according to Borowitz, that "one may do anything legitimately Jewish."^{143/}

B.

While Borowitz has emphasized the subjectivity inherent in the dynamic process of Halakha, HUC Rabbinics Professor (and Executive Vice President for Academic Affairs) Eugene Mihaly has strongly argued for retention of the traditional form and process of Halakha but with a radical transformation and alteration of its normative content. Though Mihaly has noted that "a more comprehensive guide for the Jewish layman and the rabbi prepared by a qualified morei Halakha may be a forward step,"

ultimately our reliance is upon the dedicated rabbi who has the knowledge and the confidence to apply the divine imperatives of historic Halakha to our life situation [The problem is that] in many instances we lack the confidence.^{144/}

^{142/} E. B. Borowitz, "The Autonomous Jewish Self," 4 Modern Judaism 45-46 (February 1984).

^{143/} R. A. Daum, op cit. supra at 61. We feel this point, if taken seriously, is question-begging. What is legitimate, and who has the authority to declare it so? Does Borowitz really mean that if one were to undertake a resumption of ancient sacrificial rites that such behavior would be normatively equivalent to taalit, yahrtzeit candles and eshet ha'il? We have noted elsewhere, C. E. Librach, "Prayer, Worship and Creative Services," 50 Jewish Spectator 40-42 (Summer 1985), that the irony is that the modern Reform creative worship service is the most authoritarian and least autonomous of modern Jewish experiences. Further, as we contend infra, autonomy is a self-destructive cancer on Judaism unless it is limited by the obligation to inherit and transmit a Judaism recognizable and coherent to its historical antecedent representations.

^{144/} E. Mihaly, "Reform Judaism and Halakha: The Contemporary Relevance of the Mishnah Torah of Maimonides," 64 CCAR Yearbook 225-26 (1954).

Writing in 1954, Mihaly discussed the nexus between Reform and Halakha by first describing the religious thought of Danish philosopher Soren Kierkegaard, who delineated three stages of existence: aesthetic, ethical and religious. The latter stage, to Kierkegaard, was divided between the religiosity of immanence or inwardness, and that of paradox or absurdity.^{145/}

For Kierkegaard, therefore, and for many moderns as well, the individual is posited above the ethical, whose experience of absolute inwardness cannot be made intelligible to others. Further, this relation to God cannot be expressed in the concrete act recognizable by others, nor does society or its art serve to link the individual with the Absolute.

To this, Mihaly argues that Judaism has a definitive though not-yet-popular response, namely that the ethical is universally applicable, even to God Himself.^{146/} Further, our relationship to

^{145/} Id. at 214-16.

^{146/} How else is it possible that Abraham would implore God with the exclamation (in defense of the few righteous people of Sodom) "Shall not the judge of all the earth deed justly!?" (Genesis 18:25). Contra Rashi ad loc., we understand this as more of an excited utterance of the obvious than a query--it is a rhetorical question which is as if to say "it is impossible and inconceivable that God should not do what is right and just!" The essential teaching is not that God and God's way--Halakha--can be immoral: the medieval assumption of a perfect and self-sufficient God (so Saadia, for example) still prevails, precluding the predicate selfishness which motivates evil and immoral behavior. See J. Guttman, "The Principles of Judaism" (D. W. Silverman, trans.), 14 Conservative Judaism 90 (Fall 1959). What is just and right is desired by God because it is just and right, cf., M. Roshwald, "Authority, Skepticism and Dissent in Judaism," 40 Jewish Social Studies 195 (Summer/Fall 1978). Halakha, in this consideration, can only be immoral to the extent that it is uncorrected: calling for the dialectical process in which man invests positive norms with ethical character the union of which is understood as God's will for man.

God is expressed in the concrete act, as to which kavannah, or intention, is important but only as an accompaniment to the positive deed or mandated withdrawal therefrom.^{147/}

Finally, Mihaly says that Judaism responds directly to Kierkegaard in that

The group, its welfare, a just and righteous society, the concern for the widow and the orphan, the challenge of the lack--the not-yet, these are the truth. This is the way which God reveals to us. This is the commitment and the dedication of Judaism. These are the major waves, the kerygmatic embedded in the Halakha with which Jews throughout the ages have met the ever changing situation. The imperative of Judaism calls to each generation: you are b'nai Halakha, now become the boneh Halakha . . . to create, to apply, to interpret, to deepen. The question, if one is to remain within the mainstream of the development of Judaism, can never be whether we have a positive relationship to Halakha. There is no Judaism without it.^{148/}

For Mihaly, the authority of the modern rabbi to reshape--or reform--the Halakha is not in the Psalmist's dictum et lahsot l'adonai^{149/}, and its rabbinic interpretation as emergency authority in times of communal disintegration,^{150/} but in the derech ha-melech of the dialectical rabbinic tension and process.^{151/}

^{147/} E. Mihaly, "Reform Judaism and Halakha: The Contemporary Relevance of the Mishnah Torah of Maimonides," 64 CCAR Yearbook 216-17 (1954).

^{148/} Id.

^{149/} Psalms 119:126 ("It is time for the LORD to act . . .").

^{150/} M. Ber IX:5; Git 60a and Men 99b.

^{151/} E. Mihaly, op cit. supra at 217.

Halakha thus becomes "the totality of the demands of God as seen by Judaism and applied to every life situation,"^{152/} whose central motif is Imitatio Dei^{153/}, the welfare of society^{154/} and the imperative "to refine and purify mankind."^{155/} Halakha is thus not concerned with discovering the essence of God nor with finding some magical path which would enable man to commune with the Unknowable. Nor does it find expression in the speculative or the metaphysical but in the concrete life situation. The demand of God is embedded in a call for specific deeds.^{156/}

Writing some 21 years later, Mihaly significantly retreated from this expansive rendition of the reconciliation of Halakha and modern Jewish life. "I, of course, [in 1954] used the word in its basic sense, 'the way in which a Jew should walk.'"^{157/} Mihaly, now sensing a political and emotional charge to the language he had used in 1954, insisted in 1975 that the word Halakha when now used means "the final, authoritative decision, 'the law' which prevails, is binding and must be followed--the p'sak din."^{158/}

^{152/} Id. at 218; see Shab 138b s.v. derekh adonai zoo Halakha.

^{153/} Sotah 14a; Maimonides, Guide III:54.

^{154/} Git 59b.

^{155/} Genesis Rabbah XLIV:1.

^{156/} E. Mihaly, op cit. supra at 218.

^{157/} E. Mihaly, "Religious Discipline and Liberal Judaism," 85 CCAR Yearbook 179 (1975).

^{158/} Id. at 174.

"The very concept of Halakha," he wrote in 1975,
reflects a progressive rigidity, an evermore
constrained, limited process, a cone with the
evernarrowing end pointing to the future
The historical reality of a rigid, specific
authority which dare not be questioned. . . .
"The law" as defined in the authoritative codes.

[It is] a monolithic structure, a static,
binding, authoritative Halakha which represents
ultimate, divine truth. Coercion is not only
permitted: it is meritorious.^{159/}

Though Halakha "was, during the many dark centuries, perhaps the
major factor in the survival of the Jew . . . [having] preserved and
strengthened his humanity and enhanced his sensitivity and his
ethical awareness . . . [and] kept him human and helped him achieve
an amazing--a miraculous dignity," it is hardly so today. Rather,
today it stands as an unmitigated monolith to which we defensively
cower in a self-defeating expression of sloppy sentimentality which
is initiated by

lachrymose appeals to nostalgia, all the
romantic, emotional oratory calculated to
manipulate and to evoke guilt and fear and
vestiges of Jewish insecurity . . . [which
nevertheless] will not obscure the mortal threat
to the dignity of the individual. . . . What may
have been a strategy of survival at one time
becomes a strategy of irrelevance, bankruptcy,
and may even be suicidal in an environment of
freedom, in a mobile, open society.

It is we who are k'lal yisroel,^{160/} and we
cannot surrender to the endless minutiae which
are absorbed within themselves and largely

^{159/} Id. at 174-75.

^{160/} Contra W. G. Plaut, "The Need for Religious Discipline," 85
CCAR Yearbook 172 (1975); H. E. Schaalman, "President's
Message," 92 CCAR Yearbook 4 (1982).

reflect antiquated social views and institutions, archaic science, transient myths, dated 'tool words' and fluctuating historic circumstances.^{161/}

Having at one time put so much stake in the traditional Halakhic process, by 1975 Mihaly changed his focus to what he proposed to be an enlightened lay constituency, burdened by insecure rabbis. To those rabbis, he asked that they be "imaginative and creative enough to gain the voluntary adherence, the enthusiastic commitment and dedication of the men and women we are privileged to teach and guide. We . . . will persuade by our deep learning, our own exemplary lives, our love, our concern, our profound caring, our own humanity."^{162/}

He thus called for what he termed a "living Torah"

which is at the center of our lives into which we devote our effort when we lie down and when we rise up, when we sit in our house and when we walk by the way. [It] is that Jewish continuum, the essential Jewish ethos diffused throughout the totality of Jewish experience--often discernable only as a tendency, an attitude--tentative, illusive, discovered only after arduous struggle and search. . . . It emerges dialectically.

For this, though, an indispensable prerequisite for Halakha or discipline is that . . . we need somehow purge ourselves of our feelings of inauthenticity, of guilt, of our feelings of inadequacy in the presence of the traditionalist--an attitude which is the

^{161/} E. Mihaly, "Religious Discipline and Liberal Judaism," 85 CCAR Yearbook 175-77 (1975); see E. Mihaly, "Halakha is Absolute and Passe," 29 Judaism 72 (Winter 1980).

^{162/} Id. at 182.

debilitating malaise of the Reform
rabbinate.^{163/}

Much of Mihaly's language from 1975 is repeated in his 1980 essay "Halakha Is Absolute and Passe,"^{164/} which was offered and published in response to an earlier essay by The Jewish Theological Seminary's Seminary Professor of Bible Robert Gordis,^{165/} which had argued that the Halakha had embedded within it certain dynamic qualities. Mihaly referred to the Gordis effort as a "remarkably sanguine apologia."^{166/}

In the 1980 essay, Mihaly continues his venomous attack on the contemporary Halakhic pattern and structure, which he calls "a calcified distortion of our historic faith."^{167/} He accuses it of "ever greater stringency" and an "encrusted literalism" by which a leading proponent will "display his piety to his colleagues by demonstrating that he could be more punctiliously stringent than they."^{168/} To Mihaly,

The contemporary, traditional Halachist is
enchained by an all-embracing 'Written Law' as

^{163/} Id. at 177-78. Mihaly repeats and amplifies his notion of the "living Torah" in his "Halakha is Absolute and Passe," 29 Judaism 75 (Winter 1980) and his Resonsa on Jewish Marriage (1985) pp. 58-59.

^{164/} 29 Judaism 68 (Winter 1980).

^{165/} R. Gordis, "A Dynamic Halakha: Principles and Procedures of Jewish Law," 28 Judaism 263 (Summer 1979).

^{166/} E. Mihaly, "Halakha is Absolute and Passe," 29 Judaism 69 (Winter 1980).

^{167/} Id. at 74.

^{168/} Id. at 71.

well as by his own timidity^{169/}--the result of many dark centuries of precarious existence in a dominant environment determined to dehumanize the Jew and to brand him a grotesque, devil-possessed monstrosity.^{170/}

Gordis, in responding to Mihaly^{171/}, noted that his bitterness and antagonism seemed to curiously align him with the most rigid of Halakhic authorities in preserving a static and permanent schema.^{172/} Further, Gordis rhetorically asks of Mihaly, regarding the latter's positive statements concerning the function of Halakha in the period up to the emancipation: if it was so good, why is it so bad?^{173/}

C.

Mihaly's call for "a living Torah" is as expansive an intellectual formulation as can be found among contemporary Reform

^{169/} He has already asserted that the contemporary liberal rabbi is also, in so many words, "enchained . . . by his own timidity." Aside from the underlying anti-clericalism of this attitude, reminiscent of the claim of politicians that a "silent majority" endorsed their policies and excoriations of others, it must be observed that one man's courage is another's cowardice. Courage, to be sure, "mounteth with occasion," Shakespeare, King John II:i, but an occasion which calls for rejecting an inherited tradition may be no more a call to courage than one which challenges us to reject that which is popular, contemporary, fashionable or accepted.

^{170/} E. Mihaly, "Halakha is Absolute and Passe," 29 Judaism 71 (Winter 1980).

^{171/} R. Gordis, "The Halakha, Past, Present and Future: A Reply to the Responses," 29 Judaism 85, 103-06 (Winter 1980).

^{172/} Id. at 103-04. Cf. J. Cahn, "The Struggle Within Reform Judaism," 22 CCAR Journal 64 (Summer 1975) ("We should not create a body of law which is in opposition to traditional Jewish law. The Halakha is singular, unique and authentically Jewish, whether we observe it or not"). Just so, but why is it their inheritance and not ours as well?

^{173/} Id. at 106.

thinkers, in contrast to the pedestrian and otherwise predictable thoughts of noted Reform posek Solomon B. Freehof. To Freehof, the abandonment of the Halakhic process meant the abandonment of "a great intellectual vitality."^{174/} He calls Jewish law "the Jewish intelligence,"^{175/} though

it is far too late in history for us simply to declare that religious observance is law. We must first work out the entire philosophy of Jewish law and of our relationship with it. It will have to be a system that will find room for individuality and unity, for obedience and freedom, for revered tradition and for creative originality. Such a philosophy will require much study, many articles by many thinkers and much debate. It may need a generation or two for its accomplishment.^{176/}

In language similar to Mihaly's, Freehof calls Reform Judaism

the only religious division in Judaism which is completely free from the compulsive power of the now immobile legal system. We are the only ones who can create new minhagim freely, try them out without hindrance, and accept or reject according to our experience We must give up the easy comfort of early codification.^{177/}

Reform Judaism is strong in ethical idealism but weak in legal discipline . . . the weakest influence upon its thought is the Halakhic tradition, extending from the Talmud to the codes Reform hopes to find a new balance between discipline and liberty. If it succeeds, it will be stronger and more widely appealing

^{174/} S. B. Freehof, Reform Judaism and the Law, (Louis Caplan Lectureship on Jewish Law) (1967) p. 13.

^{175/} Id. at 22.

^{176/} Id. at 19-20.

^{177/} Quoted in A.S. Task, Reform Judaism and Halakha (1972) p. 57.

than ever before Reform Judaism . . . must now grope toward a new definition of authority and revelation; otherwise, its form of Judaism [will] degenerate into a mere convenient construct of wilfully chosen observances, where the will of God is only metaphorically present and where there is really no such thing as a commandment.^{178/}

But despite the extraordinary challenge put to liberal Judaism -- not the "easy comfort" of a code or guide but the presumably more difficult and rigorous task of reconciling and transmitting new religious norms -- Freehof provides the articulated justification for Reform's characteristic permissiveness.

It is difficult to make even a simple practical decision without having an attitude on the question of the authority of the Halakha. Of this much we are sure, that whatever authority the Halakha has for us, it is certainly only a selective authority. There are vast sections of law about which we are never questioned and on which we do not volunteer decisions. . . . These observances have ceased among Reform Jews and among large numbers of other Jews. Nor do Reform rabbis feel obligated to restore them. These observances are in the Talmud but they have no legal status for us. [As to the Halakha] we respect it and seek its guidance. Some of its provisions have faded from our lives. We do not regret that fact. But as to those laws that we do follow, we wish them to be in harmony with tradition. . . . The law is authoritative enough to influence us, but not so completely so as to control us. The rabbinic law is our guidance but not our governance. Our concern is more with the people than with the legal system. Whenever possible, interpretations are developed which are feasible and conforming to the needs of life.^{179/}

^{178/} S. B. Freehof, Reform Responsa (1960) pp. 3, 17.

^{179/} S. B. Freehof, "A Reformed View of Jewish Law," 24 Keeping Posted 18-19 (1979).

Freehof is here most revealing when he states that he is, so-to-speak, more concerned with people than law. Even a cursory examination of his seven volumes of Responsa published during his tenure as Chairman of the CCAR Committee on Responsa^{180/} reveals a striking permissive predisposition. "Concern" for people has been translated by him into consenting sympathy for their intentions and desires, with scant restriction by the corpus of Jewish law -- Halakha -- as he renders it. Law becomes, in this artifice, a matter of sport, or as Stephen Passamaneck defensively puts it, a matter of art.^{181/} It is a "classical form" only, and is readily put aside in favor of an unintegrated "modern" view. That is, "the Halakha" is determined and analyzed, then set aside, followed by a recitation of "our" view with rare attention to reconciliation or overall coherence.

180/ Reform Responsa (1960); Recent Reform Responsa (1963); Current Reform Responsa (1969); Modern Reform Responsa (1971); Contemporary Reform Responsa (1974); Reform Responsa For Our Time (1977); New Reform Responsa (1981).

181/ S. M. Passamaneck, Reform and Halakha (HUC-JIR Founders' Day Address) (HUC-JIR Los Angeles) (1967) p. 8. Passamaneck, of the HUC-JIR Los Angeles faculty, expressed views essentially identical to Freehof in the Founders' Day lecture. While he agreed "that any group which desires and claims to be Jewish must demonstrate a juristic frame of reference," id. at 2, the legal theory of Reform is one of "a process of informed free choice" where "only the great moral and ethical principles of Judaism are divine." Id. at 5. Halakha is thus, he says, (like Freehof) "a guidance not a governance" which "may [only] persuade . . . in the absence of psychological sanctions." Id. at 6-7. Though he says this state of affairs is not "necessarily permanent" it is difficult to imagine "psychological sanctions" ever applying to actions which are, a priori, determined to be of other than divine origin and derivation. But "even without the element of divine

(Footnote cont'd on next page)

True enough, as Freehof himself has said, "a Reform code will develop mitzvah by mitzvah"^{182/} as concerned members of the Reform community develop and express a coherent Judaism, but not if their rabbinic leaders use the form and language of Halakha as a fig leaf behind which to dismantle Halakha itself as the tool of Jewish self-definition and self-preservation. Freehof's permissive inclination has overwhelmed his considerable facility with traditional Jewish texts,^{183/} making his uniqueness as Reform's

(Footnote con'td from previous page)

revelation," Passamaneck insists, "we may still speak of Halakha as a means of transmitting life into a distinctly Jewish program of activity . . . associated with inspiration [like art], rather revelation." Id. at 9. Without Halakha, he says, "the Jewish community is debased [and] we have little to do that others cannot achieve without us." Id. at 15. We contend likewise, but add that this is so even with Halakha, if Halakha is "informed free choice" without revelation. For "once the normative impetus [of the commanding God] of the tradition is dispensed with . . . rather than recognize the tradition as a dynamically normative force, one views it statically, cumulatively, a storehouse from which one may or may not select agreeable features: the tradition no longer demands a decision." S. Carmy, "Halakha, Tradition and History," 13 Tradition 163 (Winter 1973).

^{182/} S. B. Freehof, "A Reform View of Jewish Law," 24 Keeping Posted 19 (1979).

^{183/} Eugene B. Borowitz, commenting on Freehof's usual grant of license in answering questions on Jewish behavior and practice, was driven to state that those looking for restrictive answers will hardly send their queries to so permissive a judge, and those queries which do come seeking justification for liberalities are therefore hardly likely to provoke him to many revealing inconsistencies. "[It would be] . . . highly interesting to know as fully as possible the bounds beyond which he feels Reform Judaism can go." E. B. Borowitz, "Subjectivity and the Halakhic Process," 13 Judaism 217 (Spring 1964).

only "official" posek for a nearly thirty year span that much more disingenuous.^{184/}

D.

Where Eugene Borowitz has emphasized the subjectivity in the Halakhic process, and Eugene Mihaly and Solomon Freehof have demonstrated the dynamic capacity of the traditional pattern of interpretation, another major Reform thinker has qualified any discussion of Reform Halakha by considerations of antecedent commitment to revelation, faith and tolerance. Reform Judaism erred, says HUC Professor Jakob J. Petuchowski in that

the non-observance of the mitzvoth was made to look like one of the demands of Reform Judaism In such a categorical rejection (viz. the Pittsburg Platform 'we accept as binding only its moral laws and maintain only such ceremonies as elevate and sanctify our lives, but reject all such as are not adapted to the views and habits of modern civilization.') there was no less dogmatism than there is in an uncritical acceptance of the totality of the Shulchan Aruch.^{185/}

Petuchowski argues that there is simply "no need for Halakha where Sinai is deplored or rejected and Torah simply means respectability and goodwill."^{186/} Reform Judaism, he fears, has descended into a cultic world of "religious pagentry" and "ad hoc ritualism which

^{184/} Eugene B. Borowitz suggested, in 1956--one year following Freehof's appointment as Chairman of the CCAR Committee on Responsa--that the committee expand from a small coterie to a twenty-one member panel, half of whom would be congregational rabbis. Further, he said, concurring and minority opinions should be published alongside the one opinion then (and now) receiving the committee's imprimatur. 66 CCAR Yearbook 114 (1956).

^{185/} J. J. Petuchowski, Heirs of the Pharisees (1970) p. 171.

^{186/} J. J. Petuchowski, "Problems of Reform Halakha," 4 Judaism 346 (Fall 1955).

refers only to treasured 'folk ways'; didactic effectiveness and desire for warmth and emotional appeal to strengthen 'cold' worship services."^{187/} These attributes of the new cultic world of Reform are rejected by him as being fundamentally inconsistent with a commanding God--the necessary and sufficient condition behind Halakha.^{188/} Thus, "Halakha is Halakha (and not folkways, pagentry, etc.) only if it is related to the divine origin of the Torah." Further,

to be included in the process (acceptance of divine authorship of the Torah or the divine character of Torah) and be non-Orthodox you must ascribe the origin of Halakha to an act of divine revelation (however that 'act' may be imagined), and be one who feels the need to live his life according to the pattern of divine imperatives (mitzvot) which he seeks, not least, in the classical sources of the Halakha.^{189/}

Reform made its key mistake, says Petuchowski, in embracing the "fallacy of primitivism" such as using the Bible as a basis for current behavior (as if the overwhelming totality of contemporary practice is not indeed post-Biblical) and of following the critical/historical analysis of traditional texts in a manner which was ultimately nihilistic.^{190/}

^{187/} Id.

^{188/} Id.

^{189/} J. J. Petuchowski, "Plural Models Within The Halakha," 19 Judaism 87 (Winter 1970); Petuchowski's occasional interlocutor Rabbi Walter Wurzburger has also stated that "unless the Halakha is in some sense related to the content of divine revelation, I cannot see why the allegedly purely subjective response of my ancestors should impose any obligation on me." W. Wurzberger, "Plural Models and The Authority of the Halakha," 20 Judaism 394 (Fall 1971).

^{190/} J. J. Petuchowski, "Problems of Reform Halakha," 4 Judaism 339 (Fall 1955).

It does not follow, he says, "that just because Moses did not write the Torah, it can no longer be the authoritative rule of Jewish life." Indeed, "does every worthwhile religious ordinance have to be a creatio ex nihilo?"^{191/} He insists that any understanding of Judaism as something less than a "revealed religion" -- by which Torah is nothing more than "the record of the consecration of the Jewish people to its mission" (quoting from the 1886 Pittsburgh Platform) -- wherein only the "moral laws" are valid and modernism alone is the litmus test of observance, renders Halakha impossible.^{192/}

The Reform God, says Petuchowski, is the Ein Sof of Kabbalistic tradition--the Unknowable. Such is "the God of the philosophers" with which the Bible is not particularly concerned. Rather, Scripture is concerned with a God who can be known--the creator of the world and the revealer of Torah. Halakha, as such, is impossible without this kind of revelation by this kind of God, made known through experience and not merely through intellect.^{193/} It is not that the "God of the philosophers" is not contained within the larger concept of God as embodied in the totality of Judaism. Rather, he asserts, this is one of three God concepts contained in a triad which is metaphorically unified in the

^{191/} Id. at 341-42.

^{192/} Id. at 344. We do not understand him to mean, of course, Halakha as art or sport, but as the best way of life as imparted by God, refracted through experience, and transmitted through the processes of classical Judaism.

^{193/} Id. at 348.

words of the sh'ma: the God of the philosophers is joined with the God of Israel/history, which are both joined with the God of private religious experience/shekhinah. Thus, "Hear O Israel, . . . God is One." Thus also, "history and its God is the conditio sine qua non of any continuity within Judaism."^{194/}

Reform will continually struggle on the periphery of this continuity, Petuchowski predicts, as long as its raison d'etre continues to be the emancipation from the belief in the God of Israel and of History as the Giver of Torah.^{195/}

Petuchowski is under no illusion that a "return to The Halakha" is possible for a non-Orthodox Jew,^{196/} but he nevertheless calls for an "involving individual process . . . of internalization according to one's own capacity to understand." There are, he says, three categories of commandments in which the Halakhic tradition can be organized. In the first category are commandments between man and God, involving that private domain wherein the greatest individual diversity is possible. The second

^{194/} Id. at 349.

^{195/} Id. at 351.

^{196/} To the same effect is Ira Eisenstein, who wrote that "the halakha is a thing of the past," I. Eisenstein, "There is No 'One' Halakha," 29 Judaism 65 (Winter 1980) and Jacob Neusner, who distinguished "a Halakha" from "the Halakha." J. Neusner, "What is Normative In Jewish Ethics?" 16 Judaism 15 (Winter 1967). The former, says Neusner, must have as its "central focus . . . the private person, his best interests, his needs, his particularities," and will never satisfy those whose focus is on the latter. We contend, infra, that "The Halakha" is a brooding omnipresence which any "other" Halakha only tends toward, ever in the midst of its corrective process. It is not that we "cannot return to The Halakha" but that we cannot abide an uncorrected and morally defective Halakha which is presented to us as de rigueur regimen.

category constitutes commandments between Israel and God, the community domain involving such issues as kashrut. Here, he argues that traditional practice should prevail in community situations, even where such practice is not generally prevailing. Protection of minority "rights" and an opportunity for one to move from rejection to adherence together justify a traditional practice in community situations.^{197/} The third category involves those commandments between Jew and Jew, namely those involving the laws of ishut, or personal status. Here, he argues that the strictest adherence to traditional standards should prevail as a means of guaranteeing the fundamental unity of Israel.^{198/} Petuchowski concludes his less-than-sanguine analysis by renewal of the themes of tolerance and education as the basis for a truly liberal Judaism:

If Reform Judaism is truly meant to be liberal, than it must be left to the individual to decide which of the Commandments he accepts as binding for himself. Indeed, we must even reckon with the possibility of his accepting an ancient piece of legislation as 'commandment'--even though it might not be 'adapted to the views and habits of modern civilization.'

In order to be able to make his individual choice, the Reform Jew must have at his disposal a knowledge of the material from which this choice is to be made, a knowledge of the mitzvot handed down by Tradition. This, in turn, necessitates an intensive study of that Tradition. In theory, a Reform Jewish education would have to be much more intense than an Orthodox one. Only the educated Jew, who is well acquainted with the Tradition, can come to terms with it and can make his own selection from the plethora of traditional observances.

^{197/} J. J. Petuchowski, "Plural Models Within The Halakha," 19 Judaism 82 (Winter 1970).

^{198/} Id. at 83-85.

Only if the Reform Jew acts out of a full knowledge can there be talk of Reform Judaism at all. An ignoramus is only an ignoramus; and if he acts out of his ignorance, he still remains an ignoramus, and does not automatically become a Reform Jew.^{199/}

E.

Even more direct and down-to-earth than Petuchowski in his criticism of Reform and its practices has been W. Gunther Plaut, who has strenuously argued for a return to traditional Halakhic formulae. "Our people lack a Jewish lifestyle," he has written, "they live like goyim: they have adapted themselves so completely they have forgotten what it is they left behind. To defend the emptiness of their lives, they shout 'freedom!'--but they mean hefkerut, license to carry on with as little as possible, or at best with what is convenient."^{200/}

Plaut hoped that with the appearance of the CCAR Shabbat Manual in the fall of 1971, Halakha would make "its re-entry into the official fold of our movement."^{201/}

"It may be," he wrote in October, 1971, "that the Halakha-oriented Reform rabbis now form the majority. Those of us, who, for years, have been voices crying in the wilderness, will be greatly heartened by their support."^{202/}

Plaut was intolerant of those who argued that any Reform code or guide to ritual would be the beginnings of a new Shulhan

^{199/} Id. at 172-73.

^{200/} W. G. Plaut, "The Need for Religious Discipline," 85 CCAR Yearbook 169 (1979).

^{201/} W. G. Plaut, "New Directions for Reform Rabbis," CCAR Journal 25 (October 1971).

^{202/} Id.

Aruk. "None of us as rabbis," he argued, "who has attempted to speak of this to his members has ever dreamt of forcing anyone to do anything. The people are hungry, they want opportunities, and we in turn must say to them 'here are your opportunities for mitzvah.'" ^{203/}

On the canard of authority, Plaut willingly embraced Eugene Mihaly's translation of Avot 1:17: lo ha-midrash ikar, elah ha-maasseh; v'kol ha-marbeh devarim marbeh het - "the essential is not the search for authority, but the performance of the mitzvah - the meritorious deed. And he who overindulges in abstract theorizing only increases sin." ^{204/}

But he sharply disagreed with Mihaly on the latter's assertion that "we (Reform Jews) are k'lal yisroel," saying "we are not k'lal yisroel. . . . We need our brethren. . . . We cannot accept the Halakha of tradition, but we must relate to it. We can veto it, but we cannot overlook it as if it did not exist." ^{205/}

Plaut pleaded with his colleagues of the CCAR to adopt some form of ritual guide without which "we will have ultimately no

^{203/} W. G. Plaut, "The Need for Religious Discipline," 85 CCAR Yearbook 171 (1975).

^{204/} E. Mihaly, "Religious Discipline and Liberal Judaism," 85 CCAR Yearbook 180 (1975); So, too, Frederick Doppelt asks whether and why, "if Reform rabbis have authority where it comes to matters of social action, they cannot also have authority to speak for davar she-b'kedusha. Are not prayer books, hagadot, etc. matters of authority which are never questioned?" quoted in W. G. Plaut, "The Sabbath in the Reform Movement," 75 CCAR Yearbook 203 (1965).

^{205/} W. G. Plaut, "The Need for Religious Discipline," 85 CCAR Yearbook 172 (1975).

Reform Judaism left"^{206/} and argued that calls for the same dated as far back as 1854.^{207/}

Short of some resolve by this conference to introduce a level of Halakha into Reform Jewish life, short of some understanding that even liberals must submit to obligation, be it theological, historical, national or even congregational in origin--short of this there will be only frustration and further decay.^{208/}

The problem for Plaut, unlike Petuchowski or Mihaly, is that he does not undertake a definition of Halakha or a explication of its relationship to revelation. To him "it" is important, whatever its basis -- be it theological, historical, national or even congregational in origin. To this it can be said that "unless the Halakha is in some sense related to the content of divine revelation, . . . [it is inconceivable how] the allegedly purely subjective response of [our] ancestors should impose any obligation on [us]."^{209/}

IV.

There have been other voices, in addition to the aforementioned major thinkers within the Reform movement in Judaism, who have addressed the issues of a reconciliation between liberal Judaism and Jewish law. Some, such as David Polish, have

^{206/} Id. at 189.

^{207/} Id. at 190-91.

^{208/} Id. at 185.

^{209/} W. Wurzbarger, "Plural Models and the Authority of the Halakha," 20 Judaism 394 (Fall 1971).

essentially articulated a critical-historical position in the face of perceived demands for more traditional Jewish living. For example, he noted that the issue of an authoritative code or guide of Jewish practice has been with all movements denominated as "liberal Judaism" since the early 19th century. The early Reform issue of a rabbinic synod, which would have the authority to promulgate new and, in some cases radical Halakha, was at the center of the early Geiger-Holdheim debates. The latter argued that, in essence, rabbinic authority was a useless vestige of a Judaism which had to be radically altered. His view was to prevail despite the 1871 resolution of the Conference of Reform Rabbis in Cincinnati, led by Isaac Mayer Wise, which called for a new synod.^{210/}

Polish wanted to rectify, in part, the Holdheim influence, and noted in support of his effort and concern a greater contemporary reference (in Reform Jewish circles) to Halakha qua Halakha, as opposed to prior expressions of ceremonies or customs.^{211/} His Guide for Reform Jews^{212/} was promulgated, he says, because (a) Reform Judaism required sturdier observance than mere popular customs, ceremonies and rituals; (b) such as was observed should be systematic rather than impromptu; (c) the normative behavior of Reform Jews should not depend exclusively on the efforts of committed individuals who are without any focused

^{210/} D. Polish, "The New Reform and Authority," 23 Judaism 10 (Winter 1974).

^{211/} Id. at 11, 15.

^{212/} F.A. Doppelt and D. Polish, A Guide for Reform Jews (1957).

leadership; (d) a hortatory guide will "head off" all calls for a more authoritative mandatory guide; and (e) such a guide will assure that those practices which do become normative within Reform Judaism have a justification and rationale.^{213/}

In reality, Polish, not unlike Petuchowski, emphasized what he called "public sector issues," namely marriage, conversion and divorce as the focus of his attention in the context of "Reform Halakha."^{214/} All other matters were regarded by him as "private sector issues" which were not governed by Halakha, but by a mitzvah-system.

From a Reform prospective, an individual mitzvah can be performed, altered, suspended or created, but if the Halakha is dealt with similarly, it ceases to be The Halakha. If it is retained substantially, Reform ceases to be. One does not accept Halakha selectively. . . . Mitzvot . . . are specific responses to existential situations in which the Jew answers to history, to his current situation, to the sacred, to the life cycles, to the calendar, to the rites of passage. Through mitzvot, the individual is capable of reliving the central elements of his people's history and to bring history into the circumstances in which he and his people presently find themselves. The mitzvah becomes an immediate response to a given moment.^{215/}

Polish's rhetoric and image of Halakha resonate with the mainstream Reform perspective in this regard, emphasizing mitzvah as covenantal imperative while denigrating Halakha as little more than an antique cornucopia of the same.

^{213/} D. Polish, "The New Reform and Authority," 23 Judaism 15 (Winter 1974).

^{214/} Id. at 19.

^{215/} Id.

A more positive nod in the direction of the traditional Halakhic process is reflected in a brief and little-noted essay by Paul Gorin. Gorin, writing in 1973 (some ten years before UAHC President Alexander Schindler called for the adoption of a resolution declaring acceptance of Jewish identity by patrilineal descent)^{216/} argued that it was appropriate for Reform Judaism to issue a comprehensive "Halakhic ruling of patrilineal descent.

This difficult issue may compel us to re-examine the entire relationship of Reform Judaism to Halakha. It may lead us from a denigration of an unworkable Halakha of the past to the construction of a dynamic and relevant Halakha of the present--and from a mere echo and repetition of yesterday's spiritual glories to an innovative weaving of meaningful spiritual pathways and guidelines for today and tomorrow.^{217/}

Similar calls for a "new Halakha" were made by Bernard Bamberger, who declared the "concept that every aspect of the life of the individual Jew and of the Jewish community should be governed and guided by a rule believed to be of divine origin . . . a noble concept indeed."^{218/}

Bamberger cautioned that codification of merely the ritual aspects of Reform Judaism, "while offering no more than pious generalities as a guide for ethical conduct, would seem out of keeping with the spirit of the Reform tradition." He urged that the

^{216/} Adopted by the CCAR as Report of the Committee on Patrilineal Descent on the Status of Children of Mixed Marriages, reprinted in W. Jacob, ed., American Reform Responsa (1983) pp. 547-50.

^{217/} P. Gorin, "We Need A New Halakha," 20 CCAR Journal 28, 29 (Spring 1973).

^{218/} B. Bamberger, "The Problem of Halakha Today: A Symposium," 34 Reconstructionist 7 (March 8, 1968).

generation of any creative Reform Halakhic tradition would occur only when "our people [have] the awareness that all have obligations by virtue of the fact that they are Jewish."^{219/} "We must . . . try to convince our people," Bamberger wrote,

not only by our words but by our total demeanor, that we Reform Jews have duties and obligations, the definition of which must be ultimately left to the individual conscience, but the compelling power of which is beyond question. . . . A law-abiding citizen is not inevitably a conformist. Indeed, to obey the law is sometimes a highly unpopular form of non-conformism.^{220/}

Bamberger's formula lacks the concern with revelation^{221/}, which is the foundation of any reference to the "compelling power" of the duties and obligations of Jews in Judaism.

Kenneth E. Stein is another whose effort to reconcile Jewish law and liberal Judaism falls clearly within the mainstream of Reform Jewish thought. Stein wrote that

our [Reform] theology has drawn us out of the orbit of Orthodox Halakha. We are therefore forced to search out our own. . . .

Inspirational value is not the prime touchstone of our Halakha [noting, for example, that there is no 'inspirational value' in agreeing to perform a wedding on a certain day or time or without requiring one of the parties to obtain or receive a traditional Jewish divorce--all in violation of traditional normative Halakha]. To ignore [Halakha] is anarchy, to stretch it to the breaking point, dangerous.

^{219/} Id. at 8, 10.

^{220/} B. Bamberger, "The Developing Philosophy of Reform Judaism," 68 CCAR Yearbook 260, 265 (1958).

^{221/} See the discussion on J.J. Petuchowski, supra at 62-64. concerning revelation as the conditio sine qua non of the "compelling power" of any normative system.

We can only hope that custom is not guided exclusively by 'inspirational values', aesthetic emotionalism and spiritual nostalgia, but that it will return to the old Reform orientation . . . of historical criticism, scholarly research, scientific method and the rule of reason. Once this has been done, it will be found that local customs will tend to blend into a certain general uniformity. In that day Reform Halakha will be exemplified in a commonly observed rational practice.^{222/}

Stein is essentially saying that Reform Halakha, as such, will emerge "mitzvah by mitzvah"^{223/} in a pattern of "commonly observed rational practice" where individual rabbis and individual Jews will have worked through the appropriate modern normative response to the various life situations.

One of the most comprehensive attempts, in the modern Reform discussion, to reconcile Jewish law and liberal Judaism was offered at the 1982 CCAR convention by Eugene Lipman.^{224/} Lipman told the convention that there are six arguments "for Reform legitimacy": the first is the restoration of the biblical/prophetic basis for Judaism as against the inherited rabbinic process; the second, the elevation of reason as the sole legitimating medium for religious behavior; the third is the import of Jewish survivalism, itself as an "ism" prevailing over any normative claims in the name of any other "ism;" the fifth is simply the accommodation to popular

^{222/} K. E. Stein, "The Problem of Halakha in Reform Judaism," CCAR Journal 17 (June 1960).

^{223/} See supra at 61.

^{224/} E. Lipman, "Change and Authenticity: The Continuum of Jewish Experience," 92 CCAR Yearbook 21 (1982).

will and custom^{225/}; and the sixth is the elevation of personal subjectivity to a legitimating medium for all religious practice.^{226/}

Lipman incorporates all of these "arguments for Reform legitimacy" into his own subjective system of religious behavior. He first asks "what is the covenantal intent of this act as a mitzvah?"--rejecting the twin concepts of Torah min ha-shamayim or Halakha le-moshe mi sinai.^{227/} If the "covenantal intent" is recognizable and acceptable to him, Lipman then asks "should I perform this mitzvah in a traditional manner, or is there a better way?

If it appears to me personally in my own Jewish decision-making [or to the congregation which I serve], that God, our m'tzaveh, commands this action of us or me, the covenant partner, as a mitzvah, then that act becomes a legitimate Jewish act and my conviction that it is a mitzvah is the only way I can legitimate it.^{228/}

225/ See Ber 45a. ("Go forth and see how the people are accustomed to act") - surely Raba was referring to the then-extant Halakhic community and not to Jews who were alienated, for whatever reason, from Judaism. Those who denied revelation, or God's unity or the authority of the rabbinic process were not included in "the people" for this purpose. To the same effect is the Latin maxim Salus populi suprema lex esto (The Will of the People shall be the Supreme Law) which has embedded within it a concept of exclusive citizenship.

226/ E. Lipman, op cit. at 22-24.

227/ Id. at 24. These are, of course, the great rabbinic metaphors for a unitary Judaism and a unitary Halakha, see fn. 39, supra. The former is "the very premise on which Halakha is predicated," J.J. Petuchowski, Heirs of the Pharisees (1970) p. 106-07, and, like lechem min ha-aretz is a euphemism whose meaning expands far beyond its literal image. J.J. Petuchowski, "Not By Bread Alone," 7 Judaism 229-34 (Summer 1958).

228/ Id. at 24-25.

Lipman's process is thus highly subjective, in accord with the concept of autonomy of which Eugene B. Borowitz frequently speaks.^{229/}

Lipman then indicates that he uses several "tools" to arrive at his subjective determinations: "rabbinic insights, Weissenschaftlich [sic] investigations, my own saychel, contemporary experience and instincts, and aesthetic sensitivities."^{230/}

He went on to reveal to the CCAR convention that by his subjective process, Lipman permits himself to chop wood on Shabbat (a direct violation of traditional Shabbat observance) but, in addition, maintains a home which he described as kasher lemehadrin (so that "any Jew" would feel comfortable eating there).^{231/}

Despite Lipman's facially complex, sophisticated and elaborate system, his vectors are obviously so wide as to permit great latitude in the form of his behavior as a Jew. Indeed if his only lodestar is rationality - "the sole legitimating medium for religious behavior"- it would seem to make little sense, for example, for him to buy only Kosher cheese ("our home is kasher lemehadrin") or to tovel all of his dishes, pots and pans, when so few--if any--of his guests would ever inquire or care about the same. Lipman's composition becomes, it seems, no less an elaborate justification for radical subjectivity as are other Reform theories, however described in the language and form of the tradition. This

^{229/} See supra at 49-50.

^{230/} Id. at 25.

^{231/} Id. at 26-27. That is, kosher even for the most punctilious Jew.

is because--with the possible exception of Mihaly--the suggested modus operandi has been, vis-a-vis Jewish tradition, consultation leading to acceptance or rejection. This as opposed to inheritance leading to encounter leading to interpretation and reconciliation.

Nevertheless, Lipman does contend that the key question in all of Jewish behavior is mah adonai doresh^{232/}--what does God ask of me? Though this is not a direct reference to revelation, it is an attempt to put the commander back into the commandment. Such an approach is frequently rejected, as it was by Jack Stern, Jr., who wrote that

While ethical obligations are validated by the divine authority who commands the ethical deed, religious practice . . . originates not with the divine but with the Jewish people in the course of its historic encounter with the divine. Something else, then, must serve as the validating force which entitles religious practice to impose obligations Something else includes . . . emotional warmth ambiance of traditional backgrounds a sense of community . . . ethnicity and a self-assertive return to ethnic roots The Holocaust and the establishment of the State of Israel . . . which was authorized, by spontaneous consensus, to lay claims and impose obligations on the contemporary Reform Jew.^{233/}

Stern's rejection of God as the "validating force" of religious practice was not nearly as sharp an attack on mainstream Reform thinking as was exhibited by Albert S. Goldstein in 1974.^{234/}

^{232/} Id. at 27.

^{233/} J. Stern, Jr. "Our Obligations: Religious Practice," 24 CCAR Journal 59-60 (Spring 1977).

^{234/} A. Goldstein, "Judaism as Shulchan Aruch," 21 CCAR Journal 27 (Summer 1974).

Goldstein insisted both that Halakha could only be "genuine" and that, such as it was, "genuine Halakha" was "a dead letter, outdated, uninspiring, counter-indicated and violable."²³⁵

To him, Reform Judaism began and ended with autonomy, within which "a free man is eclectic. He chooses from our vast tradition whatever he pleases and cares to use for himself. Our function," he wrote,

is to expose our people to as much of the totality of Judaism as we can convey and they can absorb, allowing them to decide what is significant and relevant for themselves and worth perpetuating for their children.^{236/}

Echoing and articulating the common motif of Reform Judaism as a smorgasbord, Goldstein wrote

Judaism . . . is a shulchan aruch. It is a banquet board bountifully spread and fairly groaning with the weight of a prodigious variety of intellectual, spiritual, ethical and aesthetic delight: poetry, philosophy, and theology; history and biography; rationalism and mysticism, the moral mandates of the prophets and the colorful symbols and pagentry of the priests.

And each of us is invited: kol dichfim ye-sey v'yeychul--let all who are hungry come and eat. . . . There are gourmands, who try to consume the whole thing, but who needs to make a glutton of himself? He can feast his eyes and let his soul revel in the vision of the beautiful variety of it all. He can taste all, much or some of it. However, a most gratifying meal can be made of a gourmet selection from among the many dishes.^{237/}

^{235/} Id. at 28-31.

^{236/} Id. at 29.

^{237/} Id. at 30-32.

Goldstein recognized as the "Halakhists of our own day . . . the Responsa Committee of the RCA and the Chief Rabbinate of Israel" and insisted that the focus of his antagonism to (1) traditional Jewish practice and (2) talk of a "Halakha" within Reform Judaism was to "keep Liberal Judaism liberal, free, open and receptive not only to traditional Jewish thought and practice, including Halakha, of course, but receptive to all goodness, truth and beauty."^{238/}

In many respects, the Judaism-as-smorgasbord which he represented was never better articulated.

In addition to the aforementioned address by Eugene Lipman, the 1982 CCAR convention in New York was treated to perhaps the strongest statement in favor of an embrace of a Halakha ever delivered at such a gathering. Its author, Mordecai Podet, described Reform Judaism as a "movement for liberated Orthodox Jews."^{239/} In this, Podet meant to celebrate the existence of "liberated Judaism" from the heavy-handed system of regulation which had grown and become encrusted within orthodoxy. He did not, however, seek to praise excessive

critico-historical analysis [of sacred texts such as the Bible] and understanding [which] does not provide ideological support for . . . institutionally imposed pressure on the Reform rabbi or layman to define Judaism in as close a relationship to the received tradition as serving liberal Jewish values will allow.^{240/}

^{238/} Id. at 33.

^{239/} M. Podet, "Autonomy and Authority: The Dilemma of Reform," 92 CCAR Yearbook 31 (1982).

^{240/} Id. at 29.

Podet excoriated "generations of autonomy-oriented rabbis" who taught Jews to continually ask "isn't Judaism really just living an ethical life? That Jewish concerns, knowledge, practice, and laws have importance is now seen by most as the rabbi's eccentricity."^{241/}

Podet called for a revitalized Halakhic community within the Reform movement. He had earlier defined Halakha as that which is

logically based on and inevitably bound up with true doctrine. It exists, not for its own sake, but as an emanation, a reflection, a conformity with, a reaching toward, a searching the face of ultimate reality and ultimate meaning.^{242/}

Now, in 1982, he called for a resurgent Halakha "justified by our purposes, our goals, by the values we hope to express and perpetuate; a Halakha by objective."^{243/} He called for the creation of a Reform rabbinic chevruta,

by the like-minded among us, more deliberately than in the past, to encourage and sustain one another in attempting new levels of personal and congregational Halakha, mitzvah and minhag. Of course, the particulars will depend on each participant's personal and professional reality. But at least the banner will be raised, unfurled and flying so that the front of the procession and its direction will be apparent to all--even to those who chose to turn their backs on it.^{244/}

^{241/} Id. at 33.

^{242/} M. Podet, "For Explicit Doctrine in Reform Judaism," CCAR Journal 25 (April 1960) (emphasis added).

^{243/} M. Podet, "Autonomy and Authority: The Dilemma of Reform," 92 CCAR Yearbook 29 (1982).

^{244/} Id. at 34.

In terms of sheer rhetoric, Podet's call in 1982 for Reform commitment to Halakha qua Halakha was the highwater mark in modern Reform claims to the need to adhere to some objective standards.

Podet's rhetoric has been joined by penetrating--if not theoretically complete--analysis of several questions related to Halakha and the Reform movement on the part of Richard A. Block. Block has objected to "the process of thought that begins 'how can I use Jewish tradition to justify what I have already decided to do?' instead of 'what does Jewish tradition teach me about what I ought to do?'"^{245/} He says that

a coherent, Jewishly authentic position for oneself . . . can emerge from a personal confrontation with Jewish tradition, as one draws upon that part of the tradition that resonates most intensely within oneself.^{246/}

Block's legal theory is thus somewhat confused. If he objects as indicated, then how can he rely simply upon "a personal confrontation with Jewish tradition" which may or may not yield data "that resonates most intensely within oneself." It would seem that an antecedent personal humility and submission is necessary in order to receive or inherit the essence of Judaism.

He acknowledges that Reform Jews do not accept the legal authority of the Halakha, but asks if it is appropriate, therefore, to utilize its precedents in advocating 'the right to abortion?' After all, can it be doubted that those Reform Jews who favor abortion would

^{245/} R. A. Block, "Response," 28 Journal of Reform Judaism 21 (Fall 1981).

^{246/} R. A. Block, "Reform Judaism and Capital Punishment," 30 Journal of Reform Judaism 7 (Spring 1983).

continue to do so, even if the Torah forbade it? If we concede that Jews who are not 'halakhic' in the traditional sense may lay rightful claim to a share in Jewish tradition and may therefore speak in its name, must we also grant the right to appropriate whatever Jewish laws and traditions that support one's views and to disregard those which oppose them? It certainly is the distinct tendency of Reform Jews to do so. If we justify them by admitting that the highly selective use, even the taking out of context of sources, was a widespread and accepted practice among Talmudic authorities, may we do likewise, absent a guiding principle, consistently applied? In my opinion, the highly selective appropriation of Talmudic materials in support of a political objective . . . reenforces the impression that Reform Jews value Jewish tradition only insofar as it lends itself to polemical use.

Rather than wend a tortuous way through the time-and-place bound specifics of various cases and rulings, as if we were lawyers practicing law before a court whose jurisdiction we do not acknowledge, we ought to seek out the fundamental moral thrust of Jewish tradition and its enduring values.^{247/}

Block's approach, demanding that we "seek out the fundamental moral thrust of Jewish tradition and its enduring values" mirrors much of earlier calls for a renewed Halakha from Mihaly and others.

It seems that the critical missing elements in the development of a Reform Halakha are (1) the absence of a consenting community, though Reform rabbis are well acquainted with their capacity to function as mara d'atra in a variety of circumstances by virtue of their consensual authority, and (2) the absence of any developed theory of a "guiding principle" or methodology by which the "fundamental moral thrust" of the tradition can be merged with

^{247/} R. A. Block, "The Right to Do Wrong: Reform Judaism and Abortion," 28 Journal of Reform Judaism 9-10 (Spring 1981).

its vast array of inherited details and regulations, and by which the autonomy of the individual--however perceived--can be synthesized with a tradition based in large part upon the authority of inheritance.

A condition precedent to a developed theory of Halakha for liberal Jews is a close examination of the traditional understanding--frequently eclipsed in the modern debate--of human autonomy and its relation to Halakha.

CHAPTER 3

AUTHORITY AND AUTONOMY

I.

Authority and autonomy: these are the twin fonts of contention in Reform Judaism. Though in its early stages, Reform Judaism and its leaders (from Abraham Geiger to Isaac Mayer Wise) embraced a process of syncretism and gradual change by a reform of the Halakha under the auspices of traditional rabbinic authority,^{248/} once firmly established in America, a much more radical and comprehensive rejection of rabbinic authority became the fashion.^{249/}

Today, "Reform Jews love their autonomy,"^{250/} which is described as "the ultimate freedom of the individual conscience from

248/ See W. Jacob, "The Source of Reform Halakhic Authority," in E. L. Stevens (ed.), Rabbinic Authority (1982) p. 35 and W. G. Plaut, "Can We Speak of Reform Halakha?" In E. L. Stevens (ed.), Rabbinic Authority (1982) p. 63. Both conclude that radical reform prevailed in America and ended the earlier phase of alteration (or, better, correction) of the received tradition. Walter Jacob, however, contends that "although sometimes antinomian in mood, Reform Judaism has worked within a broad framework of traditional authority." Jacob, op cit. supra. This despite the fact that in the Reform Shabbat Manual (1971), Gates of Mitzvah (1979) and Gates of the Seasons (1983) the word Halakha is "prominent by its complete absence," Plaut, op cit. supra, and that others have concluded that in pursuit of its radical/classical mode, Reform Judaism "flourished as a Jewish Unitarianism, spread as a broad and pleasant middle-class establishmentarianism and . . . the Jewish segment of the new North American Religion." Id.

249/ See Jacob, op cit. supra and Plaut, op cit. supra.

250/ E. B. Borowitz, "Subjectivity and the Halakhic Process," 13 Judaism 217 (Spring 1964); cf., E. Lipman, "Change and

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external coercion [sic] in matters of religion as in all else."^{251/} The 1976 CCAR Centenary Statement, for instance, was written in an atmosphere which was said to hold "inviolable [the] principles of individual freedom and autonomy" which blocked any "suggested obligation to specific ritual practices."^{252/} Thus, the 1976 statement concerning "our obligations" became little more than an encomium to self-control:

Judaism emphasises action rather than creed as the primary expression of a religious life, the means by which we strive to reach universal justice and peace. Reform Judaism shares this emphasis on duty and obligation. Our founders stressed that the Jews' ethical responsibilities, personal and social, are enjoined by God. The past century has taught us that the claims made upon us may begin with our ethical obligations but they extend to many other aspects of Jewish living, including: creating a Jewish home

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Authenticity: The Continuum of Jewish Experience," 92 CCAR Yearbook 22 (1982), where Eugene Lipman says that

We Reform Jews are so radically individualistic about most things and we appear determined to remain so. No Reform Jew in any congregation is prepared to accept institutional discipline regarding the Jewishness of his or her home. Our congregations as institutions are absolutely not prepared to accept discipline from the CCAR or from the UAHC. . . . and it takes a pathologically suspicious mind to take seriously the notion that there is a cabal within this CCAR to change our historically non-binding resolutions into some kind of pseudo-Halakhic system.

^{251/} A. Arian, Reform Rabbis and the Movement for Official Authority: The Abrogation of Modernity? (unpublished Brown University Master's Thesis) (1971) p. 57.

^{252/} J. Stern, Jr. "Our Obligations: Religious Practice," 24 CCAR Journal 62 (Spring 1977).

centered on family devotion; life-long study; private prayer and public worship; daily religious observance; keeping the Sabbath and the holy days; celebrating the major events of life; involvement with the synagogue and community; and other activities which promote the survival of the Jewish people and enhance its existence. With each area of Jewish observance, Reform Jews are called upon to confront the claims of Jewish tradition, however, differently perceived, and to exercise their individual autonomy, choosing and creating on the basis of commitment and knowledge.^{253/}

The Statement not only calls upon Jews "to confront" rather than "to inherit" or "to receive" the claims of Jewish tradition (suggesting an antecedent mood of rejection) but "requires" essentially nothing, the Jewish authenticity of which is guaranteed by the suprema lex of "the principle of the sovereignty of the individual conscience."^{254/}

So, "the whole basis of authority in rabbinic Judaism is not and has not been acceptable to us"^{255/} and, as such, "the authority required to give substance to either a code or a guide is lacking" because of a disparity in the hopes of rabbis and the practices of laymen.^{256/}

It is "our conscience and our reason [which] remain in the front, as primary and living as well as ultimate authorities,"^{257/}

^{253/} Reprinted at Stern, op cit. supra p. 58.

^{254/} R. Kahn, "A Guide for Reform Judaism," 69 CCAR Yearbook 279 (1959) (quoting Ferdinand M. Isserman).

^{255/} H. S. Waller, "The Course of Reform Judaism," 66 CCAR Yearbook 250 (1956) (quoting James Heller).

^{256/} R. J. Marx, "The Problem of Authority in the American Reform Rabbinate," CCAR Journal 67 (June 1958).

^{257/} F. C. Schwartz, "Claude Montefiore on Law and Tradition," 55 JQR 46 (July 1964).

whereas to live otherwise as a Jew and to find authority in an inherited tradition "is to live as a mere automaton or sink to the level of an animal."^{258/} An animal, in this schema, does not arrive at decisions based upon reason and conscience. For

what they [reason and conscience] bid me believe and do, this, and this only will I do and believe. They alone are my ultimate, and my sufficient, authority. Only in them can I recognize for myself the voice of the Divine.^{259/}

Not all modern Reform attention on the question of autonomy has been quite so sanguine, however. Writing in 1982, Mordecai Podet cautioned that the "great values" of liberal Judaism would not survive the Reform fixation on autonomy. He identified these values as (a) a passionate, constructive involvement with Eretz Israel; (b) a haven for what he called the "liberated Orthodox Jew;" (c) Jewish authenticity; (d) freedom of the pulpit; (e) rabbinic independence; and (f) an enduring and secure relation to k'lal Yisrael.^{260/} "Under unconstrained autonomy, these values," Podet said, "may be doomed."^{261/} He continued:

We are seeing the generations which did not fight for autonomy but grew up in it. . . . With exceptions, [they have] so pallid an awareness of

^{258/} Id. Contra M. Fox, "Heschel, Intuition and the Halakha," 3 Tradition 10 (Fall 1960) ("without God and His Torah men are reduced to being animals and automata."); Yoma 22b and San 54a ("if a man has sinned, wherein has the animal sinned?"); BM 35b ("how may one do business with one's neighbor's cow?").

^{259/} C. G. Montefiore, The Question of Authority in Liberal Judaism (1936) p. 3 (emphasis added).

^{260/} M. Podet, "Autonomy and Authority: The Dilemma of Reform," 92 CCAR Yearbook 29-30, 34 n.5 (1982).

^{261/} Id. at 29-30.

and so anemic an emotional involvement in Jewish practices or concerns that one might trail them day after day and not encounter a clue as to their religious identity.^{262/}

Podet even disparages so-called Reform responsa, which have been issued periodically under the authorship of Solomon B. Freehof, or under the aegis of the CCAR,^{263/} whose Responsa Committee has been in continuous operation since 1906.^{264/} These responsa have been characterized, most notably, by their permissiveness. Yet

^{262/} Id. at 31-32.

^{263/} J. D. Schwartz (ed.), Responsa of the CCAR Yearbooks I-LX (1890 - 1950) (1954).

^{264/} W. Jacob, "The Source of Reform Halakhic Authority," in E. L. Stevens (ed.), Rabbinic Authority (1982) p. 36. In another context, Jacob, not unlike the Centennial Statement, makes a stab at a conflation of authority and autonomy.

As Reform Judaism has stressed the individual and the need to make personal decisions in connection with Jewish thought and Jewish practices, so it has also laid a great deal of emphasis on individual freedom. Both the rabbi and the congregation are autonomous, yet in a sense a member, by joining a congregation, signifies acceptance of the authority of the rabbi for guidance and inspiration. The rabbi has also made an implied contract through the ordination which he has received and the rabbinic body which he has decided to join.

Id. at 34-35. While the "acceptance of authority" on the part of the individual congregational member is perhaps valid, we seriously question whether the overwhelming number of American Reform rabbis would agree that their ordination and CCAR membership constitute anything in the nature of "an implied contract" that signifies acceptance of any authority.

The work of the CCAR Committee on Responsa since its establishment in 1906 has been one of the most fascinating side-shows in the whole arena of reconciliation between Halakha and liberal Judaism. Twice, in 1956 and 1963, the CCAR has

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felt it necessary to announce that the reports of its Committee on Responsa do not represent any official CCAR opinion.

A. Arian, Reform Rabbis and the Movement for Official Authority: The Abrogation of Modernity? (unpublished Brown University Masters' Thesis) (1971) at 14. Indeed, "the exact function of the CCAR Committee on Responsa has at times been so unclear that it has twice been necessary for other committees of the CCAR to report on what they believe the function of the Committee on Responsa to be." Id. at 9. Solomon Freehof, the Committee chairman for a longer term than any other, has modestly suggested that Reform responsa "constitute our oral law, an equivalent to the Talmud as it developed." Freehof, "A Code of Ceremonial and Ritual Practice," 51 CCAR Yearbook 295 (1941).

Again, Mordecai Podet did not permit the charade of Reform responsa which almost routinely yield a permissive response to legal questions, to go unscathed. He said that the same were approached "as a literary art form, a genre like science fiction or mystery thrillers, created by those among us whose talents and predilections lead them to this particular form of artistic self-expression for the enjoyment of those of us who find it intellectually stimulating." M. Podet, "Autonomy and Authority: The Dilemma of Reform," 92 CCAR Yearbook 28 (1982).

The one-volume American Reform Responsa: Jewish Question, Rabbinic Answers (1983) consists essentially of a compilation of responsa published by Freehof and several others under the auspices of the CCAR Committee on Responsa. It is organized by the four general sections of Karo's Shulchan Aruch and shows that Freehof was not alone in being predictably permissive. The Committee's latest chairman, Walter Jacob, however, has laudibly attempted to maintain the high standards of erudition and scholarship which, however one may disagree with his conclusions, were generally characteristic of the Freehof era.

Finally, we take note of the unpublished rabbinic thesis of Lewis Richard Bornstein, of HUC-JIR, in 1972, entitled Halakhic Problems of Reform Judaism: 20 Questions and Answers.

Bornstein's thesis is a series of responsa to questions gleaned from a student questionnaire he distributed to the HUC-JIR student body in 1970-71. "The purpose of this methodology," he wrote, "was to present both an academically sound and honest progression of thought so that one may choose the position with which one sides." Id. at v. This is hardly the purpose of rabbinic responsa, which are at once deliberative and polemical. Of the twenty questions which he identified as the "Halakhic problems of Reform Judaism" two were notable: (a) If the second day of Pesach falls on Shabbat, what Kiddush does one recite? (this is a calendrical impossibility!) and (b) what

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the heter [a permissive rabbinic ruling in a specific case in the face of a clear Halakhic prohibition] is not a Reform invention. All those exceptional leniencies which Reform Halakhists seek out as precedents for our permissiveness are the judgments of rabbis who cannot be considered cavalier in their attitude toward Halakha and tradition; rabbis who in modern times would be described as very Orthodox. Obviously, there were far more such exceptional leniencies than would become part of the written record. The principle implied here is not, as we often infer, that permissiveness should set the standard. It is that under conditions of communal solidarity and widespread loyalty to unifying practices, those serving as the community Jewish conscience can permit themselves an occasional even excessive leniency without concern that they are thereby endangering either the community or the ideals for which they are responsible. But in an atmosphere of unchallenged autonomy, what is leniency? In such an environment, how does a declared leniency serve communal strength and values?^{265/}

The same point is made by Jakob J. Petuchowski who retells the story of Rabbi Israel Salanter who, in the face of a cholera epidemic, authorized others and did himself eat on Yom Kippur.^{266/} The import of the story and its correlative ethical

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do the lions engraved above the ark symbolize? (If this is an appropriate or relevant or even coherent she'lah, where is the Tent of Meeting?) Id. at 86, 105.

What is striking in the Bornstein treatment is the sport of the Halakhic process which is disingenuously employed, justifying Podet's observation that Reform responsa are simply a literary art form.

^{265/} M. Podet, "Autonomy and Authority: The Dilemma of Reform," 92 CCAR Yearbook 29-30, 35 n.6 (1982).

^{266/} The operative Halakhic principle here is horaat shaah - suspension of an obligation during a period of communal or personal emergency, which here is pikuakh nefesh -- saving of life -- which traditionally trumps all commandments save three prohibitions: murder, adultery and idolatry.

lesson is very powerful, but, Petuchowski notes that "this would not be so powerful a story in American Reform circles where, even without a cholera epidemic, it is customary to adjourn for a luncheon on the Day of Atonement."^{267/}

But even Petuchowski, though he is critical and saddened by American Reform hefkerut (anarchy), does not seek to abandon the central Reform value of autonomy, or self-authority, in Jewish life--except as it relates to communal standards such as ishut (identity or Who is a Jew) and kashrut at communal Jewish functions. Rather, he argues that "it must be left to the individual to decide which of the Commandments he accepts as binding for himself. Indeed, Petuchowski cautions, "we must even reckon with the possibility of his [the Reform Jew's] accepting an ancient piece of legislation as Commandment even though it might not be 'adapted to the views and habits of modern civilization.'"^{268/}

In setting out his four criteria for Jewish observance, even Petuchowski- who has asked, as aforesaid, that some measure of autonomy be ceded by Reform Jews and rabbis--embraces a dialectical process which is only appropriate for an autonomous Jewish self.^{269/} Petuchowski suggests, namely, that after determining "what, in a given case, has been the main direction of the millennial Tradition," the modern Jew should then inquire seriatim:

^{267/} J. J. Petuchowski, "How 'Relevant' Can Judaism Be?" Jewish Affairs 6-7 (September 1969).

^{268/} J. J. Petuchowski, Heirs of the Pharisees (1970) p. 172.

^{269/} The phrase is the title of a major article to the same effect by Eugene B. Borowitz. E. B. Borowitz, "The Autonomous Jewish Self," 4 Modern Judaism 39 (February 1984).

In what manner can I best realize the traditional teaching in my life and in the situation which I find myself?

What is the voice of my own conscience?

What is my feeling of responsibility toward the Covenant Community?^{270/}

It is clear that autonomy, self-control or self-direction continues to prevail as the linchpin of the world-view of liberal Judaism.

II.

This shield of autonomy stands against any manifestation of authority, meaning the legitimate right for a claim to enforce obedience upon others to a set of commands,^{271/} which Reform thinkers have universally rejected. But authority, even in a religious context, does not necessarily derive from a "flow chart" in which God the Creator is at the top. Indeed, authority "is itself inherently an act of imagination.

It is a search for solidarity and security in the strength of others . . . [and is] not based simply on abstract principles of right . . . [but] arises from a perception of differences and strength. The authority conveys, the subject perceives, that there is therefore something unattainable in the character of the authority. There is a power, self-assurance, or secret the authority possesses which the subject cannot penetrate. This difference arouses both fear and respect. . . . Hegel expressed this by saying that an authority is perceived to be legitimate when his strength makes him an Other, a person inhabiting a different realm of strength. A

^{270/} J. J. Petuchowski, Heirs of the Pharisees (1970) pp. 175-88 (emphasis added).

^{271/} A. J. Reines, "Authority in Reform Judaism," CCAR Journal 17 (April 1960).

legitimate personal authority is perceived as able to do two things: judge and reassure.^{272/}

Thus authority is, in fact, "a belief in legitimacy, measured by voluntary compliance,"^{273/} which, as indicated, is conditional upon the agent's perception of legitimacy. This kind of conditional authority, as distinguished from the more popular image of absolute authority with the concomitant power to enforce, is considered "appropriate in Reform Judaism."^{274/}

The problem with unrestrained autonomy, in its deep philosophical sense, is simply that it is the sufficient condition for the complete breakdown of any ethical or religious theory based upon naturalist, rationalist or historical justifications.

The ethos of the existentialist position [in support of radical autonomy] is antirational. If a mathematician must conclude from the premises of his system that a particular theorem holds, then he has surrendered his moral autonomy to assert or deny the theorem. If a scientist must derive his conclusions on the basis of the evidence by virtue of his methods, then he has abdicated moral freedom with respect to those conclusions. Moral autonomy presupposes this view, and moral freedom requires that ethical [or religious] commitment not be derivable from systemically held premises but that each moral [or religious] decision constitute an act of authentic commitment.^{275/}

Under this view of autonomy, not only can a religious or ethical decision not be coerced by an absolute authority with power to

^{272/} R. Sennett, Authority (1980) pp. 197, 154.

^{273/} Id. at 22.

^{274/} Reines, op cit. supra at 20, 26.

^{275/} D. Sidorsky, "The Autonomy of Moral Objectivity," in M. Fox (ed.), Modern Jewish Ethics (1975) p. 161.

enforce, it cannot even be motivated by personal character if the same is conditioned by an antecedent commitment to rules of behavior or inherited tradition.

Thus it is, in part, rationalism itself which is at stake in the celebration of autonomy as the Reform suprema lex. If rationalism lends credibility to the concept of conditional or consensual authority, so much the more so does the non-rational deep psychological embrace of an inherited tradition, which was revealed and/or perceived long, long ago. This is because reason alone, "when appealing only to those factors which are completely within the scope of its comprehension, is rarely adequate to the task of moving men to act in accordance with its precepts."^{276/} It is therefore possible to view the inherited tradition as not a static system of control, power and authority attempting to seduce Jews from their own self-control but rather the fertile soil from which a rooted autonomy can flourish.^{277/}

The issue of authority and autonomy for Reform Judaism is not as much a matter of a new Judaism but, rather, a matter of the misperception of those terms. Autonomy is the ground of and predicate to commitment; and authority, certainly in modern western civilization, is conditional and consensual. So, therefore,

^{276/} M. Greenberg, "A Revealed Law," 19 Conservative Judaism 46 (Fall 1964).

^{277/} See generally S. Spero, "Remembering and Historical Awareness Part II: Psychological Aspects of a Halakhic State of Mind," 19 Tradition 63 (Fall 1981), quoting Soloveitchik, "Sacred and Profane: Kodesh and Chol in World Perspectives," 3 Gesher 21 (1966) and "The Community," 17 Tradition 24 (Winter 1978).

even in liberal Judaism, it is true that "far more important than coercion in securing obedience to rules . . . are such factors as trust, fairness, credibility and affiliation."^{278/} It is precisely "when law is trusted" as customary practice, "and therefore does not require coercive sanctions, that it is efficient."^{279/}

Surely there is a difference . . . between responding to a coercive external demand ('is obliged') and responding to a standard ('is obligated') to which one has, explicitly or implicitly, consented. A robber who sticks a gun in my back and demands my wallet obliges me to turn it over to him. A divine law giver who threatens eternal punishments for those who depart from His laws obliges me, if I think his threat is credible, to conform my life to His laws. But my acceptance of a promise-keeping institution (I believe human life would be greatly impoverished without it) [such as is the concept of Jewish collective responsibility] plus the fact, for example, that I promised to prepare and submit this essay, obligates me to do what I am now doing. And my entering into a covenant with God (I would be a son of God) by which I have committed to loving my enemies, obligates me to try to understand, appreciate and help those who spitefully use me.^{280/}

So, for example, the obligations exchanged by Laban and Jacob for the latter's securing the hands of Rachel and Leah in Genesis 29:16-25 were not a matter of external or mechanical authority, but rather an internal or psychological authority grounded in their mutual "obligation" or consent to a system of

^{278/} H. J. Berman, The Interaction of Law and Religion (1974) p. 28, citing the work of Piaget and Kohlberg.

^{279/} Id.

^{280/} F. Carney, "The Virtue-Obligation Controversy," 1 Journal of Religious Ethics 12-13 (1973).

reward for labor.^{281/} To put the matter more directly, when driving at midnight (when the traffic is sparse), we nevertheless stop at a red light not because of a fear of apprehension and punishment or a rational knowledge that our behavior may not be safe, but because we have willingly consented to a standard of order. Each of us does not renew a rational dialectic process at every moment of decision in public life. This is the essence of the authority of law.

III.

The authority of a rabbi as the interpreter of Torah was generally, in any event, based upon personality and charisma "not because of the rabbis' power in the courts, but because of their piety and sanctity outside of them."^{282/} This is ever true. The modern rabbi "is the authority because they [the Jews] turn to him as the authority."^{283/} His task, as such, is ever "to gain the voluntary adherence" of his constituency.^{284/}

The establishment of rabbinic authority thus depends upon a community's perception of a rabbi's learning and piety^{285/}--these

^{281/} See H. L. A. Hart. The Concept of Law (1961) pp. 86-88.

^{282/} J. Neusner, "What is Normative In Jewish Ethics?" 16 Judaism 14 (Winter 1967).

^{283/} E. Mihaly, "Religious Discipline and Liberal Judaism," 85 CCAR Yearbook 181 (1975).

^{284/} Id. at 182.

^{285/} "Piety was at least as much the hallmark of authority as genius, and unless religious experience is involved in Halakhic exegesis this requisite makes no sense." E. Rackman, "Israel and God: Reflections on Their Encounter," 11 Judaism 236 (Summer 1962).

to obtain the respect and anticipatory allegiance of colleagues and students--and charisma--this to effect the same among the general population of a rabbi's constituency. Authority in this context is clearly, then, not a matter of imposition or autocracy. There is, instead, obviously "an element of public opinion in the discovery of the Divine Law of the Torah, perfect and eternal though it may be."^{286/} Kaplan's call, therefore, for a new "constitutional convention of the Jewish people" in order to effect a new unification on a "voluntarist, democratic and quasi-contractual basis"^{287/} is superfluous when the tradition itself clearly contemplates a dialectic between what is authorized and what is popular, and a consequential creative tension.^{288/} In this, it was not merely "popular will" which it was anticipated would be a source of creative challenge to rabbinic authority, but individual autonomous Jewish will as well.

All Jews themselves, in the traditional contemplation, had, in Emmanuel Rackman's estimation, "to be expert in God's law. How else might they participate in the authority if they were not themselves students of Torah? . . . Judaism thus became an exoteric religion instead of an esoteric one . . . because man is

^{286/} J. J. Ross, "Morality and the Law," 10 Tradition 13 (Winter 1968).

^{287/} Quoted in I. Schneider, "The Reconstructionist Approach to Halakha," 42 Reconstructionist 21 (June 1976).

^{288/} B. M. Leiser, "Custom and Law in Talmudic Jurisprudence," 20 Judaism 398-400 (Fall 1971) and W. Jacob, "The Source of Reform Halakhic Authority," in E. L. Stevens (ed.), Rabbinic Authority (1982) pp. 32-33.

created in the divine image."^{289/} It is universal legal education, the traditional sine qua non of Jewish education (at least for males), which is the means to establish the sovereignty of law rather than the sovereignty of human beings.^{290/} And it is a signal to the value of the autonomy of the individual Jew that obedience to an unjustified command of a secular authority is, under Jewish law, punishable.^{291/}

IV.

In historical -- and not just Orthodox -- Judaism, then, the importance and value of heteronomous revelation is "due as much to the process it initiated and continues to mold as it is to its fixity."^{292/} Even the simplest revelation, says modern Orthodox theorist Rackman, such as the prohibition not to steal:

provides none of the absolutism that so many moderns associate with traditional Judaism. Man retains a creative role in the very process of applying revelation itself. He cannot altogether abdicate the autonomy of his reason. Nor can he, in Judaism, altogether delegate this responsibility to others. Even his choice of an authority [rabbi] is ultimately an act that calls for deliberation and decision.^{293/}

^{289/} E. Rackman, Theocentricity in Jewish Law (Bar Ilan University monograph) (1979) p. 6.

^{290/} E. N. Cahn, The Sense of Injustice (1949) p. 105. Russian jurist Petrashitsky articulated and developed this concept. Id.

^{291/} M. T. Hilchot Melachim III:4; see A. Kirschenbaum, "A Cog in the Wheel," in Israel Yearbook on Human Rights (1974) Vol. 4 pp. 168-93; L. Landman, "Law and Conscience: The Jewish View," 18 Judaism 21-24 (Winter 1969); S. B. Freehof, Reform Judaism and the Law, (Louis Caplan Lectureship on Jewish Law) (1967) p. 11.

^{292/} E. Rackman, "Truth and Wisdom: An Orthodox Approach," 10 Judaism 143 (Spring 1961).

^{293/} Id.

So therefore if, in the traditional Halakhic process, there is encounter with God then,

as in prayer, the process cannot be oblivious to life. What is more, as in prayer, the same texts are discovered to be meaningful throughout the millennia and amid the diversity of human situations in every age, so the same legal texts address themselves to many new legal problems and permit extensive discovery. . . . The ongoing dialogue between God and Israel involves both God and man.^{294/}

Thus, David Hartman -- another liberal Orthodox thinker -- says, "Kenneset Israel was, and will remain, responsible for the way of life (Halakha) it develops"^{295/} despite the system which posits that the ultimate source of Halakhic authority is God. This can be true whether one understands revelation to be a historical, public and verbal event or a subjective memory of a reaction to a particular meeting with God.^{296/} Thus, in Kantian terminology,

^{294/} E. Rackman, "Israel and God: Reflections on Their Encounter," 11 Judaism 233-34 (Summer 1962).

^{295/} D. Hartman, "Halakha as a Ground For Creating a Shared Spiritual Language," 16 Tradition 16-17 (Summer 1976).

^{296/} So Buber. B. Kraut, "The Approach to Jewish Law of Martin Buber and Franz Rosenzweig," 12 Tradition 57 (Winter/Spring 1972). Alvin Reines says that "if God authored the Halakha, it cannot be changed." A. Reines, "Who is the 'Author'?" 29 Judaism 82 (Winter 1980). But this only begs the central question in the authority of Halakha, that is, not whether God "authored" it but how is what God "authors" transmitted to humanity. Reines thus strikes at a straw-man caricature of traditional Judaism (which he denominates PHRO--or PHarisaic-Rabbinic-Orthodox) which is belied by the dynamic quality of the process (Halakha), the Divine essence of which he can only see in the crudest anthropomorphic terms. But, as a matter of fact, is the caricature false or merely exaggeration? Jewish historiography has admitted a level of truth--partial though it may be--to the New Testament stereotype of the pietistic arrogance of the Pharisees. In fairness to Dr. Reines, a substantial portion of contemporary orthodoxy displays its own pietistic arrogance in a striking anti-intellectualism that insists that the precision of its punctiliousness is required because, literally, God says so.

"one would say that the heteronomous Law of God becomes autonomous through the willing consent of scholars and ordinary Jews throughout the centuries."^{297/} It is an interaction, dialogue and dialectic between autonomy (self-authority) and heteronomy (imposed or God-authority) which is projected by the holy texts of Judaism: the Bible, Talmud and various strata of midrash. When man "merges his will with that of his Creator"^{298/} the problem of heteronomy (reconciliation with externally imposed norms) is, in the traditional Jewish projection, solved.^{299/}

But this proposed reconciliation obviously contemplates a continuing underlying tension for the Jew. Thus, Buber's insistence, for example, that "one's own revelatory encounter [with God] must be the basis for conforming [religious] behavior."^{300/} Buber rejected the authority of Halakha, but he did not reject the authority of autonomy, so to speak, to "impose" Halakhically - conforming behavior upon oneself. The central analytical problem with Buber's theology cum encounter is that the Jew will continually ask: what shall I/we do?^{301/}

^{297/} M. Roshwald, "Authority, Skepticism and Dissent in Judaism," 40 Jewish Social Studies 192 (Summer/Fall 1978). See Gen. 12:1-2 (God's promise to Abraham); Ex. 3:10-12 (God's promise to Moses) and Jeremiah 1:5-8 (God's sanctification of the prophet) for Biblical instances of human consent as the basis for God's authority - that is, as the basis for human response to God's authority.

^{298/} Avot 2:4.

^{299/} A. Carlebach, "Autonomy, Heteronomy and Theonomy," 6 Tradition 16 (Fall 1963).

^{300/} B. Kraut, op cit. supra at 58.

^{301/} So Rosenzweig, Id. at 60.

This issue is addressed by Buber's most famous interlocutor, Franz Rosenzweig. Rosenzweig distinguishes between law (Gesetz) and commandment (Gebot), the former being "a body of precepts and regulations with which to organize a life under God" and the latter "the Divine call in which one feels the immediate presence of God." Law, to Rosenzweig, must become commandment for which one must have the religious ability to experience the same as God's commandment to him. He thus calls on us to increase our ability to perform mitzvot, which stand before us as law becoming commandments upon our subjective embrace of them as such.^{302/}

Obviously this dialectic between God and man which yields commandment out of "mere law" does not deny the "deep religious inspiration" which is at the heart of the Kantian system, which posits that reason and reason alone is the moral sense of man. To be sure, according to Kant, this "reason", when refracted through the human conscience and its categorical imperative is the only possible source of moral ideals and rules of conduct. At its heart, though, a deep religious inspiration can and does underlie the Kantian system, which contemplates but does not sufficiently address the "intuitive, affective and imaginative areas of the human psyche" and the role played by historical religions with their acts of revelation and processes of tradition^{303/} by which the categorical imperative is amplified and fructified.

^{302/} Id. at 58-59.

^{303/} A. Carlebach, op cit. supra at 23. Carlebach says that Reform Judaism makes the same mistake. The same point of the text is generally made by neo-Kantian Jewish philosopher Hermann Cohen, who identified traditional Judaism as Kant's "religion of reason." Id. at 26. Rosenzweig was Cohen's student.

V.

The interaction of the autonomous Jewish self with a received or inherited heteronomous Jewish law is not inconsistent with the precepts of that law as it has been inherited over the centuries. The so-called authority of Joseph Karo's Shulchan Aruch, an abbreviated code of Jewish law published in the 16th century, was "made necessary by the growth of the diaspora and the end of central rabbinic seats of learning. [As such], it was a radical change in the essential character of the historic Halakha, which to that point had been an outgrowth of the [above-described] dialectic process."^{304/} So, therefore, "differences of opinion on Halakhot by various authorities are not inconsistent with its objective character because adherence to the text of the Bible and Talmud is the objective framework or core which serves to provide a framework for one's freedom of interpretation."^{305/}

In all, it is possible to discern three levels of traditional authority in the Halakhic system. This does not include the Divine nature of the Halakha itself, whether dictated or inspired, inasmuch as that authority (I will do what God wants me to do) is at the foundation of all religious behavior. The three levels consist, first, of the local autonomy of the rabbi as the mara d'atra of his kahal. As indicated earlier, his piety, learning and charisma will be the basis for the existence and

^{304/} D. Aronson, "Faith and Halakha," 21 Conservative Judaism 39 (Fall 1966).

^{305/} M. Sosevsky, "The Lonely Man of Faith Confronts the Ish Ha-Halakha," 16 Tradition 83 (Fall 1976).

effective use of whatever authority is yielded by him. Second is the consensus of opinion of various rabbinic authorities which gradually becomes crystalized over time. Third, is the individual teacher or rabbi, not necessarily of the same locale, whose vast authority is acknowledged by popular acclaim by reason of his extraordinary scholarship, piety and personality.

The authority of the traditional rabbi as here described does not depend upon the historic validity of verbal revelation at Sinai. It may depend upon a community's shared value in the historic validity of verbal revelation but that is distinct from the validity of such verbal revelation itself. A rabbi is not "sent" by God to be His voice in a congregation; rather rabbis are designated and empowered by a consenting group to articulate and interpret his or her best understanding of the demands of God in this place and this time. True, in an orthodox or traditional scenario, the community's antecedent commitment to verbal revelation at Sinai will be the bonding agent that describes both the rabbi's responsibility and the congregant's opportunity. But orthodox congregations can and do relieve their rabbis of responsibility--not because they are rejecting the word of God but because they have lost confidence, i.e., consensual authority, which had been the possession of the now de-legitimized spokesman.

Authority does not come with the office as much as does the opportunity for the investment of authority by a willing community. Certainly articulate and charismatic Reform rabbis have, over the years, been authorities in their time and in their place. This was not because of antecedent commitment to verbal revelation at Sinai. It obviously was due to the provisional willing consent of the

community of individuals, which had psychologically resolved that wisdom and charisma were more worthy of respect and obedience than tolerance and rejection. So, all decisions of "law" in such a system -- of whatever denomination -- can be seen to derive their ultimate validity from their implicit (or explicit) assent by a popular majority. Indeed, even in Orthodoxy the door is left open to individual dissent, based upon one's conscientious objection to the consensus of the majority, thus allowing for the possibility of the law's constant reexamination and revision in the continuous study and debate among its students.^{306/}

Traditionally, then, autonomous motivation has been a critical factor in the successful transfer of "mere law" (Gesetz) to commandment (Gebot). If, for example, one's autonomous intention to perform this or that mitzvah is present, though he is forcibly prevented from doing the same, his intention is "credited" to him -- in Talmudic terms -- as if he had fulfilled it.^{307/} Other Talmudic concepts readily suggest autonomous will as the predicate to authentic Jewish living, to-wit: v'anvayhu (adorning the commandments);^{308/} hidur mitzvah (beautifying the commandments);^{309/} hiyuv mitzvah (love of the commandments);^{310/}

^{306/} I. Jakobovitz, "Review of Recent Halakhic Periodical Literature," 4 Tradition 96-97 (Fall 1961).

^{307/} Kid 40a.

^{308/} Mekhilta, Shira Ch. 3 (ed. Horowitz-Rabin) p. 127; Shab 133b; Suk 11b; Nazir 2b.

^{309/} BK 9b. Note that Rashi here says that this is an equivalent principle to v'anvayhu.

^{310/} Pes 68b; Suk 41b; Sota 13a; Kid 33a.

lishmah (intention for fulfillment);^{311/} kavanah (wilfullness or single-mindedness);^{312/} zerizut (eagerness to fulfill the commandments);^{313/} chasid shoteh (excessiveness of the foolish pietist);^{314/} averah lishmah (transgressions performed with good intention for the sake of a greater mitzvah);^{315/} and horaat shaah (temporary suspension of antecedent obligations).^{316/}

These legal precepts obviously contemplate an autonomous encounter with inherited religious norms. Embedded therein also is the concept of Jewish collective responsibility, or kol yisrael aravim zeh bazeh, namely that included in my responsibility to perform each of the mitzvot there is the responsibility to see that others do likewise.^{317/}

It is obviously a flawed apperception which renders autonomy and authority such canards in the reconciliation of Halakha and liberal Judaism. Halakha, in its traditional formulation, is

311/ Pes 38b, 50b; Suk 9a; Git 20a; AZ 27a.

312/ Ber 5b, 13a, 31a; Eruvin 95b; Pes 114b; Meg 20a.

313/ Pes 89b; Yoma 84b; Men 43b.

314/ Sota 21b.

315/ Nazir 23a-b; Horayot 10b. Cf. Tos. to Haggiah 2a-b, which declares that we must cause others to avoid large violations of the Halakha by ourselves performing small violations; and Ber 63a and Raba's remark there that an averah can be consonant with Proverbs 3:6 ("In all thy ways acknowledge Him, and He will direct thy paths."). But see A. Lichtenstein, "Does Jewish Tradition Recognize an Ethic Independent of Halakha?" in M. Fox, ed., Modern Jewish Ethics (1975) p. 68 n. 25.

316/ Ber 54a, 63a; Yoma 69b; Yev 90b; Horayot 6a.

317/ See RH 29a-b and RaN ad loc. See generally D. Gottlieb, "Collective Responsibility," 14 Tradition 48 (Spring 1974).

"the most democratic of endeavors since anyone may enter the gates of the halls of study and on his own volition, without the necessity of intermediaries, use the Halakhic process to become a creative partner of God."^{318/} The Oral Law is not so much a set of ready-made propositions but, as Walter Wurzburger says, "a process in which subjective factors come to the fore most prominently because such wide latitude is accorded to the individual rendering each Halakhic decision."^{319/} The problem for a modern or liberal Judaism is, of course, just who the "individual rendering each Halakhic decision" is. Can we "democratize" the Halakhic process without at the same time abandoning its centripetal force as the cohesive agent of historical Judaism? The tension between an anxious autonomous inquiry asking, with Buber, mah adonai doresh? -- and a received tradition which is not-yet-dynamic until it is the object of coherence and reconciliation--is surely fine and delicate.

For the question is not how do we modify the Halakha--as this can be done--as much as it is "how do we maintain the Jewish group. How do we make of an aggregate of Jews a Jewish community [committed to Judaism]? How do we give Jews a sense of Jewish peoplehood? How do we infuse them with Jewish values? In sum, how do we create a Jewish identity?"^{320/} Halakha can thus best be

^{318/} M. Sosevesky, op cit. supra at 75.

^{319/} W. S. Wurzburger, "Plural Models and the Authority of the Halakha," 20 Judaism 394 (Fall 1971).

^{320/} L. Kravitz, "Halakha and the Role of the Community," 29 Judaism 80 (Winter 1980).

understood not as a mere expansion of existentialism but by the categories of political philosophy, namely law and community.^{321/}

But it is individual Jews who are its yeast; otherwise, as Moshe Silberg asks, "Why is the Talmud filled with so much exactitude and measurement as opposed to the open language of common western law?

Jewish jurisprudence . . . is a jurisprudence which does not depend on judges. The function of the law is not to prescribe for the judge how to decide; it prescribes how to conduct his life. . . . The turning of Jewish jurisprudence directly to the person is based on, or follows as a logical inference from, the commandment to study Torah. It is for this reason that the commandment has been declared as the 'equivalent of all others' (M. Peah 1:1). It is striking--I do not know if anyone has already called attention to it--that the term pesak din in the sense of a concrete determination is found in the Talmud only once (BB. 130b).^{322/}

Halakha is thus "the dialectic of freedom and order [which] is not a refuge from this paradox of human-ness--the need for freedom and transcendent standards--but rather its most appropriate expression."^{323/}

^{321/} See Guide I:54, II:36-40. See generally D. Hartman, "Halakha As A Ground For Creating a Shared Spiritual Language," 16 Tradition 7 (Summer 1976).

^{322/} M. Silberg, Jewish Law in Ancient and Modern Israel (B. Z. Bokser, trans.) (1973) p. 48.

^{323/} Borowitz, "Subjectivity and the Halakhic Process," 13 Judaism 211, 219 (Spring 1964). The Jewish tradition of commentary is an example of the necessary union of awe and presumptuousness which animates a dynamic interaction between the Divine and His vehicle. See G. Scholem, The Messianic Idea in Judaism (1971) pp. 289-90.

CHAPTER 4

THE DIALECTIC OF HALAKHA: AN OVERVIEW

I.

The central goal of Halakha in providing the way for man to fulfill the will of God's law is, in short, to impart "a means whereby the individual obtains physical and spiritual happiness."^{324/} It was Judaism's greatest philosopher and theoretician, Moses Maimonides, who examined this goal by articulating two different aspects of health and perfection: namely that of the body and that of the soul.

Law itself, to Maimonides, is divided between human law and divine law. The former (nomos) is not divine, and is like a policeman, achieving its objectives through punishment or the threat of punishment. This as opposed to divine law, which tries to create "an internal mechanism of restraint through education, as well as to provide its adherents with an introduction (at least) to the contemplative life. Nomos merely seeks a just and orderly community pursuant to secular goals."^{325/}

Thus Maimonides distinguishes between the law in general, which is made up of politically salutary beliefs and regulations, and the Law par excellence, which contains some beliefs which are without political utility but which are conducive to the acquisition

^{324/} B. Cohen, Law and Tradition in Judaism (1969) p. 57. Cf. "All the provisions of the Torah result in peace." Git 59b.

^{325/} See M. Galston, "The Purpose of the Law According to Maimonides," 69 JQR 27, 32, 34 (July 1978); cf. Guide II:40.

of correct religious opinions through speculation and philosophical inquiry.^{326/} The law in general provides us with the benefits of collective association and the good that derives therefrom: the utility of shared responsibility, and the acquisition of what Maimonides calls "noble morals."^{327/} The Law par excellence, in contrast, gives rise not only to noble but to "virtuous morals," and is directed toward the good of each individual in association or community. Its focus on the individual is thus a threat to communal political stability. The necessary consequence is a continuing tension between the two laws.^{328/}

The reason for this brief excursion into the legal theory of Maimonides is that he is the paradigm Jewish philosopher on the proposition that Halakha has utility far beyond social control. It is the realm of "ultimate perfection" or what Maimonides called the "actualization of man's rationale faculty"^{329/} by which we move from God's image to His likeness, which is the ultimate goal of Judaism and its law.

The law is thus to be "the leaven"^{330/} which aims to draw man closer and closer to God and a resonating spiritual happiness.

326/ Guide III:28.

327/ Guide II:40 and III:27, 28. see M. Galston, op cit. supra at 49-50.

328/ M. Galston, op cit. supra at 50.

329/ Guide III:27.

330/ From J. T. Haggigah I:7, p. 76c: "Said R. Hiya Bar Ba: 'They have forsaken Me.' For this I would forgive them. Have they 'kept my Torah?' For if they forsook Me and kept my Torah, the leaven in it would draw them near to me."

This law is, as has been argued by Rosenzweig, not necessarily to be observed only "because it comes from God" but can be imparted to others "because it is inherited as the access to God--the Jewish means to commandment, contemplating the right of experience to give testimony: the form through which the content of God is exposed and expressed."^{331/} However it is "sold," Jewish law is the Jewish means to God, but is not God Himself.

This notion of law as the Jewish means to God suggests an underlying distrust of human intuition or emotion for the same purpose. And with some exception, notably that of Martin Buber,^{332/} this has been the normative position of Jewish law and thought. Human intuition,

as a medium of what is abidingly real and good and true was regarded by the Jewish sages with suspicion. Judaic thought was prone to consider the claims of individuals who said they had ineffable, unshakable and unreportable experiences (even when they were not the result of psychic disturbance) as of questionable worth and dubious validity.^{333/}

It is understandable, therefore, that Judaism's endeavor to connect all value and wisdom to the biblical source is not only "an attempt to draw out that which is objectively in it; it is an

^{331/} F. Rosenzweig, On Jewish Learning (1955) pp. 117-120. Cf., B. Kraut, "The Approach to Jewish Law of Martin Buber and Franz Rosenzweig," 12 Tradition 62 (Winter/Spring 1972).

^{332/} B. Kraut, op cit. supra, and H. Simon, "Martin Buber and the Law," 18 CCAR Journal 40 (April 1971).

^{333/} B. Heller, "'Experience' As A Medium of Religious Truth," CCAR Journal 25-26 (June 1960); the Talmud's distrust of intuition is most simply expressed by Rav Zera, who says "I continually implore you: do not go beyond the bounds of the legal system." RH 13a (our translation).

attempt on our part to unify our knowledge by reference to a single source of authority"^{334/} for which there is clear philosophical and psychological justification. As Louis Jacobs has put it:

A problem every religion has to face is how to avoid the excesses that so easily can result from religious emotionalism. The sea of religion is strewn with the wreckage of ships lured into the inhospitable waters by the siren-song of enthusiasm. Rabbinic/Halakhic Judaism seeks to avoid this danger by its stress on law.^{335/}

So, Judaism "does not derive from personal prophetic visions or from moments of personal revelation. It is forced upon us as the only alternative to forfeiting our very humanity,"^{336/} which we would forfeit if we each followed our own purely personal religious mystique.^{337/}

Law is thus necessary to Judaism, without which it loses its social and historical character and becomes an institutional cover for hubristic emotionalism in the guise of religious rhetoric. Indeed, if Judaism along with other American religions--excepting their traditional manifestations--share an unmistakable impotence in the contemporary society, it is not from excessive legalization but, on the contrary, from the decline in the social forms of expression--ritual, tradition, authority and universality--by which Judaism identifies itself as a formal community. Instead, liberal Judaism, like its liberal American

^{334/} B. S. Jackson, "Legalism," 30 Journal of Jewish Studies 13-14 (1979).

^{335/} L. Jacobs, The Love of Law and the Law of Love (1974) p. 5.

^{336/} M. Fox, "Heschel, Intuition and the Halakha." 3 Tradition 10 (Fall 1960).

^{337/} H.J. Berman, The Interaction of Law and Religion (1974) p. 79.

counterparts, has become the private affair of individuals seeking to be unburdened of their loneliness, a cult of personal peace of mind.^{338/} So, therefore,

contemporary religious thought must incorporate the dimension of law into its concept of the sacred, and contemporary religious experience must be incarnated in legal structures and processes, both within religious communities and in the larger society of which they are a part^{339/}. . . .

In short, then, Jewish law can be seen as Judaism's only reliable way of finding God in life, and, perhaps more importantly, is Judaism's antidote to the inconsistencies and vagaries of emotion, intuition and style.

II.

True to the complexity of its purpose, Jewish law functions in a continuing creative dialectic between the literal din Torah as it appears in the earliest strata of Jewish holy literature, and the values which the architects and interpreters of Jewish law over the centuries have been anxious to preserve. It is a gross error, obviously, to suggest that Halakha is, and always has been, a purely coercive order or system,^{340/} or that "legalism" in the sense of exclusive reliance upon legal argument -- without attention to moral value -- is the summum of Halakha's features.^{341/}

^{338/} Id. at 95.

^{339/} Id. at 105.

^{340/} B. S. Jackson, op cit. supra at 17.

^{341/} Id. at 8.

The reason for this creative tension between law and morality, and the correlative lack of a static quality to Halakha, is that law, in order to be effective as a pedagogical device for the refinement of the human personality^{342/} must, perforce, be believed. Though it itself is the antidote to emotion and intuition, as aforesaid, it nevertheless involves man and woman in more than his or her reason and will, namely his or her emotion, intuitions and commitments, and his or her faith, as well.^{343/}

Here, however, emotion and intuition are drawn upon for their capacity to effect fidelity to law and abhorrence of illegality and chaos. These intuitive sensations cannot occur if grounded only in a proffered utilitarianism (e.g., "most people are better off this way"), because that would beg a rational inquiry. Rather they must be based upon a deep fundamental acceptance of the inherent rightness of law's (and religion's) four essential characteristics: ritual, tradition, authority and universality.^{344/}

In this context, Jewish law or Halakha differs from no other legal system. For example, ritual in any system can be defined as ceremonial procedures which symbolize the timelessness and objectivity of the system. Though at times religious ritual may seem archaic and outmoded, William Etkin argues that it is

342/ "The mitzvot were given solely for the purpose of enobling creatures." Vayikra Rabbah 13:3; Shemot Rabbah 44:1; cf., Nachmanides on Deut. 22:6.

343/ H. J. Berman, The Interaction of Law and Religion, (1974), p. 14.

344/ Id. at 25, 31.

characteristic of all religious ritual that it is not the actions in themselves that signify but the self-consciousness demanded by them which is effective.^{345/} So

to be effective as a signal and guide to conduct, a ritual must stand out as unusual and not be done for practical effect. Its non-utility must be conspicuous, so that it will compel attention and not be lost in the welter of functional actions of everyday living.^{346/}

Close to ritual is tradition, which consists of language and practices handed down from the past which symbolize the on-goingness of the system. Authority, in this context, distinguishes Halakha and Jewish law from other systems in that the former is concerned with God as the supreme moral authority and not as the supreme secular power. Authority therefore functions in Halakha not as a matter of power but of reliance; reliance upon the written or spoken sources of the law which are considered to be decisive in themselves and which together symbolize the law's binding power. Finally, and most importantly for purposes of understanding the Halakhic dialectic, Halakha claims to embody universally valid concepts or insights which symbolize its connection with an all-embracing truth.

When combined, these four attributes bring into existence a collective attribution of Halakha's (or any legal system's) over-arching quality, unifying what philosopher John Rawls calls "legal feelings" (entitlement, violation, obligation, fairness and

^{345/} W. Etkin, "The Mystery of the Red Heifer: A Scientific Midrash," 28 Judaism 356 (Spring 1979).

^{346/} Id. So the dominance and courtship displays of most birds, or, in the Jewish context, "washing" before eating bread.

objectivity), "moral feelings" (guilt, shame, remorse, and indignation) and "natural feelings" (love, friendship and trust).^{347/}

But how do we find the universality in so particular a system as Halakha? The answer is that we must understand the didactic or pedagogic function of Halakha. As was suggested by Nachmanides on Deuteronomy 6:18 ("Thou shalt do what is good and right in the eyes of the LORD") this standard can only be "properly understood . . . if we have at our disposal sufficiently large numbers of concrete specific rules exemplifying the underlying principle as to enable us eventually to acquire an intuitive grasp of the principle [of the good and the right] itself."^{348/}

Obviously, then, decision-making in Halakha should not be a mechanical process.

The emphasis placed on certain principles, the weight given to specific values, the appreciation of the historical situation and its needs, are all constitutive elements of a Halakhic decision. Applying the law to a living situation, the judge/decisor gives expression to an entire philosophy of life. Judges, as distinct from logicians, are responsible for their decisions.^{349/}

Responsibility, here meant as being one morally and historically answerable for the logical consequence of a decision, is then a key to understanding the predicament of the rabbi/ decisor in any question involving the appropriate Jewish norm. Indeed, philosopher

^{347/} J. Rawls, A Theory of Justice (New York: 1974) pp. 479-90.

^{348/} W.S. Wurzbarger, "Law as the Basis of a Moral Society," 19 Tradition 50 (Spring 1981).

^{349/} D. Hartman, "Halakha as a Ground for Creating a Shared Spiritual Language," 16 Tradition 16 (Summer 1976).

Edmund Cahn suggested that the Talmud's "Oven of Achnai" story^{350/} (where the majority refused to accede to the Heavenly Voice), is teaching "the moral that the individual has the right and duty to bear personal responsibility for his decisions. The judge [or the individual] must interpret the law as best he can, and no miraculous act can relieve him of the attendant responsibility."^{351/}

Instances are numerous in Halakha, where, "in the process of judging cases

even though, theoretically, all decisions are dictated by precedent, rabbis have, in fact, justified almost any decision they chose to make by construing the available precedents either broadly or narrowly, as their predilections dictated. [The rabbis, in areas where the Bible was relatively silent] decided disputes on the basis of their own best evaluations of equity.^{352/}

Perhaps the most famous example of this living law at work is in the area of capital crimes, wherein the death sentence is prescribed in Leviticus 24:23 and Numbers 15:32ff. A general antipathy to capital punishment, attributed to Rabbi Akiva and Rabbi Tarfon^{353/} resulted in remarkably stringent rules on witnesses in

^{350/} BM 59b; Eruvin 7a; San 3b; Hul 11a; M. Eduyot I:5; Ber 52a. See supra at 15.

^{351/} E. Cahn, "Authority and Responsibility," 51 Colum L. Rev. 838-39 (1951). But see J. Stone, Human Law and Human Justice (1965), at 27 n.89. Stone cautions that Yehoshua's rejection of the Heavenly Voice was for the sake of the integrity of the fellowship of the learned, and not merely for his individual heart and reason. This qualifies, to some extent, Cahn's use of the story as a lesson in personal responsibility.

^{352/} E. Dorff, "The Interaction of Jewish Law With Morality," 26 Judaism 460 (Fall 1977).

^{353/} M. Makkot I:10.

all murder cases,^{354/} the consequence of which was, essentially, the end of capital punishment as an appropriate Jewish sanction should Jewish legislative authority ever be restored. Here the legal notions of capital crime and punishment have served as the matrix of moral conceptions of fairness, equity and human vulnerability.^{355/}

On this basis it is possible to see a moral "ought-ness" deriving from Halakha as a sense of obligation evoked by rules which are rooted in a transcendent realm. Mere obedience to law, whether it is that which would ultimately have been enacted by human society without divine legislation^{356/} or not, though it is surely incumbent upon all Jews,^{357/} is a necessary but not sufficient condition of morality.

From what can be described as a "consumer perspective," the world of legal analysis can be divided into a submissive type and a consensual type. The former can be compared to the paradigm of

354/ M. San IV:5-V:5.

355/ Other examples abound. The law of evidence is interpreted differently for murder and the agunah despite explicit biblical mandate to the contrary. M. Yev XVI:7. Shulkan Arukh Even ha-ezer 17:21 [Isserles] cites Maimonides' responsum on evidence requirements concerning agunah: "Whoever adopts a stringent position in such cases and subjects the evidence which is offered to detailed investigation and examination does not behave properly." The Talmud at San 46a, says that "the Bet Din may impose flagellation and capital punishment even when not warranted by Torah, but not with the intent of disregarding the Torah, but in order to guard it." The important values here are two: an elasticity in the law and the rabbis' human concern for persons threatened by tragedy. Note, however, that elasticity is not always permissive. "Why were the bazzars of Beth Hini destroyed? Because they based their actions on [a leniency] in Scripture [rather than the stringency imposed by the rabbis]. BM 88a and Rashi ad loc.

356/ These laws are identified by the Talmud as mishpatim. Yoma 67b.

357/ Cf. San 56b.

Isaac in the akedah story. He accepts his instruction without challenge. The latter can be compared, in the same sense, to the character of Abraham. Abraham encounters God, in the akedah and elsewhere, and exhorts Him to His own highest standards of morality. For Abraham and the consensual type,

equity and compassion do not constitute a remedy of despair beyond the margin of law and ethics; on the contrary, they are working emollients within law and ethics, designed to keep the rules and decisions elastic, flexible, and humane. A concern with justice and compassion is what converts mere legalism into living law.^{358/}

It must be the conversion of mere legalism into living law to which the Talmud refers when it says that "he who reconciles a true judgment with its Truth becomes a partner with God in the process of creation."^{359/} It is this reconciliation, this conversion which yet makes it possible for the modern liberal Jew to "become a partner with God in the process of creation" by articulating and undertaking a coherent and responsible Halakha, deriving both from inherited norms and autonomous reflection. In this way, "true judgments" can be reconciled with The Truth.

^{358/} E. Cahn, "The Juristic Approach to Moral Problems," 70 CCAR Yearbook 190-91 (1960).

^{359/} Shab 10a. Our translation. Soncino renders the same: every judge who judges with complete fairness even for a single hour, the Writ gives him credit as though he had become a partner to the Holy One, blessed be He, in the creation.

CHAPTER 5

THE INTEGRATION OF LAW AND MORALITY: AN APPROACH OF TRADITIONAL JUDAISM

I.

In order for Judaism--of whatever variety--to continue as a historical experience of encounter with God and His revelation, it is critical to contrast the notion of an independent autonomous ethic by which God's suggested best way of life (Halakha) is measured, with an integrated system of ethics and law. In the latter system, normative "changes" in the law--or Halakha--are understood not as matters of simple policy-based change, as in most legislative deliberations, but rather corrections, wherein both the letter is changed to conform to the spirit and our understanding of the spirit is changed to conform to the letter. In this construct, human autonomy is required as the agent of reconciliation: the force, acting as God's partner, which gives moral values to the positive law.

This understanding would undergird the mytho-poetic Talmudic references to the effect that a perfect and complete Halakha was given to Moses at Mt. Sinai. This can only be true, obviously, if the continuing historical encounter as represented by the rabbinic process of she-elot u'tshuvot--specific inquiries and responses in Jewish law--pertains to a process of correction, rather than change. The Jerusalem Talmud, for example, contains the dictum that "in consideration of the totality of Scripture, Mishnah, Talmud and Aggadah, even that which a worthy student will discover and reveal to his teacher, indeed even this was told to Moses at Mt.

Sinai."^{360/} To the same effect is the aggadic reference in Menahot^{361/}, where God permits Moses to step, as it were, into the future. Moses is permitted to observe the "gemara shiur" of Rabbi Akiva in the latter's yeshiva. God has told Moses that Akiva will be one "who will expound upon each tittle [of the Torah] heaps and heaps of laws."

Those laws, needless to say, are so obscure and confusing that, the story relates, Moses is distraught and frightened that his progeny have forgotten their origins. Only when he hears Rabbi Akiva respond to the inevitable inquiry: whence such a law?--does he feel secure. Akiva's response, that the law "was given to Moses at Sinai" satisfies Moses that though there may be strain and elaborate circumlocution in the process, it is nevertheless essentially a constant striving for an a priori perfection. He then is able to leave the scene satisfied.

It is not necessary, in this projection, to belittle positive law to the point where we say that "the specific laws are responses to revelation; they are not the content of the revelation. The demands of morality are absolute. The specific laws are relative."^{362/} Seymour Siegel's argument here is that there is something called "morality" which is superior to the "mere" positive laws. In contrast, we are suggesting that the process of

^{360/} Peah II:6, p. 17a (our translation).

^{361/} 29b.

^{362/} S. Siegel, "Ethics and the Halakha," 25 Conservative Judaism 35 (Spring 1971).

reconciliation need not be one of simple abrogation, but also of reinterpretation, wherein we refine (correct) our understanding of the antecedent moral meaning behind the positive law, which we then put into a more appropriate perspective. In this way the biblical meaning of the lex talionis ("eye for an eye", etc.) and capital punishment were understood. So, too, could the single Torah reference to mamzerut have been viewed as a moral issue of family, tribal and national integrity, rather than as a legal issue involving elaborate circumstances and consequences under which a technical definition of Jewish illegitimacy prevails.^{363/} In this way, the process is best represented as one of interpretation rather than abrogation.^{364/}

To the same effect, that the process is one of reconciliation and correction, is the statement of Rav Assi that "the Torah was given [at Mt. Sinai], and the Halakha was then regenerated [or reformed]" in order to conform to the antecedent morality which was not changed by the Sinaitic revelation.^{365/}

^{363/} D. W. Halivni, "Can A Religious Law Be Immoral?" in A. A. Chiel, ed., Perspectives on Jews and Judaism (1978) p. 169.

^{364/} Cf. Kid 18a, wherein the requirements of Exodus 22:2 to sell a thief for his debt is interpreted to mean only if his value is exactly equal to the value of his debt--essentially rendering the rule as theoretical only. Also, Ket 52b, where it is determined that a wife's estate should be severable, to encourage free alienation and transfer of property to daughters in order to make them, so-to-speak, more eligible for matrimony. This rule runs counter to Numbers 27:8, though the rabbis base their rule here on a verse from Jeremiah which they call d'oraita (revealed at Sinai). Maimonides calls the same asmakhta, or derivative only. M. T. Hilchot Ishut XII:2.

^{365/} Shab 135a-b (our translation).

The interaction which is disclosed here--between positive law and an antecedent, though equally revealed, morality--is manifested in the exhortation that though "without Torah, there can be no derekh eretz (morality)"^{366/}, derekh eretz (morality) in fact preceded Torah and its medium of positive law.^{367/} This explains, as well, the expressions that "whoever says 'I care only for Torah' will lack even Torah"^{368/} and that "one may be exempt from the laws of humanity but obligated according to the laws of Almighty God."^{369/}

There is a complimentary tension here, wherein "in effect, the Halakhic Jew must submit simultaneously to two authorities in deciding what to do [for] believing that God commands certain acts is neither a sufficient nor a necessary moral justification for

366/ Avot 3:17; cf. Yoma 85b s.v. teshuva.

367/ Leviticus Rabbah 9:3 (Tzav). Cf. Eruvin 100b, the classical Talmudic text for support of an a priori morality, to the effect that: "if the Torah had not been given, we could have learned modesty from the cat, not to rob from the ant, chastity from the dove, and considerate behavior to our wives from the rooster." Maimonides, however, says that kabbalat Torah abrogated this antecedent ethic, but only as a basis of authority. Perush Ha-Mishnayot, Hullin 7:6. And Marvin Fox asks whether, in any event, this text is not reference only to our capacity to imitate. Is it not just as likely, he says, "in a state of nature to imitate the ferocity of the lion, the murderousness of a wolf pack, and sexual behavior of rabbits?" M. Fox, "Reflections on the Foundations of Jewish Ethics and Their Relation to Public Policy," in Society of Christian Ethics, 21st Annual Meeting, Selected Papers (1980) p. 41.

368/ Yev 109b.

369/ BK 55b.

doing these acts."^{370/} Morality is, therefore, a compliment to Halakha, and not its alternative.

There are, of course, situations in which ethical factors--the preservation of life, the enhancement of human dignity, the quest for communal or domestic peace, or the mitigation of either anxiety or pain--sanction the breach, by preemptive priority or outright violation, of specific norms. However, these factors are themselves Halakhic considerations, in the most technical sense of the term, and their deployment entails no rejection of the system whatsoever.^{371/}

In short, "when operative religious law is correctly applied, it never sacrifices moral goodness upon the altar of pedantic legalism."^{372/}

In this representation of Judaism, "it is unacceptable that the invocation of Jewish religious norms should be the vehicle for unethical outcomes,"^{373/} inasmuch as "morality is the conditio sine qua non for all law, including, of course, ritual law."^{374/}

^{370/} E.B. Korn, "Ethics and Jewish Law," 24 Judaism 208 (Spring 1975). The notion that we are responsible and answerable to two authorities simultaneously, the undifferentiated law or din and a correlative and inclusive ethic, amplifies and is supported by Nachmanides' exegesis to Deuteronomy 16:20 ("Justice, justice shalt thou pursue") on the question of why "justice" is repeated twice.

^{371/} A. Lichtenstein, "Does Jewish Tradition Recognize an Ethic Independent of Halakha?" in M. Fox, ed., Modern Jewish Ethics (1975) p. 67.

^{372/} E. B. Korn, "Ethics and Jewish Law," 24 Judaism 213 (Spring 1975).

^{373/} S. Siegel, "Reply to Michael Ziegler's Critique," 33 Conservative Judaism 79 (Winter 1980).

^{374/} A. Guttman, "The Moral Law as Halakha in Reform Judaism," 68 CCAR Yearbook 250 (1958). Cf. M. Suk II:1 that "if a lulav was obtained by robbery . . . it is not valid."

Morality, as it is understood here, is contextual and is "subconsciously integrated into the Halakhic framework.

Thus the virtue of the rebellious son text is not legal but moral--it is there to teach a lesson but not to provide a pretext for killing children [San 71a]. The morality of the text is posited; the capacity of humanity to apply it consistently and coherently causes the rabbis to treat it theoretically only. Their subconscious concern may be moral, but their conscious concern is structural.^{375/}

Contextual morality is thus integrated morality which is both revealed and dependent upon humanity to bring to bear in each specific instance of choice-making for the Jew in Judaism.

Contextual morality "is different from syllogistic and deductive reasoning involved in rendering the traditional p'sak din,

[in that] the contextualist employs his moral sense to evaluate and intuit the best way of eliciting maximal good from the existential predicament confronting him. Only a direct ad hoc process, usually--although this is logically a wholly separate question--his own, can serve as an operative basis for decision. Between ultimate value and immediate issue, there can be no other midwife.^{376/}

So, even Orthodox theorist J. David Bleich is able to assert--somewhat confusingly--that "Judaism does recognize an ethic which does not have the binding force of law in the sense of a discipline incumbent upon all people at all times, [but] . . . even

^{375/} D. W. Halivni, "Can A Religious Law Be Immoral?" in A.A. Chiel, ed., Perspectives on Jews and Judaism (1978) p. 169 (emphasis in original).

^{376/} A. Lichtenstein, "Does Jewish Tradition Recognize an Ethic Independent of Halakha?" in M. Fox, ed., Modern Jewish Ethics (1975) pp. 78-79.

this extra-legal ethic also constitutes an integral part of Halakha."^{377/}

It was the failure of b'nai yisrael to act as contextualists, rendering a Halakha which unites ethical sensitivity with the p'sak din, to which Rabbi Johanan referred when he said that "Jerusalem was destroyed only because . . . they based their judgments strictly upon Biblical law, and did not go beyond the requirements of the law (lifnim mishurat ha-din)."^{378/}

II.

But what are these ethical propositions, and where do they come from? To this the only answer must be that they are clearly and demonstrably embedded in the very text from which all positive law derives.

Deuteronomy 6:18 tells us, for example, to "do what is right and good in the sight of the LORD." Nachmanides, in his commentary on the verse argues that the text "states in a comprehensive way that in all matters of life, each should do what is good and right, including even compromise and [reconciliation with standards] beyond the mere limits set by positive law (lifnim mishurat ha-din)."^{379/} Again, commenting on Leviticus 19:2 ("you

^{377/} J. D. Bleich, "Halakha as an Absolute," 29 Judaism 33 (Winter 1980).

^{378/} BM 30b.

^{379/} Ad loc. s.v. u'ki'yotzeh (our translation). BM 16b, 108a-b and AZ 25b are all examples of application of this verse as the basis of the dialectic between the undifferentiated law and an

(footnote continued on following page)

shall be holy, for I, the LORD your God, am holy"), Nachmanides asserts^{380/} that the same is a positive commandment which is meant to provide a comprehensive ethical construct to the otherwise undistinguished legal standards which precede the verse.

To the same effect is Deuteronomy 4:5-8:

See, I have imparted to you laws and rules, as the LORD my God has commanded me, for you to abide by in the land which you are about to invade and occupy. Observe them faithfully, for that will be proof of your wisdom and discernment to other peoples, who on hearing of all these laws will say 'surely, that great nation is a wise and discerning people.'

For what great nation is there that has a god so close at hand as is the LORD our God whenever we call upon Him? Or what great nation has laws and rules as perfect as all this Teaching that I set before you this day?

Exodus 23:2 ("you shall not side with the multitude to do wrong"), Psalms 19:8-10 ("the teaching of the LORD is perfect . . . the precepts of the LORD are just"); and Proverbs 2:20 ("so follow the way of the good and keep the paths of the just").^{381/}

(footnote continued)

all-encompassing ethic. BM 108a-b, for example, describes the dina debar mezra or "the law of the abutter" whereby an owner of adjacent property has a preemptive "first right of refusal" to the purchase of a neighboring tract, permitting the voiding of a contract for the purchase of the property by another party who had not first obtained a waiver of the neighboring owner's preemptive right. This is an example of the rabbi's exercising what was in philosopher Edmund Cahn's felicitous phrase, their "sense of injustice." E. Cahn, The Sense of Injustice (1949).

^{380/} Ad loc. s. v. ki'af al pi sh'elu.

^{381/} See BM 83a and Rashi ad loc. for application of this last verse as the basis of the dialectic between the undifferentiated law and an all-encompassing ethic.

In addition to Biblical exhortations and mandates, there are a series of meta-Halakhic propositions, or ethical concepts which emerge from the corpus of Halakha when taken as a whole. These propositions, it is said, form a uniquely bound "wisdom-law" and rebut the contemplation of a distinction between the same.^{382/} Such propositions might include, for example, goodness, or the promotion of human welfare, fulfillment and virtue; right, or the equal protection of individual interests in a system governed by universalizability; and justice, in its distributive capacity as preventing any arbitrary inequalities, and in its retributive capacity as mandating proportionate return of reward and punishment.^{383/}

Reference in Deuteronomy 4:6 to "proof of your wisdom and discernment to other peoples" suggests yet another locus for the discovery of ethical propositions which must be comported with the otherwise fundamental positive Halakha, namely the prevailing ethical milieu of the surrounding culture. Though, as has been said,^{384/} Halakha and Judaism seeks to change the world and not conform to its standards and patterns, nevertheless we are clearly informed that it would be inconceivable for the Gentile to have a higher ethical standard than ours, where the Gentile would be prohibited from certain behavior which would otherwise be

^{382/} B.S. Jackson, (review) M. Carmichael, The Laws of Deuteronomy, Cornell University Press (Ithaca: 1974), 27 Journal of Jewish Studies 87 (Spring 1976).

^{383/} These categories are suggested by Eugene B. Korn in E. B. Korn, "Ethics and Jewish Law," 24 Judaism 203 (Spring 1975).

^{384/} See text supra at 12.

permissible for the Jew.^{385/} The inference here should not be overstated, that a morality external to Judaism should be its benchmark; we are suggesting only that a sensitivity to the surrounding culture can and must be an additional antenna by which the Halakhic Jew discerns morality in his quest for a perfect--corrected--Halakha.

Finally, there are values inherent in the antecedent or technically superceded standards of the Halakha, which constitute "the penumbra of mitzvot" which require "relation to a fundamental law."^{386/} That is to say, there are values in legal standards which have been superceded in a developing legal system, which values nevertheless perpetuate as positive ethical standards which the Halakha contemplates will continually be integrated into its framework. This is the essential meaning of lifnim mishurat ha-din.

^{385/} The rubric appears four times in two different forms. In one, it is rhetorically asked whether it would be conceivable that behavior would not be prohibited to Israel but prohibited to the Gentile. San 55a; Hul 33a. Elsewhere, it is asked whether it is conceivable that Israel would not be obligated in a matter as to which the Gentile is obligated. San 58b; Yev 22b. Cf. D. Hoffman, Sefer Melamed Lehoil (1954) Part I: pp. 11, 119 (smoking prohibited in synagogues generally and especially on fast days because, in large part, of the fact that Gentiles prohibit smoking in their churches). But see J. D. Bleich, "Halakha as an Absolute," 29 Judaism 35 (Winter 1980), which notes the teshuva of Rabbi Jacob Emden to the effect that fear of persecution by monogamous Christians led to the famous takkanah of Rabbenu Gershom mandating monogamy among Ashkenazim, rather than a manifest co-option of extant Christian ethics.

^{386/} A. Lichtenstein, "Does Jewish Tradition Recognize An Ethic Independent of Halakha?" in M. Fox, ed., Modern Jewish Ethics (1975) p. 81.

III.

Lifnim mishurat ha-din is a Talmudic concept usually rendered as "going beyond the letter of the law."^{387/} This despite the fact that its literal meaning is "within the line of the law," which we contend is a more appropriate representation of its contextual meaning. That is, that lifnim mishurat ha-din is not a standard which calls into play notions of morality or ethical behavior which stand outside of law, but rather that it defines The Law as a reconciliation of its positive limits with its antecedent moral content.^{388/}

Its earliest reference is in the Mekhilta,^{389/} commenting on Exodus 18:20 ("and you shall teach them the statutes and the decisions, and make them know the way in which they must walk and what they must do").

And make them know the way, etc., meaning the study of Torah; and what they must do, meaning good deeds--these are the words of Rabbi Joshua. Rabbi Eleazar of Modi'im, however, says: And make them know, means show them the path of life; the way, refers to visiting the sick; they must

^{387/} E.g., E. B. Korn, "Ethics and Jewish Law," 24 Judaism 213 (Spring 1975): "nor can it be consistently maintained that the concept of 'going beyond the law' [lifnim mishurat ha-din] is itself legal, for this contention is a paradox leading to a logical absurdity." Cf. I. Herzog, The Main Institutions of Jewish Law (1980) p. 385.

^{388/} We are indebted to Rabbi Saul J. Berman, the general scope of whose cogent analysis of this principle, S. J. Berman, "Lifnim Mishurat Hadin," 26 Journal of Jewish Studies 86ff. (Spring/Autumn 1975) and 27 Journal of Jewish Studies 181ff. (Autumn 1976), is in part reflected in the within chapter.

^{389/} Mekhita, Yitro, Massekhta D'Amalek ii (Horowitz-Rabin, ed.) p. 198.

walk, refers to burial of the dead; in which, refers to acts of loving kindness; and the deed meaning the positive law; they must do, meaning the law within The Law (lifnim mishurat ha-din).^{390/}

The suggested interpretation, in this initial aggadic passage, is that humanity is exhorted to combine law, in the sense of positive command or rubric, with justice, in the sense of virtue or ethical conduct.

The term shurat ha-din appears only once in the Mishnah.

There, in Gittin IV:4, the text states:

If a man makes his slave security for his debt to another, and he emancipates the slave, according to the shurat ha-din the slave is not liable for anything, but to prevent abuses his master is compelled to emancipate the slave, and he [the master] gives a bond for his [the slave's] purchase price. Rabban Simeon ben gamaliel says that he does not give a bond, but he nevertheless emancipates him.

The concern in this mishnah is a form of security which permits creditors to collect or secure debts from land or other property which his debtor has already alienated. That is, the creditor should still have an interest in the property which his debtor has sold. This security interest is maintained by the creation of a lien which follows the alienated property. Here, an emancipated slave (considered property) is exempted from property as to which a creditor's lien attaches.

This rule is identified in this mishnah as the shurat ha-din. Its meaning is obviously beyond notions of "strict law" and in fact refers to a rule beyond what would be understood as the

^{390/} Our translation.

"strict law" of the matter. The same function of shurat ha-din is expressed in the three appearances of the phrase in Tosefta, as follows:

(a) One who sells fruit to his fellow and subsequently says to him, 'the fruit which I sold you are tevel; or meat; or wine . . .; --according to the shurat ha-din, he is not believed.^{391/}

(b) One who is offering sacrifices with another and told him, 'they have become piggul; one who was preparing ritually pure products with another and told him 'they have become impure'--no Jew is suspect of [lying under these circumstances]. But if he said to him, 'the sacrifices which I offered with you on that certain day [in the past] had become impure'--according to the shurat ha-din he is not believed.^{392/}

(c) One who slaughters the Paschal sacrifice for the members of a group, and says 'I slaughtered it without proper intent--according to the shurat ha-din he is not believed.^{393/}

These three cases concern similar issues of testimony of only one witness with regard to a matter of ritual prohibition. Clearly, shurat ha-din cannot mean "strict law" under these circumstances inasmuch as the otherwise "strict law" is clear that "one witness is sufficient where the question at issue is a ritual prohibition."^{394/} Here "strict law" is distinguished by the shurat ha-din, in that the testimony of a single witness (adequate according to the undistinguished din) is not deemed adequate when the same is self-incriminating concerning the performance of a forbidden or prohibited act.^{395/}

^{391/} Tosefta Terumot 2:1.

^{392/} Tosefta Terumot 2:2.

^{393/} Tosefta Terumot 2:3 and Tosefta Pesahim 3:7.

^{394/} Git 2b.

^{395/} Git 54b and Hidushei Ha-RamBan ad loc; cf. S. Lieberman, Tosefta Kifshutah, Terumot 2:1, p. 307.

The Gemara records six instances wherein lifnim mishurat ha-din--now understood not as "beyond the letter of the law" but as "within the letter of the law" or, better "the law within The Law"--is applied. In each case a structured analytical transition can be seen: first there is the din, or undifferentiated antecedent legal standard. This is followed by a progression or jurisprudential advance--acknowledged or suggested--to the shurat hadin, a refinement whereby the original din is distinguished by differentiating the categories of cases to which it applies. Finally the behavior of an authority is called--by another--lifnim mishurat ha-din, meaning that the original antecedent standard was not abrogated or lost but remains a part of the moral furniture of the system and is still appropriate in the "ought-ness" context of Halakha. Thus refinement and categorization in Jewish law is seen as not morally restrictive but expansive, and the nexus between "the right and the good" and "mere law" is structurally secure.

The first instance^{396/} concerns porters who negligently broke a barrel of wine belonging to one Rabbah, son of R. Huna. The question becomes one of creditor's rights: namely, to what extent the damaged party--here the owner of the wine barrels--can employ self-help in order to secure his damages from his negligent debtors. The Gemara states:

Some porters [negligently] broke a barrel of wine belonging to Rabbah, son R. Huna. Thereupon he seized their garments; so they went and complained to Rab. 'Return them their garments,' he ordered. 'Is that the law?' he inquired.

^{396/} BM 83a.

'Even so,' he rejoined: 'That thou mayest walk in the way of good men.' (Proverbs 2:20).

Their garments having been returned, they observed, 'we are poor men, have worked all day and are in need: are we to get nothing?'

'Go and pay them,' he ordered. 'Is that the law' he asked.

'Even so,' was his reply: 'And keep the path of the righteous' (Proverbs 2:20).

Rashi^{397/} says that here, despite the Gemara's failure to mention the phrase, this is a matter of lifnim mashurat ha-din inasmuch as Rab demanded that in such cases as this one, a creditor should not insist on performance of the letter of the law.^{398/}

In a second instance,^{399/} the Talmud deals with a moneychanger (shulhani) who is negligent. The question here is the liability of an expert for his negligence, and the Gemara notes two contradictory baraitot, one which distinguishes the liability of an expert and an amateur and the other which does not. R. Papa contends that the "exemption for an expert" to which the first baraita referred only concerned an exceptional expert, who was beyond instruction in his profession. The Gemara challenges R. Papa by relating the following:

There was a certain woman who showed a denar to R. Hiyya and he told her that it was good. Later she came again to him and said to him, 'I

^{397/} ad loc. s.v. b'derekh.

^{398/} But see Tos. BM 24b s.v. lifnim mishurat ha-din, which says that this is not such an instance but rather an application of the appropriate basic principle of law concerning debtor's protection.

^{399/} BK 99b-100a.

afterwards showed it [to others] and they said to me that it was bad, and in fact I could not [pass it as good].'

He therefore said to Rav: 'Go forth and change it [the denar] for a good one and write down in my register that this was a bad business.' But why should he be different from Dankho and Issur [the examples of the above-mentioned exceptional experts] who would be exempt because they needed no instruction? Surely R. Hiyya also needed no instruction?

R. Hiyya acted lifnim mishurat ha-din, on the principle learned by R. Joseph: [quoting the Mekhilta reference as detailed supra].

The lifnim mishurat ha-din here consisted of the fact that R. Hiyya assumed liability for his negligence, this despite the shurat ha-din that he need not have been responsible because of his capacity as an exceptional expert. But this "exceptional expert exemption" (the shurat ha-din) is really a technically superceding standard--that is, it is a standard subsequently entered by R. Papa (a 4th century Babylonian Amora) which had not always been the law. The structure of the segment clarifies the issue:

- (a) Baraita: amateur is liable, expert is not
- (b) Contra Baraita: amateur and expert equally liable
- (c) Resolution (per R. Papa): (a) is to be understood as applying only to exceptional experts; otherwise, (b) is the rule. Therefore R. Hiyya acted beyond the limit of the law.

But R. Hiyya did not denominate his actions as lifnim mishurat ha-din, and Rab did not question him as to the basis for his behavior. Indeed, R. Hiyya (a Tanna) antedates R. Papa by four or five generations, thus when the former assumed liability for the injury which he caused to the woman by his negligence, he was acting according to the law perhaps as he knew it as such, and not as beyond or outside the law's otherwise strict limitation. The import

here is that the antecedent or technically superceded standard of R. Hiyya still prevails, and can be integrated into The Law in an appropriate contextual situation.

The moneychanger case is similar to our third example, the unloading case involving the question of the dignity of an elder. Here,^{400/} the legal question concerns the obligation of returning lost articles. The Mishnah and Gemara delineate the rule that if one finds abandoned property, he need not pick it up if it would be undignified for him so to do. One class of persons (for whom the general duty to return lost articles does not apply for reasons of this issue of "lost dignity") is elders. Rava (an Amora) insists that the obligation of returning lost property is equivalent to the obligation of helping another to load and unload the latter's animal. The Gemara continues:

Rabbi Ishmael, son of R. Jose, was walking on a road when he met a man carrying a load of a bundle of twigs. The latter put them down, rested and then said to him, 'Help me to take them up.'

'What is it worth?' he inquired.

'Half a zuz.' was the answer. So he gave him the half zuz and declared it hefker [ownerless]. Thereupon he [the carrier] reacquired it. He gave him another half zuz and again declared it hefker. Seeing that he was again about to reacquire it, he said to him, 'I have declared it hefker for all but for you.' [And he helped him].

. . . but was not R. Ishmael, son of R. Jose, an elder for whom it was undignified [to help one take up a load]? He acted lifnim mishurat ha-din. For R. Joseph learned: [quoting the Mekhilta text supra].

^{400/} BM 30b.

Again, as in the case of the earlier examples, that which is denominated lifnim mishurat ha-din is, in fact, the performance of a primary or technically superceded standard. That is, in this case, the obligation to help load and unload burdens when demanded by another so to do. The shurat ha-din, or the limitation imposed by the rabbis on this primary obligation, is that an elder is exempt from such obligation insofar as his dignity would thereby be jeopardized.

This rule is derived from the Mishnah which had stated earlier that "if one finds a sack or a basket, or any object which it is undignified for him to take, he need not take it."^{401/} The Gemara explains the rabbis' justification for this rule by relating it to a Biblical verse:

How do we know this [is the rule]?--For our Rabbis taught: 'and thou shalt hide thyself' (Deut. 22:1)--sometime thou mayest hide thyself, and sometimes not. For instance (ha keitzad), if one was a kohen, while it [the lost animal] was in a cemetery; or an old man and it was inconsistent with his dignity [to lead the animal home]; or if his own [work] was more valuable than his neighbor's--therefore it is said, and thou shalt hide thyself.'

But the Gemara itself notes^{402/} that the first and third examples of the "hide thyself" rule are superfluous--that is, binding without the need to rely on the verse from Deuteronomy. It would appear that this justification is also--like R. Papa's ruling in the shulhani case--the basis for a new norm or precedent which the Amoraim, here led by Rava, were to announce.

^{401/} M. BM II:8 (29b).

^{402/} BM 30a-b.

Thus the purported Torah-bound basis for the "exemption for the elderly" is not even addressed by Karo^{403/} or Maimonides^{404/} who both rule that

if one is pious and acts lifnim mishurat ha-din, even if he is a prince of the highest rank, still if he sees another's animal crouching under its burden of straws or sticks or the like, he should help unload and reload.

So the action of R. Ishmael (a Tanna) was not the waiver of an exemption but the fulfillment of the law as it probably was in his Tannaitic time. The key, again, is that the values inherent in the antecedent or technically superseded legal standards are still understood by the Gemara as having contemporary moral authority.

The fourth instance concerning lifnim mishurat ha-din relates to the presumptive abandonment of lost property. Here a hasid returned property which was, according to the shurat ha-din, legally retainable. The Gemara^{405/} refers to a statement of law by R. Simeon ben Eleazar to the effect that "if one rescues anything . . . in any place where the crowds are frequent, it belongs to the finder--because the owner has given it up."

Further,

Rab Judah once followed Mar Samuel into a street of whole-meal vendors, and he asked him: What if one found here a purse?--Mar Samuel answered: It would belong to the finder. What if an Israelite came and indicated an identification mark?--Mar Samuel answered: he would have to return it.

403/ Shulkhan Arukh, Hoshen Mishpat 272:3.

404/ M.T. Hilchot Rotzeah u' Shemirat ha-Nefesh XIII:14.

405/ BM 24a.

Both? Mar Samuel answered: lifnim mishurat
ha-din.^{406/}

Again, the antecedent standard (din) in this case makes no distinction concerning the location of a presumptively abandoned object or the Jewish identity of the crowd. The mere fact that an object is found in a public place does not necessarily indicate abandonment,^{407/} and thus the antecedent standard is return of lost objects which are found. The shurat ha-din is the statement of R. Simeon ben Eleazar, which exempts the obligation to return lost objects when found in a clear public location. Mar Samuel teaches that where the majority of the people present in a public place are Jews--and thus presumptively trustworthy--the law would revert to its antecedent standard, imposing the obligation of return.

The fifth instance of mention in the Gemara of lifnim mishurat ha-din concerns a voidable property transfer. The law is generally clear that in certain circumstances transfers of property are voidable, despite bona fide sales or gifts. Such circumstances almost always involve conditional sales, or sales which "happen" only on the occurrence of a specific event. The issue here^{408/} is whether

If a man sold [a plot of land] but [on concluding the sale] he was no longer in need of money, may his sale be withdrawn or not? Come and hear: there was a certain man who sold a plot of land to R. Papa because he was in need of money to buy some oxen, and, as eventually he did not need it [the money] R. Papa actually returned the land to

^{406/} BM 24b.

^{407/} M. BM 2:10

^{408/} Ket 97a.

him!--[This is no proof since] R. Papa acted lifnim mishurat ha-din. . . . And the law is that if a man sold a plot of land and on concluding the sale was no longer in need of money, the sale may be withdrawn.

Again, the shurat ha-din concerns the point at which a conditional sale becomes indeed conditional and thereby voidable. The earlier, antecedent standard is that a conditional sale - express or implied - is voidable subject to the fulfillment or non-fulfillment of the condition.^{409/} Here, in the judgment of one Amora, R. Papa acted lifnim mishurat ha-din because the shurat ha-din--the point at which a conditional sale is indeed conditional--is the point at which the seller makes some express statement as to the condition (the antecedent din having made no such clear qualification). R. Papa went beyond this standard, so it is implied by one Amora, because he voided the sale despite the absence of an express statement. The subsequent Amora disagrees, arguing that R. Papa was acting in accordance with the appropriate standard on conditional sales. Though this instance is structurally different from our earlier references, we have another example of the citation by an Amora of lifnim mishurat ha-din to mean the continued binding quality of an inchoate -- or arguably -- superseded legal standard.

The sixth and final instance of Gemara discussion of lifnim mishurat ha-din concerns the rules of interruption appropriate for the recitation of birkat hamazon by a zimun of three men.^{410/} The

^{409/} Kid 49b

^{410/} Ber 45b.

Mishnah clearly sets out the analytically superceded standard, namely that "if three persons have eaten together, it is their duty to invite [one another to say grace]."411/ And, "if three persons have eaten together, they may not separate [for grace after meals]."412/ The Gemara, in the name of Raba, provides a limitation on this general antecedent standard, which limitation (the shurat ha-din) consists in limiting the obligation to issue invitation and say grace together only when all three are ready for it at the same time, or where two have concluded and only one must be interrupted. The passage states:

Raba said: the following statement is made by me independently and a similar statement has been made in the name of R. Zera: if three persons have been eating together, one breaks off to oblige two, but two do not break off to oblige one. But do they not? Did not R. Papa break off for Abba Mar his son, he and another with him? --R. Papa was different because he acted lifnim mishurat ha-din.

Again, as in the other instances the one who is said to have acted lifnim mishurat ha-din has not so identified his own behavior, but the same has been denominated as such by a subsequent Amora. The general antecedent obligation (as stated in The Mishnah) was indeed performed by R. Papa, and the subsequent reformed standard was seemingly ignored by him in preference to an analytically prior standard. This was still a part of the law--the moral quality of which still prevailed within The Law.

The debate has continued, from the rishonim to today, as to whether lifnim mishurat ha-din is indeed an enforceable legal

411/ M. Ber 7:1.

412/ M. Ber 7:4.

standard. There are those who have argued that the standard is an enforceable one, permitting authority to exact it where appropriate.^{413/} Others have insisted that it is not enforceable,^{414/} but is rather a "commendable" standard, addressed to an ethical elite.^{415/} The notion here is that it is a supererogatory action "presented by God as a challenge to the individual capacity, rather than as a duty imposed universally upon the human moral faculty. It thus exceeds the boundaries of the moral norm, and its non-performance does not place the agent 'in the wrong'."^{416/} It is thus understood as encompassing that sway of

413/ Cf. Mordecai BM Sec. 327; SeMaK Sec. 49 (R. Isaac of Corbeille); A. Lichtenstein, "Does Jewish Tradition Recognize an Ethic Independent of Halakha," in M. Fox, ed., Modern Jewish Ethics (1975) p 74; S. Shilo, "On One Aspect of Law and Morals in Jewish Law: Lifnim Mishurat haDin," 13 Israel L. Rev. 366-68 (1978).

414/ Beit Yosef to Tur, Hoshen Mishpat 12:8, Maimonides, M.T. Hilchot Shekhenim XIV:5; see A. Lichtenstein, op cit. supra at 84 n.56. Reuven P. Bulka and Justice Haim Cohn translate lifnim mishurat ha-din as "inside the line of the law" and the latter says whether it is an enforceable standard or not, "principles of equity and considerations of goodness and righteousness [were called upon] in order to see that justice is done rather than to enforce the formal law." H. Cohn, "Ancient Jewish Equity," in R.A. Newman, ed., Equity in the World's Legal Systems (1973) pp. 45, 73; R. P. Bulka, "The Role of the Individual in Jewish Law," 13/14 Tradition 126 (Spring/Summer 1973).

415/ Maimonides, M.T. Hilchot Deot I:5; Gezalah v'Avedah XI:7, XI:17; Rozeah u'Shemirat ha-nefesh XIII:4; see E.E. Urbach, The Sages, Their Concepts and Beliefs (1975) pp. 372,375; S. Shilo, op cit. supra at 387 ("obedience to the unenforceable"). Rashi says that the essential meaning of lifnim mishurat ha-din is the aspect of piety, midat hasidut, BM 83a s.v. b'derekh; BK 108a s.v. tavuhu be'alim, 108b s.v. at avdat, or gemillut hesed, BM 33a s.v. kol; cf. Shulkhan Arukh, Hoshen Mishpat 264:1.

416/ C. Anderson, "Scripture and Supererogation: Evolution of an Ethical Category," 36 Conservative Judaism 7 (November/December 1980).

duty between "can" and "may"^{417/} or between the "morality of duty" and the "morality of aspiration."^{418/}

It is as though

God's words can only go so far. After that it is up to man to take up the baton, to give to the body of law meaningfulness of life with his heart and soul. Here enforceable Judaism ends and responsive and responsible man enters. . . . [Nevertheless], lifnim mishurat ha-din actually means "within the boundary of the law."^{419/}

Further, God Himself is said to act lifnim mishurat ha-din,^{420/} inasmuch as "morality is an absolute value, for it is divine in essence. The God who demands righteousness, justice, kindness and compassion is Himself just, gracious, kind and compassionate."^{421/} God's actions lifnim mishurat ha-din are understood as flowing from His sense of compassion (midat harahamim)^{422/} or his sense of ethical perfection and virtue (midat ha'hesed).^{423/} What is just and right is beloved by God, then, because it is just and right.^{424/} And God's actions in

^{417/} S. Shilo, op cit. supra at 387.

^{418/} L. Fuller, Morality of Law (1964) pp. 5-9. Cf. Matthew 5:20.

^{419/} R. P. Bulka, op cit. supra at 128, 126.

^{420/} S. Shilo, op cit. supra at 360 and sources cited therein.

^{421/} Y. Kaufmann, The Religion of Israel (1960) pp. 366-67.

^{422/} Ber 7a.

^{423/} AZ 4b; cf. Deuteronomy Rabbah Re'eh 4:3.

^{424/} M. Roshwald, "Authority Skepticism and Dissent in Judaism," 40 Jewish Social Studies 195 (Summer/Fall 1978). Note God's confrontation with Abraham concerning Sodom and Gomorrah, Gen. 18:17-33 and the discussion in L. Ginzberg, The Legends of the

(footnote continued on following page)

responding to humanity with an integrated sense of rule and morality, can be a model for our own.

Finally, despite the substantial opinion to the effect that lifnim mishurat ha-din is not enforceable, it must be noted that those opinions do converge on the concept that lifnim mishurat ha-din is commendable, and addressed to the pious, or the ethical elite among us. This need not be seen as a demonstration, however, of its inapplicability to the daily lives of individual Jews who would not consider themselves among the ethical elite. This is because, as we are also taught by R. Tanhum in the name of R. Joshua ben Levi, personal contact with the masters of the law is of greater value than the content of their teachings.^{425/} The import here is that we should, as it were, do as the "ethical elite" do, in preference to what they say. In other words, it is not "wrong" to model our behavior as Halakhic Jews upon an "ethical elite" whose obligation is to rise above the dry positive law and connect it with

(footnote continued)

Jews (1939) III:133, 254, on the Midrashic understanding of God's various arguments with Moses, and finally Lamentations Rabbah 7 concerning Rachel's successful intervention on behalf of Israel, using morality as the basis for her argument. But see however, two close and unresolved conflicts between positive law and what is represented as a moral challenge thereto. Yoma 22b and Ecclesiastes Rabbah 7:16 record Saul's protest to God's order to destroy the whole tribe of Amalek, including the animals. The response to Saul, reminiscent of a similar encounter in Job, is "don't be more just than our Creator." And Leviticus Rabbah 32:8 expands upon Ecclesiastes 4:1 ("behold the tears of the oppressed, and they had no one to comfort them!"), calling upon God to show comfort and understanding to mamzerim. In both cases, however, there is no inconsistency with the suggestion that God Himself applies the law within The Law, or acts lifnim mishurat ha-din. Ber 7a.

^{425/} Ber 6b.

its higher and prior correlative, transforming all that is "the law" into The Law.

IV.

The term "halakha" now can take on its full, larger meaning. It is the "mere" law but more, calling forth the full flavor of the Divine-human partnership, ultimately yielding

the kind of religious obligation which cannot be said to derive its sanctions [only] from a general norm or law . . . [which] does not have to be apprehended through a process of reflection . . . [but one which] possesses . . . the authenticity of a personal decision, which cannot be avoided by recourse to preestablished rules and ready-made principles Implicit in this doctrine [of dynamic Halakha] is the notion that the residual influence of halakhic categories of thought can make itself felt outside the relatively limited area to which the per se [daat Torah] is applicable.^{426/}

In this sense--that God's impact upon us is greater (but not less) than the "mere law"--we can derive new insight from the Haggadah's reference to the Divine Presence as preceding revelation's content (Dayenu).^{427/}

The decisor in such cases must serve as both dayan and darshan, activating the dialectic process which has been here described. He (or she) will have many possible methodologies of normative correction, among which are (a) to surround the objectionable standard with restrictions so that, in effect, it becomes inoperative; or (b) deliberate misrepresentation of the

^{426/} W. S. Wurzbarger, "Covenantal Imperatives," in G. Appel, ed., Samuel K. Mirsky Memorial Volume (1970) pp. 8-10.

^{427/} Id. at 11. To the same effect is Maimonides, Guide II:35.

letter of the text; or (c) legal fictions (lies that are not intended to deceive) such as, for example, the selling of hametz to a Gentile before Passover; and (d) takkanot justified by the described integrated view.^{428/} Regardless of methodology, the key is that morality "is subconsciously integrated into the Halakhic framework" and is expressed in a conscious structural concern for the shape of the rules and standards of Judaism.^{429/}

In this respect, we can speak of a second means of application of the integrated view, namely on the part of the autonomous Jew who must face each day of life without constant resort to an extant body of integrated Halakha. For this individual autonomous Jew, as well, the opportunity to reconcile lifnim mishurat ha-din (the law to The Law) exists, and must be embraced as an active encounter with the Jewish tradition. The "correctness" of the decision or outcome of the dialectic will depend, for the individual as it does for the system-wide process of correction, on the character of the decisor and the methodology of decision.^{430/}

It is clear that conformity alone is a wholly inadequate means by which to evaluate correctness, for

no matter how pronounced the divergences of opinions were between the schools of Hillel and Shammai, or between R. Akiva and R. Yishmael, both sides qualified to be regarded as

^{428/} These are suggested at E. N. Dorff, "The Interaction of Jewish Law with Morality," 26 Judaism 461 (Fall 1977). On legal fictions, see fn. 469 infra.

^{429/} D. W. Halivni, "Can A Religious Law Be Immoral?" in (A. A. Chiel, ed.) Perspectives on Jews and Judaism (1978) p. 169.

^{430/} E. N. Dorff, "The Interaction of Jewish Law with Morality," 26 Judaism 462 (Fall 1977).

interpreters of 'the words of the living God.'
Whether a particular opinion can qualify as an
authentic Halakhic one depends not upon its
content, but, rather, upon its conformity to the
methodology appropriate for the evolution of
legitimate opinions.^{431/}

It is thus indulgence in the dialectic, the process, the recognition
of polar tension and a continuing need to reconcile--this the very
heart of the Halakhic process--by which elu v'elu^{432/} has any
meaning at all.

^{431/} W. S. Wurzbarger, "Is Sociology Integral to the Halakha?" 29
Judaism 28 (Winter 1980).

^{432/} Eruvin 13b.

CHAPTER 6

THE INTEGRATION OF "MERE LAW" AND MORALITY: THE "COHERENCE THEORY" OF MODERN LEGAL PHILOSOPHY

I.

We have endeavored to establish in the preceding chapters that autonomy and submission in Judaism are in fruitful dialectical tension and not in a self-destructive conflict. The "oven of Achnai" tale is but one illustration (and a rather mixed one at that^{433/}) of the anti-authoritarian element in Judaic thought.

It is, indeed, remarkable that a doctrine which identified law with a revelation by direct divine intervention, rarely entertained any regular procedure of judgment by God, or other irrational mode of trial, and that the few instances (e.g., the 'bitter water' test required of the sota, Numbers 5:11-31) fell into disuse. For offenses generally the Pentateuch requires not only two witnesses, but two eye-witnesses; and it deserves to be better known that many of the cruel punishments which it (Pentateuch) prescribed in the spirit of its early origins were rendered virtually obsolete by similar requirements of proof introduced by reason as part of the unwritten [Halakha]. The exigencies of finding the true facts were thus used also to mitigate the rigours of the substantive [Biblical] law. When Solomon prayed 'for an understanding heart to judge thy people, that I may discern between good and bad,' it 'pleased the LORD, that Solomon had asked this thing.' (I Kings 3:9-10)^{434/}

^{433/} See fn. 37 supra.

^{434/} J. Stone, Human Law and Human Justice (1965) p. 29. We do not agree that the Torah contains positive or what Stone calls "substantive" law as much as it does value-parameters much in the nature of the American Constitution, which contemplates the required ancillary process of a developing system of positive law, to be continually reviewed and "checked" against the antecedent values.

So Halakha, as Jewish or rabbinic law, developed in a creative fashion similar to the dynamic character of American secular law. That is,

both in the respect for traditional authority and in the adept use of techniques for turning authority to present purposes, the rabbis often reinterpreted the weightiest texts, even neutralized them with each other, gave weight to some particular interpreters but not absolutely, and while attending to earlier precedents left themselves free to cut these down to size in the bearing on contemporary problems. For (they insisted) it was to judges of their own days (Deuteronomy 17:8-9) that Deuteronomy enjoined men to harken, and such judges should rather seek counsel from their own teachers and learned colleagues, than simply rely on precedents from even the outstanding rabbis of the past.^{435/}

In both cases, access to the "fellowship of the learned" was--at least for men--remarkably open, owing in large part to the democratic character of Jewish legal education, itself inculcating certain respect for individual endeavor and understanding.^{436/}

Learning or knowledge of the Jewish tradition is understood as so accessible a realization for even the most humble of individual--autonomous--Jews, that the Talmud records the opinion that "a mamzer who is learned in the law takes precedence even over a High Priest who is an ignoramus."^{437/}

The correlative imperative of these knowledge-endowed Jews must surely be to rise above "sheer compliance with the law, as such was never regarded as the ultimate value, it rather represented a

^{435/} Id. at 25 (emphasis in original).

^{436/} S. B. Freehof, Reform Judaism and the Law (1967) p. 11.

^{437/} Horayot 13a.

means to the fulfillment of the divine will."^{438/} This is because, in the traditional parlance, though the Torah was given once, it has been received differently in each generation.^{439/} And each must be compelled, in an ever-renewing corrective process, to yield a more refined and perfect moral value against which the vast corpus of rabbinic law is rectified. That each generation must examine, reflect and correct anew the "mere law" is not to deprecate or deny the Truth of its original mytho-poetic discrete revelation to us, for "whatever a competent scholar will yet derive from the Law, that was already given to Moses on Mt. Sinai."^{440/}

Jewish law can thus be understood as a unity--a seamless web of morality, rituals and rule--which, as in any deontological system (based upon obligation and duty) bears the risk that its moral prescriptions will sometimes not be clear because the account of reality upon which they are based is inadequate to experienced facts.^{441/} The problem is not one of obedience to the prescriptive content of the "mere law" but rather what is (a) the content of "mere law" and (b) my relation to it in order for me to

^{438/} R. P. Bulka, "The Role of the Individual in Jewish Law," 13/14 Tradition 126 (Spring/Summer 1973), quoting W. S. Wurzbarger, "Covenantal Imperatives," in G. Appel, ed., Samuel K. Mirsky Memorial Volume (1970) p. 8.

^{439/} Cf. Ber 63b; Pesikta de Rab Kahana 12:12, 12:21; ed. Mandelbaum, pp. 213, 291.

^{440/} J. Peah II:6 (p. 17a); J. Meggilah IV:5 (p. 74b); S. B. Freehof, "The Natural Law in the Jewish Tradition," in 5 University of Notre Dame Natural Law Institute Proceedings (E. F. Barrett, ed.) (1953) p. 19. See fn. 360 supra.

^{441/} See Anderson, "Scripture and Supererogation: Evolution of an Ethical Category," 36 Conservative Judaism 6 (November/December 1980).

do what is right in a sense larger than abject acquiescence in an inherited legal standard.^{442/}

The problem with modern liberal Judaism has been that this process of examination and correction has been not simply fragmentary but intuitive--or as philosopher John Rawls (speaking in another context) puts it, intuitionistic.^{443/} Though "there is nothing intrinsically irrational about this intuitionist doctrine,

we must recognize the possibility that there is no way to get beyond the plurality of principles [or, we might say, Judaisms]. No doubt any conception of justice [family, Jewish tradition, etc.] will have to rely on intuition to some degree. Nevertheless, we should do what we can to reduce the direct appeal to our considered judgments. For if men balance final principles differently, as presumably they often do, then their conceptions of justice [family, Jewish tradition, etc.] are different. The assignment of weights is an essential and not a minor part of the conception of justice [family, Jewish tradition, etc.]. If we cannot explain how these weights are to be determined by reasonable [and articulated] criteria, the means of rational discussion have come to an end. An intuitionist's conception of justice [family, Jewish tradition, etc.] is, one might say, but half a conception. We should do what we can to formulate explicit principles for the priority problem, even though the dependence on intuition cannot be eliminated entirely.^{444/}

^{442/} This is not to argue that change qua change is itself a positive value in a dynamic system of Jewish law or Halakha. Maimonides, for example, specifically felt that maintaining integrity in the Jewish legal system argues against changes in normative quality as a result of changed social conditions. By maintaining the laws of sacrifices in his normative code, for instance, Maimonides felt that the Jew might be reminded of his human vulnerabilities to paganism. Thus was he rebutting the presumption that what is old is useless. D. Hartman, Maimonides: Torah and Philosophic Quest (1976) p. 183. See text of fn. 23 supra.

^{443/} J. Rawls, A Theory of Justice (1971) pp. 34-40.

^{444/} Id. at 39, 41.

The intuitionism which inheres in most liberal Jewish dialogue consists, in large part, in emotive and fragmentary explanations for behavior (which is understood to be not in compliance with an inherited positive norm). For example, the CCAR resolution on patrilineal descent is frequently defended or supported by reference to the "reform principle of equality." The analytical problem is not that no such "reform principle of equality" exists but that it is proffered as "just so" without any coherent articulated set of other principles. It is not so wrong as it is fragmentary because it fails to account for itself save by reference to one single unifying principle which obviously barely begins to address the normative or value content of any modern Judaism.

In seeking the integration of Jewish law and morality as The Halakha, the process must be understood to begin with the unique--autonomous--individual. For each person--here Jew--is drawn to a quest for a unified world view by recognition of the fragmentary impulses and tensions which animate his or her unique self.

There are indeed crucial conflicts in which different virtues appear as making rival and incompatible claims upon us. But our situation is tragic in that we have to recognize the authority of both claims. There is an objective moral order, but our perceptions of it are such that we cannot bring rival moral truths into complete harmony with each other For to choose does not exempt me from the authority of the claims which I chose to go against [Sophocles's Antigone is such an example.]

The . . . moral protagonist stands in a relationship to his community and his social roles which is neither the same as that of the epic hero nor again the same as that of modern individualism. For like the epic hero the Sophoclean protagonist would be nothing without

his or her place in the social order, in the family, the city, the army at Troy. He or she is what society takes him to be. But he or she is not only what society takes him or her to be; he or she both belongs to a place in the social order and transcends it. And he or she does so precisely by encountering and acknowledging the kind of conflict which I have just identified.^{445/}

Here modern Aristotelian Alasdair MacIntyre is arguing that the unity of one's life will not necessarily yield--even absent what Rawls calls intuitionism--a clear system of priority allocation between moral principles. But, particularly in the modern era, we must begin with ourselves and a recognition of our own "tragic and dilemmatic choices" in order to seek the assistance of Judaism's larger coherence. In either case, of course, we do not necessarily avoid the difficulty of choosing and the attendant burden of resisting what we "ought" to do:

One way in which the choice between rival goods in a tragic situation differs from the modern choice between incommensurable moral premises is that both of the alternative courses of action which confront the individual have to be recognized as leading to some authentic and substantial good. By choosing one I do nothing to diminish or derogate from the claims upon me of the other; and therefore, whatever I do, I shall have left undone what I ought to have done. . . . for the tragic protagonist cannot do everything that he or she ought to do

Yet it is clear that . . . the existence of tragic dilemmas casts no doubt upon and provides no counter-examples to the thesis that assertions of the form 'to do this in this way would be better for X and/or for his or her family, city or profession [or religious community]' are susceptible of objective truth and falsity

^{445/} A. MacIntyre, After Virtue: A Study in Moral Theory (2nd Edition) (1984) p. 134. We are grateful to Dr. Barry S. Kogan for bringing this volume to our attention.

The presupposition of this objectivity is of course that we can understand the notion of 'good for X' . . . in terms of some conception of the unity of X's life. What is better or worse for X depends upon the character of that intelligible narrative which provides X's life with its unity. Unsurprisingly it is the lack of any such unifying conception of a human life which underlies modern denials of the factual character of moral judgments and more especially of those judgments which ascribe virtues or vices to individuals.^{446/}

The imperative is for what MacIntyre calls the "intelligible narrative" or expression of a coherent life and coordinate way of life. But this cause or goal is at the very heart of the challenge to the modernist, whose

capacity to think scatters a range of differences and conflicts before him: different languages, different ways of life, different specializations of aim within a way of life, different conventions and styles also within a shared way of life, different prohibitions. A balanced life is a particular moral ideal to which there reasonably can be, and have been, alternatives acceptable to thoughtful men at different times and places Ideals like courage and endurance, altruism and social service, detachment and contemplation, family, learning--have been adopted or not rejected by those who knew there had been and would be other admirable ways of living even if they also thought this way was the best.^{447/}

So, moral philosopher Stuart Hampshire suggests, each individual who is determined to realize and articulate a coherent way of life asks,

^{446/} Id. at 207-09.

^{447/} S. Hampshire, Morality and Conflict (1983) p. 150. Hampshire is not arguing here for a form of moral relativism where different ways of life are not subject to moral judgment, because a way of life can be analyzed as to its coherence with stated goals and virtues and as to its tendency to destroy life and commit gross injustice (e.g., Nazi Germany). Id. at 154.

ex hypothesi, why he or she should behave in a certain way or follow a certain practice or regimen.

I describe to myself, or to another, the way of life which is mine and I specify the contribution to it made by the practice or activity in question. If I do not follow this practice, such-and-such other practices, which are elements in my way of life, would be undermined and lose their hold upon me. The justification is in this sense holistic. I would need either to abandon the way of life to which I am now, whether by choice or circumstance, committed, or I would find that many of the other activities and practices to which I am at present committed, have lost their significance, and my activities have come to seem incoherent and confused. I would find myself at odds with myself Ways of life are coherent totalities of customs, attitudes, beliefs and institutions which are interconnected and mutually dependent in patterns that are sometime evident and sometimes subtle and concealed.^{448/}

Again, in agreement with MacIntyre, Hampshire understands that his "holistic" projection is not free of tension, for conflict is inherent in any morality: it is the balance between reason and memory. The latter is the confluence of continuity, history, conventions and loyalties to which persons and institutions need to adhere.^{449/}

II.

For the Jew who confronts his or her own moral quandary or tragic dilemma, Judaism stands as the available inheritance of structured and fruitful dialectical conflict which can serve to

^{448/} Id. at 4-6.

^{449/} Id. at 164-69.

liberate the individual from the narrow limits of his or her own "intelligible narrative." Judaism itself has its own "intelligible narrative" or vectors or limits, by which the dialectic is structured. The psychological precondition to the use of Judaism and its Halakha by the Jew is what legal philosopher H. L. A. Hart calls the "internal point of view."

This attitude of shared acceptance of rules is to be contrasted with that of an observer who records ab extra the fact that a social group accepts such rules but does not himself accept them. The natural expression of this external point of view is not 'it is the law that . . . ' but 'in England they recognize as law . . . whatever the Queen in Parliament enacts ' The first of these forms of expression we shall call an internal statement because it manifests the internal point of view and is naturally used by one who, accepting the rule of recognition and without stating the fact that it is accepted, applies the rule in recognizing some particular rule of the system as valid. The second form of expression we shall call an external statement because it is the natural language of an external observer of the system who, without himself accepting its rule of recognition, states the fact that others accept it.^{450/}

This notion of a a priori commitment and submission as the basis for active inheritance or self-identification with any legal system, including Halakha, is amplified by Alasdair MacIntyre in a marvelous example:

Consider the example of a highly intelligent seven-year-old child whom I wish to teach to play chess, although the child has no particular desire to learn the game. The child does however have a very strong desire for candy and little chance of obtaining it. I therefore tell the child that if the child will play chess with me once a week I will give the child 50¢ worth of candy; moreover I tell the child that I will

^{450/} H. L. A. Hart, The Concept of Law (1961) p. 99 (emphasis in original).

always play in such a way that it will be difficult, but not impossible, for the child to win and that, if the child wins, the child will receive an extra 50¢ worth of candy. Thus motivated, the child plays and plays to win. Notice however that, so long as it is the candy alone which provides the child with the good reason for playing chess, the child has no reason not to cheat and every reason to cheat, provided he or she can do so successfully. But, so we may hope, there will come a time when the child will find in those goods specific to chess, in the achievement of a certain highly particular kind of analytical skill, strategic imagination and competitive intensity, a new set of reasons, reasons now not just winning on a particular occasion, but for trying to excel in whatever way the game of chess demands. Now if the child cheats, he or she will be defeating not me, but himself or herself.

There are thus two kinds of goods possible to be gained by playing chess. On the one hand there are those goods externally and contingently attached to chess-playing and to other practices [*i.e.*, Judaism] by the accidents of social circumstances--in the case of the imaginary child candy, in the case of real adults such goods as prestige, status, money [and self-righteousness]. There are always alternative ways for achieving such goods, and their achievement is never to be had only by engaging in some particular kind of practice. On the other hand there are those goods internal to the practice of chess which cannot be had in any way but by playing chess or some other game of that specific kind. We call them internal for two reasons: first, as I have already suggested, because we can only specify them in terms of chess or some other game of that specific kind and by means of examples from such games . . . and secondly because they can only be identified and recognized by the experience of participating in the practice in question. Those who lack the relevant experience are incompetent thereby as judges of internal goods.^{451/}

This is the requirement of the Jew who would make Judaism his or her inheritance: the act of self-subordination or internal point of

^{451/} A. MacIntyre, op cit. supra at 175-76 (emphasis in original).

view, such that the question would be "what does Judaism want me to do?" and not "does Judaism agree with what I want to do?".

III.

How, then, in a large and complex system traversing thousands of years and thousands of miles, is any coherent unity to take effect? That is, suppose we are prepared to subordinate ourselves and take aim for the internal goods of Judaism and its Halakha. Whither the unity or coherence: how do we make it--or better, how do we find it?

The inquiry is not directed to what shape the Jewish world has to have for there to exist a legal system. We have already established that an antecedent commitment both to revelation--however understood--and the "internal point of view" of Halakha by which we commit ourselves to using its form and limits in a self-correcting dynamic--are the necessary preconditions of Judaism as a legal system. Nor is this an inquiry into the content of a particular rule or a law, but rather into the abstract concepts of obligation, duty and power and their relations among people, from which several propositions of law then derive. Hence, it is an inquiry into the analytical conditions which limit and define "the law."

The proposition which we must investigate can be put as follows:

The law of J [Judaism] is that proposition 'P' is true, if and only if proposition 'T' is true in J [Judaism].

In response, various schools of analytical jurisprudence have offered their estimation of the content of proposition "T." There have been, for example, empirical theories which supply a reading for T in the standard sense in which any science describes the world. These can be divided into predictive theories which argue that T means that it is true that the authorities will enforce proposition "P." Most notable within this group have been the so-called American realists, Jerome Frank, Karl Llewelyn and Benjamin Cardozo. Another group of empirical theories are historical, positing that whether a proposition of law is true depends upon not what will happen but what has happened. The historical theory is concerned with what people and authorities have done, and is divided again into two groups: behavioral/historical theories and attitudinal/psychological historical theory.

Behavioral theories restrict themselves to an examination of what people and authorities have done--observable acts--and make no reference to thoughts or mental states as such. The most famous proponent of the behavioral empirical theory is the classic British legal philosopher John Austin. The attitudinal, contra, does attend to the intuitive or psychological projections of people and authorities in assessing the question of the content of T. Where, for example, Austin would say that proposition T means that "there is in the system a sovereign and the sovereign has commanded proposition T," H. L. A. Hart, the most famous attitudinal (and positivist) legal philosopher, argues that proposition T has embedded within it a complex Rule of Recognition. This rule assumes (a) a uniformity of behavior as the rule describes; (b) a disposition on the part of people to take the rule as the

justification for their behavior and the grounds for criticism of non-conforming behavior; and (c) the internal point of view (described supra). These three conditions together form a Rule of Recognition which validates legislation, judicial precedent and commercial custom as law in a modern political jurisdiction. Questions of morality, however, stand (to the legal positivist Hart) outside this limited description of positive law. Further, in a difficult case where there is no clear answer from the inquiry into the Rule of Recognition, Hart would understand a decisor as standing in the shoes of a legislature, "making" the law as the difficult or hard question is resolved.

There are also non-empirical theories of law, which contend that no successful T can be found if we limit its components to direct and observable facts--as what people will do, have done or what is or will be in their minds. This includes proponents of natural law jurisprudence, who argue that there exist independently of any historical or predictive facts, phenomena in the universe which are relevant to the truth or falsity of propositions of law. Among the proponents of natural law jurisprudence have been St. Thomas Aquinas, Lord Coke, and Blackstone.

Finally, there is another class of non-empirical jurisprudence which has emerged in the last twenty years under the leadership of Ronald Dworkin. This is the coherence theory. This theory appeals to arguments of what has happened and what is required to happen by virtue of the consistency of what has happened. It does not appeal simply to what has occurred but to the logical consequence and consistency of that which has occurred.

Dworkin's influence has been truly extraordinary in the fields of both legal and political philosophy. When, for example, the Georgia Law Review undertook a Jurisprudence Symposium in 1977 and solicited 13 contributions from the leading legal philosophers in the English-speaking world, eight of them addressed themselves exclusively to various aspects of Dworkin's theories.^{452/} He himself has published two volumes, Taking Rights Seriously^{453/} and, most recently, A Matter of Principle^{454/}, and has been the subject of yet another volume of critical analysis and challenge, Ronald Dworkin and Contemporary Jurisprudence^{455/} whose editor calls "the jurisprudential writings of Ronald Dworkin . . . the finest contribution yet made by an American writer to the philosophy of law."^{456/}

What is so stunning about Dworkin's contribution is that he at once has effectively challenged the positivist assertion that law and morals are distinct and that "judicial discretion" defines what a decisor does in a difficult case; and has challenged natural law theories as well, such as the notion that inherited compositions are superior to and outside of the law, denying its inherent human dynamic.

^{452/} 11 Georgia Law Review 969-1424 (September 1977).

^{453/} R. Dworkin, Taking Rights Seriously (1978).

^{454/} R. Dworkin, A Matter of Principle (1985).

^{455/} M. Cohen (ed.), Ronald Dworkin and Contemporary Jurisprudence (1983).

^{456/} Id. at ix.

Dworkin argues convincingly that when lawyers stand before courts and construct a coherent unity of extant legal precedents, arguing that "therefore, the law is that 'P' and my client should prevail," such lawyers actually mean the literal content of what they say. That is, the statement "the law is" does not mean "the law ought to be" but rather "the law ought to be and it is." In each case, the argument of one of the two advocates is better--more coherent and justified--than the other. This effort to articulate a coherent theory, constantly correcting itself, is the result of the tension which exists between a decisor's concept of background rights--moral furniture which he or she brings to the decision-making process--and the positive rules or standards which do exist and must be reconciled in a difficult case.

In such a difficult case, there really is no such thing as judicial "discretion" if the same is to mean "free choice." In this, we are back to MacIntyre's tragic dilemma: a hard case can be likened to the difficult ethical choice (posed by Sartre) of going to war or staying at home with your mother. The agent in such a choice has no "free choice" in that he has no choice that is divorced from value. The young man cannot say "because this is hard I will not consider my attraction to both choices." So a value-laden choice is not just a choice out of discretion or unfettered by concepts of background rights, as understood by the moral agent or decisor of a difficult legal question. It is a "choice" mandated by the coherence of our "intelligible narrative" which for the Jew can include Judaism and its Halakha.

One immediate objection to Dworkin's theory is simply that it gives extraordinary vent to a one's own political or religious

morality as the chief predicate to his or her decisions. Why, one might ask, should one judge's opinion be of greater worth or weight than any other? Are not all opinions--especially moral opinions--equally valid?

Dworkin's answer is simply that this radical skepticism throws up Anglo-American law to the whim and caprice of public referenda ad infinitum, which makes nonsense of the forms of Anglo-American systems of adjudication. In rejecting this radical skepticism--or hefkerut--Dworkin insists that law (in the strict political sense) is not an entity, wherein there is a basket in which its propositions sit. Rather, law is the science of when propositions concerning rights, duties and obligations are true. As such, law is the confluence of coherent theories, which together form a seamless web. Perhaps we cannot fully describe the web, but we can reach for it for it in our ever-expanding sense of the most coherent and consistent justification for the law as we have inherited it.

Law, says Dworkin, is like literature and literary criticism and analysis is like that which lawyers do.^{457/} This is because, in literary criticism and interpretation, "interpretation of a text attempts to show it as the best work of art it can be, and the pronoun insists on the difference between explaining a work of art and changing it into a different one."^{458/} That is, an interpretation of a piece of literature attempts to show which way of reading (or speaking or directing or acting) the text reveals it

^{457/} R. Dworkin, A Matter of Principle (1985) p. 146.

^{458/} Id. at 150 (emphasis in original).

as the best work of art it can be. So, therefore, critics argue as to which interpretation of the meaning of a particular literary work as a whole is more coherent and compelling.

These sometimes take the form of assertions about characters: that Hamlet really loved his mother, for example, or that he really hated her, or that there really was no ghost but only Hamlet himself in a schizophrenic manifestation. Or about events in the story behind the story: that Hamlet and Ophelia were lovers before the play begins (or were not). More usually they offer hypotheses directly about the 'point' or 'theme' or 'meaning' or 'sense' or 'tone' of the play as a whole: that Hamlet is a play about death, for example, or about generations, or about politics. These interpretive claims may have a practical point. They may guide a director staging a new performance of the play, for example. But they may also be of more general importance, helping us to an improved understanding of important parts of our cultural environment.^{459/}

Making a difficult legal decision is, in strange essence, of a similar character to literary interpretation.

The similarity is most evident when judges [and rabbis] consider and decide . . . cases . . . [where the] argument turns on which rule or principles of law 'underlie' the related decisions of other judges in the past. Each judge is then like a novelist in a chain. He or she must read through what other judges in the past have written not only to discover what these judges have said, or their state of mind when they said it, but to reach an opinion about what these judges have collectively done, in the way that each of our novelists formed an opinion about the collective novel so far written [in a hypothetical chain novel, seriously undertaken]. Any judge forced to decide a lawsuit will find, if he looks in the appropriate books, records of many arguably similar cases decided over decades or even centuries passed by many other judges of different styles and judicial and political philosophies, in periods of different orthodoxies

^{459/} Id. at 149.

of procedure and convention. Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which these innumerable decisions, structures, conventions and practices are the history; it is his job to continue that history into the future through what he does on the day. He must interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own. So he must determine, according to his own judgment, what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole, really is.^{460/}

[Of course], any particular hypothesis about the point of a string of decisions . . . is likely to encounter if not flat counter-examples in some earlier case at least language or argument that seems to suggest the contrary. So any useful conception of interpretation must contain a doctrine of mistake--as must any novelist's theory of interpretation for the chain novel.^{461/}

The structural constraints in the coherence theory are quite severe: a prior ruling can be identified as a mistake, but cannot be ignored, and a characteristic of the "best" coherent theory is one that uses the device of "mistake" least.

In the coherence theory, one who decides a difficult legal question is obligated to account for all positive statements directly or indirectly on point in the legal corpus it is his or her obligation to advance. This is a significant constraint or check on the creative impulse and political fortitude of the judge in question. Though his concept of background rights, which provided justification for political (or religious) decisions in the abstract are surely available to him in his representation of the theory

^{460/} Id. at 159.

^{461/} Id. at 161.

which best fits the inherited tradition,^{462/} he is severely constrained by autonomous institutional rights.^{463/} For example,

A chess player has a 'chess' right to be awarded a point in a tournament if he checkmates an opponent. A citizen in a democracy has a legislative right to the enactment of statutes necessary to protect his free speech. In the case of chess, institutional rights are fixed by constitutive and regulative [or derivative] rules that belong distinctly to the game, or to a particular tournament. Chess is, in this sense, an autonomous institution; I mean that it is understood, among its participants, that no one may claim an institutional right by direct appeal to general morality. No one may argue, for example, that he has earned the right to be declared the winner by his general virtue. . . . Even if we suppose that the poor have an abstract background right to money taken from the rich, it would be wrong, not merely unexpected, for the referees of a chess tournament to award the prize money to the poorest contestant rather than the contestant with the most points. It would provide no excuse to say that since tournament rights merely describe the conditions necessary for calling the tournament a chess tournament, the referee's act is justified so long as he does not use the word 'chess' when he hands out the awards. The participants entered the tournament with the understanding the chess rules would apply; they have genuine rights to the enforcement of these rules and no others.

. . . But even in the case of a fully insulated institution like chess some rules will require interpretation or elaboration before an official may enforce them in certain circumstances. Suppose some rule of a chess tournament provides that the referee shall declare a game forfeit if one player 'unreasonably' annoys the other in the course of play. The language of the rule does not define what counts as 'unreasonable' annoyance; it does not decide whether, for example, a player who continually smiles at his opponent in such a way as to unnerve him, as the

^{462/} R. Dworkin, Taking Rights Seriously (1978) pp. 91-95.

^{463/} Id. at 93.

Russian grandmaster Tal once smiled at Bobby Fischer, annoys him unreasonably.

The referee is not free to give effect to his background convictions in deciding this hard case. He might hold, as a matter of political theory, that individuals have a right to equal welfare without regard to intellectual abilities. It would nevertheless be wrong for him to rely upon that conviction in deciding difficult cases under the forfeiture rule. He could not say, for example, that annoying behavior is reasonable so long as it has the effect of reducing the importance of intellectual ability in deciding who will win the game. The participants, and the general community that is interested, will say that his duty is just the contrary. Since chess is an intellectual game, he must apply the forfeiture rule in such a way as to protect, rather than jeopardize, the role of intellect in that contest.

We have, then, in the case of the chess referee, an example of an official whose decisions about institutional rights are understood to be governed by institutional constraints even when the force of those constraints is not clear. We do not think that he is free to legislate interstitially within the 'open texture' of imprecise rules.^{464/}

Thus the one who decides is constrained both by the character of the institution of which he or she is a part and by the positive content which he or she faces in now resolving a hard case. Such a case may, for example, draw into question a substantial moral objection to a rule which requires, therefore, immediate normative correction. A model American jurist would construct, for example, a

^{464/} Id. at 101-02. Cf. H. L. A. Hart, A Concept of Law (1961) pp. 121-32. An excellent example of the constraint of the coherence theory is the fact that in the many slave cases tried in the North prior to 1860, abolitionist judges, almost without exception, decided cases in favor of slave-catchers. Their strong sense of background rights was not enough to trump their view of what law is. See generally R. M. Cover, Justice Accused: Antislavery and the Judicial Process (1975).

model constitutional theory which incorporated a scheme of settled principles that justifies the constitution as a whole. That same constitutional theory will impose certain responsibilities and limitations on subsequent and derivative legislation: it will impose not only constraints reflecting individual rights, but also some general duty to pursue collective goals to support the public welfare.^{465/} In the light of a legislature's general responsibilities, the model jurist would articulate a special theory that justifies a particular statute which is before him, in a theoretical fit with the constitutional theory which itself may derive from the jurist's yet deeper and more remote background theory of political rights.

Where no positive legislative enactment appears on the question facing the model jurist, he or she is called upon to review the body of past opinions in cases which are brought to his or her attention as bearing on the instant matter. But many of these opinions cited as precedents will not contain any special propositions taken to be a canonical form of the rule that the case lays down. In the absence of such a canonical form, the model jurist is called upon to determine the gravitational force which earlier decisions on tangential cases exert in the matter before him or her.^{466/} When this model jurist defines the gravitational force of a particular precedent, and then another and another, he or she will soon develop a concept of general gravitational force which

^{465/} Id. at 107-08.

^{466/} Id. at 112.

leads him or her to the central question in articulating a coherent theory of law, namely: what set of principles best justifies the precedents at hand?^{467/}

But if the history of his or her court is at all complex (so Judaism), this model judge will find, in practice, that the requirement of total consistency he had accepted will prove far too strong to accommodate all of the inherited tradition in toto. This unless he or she develops it further to include the idea that he or she may, in applying this requirement, disregard some part of its institutional history as a mistake. Consistency, says Dworkin, "requires justification, not explanation, and the justification must be plausible and not sham. If the justification he constructs makes distinctions that are arbitrary and employs principles that are unappealing, then it cannot count as a [worthy] justification at all."^{468/}

So the constitutional or background level of the theory of the model jurist will determine which mistakes are embedded in contrary theories which he or she must reconcile or excuse from the articulated coherent fit. He or she may find that certain statutes, which he treats as mistakes, will lose their gravitational force but not their specific authority.

Seeing by institutional constraint that he or she has no power to radically alter the substantive law, the model judge may alter its effect by changing the adjective law of evidence and procedure. The judge may also resort to the common creative

^{467/} Id. at 116.

^{468/} Id. at 119.

judicial device of legal fiction, which is a means of changing the application of a law by a lie that is not intended to deceive.^{469/}

So armed with an array of creative legal tools, Dworkin's model jurist is ever striving to develop a comprehensive theory in a structure in which the elements are related more or less systematically. In that systematic effort, very concrete positions are the consequences of more abstract positions that are in turn the consequences of still more abstract positions that may be the consequences of more abstract positions still. It would be unrealistic to suppose that ordinary citizens and politicians--or ordinary Jews and rabbis--organize their political or religious convictions in that way; yet anyone who supposes himself to take political or religious decisions out of principle would recognize that some such organization of his or her full position must be possible in principle.

Dworkin therefore sees his model jurist distinguishing between constitutive and derivative political positions, which we would apply in the realm of Halakha.^{470/} A constitutive position is a position valued for its own sake: a position such that any

^{469/} Cf. p. 145, *supra*. See generally L. Fuller, Legal Fictions (1967); K. Campbell, "Fuller on Legal Fictions," 2 Law and Philosophy 339 (1983). These fictions abound, and are critical to a thriving legal system, from the notion of a corporation as a person, or a husband and wife as one person for certain purposes, or the specific intent to murder imputed to a felon who murders while in the course of an otherwise specifically-intended felony (the so-called felony-murder rule). The prosbul, heter iska and mekhirat hametz do seem rather tame in comparison. This is not to deny that form-over-substance legalism has corrupted the theoretical integrity of Orthodox Judaism.

^{470/} He articulates this distinction in A Matter of Principle at 184 n.1.

failure fully to secure that position or any decline in the degree to which it is secured, is pro tanto a loss in the value of the overall arrangement. A derivative position is one that is not, within the theory in question, constitutive.

A constitutive position, says Dworkin, is not necessarily absolute, because within a theory several such positions may be maintained and be to some degree antagonistic. The resolution of this antagonism may necessarily be compromise between two constitutive positions, neither of which may properly be ignored. This is the key to coherence as the check on unmoored creativity.

An example of such compromise in political philosophy is given by Dworkin:

Even though a theory holds, for example, that a loss in political equality is pro tanto a loss in the justice of a political arrangement, it may nevertheless justify that loss in order to improve prosperity, because overall economic prosperity is also a constitutive position within the theory. In that case, the theory might recommend a particular economic arrangement (say a mixed capitalistic and socialistic economy) as the best compromise between two constitutive political positions, neither of which may be properly ignored. Neither equality nor overall well-being would be absolute, but both would be constitutive, because the theory would insist that if some means could be found to reach the same level of prosperity without limiting equality, then that result would be an improvement in justice over the compromise that is, however, unfortunately, necessary.^{471/}

But not all important values or positions are necessarily constitutive. They may be derivative--concerned with means more than with ultimate values or ends--but nevertheless be such that the

^{471/} R. Dworkin, A Matter of Principle (1985) p. 409.

coherent theory insulates the position by arguing that it is wrong to reexamine its values on particular occasions. So derivative positions may be insulated under a certain coherent theory, in order better to protect the overall constitutive goal or values in the long run.^{472/}

In Dworkin's coherence theory of jurisprudence, we have the outlines of a system which, when applied to Judaism, is both descriptive and prescriptive of the dynamic potential in Halakha. Judaism is a specific system, as we have said, an integrated system of life leading to universal human redemption, whose source of ultimate values is God, the Creator and Master of the world. God speaks to Israel, a nation chosen as witness and exemplar, in language of covenant, obligation and opportunity, principally through Torah, the record of God's revelation to Israel. Torah is itself comprehended through a continuing historical process of encounter by which the best way of life (Halakha) is understood, followed and transmitted.

In this practice, crossing continents and centuries, the institutional constraints on a creative encounter with its inherited norms are substantial. But the Jew cannot jump outside of his or her identity as a Jew in this confrontation.

All perception of the external world is from a particular point of view, and the observer must take account of his particular standpoint; he must not think of himself as standing beyond the rim of the world, observing it from the outside, as though he were a transcendent being.^{473/}

^{472/} Id.

^{473/} S. Hampshire, Morality and Conflict (1983) p. 9.

The moral claims of the Jew in Judaism are, therefore, both conventional and "in the nature of things." That is to say that there are two kinds of morality, one being law-like and rational; the other being language-like and imaginative, "in the grip of particular and distinguishing memories and of particular and distinguishing local passions."^{474/} The difference is exemplified by that between justice and love/friendship. Justice is the disposition to treat all men and women alike in certain respects, in recognition of their common humanity. Love/friendship is the disposition to treat all men and women very differently, in recognition of individuality and unrepeated nature.

Every culture needs some sense of sexual morality, for example, but the same cannot be determined by purely rational considerations, which would be valid everywhere. Consideration must also be given to a way of life, history, culture, and reciprocal dependence of these elements in this "intelligible narrative," this way of life.^{475/}

In any system which calls itself Judaism, attention must be paid to the language-like and imaginative fount of morality, where, for example, "[human] love is the hidden source of awe [of God] and awe the hidden source of love."^{476/}

The coherence theory is not a conflict prophylactic, inasmuch as "morality and conflict are inseparable: conflict

^{474/} Id. at 135.

^{475/} Id. at 136.

^{476/} E. Schweid, "The Authority Principle in Biblical Morality," 8 Journal of Religious Ethics 180-81 (1980).

between different admirable ways of life and between different defensible moral ideals, conflict of obligations, conflict between essential, but incompatible, interests."^{477/} Rather in the struggle to articulate and represent Judaism as a wide equilibrium among initial sets of higher decisions, rules, principles and background constraints,^{478/} it should be our continuing effort to advance one theory which is superior to all others. This is accomplished by showing that the advanced theory gives a more simple and comprehensive and less exception-ridden account of the whole range of one's obligations.^{479/}

Having thus described the coherence theory of modern legal philosophy, we are now prepared to tender a description of liberal Judaism which accommodates autonomy, change and Halakha.

^{477/} S. Hampshire, Morality and Conflict (1983) p. 1.

^{478/} J. Rawls, "The Independence of Moral Theory," 48 Proceedings and Addresses of the American Philosophical Association 8 (1974/75). Rawls is speaking here of any sophisticated or complex legal system.

^{479/} S. Hampshire, Morality and Conflict (1983) p. 26; R. Dworkin, A Matter of Principle (1985) pp. 167-80; See R. Dworkin, "No Right Answer?" 53 NYU L. Rev. 1 (April 1978).

CHAPTER 7

BEYOND AUTONOMY: A HALAKHA FOR LIBERAL JEWS

In the preceding chapters we have inferred the presence of two critical problems facing contemporary liberal Judaism. The first, and lesser, problem is the absence of a methodology for liberal Jews to advance a coherent Judaism. It is not that methodologies have not been proposed, but rather that they have limited their vectors--or limits--solely to subjective or self-conscious sensitivity. The problem is not that this aspect of autonomy--self-conscious sensitivity--is irrelevant to any attempt at rendering a coherent Judaism, but rather that it is relevant but insufficient.

Richard A. Block, for example, speaks of

a coherent, Jewishly authentic position for oneself . . . [which] can emerge from a personal confrontation with Jewish tradition, as one draws upon that part of the tradition that resonates most intensely within oneself.^{480/}

There is nothing, in this projection, extrinsic to ego and personality which one must incorporate if "a coherent, Jewishly authentic position" is to have any value.

The same defect--what else besides ego, emotion and taste must fit?--appears in the early attempt of Eugene B. Borowitz to advance a method for liberal Jewish choice-making. Borowitz presented as his first question: "What would God want me to do?"^{481/} In suggesting a method for answering, Borowitz yielded

^{480/} R. A. Block, "Reform Judaism and Capital Punishment," 30 Journal of Reform Judaism 7 (Spring 1983) (emphasis added).

^{481/} E. B. Borowitz, "Towards a Theology of Reform Jewish Practice," CCAR Journal 27 (April 1960) (emphasis added).

immediately to a subjective sensitivity outside of the Jewish continuum, saying that the

answer comes from reason, conscience (to sense the moral imperatives of the universe), [and] special ways hinted at by ordinary experience, e.g., deep love, friendship, genius and inspiration.^{482/}

Borowitz continued his line of inquiry: "Does God want me as a Jew to do this so that through it I may help fulfill the covenant?"^{483/} In commenting upon this second question in his methodology, though Borowitz asserted that the Jew "acts as a member of his religious people and his religious obligations are therefore personal and communal at the same time," he nevertheless insisted, as if in self-refutation, that for "the liberal . . . individualism is basic and the single man's mind, or conscience, or inspiration, may never be compromised by any collective entity."^{484/}

True, though he might have added "unless it is willed." That is to say that the willful compromise of unbridled autonomy is at the very heart of communal obligations and, necessarily, of a coherent Judaism.

Borowitz asked his mythic Jew to inquire whether "this undertaking [is] appropriately created and loyal to the immediate religious moment as opposed to an undertaking confined to that which custom has hallowed."^{485/} This, as if the carpet had not been

^{482/} Id. at 28.

^{483/} Id. at 29 (emphasis added).

^{484/} Id.

^{485/} Id. at 32.

sufficiently rolled out for uncompromised subjectivism in his first two queries. Finally, Borowitz said that his model Jew should ask whether this undertaking--derived from an intellectual and moral process the lodestars of which are far outside the necessarily particular boundaries of coherent Judaism--involves "not just this act and this man, but this people and its historic mission."^{486/} Is this not an inversion, putting (in terms of MacIntyre's model of the child who plays chess for a reward of candy) internal goods--"this people and its historic mission"--at the mercy of external rewards--my sense, absent Judaism (as if this were a possible deontology) of the moral imperatives of the universe.

Jakob J. Petuchowski's proposed methodology is, in this respect, a vast improvement. Unlike Borowitz, he asks the Jew to begin his inquiry at the point of "this people and its historic mission," namely asking "what, in a given case, has been the main direction of the millennial tradition?"^{487/} He argues, for example, that "one must not remain satisfied with first impressions" and leave Jewish tradition merely on the basis of an emotional disinclination. Because meaning and morality within Judaism "was not always uniformly understood and interpreted" Petuchowski asks the Jew to indulge Judaism in a critical regression analysis--"to discover the main thrust within the tradition."^{488/} Following

^{486/} Id.

^{487/} J. J. Petuchowski, Heirs of the Pharisees (1970) p. 174.

^{488/} Id. We believe we are amplifying and expanding this aspect of Petuchowski's approach, which invites the Jew to develop and articulate a most coherent Judaism.

this central and critical inquiry, Petuchowski sees his model Jew asking "in what manner can I best realize the traditional teaching in my life and in the situation in which I find myself."^{489/} This is followed by submission to "the voice of my own conscience"^{490/} and to "my feeling of responsibility toward the covenant Community."^{491/}

What is superior about Petuchowski's approach is that it does not begin with ego and emotion, but with modesty and inquiry. This approach is necessary to avoid the hubristic self-sufficiency and anti-normative fixation which renders Judaism little more than a reflection of what people who call themselves Jews do or perhaps seek. Rather an initial attitude of modesty and inquiry identifies Judaism as--again in MacIntyre's terms--a "practice" which

involves standards of excellence and obedience to rules as well as the achievement of [internal] goods. To enter into a practice is to accept the authority of those standards and the inadequacy of my own performance as judged by them. It is to subject my own attitudes, choices, preferences and tastes to the standards which currently and partially define the practice. Practices of course, . . . have a history: games, sciences and arts all have histories. Thus the standards are not themselves immune from criticism, but nonetheless we cannot be initiated into a practice without accepting the authority of the best standards realized so far. If, on starting to listen to music, I do not accept my own incapacity to judge correctly, I will never learn to hear, let alone to appreciate, Bartok's last quartets. If, on starting to play baseball, I do not accept that others know better than I when to

^{489/} Id. at 175.

^{490/} Id. at 176.

^{491/} Id. at 177-88.

throw a fast ball and when not, I will never learn to appreciate good pitching let alone to pitch. In the realm of practice the authority of both goods and standards operates in such a way as to rule out all subjectivist and emotivist analyses of judgment.^{492/}

But though Petuchowski's initial inquiry signals an investment in this internal point of view--where internal goods are sought--characterized by the fact that their achievement is a good not just for an individual but for the whole community which participates in Judaism, it is too tentative. Are there boundaries--substantive categories or constitutive principles--by which the inquiry can be governed? By "constitutive principle" we mean one which is valued for its own sake such that any failure fully to secure it, or any decline in the degree to which it is secured, is pro tanto a loss in the value of the overall arrangement.^{493/}

If a methodology for liberal Jewish choice-making can confirm and articulate constitutive principles, its adherents might then begin to address the second and far more pervasively self-destructive problem inferred herein. This is the absence of community or shared values. The "Judaism" of liberal Judaism has, it seems, become little more than a historical record, swept from side to side by the juggernaut of "the liberal's most precious right . . . the universal franchise of religious decision."^{494/} It is

^{492/} A. MacIntyre, After Virtue (1985) p. 190.

^{493/} Taken from R. Dworkin, A Matter of Principle (1985) p. 408 n.l. See pp. 169-71 supra.

^{494/} E. B. Borowitz, "Toward a Theology of Reform Jewish Practice," CCAR Journal 27 (April 1960).

no wonder, then, that Halakha has become objectified as a historical corpus which liberal Jews would "consult" (and then reject on the basis of externally supplied values) because any law or rule or standard becomes "a remarkably blunt [if not irrelevant] instrument if it is not supported by a social consensus that is consonant with its important objective."^{495/} In the absence of consensus and commitment, talk of a "Reform community" is but an oxymoron, so much the more so "Reform Halakha."

As we have shown, it is not that autonomy or self-authority are intrinsically antithetical to Judaism as an inheritance which we try to make most coherent. The point is made characteristically simple by a hasidic tale retold by Elie Wiesel:

Yaakov-Yitzhak, who would become the Holy Seer of Lublin, ran away to the forest when he was only three years old. His father wanted to know: 'Why are you wasting time in the forest? Why do you go there?'

'I am looking for God,' said the three-year-old boy.

'Isn't God everywhere?' asked the father. 'And isn't He everywhere the same?'

'He is--but I am not,' replied the child.^{496/}

Liberal Judaism, to the extent that it has elevated autonomy to the status of elixir is like the child in this story, saying not "He is-but I am not" but rather "He is not, Judaism is not and I am not." In such a "Judaism," the only constitutive principle is ish

^{495/} I. R. Kaufman, "The Anatomy of Decisionmaking," 53 Fordham L. Rev. 14 (1984).

^{496/} E. Wiesel, Four Hasidic Masters and Their Struggle Against Melancholy (1978) p. 73. See J. Dewey, Experience and Nature (1929) pp. 17-27 (acknowledging the subjective element in all human experience).

kol ha-yashar b'einav--every man whatsoever is right in his own eyes.^{497/}

"Beyond autonomy is the free acknowledgment of that by which we are bound And we are bound to be free in the sense that our freedom is only actualized in the preacceptance of that which authoritatively claims our assent and obedience."^{498/}

To be sure, the ghetto is gone and the old hammer of economic sanctions went with it. This need not be fatal to a rejuvenated coherent Judaism, however, in that "enforcement" need not be seen as punitive as much as it is the necessary consequence of communal standards. There is, for example, no "law," in the strict political sense, that we are not to eat with our hands. But on this aspect of etiquette, we coerce, we impose, we circumscribe, and we require surrender--at least in the public setting--of unlimited autonomy.

Is not any prayer book or siddur of the same general essence, demanding the surrender of autonomy at least insofar as autonomy is expressed in random and disruptive practice? The answer is surely yes, but we often fail to admit as much, and further that behind the fig leaf of ungrounded autonomy is the egotistical manipulation by the few, who depend upon the ignorance and alienation of the many.^{499/}

^{497/} Deuteronomy 12:8. So Old JPS. The New JPS renders the same "every man as he pleases."

^{498/} R. J. Neuhaus, The Naked Public Square: Religion and Democracy in America (1984) pp. 17-18 (emphasis in original).

^{499/} See C. E. Librach, "Prayer, Worship and Creative Services," 50 Jewish Spectator 40-42 (Summer 1985).

We Jews outside of the Orthodox community can move ourselves beyond autonomy to a collective sense of the authoritative (not authoritarian) and sustain liberal Judaism as both. It means understanding that the antecedent autonomous attitude of the Jew (committed to a coherent Judaism) is that its proffered best way of life--Halakha--involves in some sense a submission or a subjugation of autonomous will.^{500/} This is not a subjugation to regulation but a subjugation to that which is freely chosen by one as authoritative. Ignorance, after all, is also a subjugation of autonomous will, and if "liberal" means ignorance (ignoring Judaism instead of constantly striving to theoretically express and live its most coherent explanation) it means a slavery to whim and style that strikes at the very heart of the Pesach metaphor, in which event liberal Judaism is truly neither.

In such a submission, the focus would shift from ish kol ha-yashar b'einav to taaseh ha-yashar b'einai adonai^{501/} (thou shalt do that which is right in the eyes of the LORD). This is not a descriptive fact but a collective goal, which we understand all the while to imply not imposed regulation and authoritarianism, but the self-discipline of those who freely embrace kol ehad v'ehad lefi kokho (to each person the Torah is revealed and understood according to his strength).^{502/}

^{500/} See H. Gibbons, "Justifying Law: An Explanation of the Deep Structure of American Law," 3 Law and Philosophy 168-69 (1984).

^{501/} Deuteronomy 12:25.

^{502/} Exodus Rabbah V:9. See J. J. Petuchowski, "Plural Models Within the Halakha," 19 Judaism 83 (Winter 1970).

The basis for tolerance--which is what the "liberal" in liberal Judaism must mean--in such a community would be the acknowledged shared commitment and search for a most coherent Judaism. The individual process of choice-making would not be based upon a model of choice as in a cafeteria, where Jews would parasitically depend upon others to present the smorgasbord for their curiosity and discretion, but upon the more compelling model of the "choice" of the soldier who must go to war to defend his homeland or stay at home and care for his otherwise-abandoned mother. This is not "free choice" in that it is choice divorced from value; it is not choice which permits us not to consider our attraction to both possibilities. It is a value-laden choice, not out of a cafeteria-style discretion, but conclusively bound by our concepts of what Judaism is and which theory of it gives it its best and most coherent justification.

To use an alternative metaphor: it is as if we each have inherited property as "life tenants" only. That is, it has been passed to us for our use and enjoyment during our lifetimes only, thence to be transferred anew to future generations. The property as it has been inherited carries with it an enormous and complex network of restrictions on use: some of these seem appropriate and sensible to us, but others challenge our rationality or even seem to us downright wrong. Our task is to reconcile the myriad restrictive covenants on this inheritance to give it its best theoretical justification or fit, understanding that we are not empowered to alienate any substantial portion of the inheritance, though we may reinterpret its restrictive covenants, classifying some of them as

mistakes, all in an effort to preserve for future inheritors the full estate in its best form. Our responsibility is thus not mere "choice" but active inheritance.

Yet because autonomy and subjectivity are not only not eliminable but are critical paths through which the authoritative can be discerned and followed, no monolithic Judaism is suggested. That is, in a liberal Judaism beyond autonomy the opportunity of each individual Jew to confront, struggle, embrace and articulate his or her own best justification for a coherent Judaism must be honored. While such issues as kashrut and Shabbat observance are surely to be matters of normative correction, the behavior of each Jew in respect of their private expression of coherence cannot become the object of communal coercion. This is tolerance.

As matters move from a private to a public sphere, an inverse relationship is advanced whereby public coercion becomes more and more necessary in order that each individual Jew be sustained in the opportunity to encounter Judaism and approach his or her own sense of coherence. Kashrut, for example, is essential in communal Jewish life, because only then is it possible for tolerance to be meaningful.^{503/} Public prayer and worship should also be governed, where there is no substantial moral defect, by restrictions and form which permit the autonomous Jew (not only the rabbi or Prayer Leader) to make sense of it.

Accordingly, we enunciate a first axiom of liberal Judaism beyond autonomy: public coercion in Judaism is justified when it is

503/ See id.

part of a general scheme for expanding the range and power of the will of each individual Jew to understand or articulate a coherent Judaism.

In protecting "the will of each individual Jew to understand or articulate a coherent Judaism" we are not suggesting that such a collective effort would, ipso facto, yield an instant unity. This is a drive, a determination and a preoccupation of the Jew in Judaism: the best theoretical fit or most coherent Judaism is the object of our reach ever beyond the limits of our grasp.

No actually existing individual can perform a perfectly rational deliberation, that is, a deliberation resulting in perfect consistency and in an optimal balance of coherence and generality. Yet, one can meaningfully criticize deliberative statements when they contain inconsistencies, or when their coherence or generality is not sufficient.^{504/}

Indeed, such an undertaking by each Jew is not only beyond autonomy but beyond rationality as well. For what does it mean to think something rational if not to accept the norms that permit it?^{505/} It is surely as much a psychological condition as it is a cognitive process. We are driven to articulate ourselves in rational and consistent terms not because we put "feelings" or self-conscious inheritance outside of our mind, but because "such are reciprocal social requirements as part of a coordinating device--like language--that makes life with others possible."^{506/}

^{504/} A. Peczenik, "Moral and Ontological Justification of Legal Reasoning," 4 Law and Philosophy 293 (1985).

^{505/} See A. Gibbard, "Moral Judgment and the Acceptance of Norms," 96 Ethics 11 (October 1985).

^{506/} Id. at 20.

So values--our values, arrived at through autonomous reflection--will find their way into our rationes decindendi--our constitutive principles of justification. What is unavailable in this process of coherence is willful ignorance. That is, liberal Jews might be particularly wary about simply "lopping off" large chunks of inherited Judaism as irrelevancies. Just as you "test a scientific hypothesis by its usefulness or success in correlating data; so you test a Halakhic proposition not by its source but by its usefulness in presenting a Halakhic outlook."^{507/} We liberal Jews ignore the data at our peril, forsaking our opportunity to interpret and incorporate them. It is a process not unlike that of literary criticism. We may disagree and argue about whether David Cooperfield hated his mother or whether Hamlet and Ophelia were lovers before the play begins. We may, in trying to represent each literary effort as the best that it can be, say "yes" or "no" to these propositions, or justify the novel or play in such a fashion as to render the response trivial or irrelevant. What we cannot do, however, is say that David lived in Moscow or that Hamlet was a deaf-mute. We are bound by the limits of what we are trying to explain: and even Judaism, in all its vastness, has such limits.

Of course, it is not enough to merely put forth an "edgewise justification" for Judaism--like a printer setting a page.^{508/} We might instead undertake a rigorous "sort of

^{507/} M. Sosevsky, "The Lonely Man of Faith Confronts the Ish Ha-Halakha," 16 Tradition 84 (Fall 1976).

^{508/} See H. Gibbons, op cit. supra at 165.

regression analysis"^{509/} of our inherited traditions which sees us as the performer of the tradition's composition: how best does all of this fit together in a unity which is both coherent and right?^{510/} In this, the ultimate consideration will not merely be the avoidance of injustice or moral defect, "but what we might call the most just [and moral] result not only for our place and time, but also for what lies before us."^{511/}

We have established that critical in a theory of a most coherent Judaism is (1) a certain diversity, which "acquires its legitimacy from norms that are inherent in, or derivative from, the Jewish tradition"^{512/} and, (2) the reliance upon Scripture as the source for the discovery of values from which all of our value-bound propositions do not have to be derived, but from which most are and others are worked from texts which are seen as being "incredibly pregnant with hidden meaning."^{513/}

It is not "change" of Halakha which will rejuvenate it, but a community determined to correct it.^{514/} Correction occurs not

^{509/} Id.

^{510/} The performer-composition metaphor is taken from J. Frank, Courts on Trial (1949) p. 301, who likened judges to performers and legislators to composers.

^{511/} I. R. Kaufman, op cit. supra at 22.

^{512/} D. Polish, "The New Reform and Authority," 23 Judaism 19 (Winter 1974).

^{513/} L. M. Friedman, "On Legalistic Reasoning," 1966 Wisc. L. Rev. 158 n.31 (1966).

^{514/} Emanuel Rackman refers to Halakha's "process for correction." E. Rackman, "The Principle of Polarity," 29 Judaism 11 (Winter 1980).

only by changing the letter to conform to the newly-articulated coherent spirit, but changing our understanding of the spirit in order to accommodate the letter as well.^{515/} It is a "process characterized by a continuous interaction between subjective and objective components . . . [which] is not at all a question of 'adapting' or 'adjusting' the law to meet novel conditions, but of interpreting and applying it within the frame of reference of new circumstances."^{516/}

Thus we are able to articulate a second axiom of liberal Judaism beyond autonomy: normative correction in Halakha should be accomplished by a process in which the most coherent Judaism is advanced. The most coherent Judaism incorporates its highest moral focus with its inherited praxis, identifying as mistakes only those practices which are beyond the limits of the coherent theoretical fit, such as those which suffer from a substantial moral defect. Our antecedent internal point of view or search for internal goods will of course mean that we will look to committed scholars--presumptively rabbis--for the expression of the most coherent fit, with stature following consent and appeal.

Our two axioms are structural only. The task remaining is to articulate or to propose--here tentatively--Judaism's constitutive principles, or those which are valued for their own

^{515/} J. Chinitz, "Amendment to Jewish Law," 34 Conservative Judaism 28 (July/August 1981).

^{516/} W. S. Wurzbarger, "The Oral Law and the Conservative Dilemma," 3 Tradition 86 (Fall 1960).

sake, any failure fully to secure them or any decline in the degree to which they are secured seen as a pro tanto loss in the value of the overall arrangement. These would shape the boundary of coherent Judaism in large part because they would be the basis upon which we would evaluate each other's attempt at Judaism's best justification. There would also be in such principles the matrix for our discovery of what the Jewish tradition demands of us.

We conceive six such principles:

(1) Shalshelet ha-kabbalah: the chain of tradition. This is, in a sense, Jewish self-consciousness. It is an attitude that we have received and that we will transmit: we are links in a chain across continents and centuries with responsibility moving in both directions.

(2) Kol yisrael aravim zeh ba zeh: all Jews are guarantors for each other. This is collective responsibility, different from principle (1) in that it is not concerned with historical Judaism as traversed over time, but with the here and the now. It says to us that others in our midst depend upon our maintenance of Judaism so that each Jew can exercise responsible autonomy inside of it. It is a sense of collective consciousness, in much the same vein as is the practice of American taxation for public schools, due from all whether or not they are "users" of the system.

(3) Kavanah: autonomous intention. This is our acknowledgment that we will not ask ourselves nor each other to be alienated or, worse, repulsed by our own behavior. That is, this principle limits our ability to ask for adherence to ritualistic behavior to which we have moral or aesthetic objection. Of course,

this is one constitutive principle among six; its exaggeration has been among the greatest defects of calcified autonomy.

(4) Ha yashar v'ha-tov: the right and the good. This is the moral lodestar, hovering over the inherited corpus of law. It is the divinely-enjoined check on our self-regulation and our coherence, and the principal basis upon which we identify, in our corrective endeavor, some past inherited practice or procedure as a mistake.

(5) Ha-mishpaha: the family. This, rather than the individual, is the Jewish molecule. It is impossible to justify or cohere Judaism without careful attention to the family's centrality in the Biblical, Talmudic and historical Jewish life. A Judaism which would deny or ignore the family as its central institution would necessarily alienate itself from all moorings but the most ephemeral and solipsistic.

(6) Ha-melech: The King. This is God, the creator and master of the universe, who has spoken to Israel, a nation chosen as witness and exemplar, in language of covenant, obligation and opportunity, principally through Torah, the record of His revelation. God loves "the right and the good" because it is the right and the good and His alternating currents of power and benevolence are fixed in our alternating response of awe and love.

Autonomy, like freedom itself, is not liberation to anarchy or emotivism--these a brutal slavery--but is a liberation through which we can freely choose our Guide and Master. It is to the world of commitment beyond autonomy that liberal Judaism could now call itself. What is required in this not merely a methodology--here

tentatively offered--but a self-consciousness of commitment to God and His best way of life. We can see ourselves as autonomous "cheaters" of Judaism, plucking from it those elements and aspects which nurture and underscore our external (to Judaism) values, tastes and world view. Or we can find through our autonomy an opportunity to cleave to what we now can identify as not authoritarian but authoritative; sensing that having been fashioned in God's image, we must move ourselves ever in the direction of His likeness. Though our modesty will always prevail upon us to view each step along the path of "most coherent" to be that of discovery, we will be "credited by the Torah as though [we] had become a partner of the Holy One, Blessed be He."^{517/} And so we can indeed say, with Cardozo, that the "process in its highest reaches is not discovery, but creation."^{518/}

^{517/} The reference is to a passage in the Gemara which speaks of "he who reconciles a true judgment with its Truth." Shab 10a (our translation). See fn. 359, supra.

^{518/} B. Cardozo, The Nature of the Judicial Process (1949) p. 166. He is, of course, speaking of the American common law. We hope that we have convincingly advanced the analogue.

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