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When Morality and Law Conflict. Some Halachic Aspects

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When Morality and Law Conflict: Some Halachic Aspects
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Digest

The Torah is viewed by the Rabbis and tradition to be the infallible word of God. But there are laws which the Rabbis have found problematic and difficult to uphold in every situation. The Rabbis, it seems to us, are faced with a conflict of interests: the sanctity of the Torah and their interpretation of what is moral. Furthermore, a law which seems fair and moral in theory may not apply in all cases equally. Since the Rabbis were not working in a legal system like ours today, they did not have the power to legislate against their received law. No law could be deemed "out of date" or "unnecessary." Thus I am prompted to ask: do the Rabbis sense this supposed gap between law and morality? Did the Rabbis, through creative interpretation or even manipulation, recreate the meaning of legal texts so that they would conform to morality? Are the Rabbis even aware of the conflict between morality and law? And, if so, how do they respond to it?

Chapter 1 consists of a general look at the problem of morality and law conflicting from a philosophical and legal perspective. It outlines various instances of the problem in Jewish tradition, and explores several types of solutions.

Chapter 2 is concerned with the laws of the Sotah, the woman suspected of infidelity (Num. 5). Since this law was at one time practiced, but later suspended by the Rabbis, it is particularly interesting to look at the Rabbis' reasoning (if any) and legal manipulation in doing so.

Chapter 3 examines the responsibility of the Jew to the Gentile, especially pertaining to the question of whether a Jew may desecrate the Sabbath in order to save the life of a Gentile. We will look at laws such as "You shall not hate your brother in your heart." (Lev. 19:17) and ask who is meant by "your brother"? And, does this negative

commandment require of us any positive action? Furthermore, is the Jewish doctor obligated to save a Gentile's life even though that Gentile is not technically his "brother"? This issue is examined through Talmud and codes, but primarily through responsa.

Chapter 4 examines the role of equity as the normalizing factor between morality and law. This chapter serves as a conclusion, and attempts to answer the questions posed in the first chapter.

This thesis is by no means an exhaustive examination of the topic. But it may open the door for preliminary observations about the ways in which Rabbinic law deals with the problem of the conflict between morality and law, and it may inform modern rabbis as to the methods and rationale used by the ancient Rabbis, thus enabling us to make responsible judgements today.

“At times, the abolition of the Torah is its founding.”
--Reish Lakish, Menahot 96a, b

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Chapter 1: When Morality and Law Conflict

The Problem

Rabbah bar bar Chanan had a keg of wine broken by porters [due to the porters' negligence]. He took their cloaks as payment. They went and told Rav. Rav said to [Rabbah bar bar Chanan]: "Give them back their cloaks!" He asked [Rav]: "Is that the law?" [Rav] answered him: "Yes! As it is written: *In order that you go on the path of good people.*"¹ He gave them back their cloaks. They said to [Rav]: "We are poor people, and we laboured the entire day; we are starving and have nothing to eat." [Rav] said to [Rabbah bar bar Chanan]: "Pay them their fee!" He asked [Rav]: "Is that the law?" Rav answered him: "Yes! [As that very verse continues]: *and keep the ways of righteous people.*"²

What are we to make of this anecdote? The law would hold the porters liable for their negligence and hold them responsible to pay at least half the value of the load.³ But Rav requires Rabbah bar bar Chanan not only to waive their liability, but to pay them their day's wages! Is Rav refuting the law? Or is he appealing to a sense of morality that is outside of the law? How is it that Rav is citing ethical maxims and applying them as laws? Rav's sympathy for the poor workers leads him to make this equitable decision despite the law. Rashi tells us that in this case Rav expects Rabbah to act *lifnim mishurat ha-din*, beyond the letter of the law.⁴

Who is compelled to act beyond the letter of the law? And why should such a notion exist? Is the law of the Torah not moral? These issues have far-reaching implications for the way in which we understand Torah law and the Rabbis' interpretation

¹Proverbs 2:20

²Baba Metzia 83a

³*Ibid.*

⁴Rashi, s.v. "*B'derech tovim*" (Baba Metzia 83a)

of it. For if there is a moral standard outside of the Law, a type of natural law, then it is possible that the Torah is deficient. But if there is no such morality, then how do we cope with texts such as the one cited above? Furthermore, these questions have import vis-a-vis Jewish-Gentile relations, for if all that is ethical is contained within Torah, then it is questionable as to whether Jews may ever gain significant ethical insight from Gentiles.

Plato in *Euthyphro* poses the question in a similar way: "Do the gods love the good because it is good, or is it good because the gods love it?" Kellner rephrases the question in modern terms, "Does there exist some standard of morality independent of God's will? Do God's commands define morality, or can they themselves be judged in terms of some independent standard?"⁵ This is the dilemma at hand. For if there is a standard of morality independent of God's will, then it would be possible for a Divine commandment to be branded immoral. This possibility presents terrible consequences for the nature of God's omnipotence, omniscience, and Goodness.

The followers of traditional Jewish law find themselves in somewhat of a quandary when they are confronted with the sense of morality imposed upon them by the secular world and by their own personal consciences, and realize that Torah law is sometimes at odds with it. For those who accept the teaching that the Torah laws are Divine, it is impossible for these laws to be branded as immoral.⁶ Yet, as we shall see, there are many instances of moral precepts taking precedence over the strict law.

Neither the Torah nor Rabbinic literature provide us with a fully developed

⁵Kellner, p. 39.

⁶Weiss-Halivni, p. 169.

philosophical theory of the nature of morality or the values held within a Jewish concept of it. The Mishnah tractate, Avot, gives us insight into some ethical teachings, but it only states maxims and does not discuss the applicability of them. The Mishnah does not set forth grounds on which moral judgements are based, nor does it recognize morality as a category different from law. Thus the Rabbis are not in a position to cite an ethical maxim in order to trump a legal obligation. Yet, as we saw above, they do this despite the "rules" or they claim that the morally proper act *is* the rule-- *din*.

Unfortunately for our purposes, the Rabbis of the Mishnah are not consistent regarding when they allow ethics to trump law. In M. Yevamot 10:1 we are presented with an unfortunate situation of a woman who is penalized for a legitimate error.

A woman whose husband went overseas, and they came and told her, 'Your husband died,' and she married, and afterward her husband came [back] -- she must leave both of them, and she needs [to receive] a bill of divorce from each, and she receives neither the *ketubah*, nor [payment for] the fruits, nor sustenance, nor worn property [payment] from either; if she took [payment] from either, she must return [it]. [Her] child by either is a *mamzer*, neither of them may contaminate himself to her, and neither has rights to her found objects, or the products of her labour, or the nullification of her vows....

This woman is the victim of an honest mistake but she is treated as if she committed adultery on purpose! Today's moral conscience would tell us to find a way to liberate the woman from this situation since she is being held hostage by a misunderstanding, but the Rabbis do not make any such efforts. This shows that we cannot formulate a principle that determines when the law is dictated by moral considerations and when it is not. Another such example occurs in M. Eduyot 4:9:

If there were three brothers, two married to two sisters, and one unmarried, and

one of the married brothers died, and the unmarried brother bespoke the widow, and then his second brother died, the School of Shammai say: His bespoken wife abides with him and the other is free as being his wife's sister. And the School of Hillel say: He must put away his bespoken wife both by bill of divorce and by *halitzah*, and his brother's wife by *halitzah*. This is a case whereof they have said, "Woe to him because of [the loss of] his wife, and woe to him because of [the loss of] his brother's wife!"

In both of the above cases we have Rabbi Akiva's principle, "*Ein m'rachamin b'din*," "there is no compassion in matters of law," underlying the decisions.⁷ In the latter example, even the usually gentle School of Hillel imposes a rule so painful that the Mishnah states explicitly that when the Sages considered the consequences of this ruling they experienced sorrow and anxiety.

Conversely, there are instances when the Mishnah does act in accordance with moral concerns:

If a man undertook to give money to his [prospective] son-in-law and then stretched out the leg (i.e., became bankrupt), she may sit [and remain unmarried] until her hair grows grey. Admon says: She can say, 'Had I myself undertaken it I would sit down until my hair grows grey; but since now it is my father that undertook it because of me, what can I do? Either marry me or set me free.' Rabban Gamaliel said: I approve of the words of Admon.⁸

Here we have a harsh law tempered by Admon and Rabban Gamaliel's sense of equity and compassion. But what makes the Rabbis rule compassionately in this case and not in the preceding two? Through these three examples we can conclude that the Rabbis of the Mishnah do not follow any rules which govern what causes the Rabbis to perceive inequity in some cases but not in others. In fact, the inconsistency of the Rabbis' decisions

⁷Fox, p. 40*.

⁸M. Ketubot 13:5

concerning when to adhere strictly to the law and when to allow moral and/or equitable concerns to win reveals their own struggle between right and wrong, morality and law. The Mishnaic Rabbis respond differently to each situation and treat each situation independently; a pattern cannot be detected. The absence of a pattern is perhaps as telling as a pattern might have been. From the absence of a system of determining the moral import of legal situations we learn that the Rabbis are not necessarily working with a sense of a morality outside of the law. However, I believe that the Rabbis have an understanding of equity as a separate entity from the law and try to uphold it whenever possible. Equity is the concept of resorting to general principles of fairness and justice when existing laws prove inadequate.

The Rabbis' sense of equity is illustrated in our last Mishnah from Ketubot. In considering the case at hand the Rabbis asked themselves who ought to be responsible for the father's loss of money. Clearly it is not fair for the girl to suffer for her father's mistakes. Thus Rabban Gamaliel is satisfied with the statement that the girl may demand to be released from her obligations of marriage. The Rabbis use their sense of equity--itself a part of the law--to adjust the law in such a way that it is true to the spirit of God's laws in general. In the subsequent chapters of this work, we will see several other examples of the Rabbis acting to satisfy their sense of equity.

There is no Jewish moral philosophy handed down from on high, so there is no absolute definition of "Jewish morality." Law, on the other hand, is defined and static. Man's sensitivity and thus his concept of right and wrong is constantly changing. So we are left with a situation in which the law may or may not conflict with man's sense of

morality depending on the era, the historical and social pressures, and the current ideas of what is moral.

Some Solutions

The Rabbis realised this fact but were still confronted with situations which necessitated the changing of certain laws. "Changes in the law, where social conditions demanded these, were sometimes effected through legal fictions, by means of which the original law was not abolished but circumvented."⁹ For instance, Exodus 12:20 commands, "and there shall be no leavened bread seen with you." The Rabbis stretched the meaning of this law and chose to understand it as permitting leaven in the house during Passover if that leaven belonged to a non-Jew. Thus the procedure became to sell one's leaven to a non-Jew for the duration of Passover.¹⁰ The Rabbis also developed a *hetter*, a technical legal permit, in order to avoid the prohibition against cultivating the Land during the Sabbatical year.¹¹ Further, they developed the *hetter iska*, a ruling which allowed Jews to loan with interest to other Jews--a practice forbidden according to the Torah.^{12 13} In all of these cases, the Rabbis succeeded in changing the law by creating loopholes in it and presenting the appearance of carrying out the original law. Of course, in all of these cases,

⁹Jacobs, p. 141.

¹⁰Pesachim 5b

¹¹Exodus 23:10-11; Lev. 25:1-7; 20-22; For Rabbi Kook's views see his *Shabbat ha-Aretz*, and for the opposing views of *Ridbaz* see his Commentary *Bet Ridbaz* to Israel of Shklov's *Peat ha-Shulhan*.

¹²Baba Metzia 104b; cf. Betzah 32b

¹³Another example of Rabbinic manipulation of the law will be discussed in Chapter 2.

the Rabbis present their *heterim* as legitimate interpretations of the law. Though they may seem like changes to us, as we shall see, the Rabbis explained their role differently.

However, in the case of *mamzerut* (i.e., bastardy) the Rabbis took a different approach and failed to institute the necessary changes to the law. Weiss-Halivni points out that in the case of *mamzerut* the Rabbis allowed the conflict with morality to enter into their consciousness overtly and as a result they became so paralyzed that no substantial change of law occurred.¹⁴ The Rabbis' admission of the problem is evident in Leviticus Rabba 32:8:

"But I returned and considered all the oppressions" [Ecclesiastes 4:1]--Daniel the Tailor interpreted the verses as applying to bastards. And behold the tears of such as were oppressed--If the parents of these bastards committed transgression, what concern is it of these poor sufferers? So also if this man's father cohabited with a forbidden woman, what sin has he himself committed and what concern is it of his? And they had no comforter but on the side of their oppressors there was power. This means, on the side of Israel's great Sanhedrin which comes to them with the power derived from the Torah and removes them from the fold in virtue of the commandment. "A bastard shall not enter into the assembly of the Lord" [Deut. 23:3]. But they had no comforter, says the Holy One, blessed be He: It shall be my task to comfort them.¹⁵

Declaring bastardy immoral caused an open conflict between morality and law, which closed the possible avenues of adjustment. Whereas in other instances, the Rabbis found a way to limit an unadmittedly but clearly immoral law to an extreme situation, in the case of *mamzerut*, they admitted the problem and thus their motives in changing the law would have been evident. This would have implied that God is immoral, or is morally defective. And the Rabbis could not possibly propagate that belief. "[Limiting the

¹⁴Weiss-Halivni, p. 166.

¹⁵Soncino translation.

applicability of a law] was necessary in order not to impugn the *Lawgiver* with a lack of moral sensitivity which may undermine not only this law, but laws in general.”¹⁶ In limiting the applicability and scope of a law the Rabbis would have to base their interpretation on something other than morality. Given their admission of the moral problem with mamzerut, the Rabbis of all ages have failed to find a satisfactory way to ammend the laws.¹⁷ The best solution proposed is for the mamzer to relocate and ignore his impure status. This is not a legal solution; in fact, it is immoral as well.

An example of the Rabbis successfully limiting a law so as to effectively abrogate it is seen in their treatment of Deut. 22:13-22. This is the case of *motzi shem ra*, the spreading of a bad name. In other words, a groom claims that his bride is not a virgin. In such a case the bride’s parents must prove that she was, in fact, a virgin. If the man is found to have lied, an fabricated a story because he has taken a disliking to his new wife, he is flogged and fined, and he shall never have the right to divorce her. However, if the charges are proven to be true, the woman is stoned to death.

The Rabbis limited the applicability of this law by ruling that it is limited to the time of the Temple with a court of twenty-three, since the scenario might result in an execution. Furthermore, contrary to Deut. 22:21, the Rabbis require proof of the woman’s lewdness and allow the case to be held as a monetary dispute in a small court. The Rabbis find all different types of exceptions to absolve the woman.¹⁸ But the Rabbis

¹⁶Weiss-Halivni, p. 167.

¹⁷Cf. Jacobs, Appendix B, pp. 257-275.

¹⁸Guttman, “The Role of Equity...” p. 83.

never call the law immoral. They simply act to limit it.

The Rabbis also limited laws using sound common sense, logical reasoning. This reasoning is called a *sevara* and when accepted, it has the validity of a biblical statement. When argued properly, “a *sevara* may be so convincing that it may compel one’s conscience to suppress the plain meaning of a biblical injunction and force upon a verse in the Bible a meaning that it can hardly bear textually. A *sevara* may show that in certain areas the consequences of a generally prevailing law would be unacceptable and, therefore, that those cases must be exempted from the authority of that law.”¹⁹ We see an example of the *sevara* at work in a situation dealt with at *Ketubot* 2b and 3a. The principle at issue is: *Ones rahamana patrei*, the Torah frees a person from responsibility for a commission or omission that occurs as the result of external compulsion, any Act of God, any normally unexpected event or unenvisioned circumstance. Yet Raba declared that this rule does not apply to cases of divorce.²⁰ In other words, a man cannot hand his wife a *get* on the condition that the divorce will become effective only if a certain event takes place. Raba justifies this decision based on his own *sevara*. He pictured a worst-case-scenario in which a man handed his wife a *get* before leaving on a journey; the *get* would take effect only if he did not return after twelve months. If he did not return after the twelve months, either he could not due to external factors or chose not to return. The woman is forced to choose between these two options and either remarry or live in a state

¹⁹Berkovits, p. 6.

²⁰*Ibid.*, p. 5.

of *Aguna*²¹ for the rest of her life. There is no correct choice. In practice, this situation would be intolerable, and so, Raba ruled, the principle of *Ones* cannot function in the area of divorce. With his ruling, when a *get* is given on a condition, husband and wife are informed that the divorce is valid once the condition has been fulfilled, no matter for what reason.²²

In Rabbinic understanding, no court is empowered to set aside a law promulgated by another court unless the second court is superior to the first "in wisdom and in number."²³ As far as the Rabbis are concerned, no post-Talmudic court could ever be equal to a court of Talmudic Sages. But, if there is no court ruling (i.e., there is no Sanhedrin) and the circumstances that occasioned the original ruling are no longer in play, the Rabbis can change a decision, law, or custom. Even though Maimonides later disagreed with this principle, we will see that the Rabbis did, in fact, employ it.²⁴

So we see that the Rabbis resort to several different tactics in order to change, or abrogate a law: they may limit it, sometimes to the absurd; they may reason using human logic that the Biblical text intends another meaning; or they may argue that the circumstances that occasioned a certain law are no more.

²¹I.e., the woman is not able to divorce legally due to the absence of her husband, and therefore cannot remarry.

²² Ketubot 3a makes clear that the *sevara* explanation assumes that the Rabbis issued a *takannah* invalidating a divorce in these instances otherwise there are complications with a toraitically valid *get* not successfully divorcing the wife. Instead the Rabbis act to annul the marriage. This presents new problems especially if the marriage was affected conjugally. See below, note 46.

²³Mishnah Eduyot 1:5

²⁴As in the case of the *Sotah*, see chapter 2 below.

Law vs. Ethics

In order to understand better the parameters within which the Rabbis were working, let us look closer at the nature of law, and at law as compared to ethics. Law, by nature, is categorical and for all. It is meant to be down to earth, precise and exact. Law is social, objective and coercive. Ethics are individual, subjective and voluntary. Law deals with men in the gross and in generalities. Ethics seeks the personal and particular. Law is more modest in its demands, insisting only on abstention from what is forbidden. Ethics demand the willing fulfilment of positive duties. In law an agent may act for us; to be moral, we must carry out our responsibilities ourselves. Law cannot make us good Samaritans, but it can enforce a sort of minimum social morality. For law, "the unique situation, demanding a direct, individual choice, is beyond its scope."²⁵ That is, much of law is morally indifferent, while the truly moral act cannot be legally enforced even if the content of individual moral and legal rules is the same, because the sources of their respective validity, or at least the attitudes involved in each case, are by definition different.

But what do laws have to do with ethics? St. Thomas of Aquino (1225-1274), founder of the "natural law" tradition within jurisprudence, assumed that those who make laws wish their subjects well and always establish rules that serve the common good. In his *Treatise on Law*, Aquinas says that, "Law is nothing else than an ordinance of reason for the common good, promulgated by him who has the care of the community."²⁶ By

²⁵Shklar, p. 44.

²⁶Lyons, p. 7.

contrast, John Austin (1790-1859), one of the main proponents of “legal positivism,” sees the law as a brute social fact based on power which can be exercised for good or evil. In *The Province of Jurisprudence Determined*, Austin says, “A law is a command which obliges a person or persons...Laws and other commands are said to proceed from superiors, and bind or oblige inferiors.” He explains, further, that “the term superiority signifies might: the power of affecting others with evil and pain, and of forcing them, through fear of that evil, to fashion their conduct to one’s wishes.” Laws, according to Austin, may be wise or foolish, just or unjust, but are always coercive.²⁷ Aquinas also concedes that some laws are just and others are unjust. In discussing laws formulated by humans, he argues that if in any point the law should depart from the law of nature, it is no longer a law but a perversion of the law, and one is not morally bound to obey it.²⁸ That is all well and good, but what of laws that are said to originate from God?

Both Aquinas and Austin believe that divine law provides morality with its required basis. God is seen as the source of the “moral law”. But this belief presents problems when we confront divine laws that seem immoral. Immanuel Kant (1724-1804) based his theory of morality on an understanding of what it is to be a “rational agent,” a being capable of directing his own behaviour by reasons. That is, Kant did not regard objective moral standards as dependent upon God’s will. The application of reason to action rather than God is the foundation of Kantian ethics.²⁹ For Kant, there is certainly a

²⁷*Ibid.*

²⁸*Ibid.*, p.8.

²⁹*Ibid.*, p. 10.

morality outside of the *halacha*.

The problem arises when we have a set of laws in written form, said to have come from God. Law, by nature, is morally fallible, since it is formulated to apply to many different situations. All situations cannot be anticipated at the time of the formulation of the law, and so one or more consequences of the application of that law to various situations may result in immoral action. Since we want to believe that God is good and moral, we must, therefore, concede that God was unable to anticipate each and every situation when formulating the laws of the Torah. This, of course, has implications as to God's omniscience, but even the Rabbis, at times, are willing to grant God some human-like fallibility in that regard.³⁰

Law, concludes Lyons, is undoubtedly morally fallible. "But this conclusion does not depend on legal theory. It reflects our use of moral judgement. We can identify some norms as law and we judge that some are morally deficient. We may not be able to establish, at the theoretical level, that law is morally fallible, but we are sometimes able to judge that laws are bad, wrong, or unjust, and this tells us that law is morally fallible."³¹ Since law by nature is morally fallible, God's laws must also be fallible. But this is a fact not easily admitted by the transmitters of tradition since God's law is supposed to be infallible. It is the nature of God's vehicle for transmission--law--that is fallible and so it naturally causes God's word to be problematic as well. So perhaps it is not the law itself that is fallible, but the translation into human terms that causes problems. The Rabbis

³⁰Indeed, God is pictured as grieving when Israel goes in to Exile. cf. B. Berachot 3a

³¹Lyons, p. 66-67.

realise this difficulty, and so they “fix” the divine law in order to help it achieve its true intent.

Jewish ethics is part of a system of rules that also governs relations between humans and God and is part of *halacha*. Rabbi Ovadiah Bartenura comments in the opening section of his commentary on Pirkei Avot: “I declare that because this tractate is not predicated upon explication of any particular commandment of the Torah, as are other tractates of the Mishnah, rather [it consists] in its entirety of moral maxims and ethical qualities. And [since] the wise men of the nations of the world also composed works according to the fancies of the hearts dealing with ethical conduct...therefore the Tana began this tractate [with the words] “Moses received the Torah from Sinai” indicating that the ethical qualities and moral maxims which are [contained] in this tractate were not the fancies of the Sages of the Mishnah, but that even they were revealed at Sinai.” Since ethical teachings are part of *halacha*, they must originate with the Creator. But humans, the Rabbis, are at liberty--inspired as they are by God--to develop the rules in order to implement or protect the law. Since ethics is part of *halacha*, the basic Torah rule must imply the particular moral virtue at issue; but it is up to the Rabbinic law to uphold that level of morality in the implementation of the law. “In the case of scriptural/divine law, the rule is always prior to the principle. That is, the principle is inferred from the rule a posteriori.... However, in the case of rabbinic/human law, the principle is prior to the rule in the sense that we do know in advance the reason *for which* the rule was originally devised. It is very much the ground of the rule. The rule is thus derived from the principle as a means is derived from the end it intends. For unlike divine law where “My

thoughts are not your thoughts” (Is. 55:8), in the case of human law, it is not only assumed that the intention of the human lawgiver can be fully grasped by other human minds, it is required that this intention be publicly stated sooner or later. There is no Rabbinic law without its evident intent/reason at hand sooner or later.”³² In fact, the Rabbis admit that there are only three laws for which no reason is given: “The truth is,” said Mar Zutra, “that there are three laws which the Rabbis have laid down arbitrarily without [giving] a reason. One is this one. (I.e., that for the sake of the benefit which the borrower derives from the difference [in time of payment] between the old debt and the new one, he willingly pledges himself to the new creditor.) A second is the one laid down by Rab Judah in the name of Samuel: If a [dying] man assigns in writing all his property to his wife, he only makes her a trustee for it. The third is the one laid down by R. Hananiah: If a man celebrates the marriage of his son who is over age in a special house, the son becomes the owner of the house.”³³ In several cases, as we shall see in the subsequent chapters, the reasons given by the Rabbis for their rulings are moral ones. It is our task, in the course of this thesis, to isolate instances wherein the Rabbis seem to act out of moral concern to abrogate or alter the law, and to determine whether the Rabbis reveal their motives.

Ethics and Ethical Principles

In B. Baba Metzia 30b we read, “Rav Yohanan said, ‘Jerusalem was but destroyed

³²Novak, *Natural Law in Judaism*, p. 75-76.

³³Gittin 14a

because they (i.e., the inhabitants) judged [in accordance with] Torah law within it.' Well, should they rather have followed the law of the Magians?! Say, rather because they based their judgements solely upon Torah law and did not act *lifnim mishurat ha-din*--beyond the line of the law."

We saw an application of this principle, *lifnim mishurat ha-din*, above in the case of Rav and Rabbah bar bar Chanan and the porters. Now let us take a closer look at the significance of this principle and how it is implemented. We will also look at other principles that seem to overrule the strict meaning of the law.

There is disagreement among the Tosafists and Rishonim as to whether the principle of *lifnim mishurat ha-din* is binding. R. Isaac of Corbeille in his *Sefer Mitzvot Katan* classifies it as one of the six hundred thirteen commandments (he gives it number 49) and he cites Rav Yohanan's statement in *Baba Metzia* 30b as his proof text.³⁴ Ramban, on the other hand, does not classify it as an independent mitzvah and thus as binding as the commandments of *shofar* or *tefillin*, but he believes that it is a duty incumbent upon and expected of all Jews as part of their basic obligations.

Maimonides, on the other hand, puts *lifnim mishurat ha-din* on a high plane--almost unattainable. It is reached, he contends, only by hasidim. He describes what he intends by the golden mean and concludes, "And the early pietists (hasidim) would incline their traits from the median path toward either extreme. One trait they would incline toward the farther extreme, another toward the nearer; and this is *lifnim mishurat ha-din*. But we are commanded to follow these paths in the middle, and these are the good and the

³⁴R. Isaac ben Joseph of Corbeille, *Sefer Mitzvot Katan*, part 2, Jerusalem: 1964, p. 27.

right paths as it is said, 'And you shall walk in His path.'"³⁵ Even though we are not realistically expected to achieve *lifnim mishurat ha-din*, we are obligated to aspire to it since we are obligated to imitate God.

It seems that the Rishonim were divided on the issue. The Rosh held that "we do not compel to act *lifnim mishurat ha-din*"³⁶ and it may be inferred that the Spanish school agreed. Several Tosafists, however, including Ravva and Ravan, held that such action could be compelled.³⁷

The Maharal, though, was serious about the importance of *lifnim mishurat ha-din*. He equated *chesed*, benevolent action or compassion, with *lifnim mishurat ha-din*. And this is how the Maharal explains the Talmud's comment of Baba Metzia 30b. God did not punish the people, but the destruction of Jerusalem was a natural consequence, since a society based strictly on the law cannot survive. "Standing upon *din* (law) entails ruin." Furthermore, "rejection of *lifnim mishurat ha-din* is defined as the hallmark of Sodom whose evil, although it issued in corruption, nevertheless was grounded in total fealty to legal nicety: 'For this was their nature, to concede nothing, as the Rabbis o.b.m. said, 'Mine is mine and yours is yours--this is the trait of Sodom.' And they have where said, *kofin al midat sodom* (we coerce over a trait of Sodom).'"³⁸

J. David Bleich lists eight categories of *lifnim mishurat ha-din* which do not

³⁵Mishnah Torah, Hilchot De'ot 1:5

³⁶P. Baba Metzia 2:7

³⁷Lichtenstein, p. 112.

³⁸Ibid., p. 114 as quoted from *Netivot Olam*, "Netiv Gemilut Hasadim," chap.5.

ordinarily give rise to actionable claims: 1. *Diney shamayim*: the individual is culpable in terms of the “judgements of Heaven.” (This will be discussed below.) 2. *Nikra rasha*: acts of commission or of omission which give rise to the application to the perpetrator of the epithet “wicked person.” 3. *Mi she-para*: a formal curse invoking divine retribution pronounced upon a vendor who actually accepts the purchase price but takes advantage of the technicality of the law under which he may withdraw from the bargain because of failure formally to transfer title by means of executing one of the statutory modes of conveyance (*kinyan*). 4. *Latzet yadei shamayim*: a duty which must be performed in order to satisfy an obligation imposed at the “hands of Heaven.” 5. *Mehusar amanah*: a person lacking in trustworthiness. This may lead the person to be censured and not trusted even though there may not be a culpable offense. 6. *Ein ruah hakhamim noheh heimenu*: “The spirit of the Sages is not pleased by him.” 7. *Ein lo alav ela ta'arumot*: “He has only a grievance against him.” 8. *Midat hasidut*: a trait of the pious; that is, paying back charity given once the person can afford to do so.³⁹ These categories do not give rise to actionable claims, but they are part of the legal system of Judaism, and they are encompassed within the corpus of *halacha*.

Whether or not to act *lifnim mishurat ha-din* may be expected behaviour from a Jew or by a court of law, this principle is present in Jewish legal thought and there is precedent for requiring people--albeit a Rabbi as in Baba Metzia 83a--to act in accordance with it. The idea that we ought to be called to answer to a higher standard than even our own law expects was certainly present within the thinking of the Rabbis--or perhaps the

³⁹Bleich, “Is there an Ethic Beyond the Halakha?” pp. 527-546.

Rabbis saw this higher standard as integral to the system of law. It would be expected, therefore, that everyone striving to please God would set *lifnim mishurat ha-din* as his goal.

The Rabbis often tried to compel people to act ethically by promising eventual reward, even though the actions themselves were not required strictly by law.⁴⁰ One way in which they achieved this was by invoking the “law of Heaven.” When the situation at hand was beyond the reach of the law and legal procedures, it would be delegated to the court of Heaven which ruled by the law of Heaven. “Precisely because there is a religious dimension to the law, there are instances in which a man who brings about loss to his neighbour indirectly, although he is not liable to compensate him by human law, is nonetheless obliged to compensate him ‘by the law of Heaven.’”⁴¹ The Talmud gives four examples in the name of Rabbi Joshua.⁴² Rabbi Joshua uses the technical term for invoking the law of Heaven: *patur mi-diney adam ve-hayyav be-diney shamayyim*, “exempt by the laws of man but liable by the laws of Heaven.” The principle behind this tactic is this: a wrong has been committed; compensation for that wrong cannot be compelled by the rules of law, but since Jewish law is wrapped up in religion, there is a religious and ethical demand made on the transgressor; he cannot obtain pardon for the wrong until he has appeased the ethical obligations of the religion. “The “laws of Heaven”

⁴⁰Borowitz, p. 498.

⁴¹Jacobs, p. 182.

⁴²Baba Kama 55b

are also laws, and "Heaven" insists that these be obeyed."⁴³

There are also certain instances in which the Rabbis would condone the breaking of a Biblical commandment. The Rabbis are discussing the laws of where it is appropriate for a priest to wear his priestly garments.⁴⁴ The first opinion expressed is that it is forbidden for the priest to wear them outside of the Temple, but only in the Sanctuary is he permitted to wear them since they are for private use. Another opinion is brought that it is, in fact, permissible to wear the priestly garments outside the Temple and a story is cited to support this opinion: "The twenty-fifth of Tebeth is the day of Mount Gerizim on which no mourning is permitted. On that day the Cutheans requested our Temple from Alexander the Macedonian so as to destroy it; and he gave permission to them. People came and told Simon the Just. What did he do? He put on his priestly garments and wrapped in the priestly garments some of the noblemen of Israel went with him carrying torches of fire in their hands and all of that night they walked, some walked on one side and some walked on the other until dawn. When the dawn rose [Alexander] said to them: Who are these [the Samaritans]? They answered: The Jews who rebelled against you. As he reached Antipatris, the sun shone, and they met. When he saw Simon the Just descend from his carriage, he bowed down before him. They said to him: A great king like yourself should bow down before this Jew? He answered: His image it is which wins for me in all my battles." The conclusive opinion is that Simon the Just was not acting from the law, but in order to save it. "If you like say: They were fit to be priestly garments (i.e.,

⁴³Jacobs, p. 183.

⁴⁴Yoma 69a

they were not the real thing) or, if you like, say: *It is time to work for the Lord: they have made void Your law.*⁴⁵ So we see from this discourse that the Rabbis were willing to grant that the law could be upheld in certain situations. Rashi confirms this conclusion, "It is time to act, etc.: When the time comes to do something in the name of God (*Makom*) it is permissible, in doing so, to violate the Torah."⁴⁶

Following is an example of the Rabbis clearly uprooting a Biblical commandment because, it seems, they deemed it unfair: "Amemar has laid down that if a woman consents to betroth herself under pressure of physical violence the betrothal is valid. Mar son of R. Ashi, however, said: In the case of the woman the betrothal is certainly not valid; he treated the woman cavalierly and therefore the Rabbis treat him cavalierly and nullify his betrothal. Rabina said to R. Ashi: We can understand the Rabbis doing this if he betrothed her with money, but if he betrothed her by means of intercourse, how can they nullify the act? He replied: The Rabbis declared his intercourse to be fornication."⁴⁷ Here we see that the Rabbis manipulate the law because of their sense of what is fair--a cavalier act warrants a cavalier response.

The Rabbis are not blind to society around them; they realize that times are changing and the law must adapt as well. Rashi confirms this in his discussion of the principle, "these and those are the words of the living God." Rashi says, "When two Amoraim disagree with each other about the law...there is no untruth here. Each of them

⁴⁵Ps. 119:126

⁴⁶Rashi, s.v. "*Et la'asot*" (Yoma 69a)

⁴⁷Baba Batra 48b

justifies his opinion. One gives a reason to permit, the other, reason to forbid. One compares the case before him to one precedent; the other compares it to something different. It is possible to say, "both speak the words of the living God." At times, one reason is valid; at other times, another reason. For reasons change in the wake of even only small changes in the situation."⁴⁸ And so, when changes occur, the law must be adapted.

The Rabbis even acknowledged that the law sometimes was able to be changed in order to meet the needs of the hour. In Avodah Zarah 24b, the Rabbis discuss the story found in I Samuel 6:14. In this story, the Philistines, because of a punishment that befell them for having captured the "Ark of the God of Israel" send it back on a cart drawn by two cows. When the people of Beth-Shemesh found the Ark and the animals, they used the wood to sacrifice the two cows as a burnt offering to God. The Rabbis ask: How could they do that, since female animals were not to be used as burnt offerings? They resolve this problem by the statement that it was done on the basis of *Hora'at Sha'ah*, a ruling of the hour, only for this occasion. Rashi explains that they were permitted to sacrifice the two cows since a miracle had happened: the cows found their way without help from man. The people of Beth-Shemesh understood that in that hour, in that situation, it was incumbent upon them to give recognition to the miracle by sacrificing the cows to God.

The Rabbis introduced laws because of the "ways of peace." "The *Rabbanan* taught: Because of the ways of peace, one is obligated to support the poor of the gentile

⁴⁸Rashi, s.v. "*ha k'mashma lan*" (Ketubot 57a)

together with the Jewish poor; to visit their sick as one visits the Jews sick; to bury the non-Jewish dead as one buries the dead among Jews.”⁴⁹ None of these acts is required by Jewish law, but it would be wise to perform them from a public relations point of view and from a human compassionate point of view, so the Rabbis brought these obligations to the level of law.

So it seems that the Rabbis were ready to allow for ethical principles and unique situations to overrule a law. They would, in some situations, compel one to act *lifnim mishurat ha-din*; they compelled people to act according to the “laws of Heaven;” they realized the necessity of suspending the law to act in order to save it (*et la'asot l'Adonai*, it is time to work for the Lord); they uprooted unfair commandments; they recognized the changing times and needs of society and that the law must adapt to it; they allowed for a law to be transgressed due to “the needs of the hour.” And, finally, they allowed for lawsto be changed in order to uphold peace. In fact, in addition to upholding principles such as, “And you shall do that which is right and good in the sight of the Eternal One,”⁵⁰ and “Her ways are ways of pleasantness, and all her paths are peace,”⁵¹ or, “That you may walk in the way of good men, and keep the paths of the righteous,”⁵² the Rabbis cling to the belief that all of the laws of the Torah are meant to enable peaceful existence: The

⁴⁹Berkovits, p. 25.

⁵⁰Deut. 6:18

⁵¹Proverbs 3:17

⁵²*Ibid.*, 2:20.

Torah in its entirety exists for the sake of the ways of peace.”⁵³

J. David Bleich sums the situation up nicely, “In its normative law, Judaism codifies standards applicable to everyone and makes no demands that are beyond the capacity of the common man; but at the same time, Jewish teaching recognizes that, ideally, man must aspire to a higher level of conduct.”⁵⁴

Law and Ethics

“Raba pointed out a contradiction to Rav Nahman. We learnt: These are the things that man does and eats their fruits in this world, while the principle is left for him in the world to come, and these are they: honouring one’s parents, performing acts of love and kindness, bringing peace between a man and his fellow, and the study of Torah is equal to them all. Concerning the honouring of one’s parents it is written, ‘that you may lengthen your days and that it may go well with you.’⁵⁵ Of acts of love and kindness it is written, ‘He that pursues righteousness and loving kindness finds life, righteousness and honour.’⁵⁶ And concerning the love of peace it is written, ‘Seek peace and pursue it.’⁵⁷ ... Of Torah study it is written, ‘for it is your life and the length of your days.’⁵⁸ And concerning

⁵³Gittin 59b

⁵⁴Bleich, “Is there an Ethic Beyond Halakhah?”, p. 541.

⁵⁵Deut. 5:16

⁵⁶Proverbs 21:21

⁵⁷Ps. 34:15

⁵⁸Deut. 30:20

dismissing the mother bird from the nest it is also written, 'in order that it should be well with you and lengthen your days.'⁵⁹ So let this also be taught! --He teaches some and omits others. But the Tana states, 'These are the things, (i.e., only these)' yet you say that he teaches some and omits others? -- Said Raba, Rav Idi explained it to me: 'Say of the righteous, when he is good, that they shall eat the fruit of their doings.'⁶⁰ is there are righteous man who is good and a righteous man who is not good? But he who is good to Heaven and good to man, he is a righteous man who is good; good to Heaven but not good to man, that is a righteous man who is not good.⁶¹ Similar to this matter you say, 'Woe to the wicked man who is evil, for the reward of his hands shall be given to him.'⁶² is there a wicked man that is evil and one that is not evil? He that is evil to Heaven and evil to man, he is a wicked man that is evil; he who is evil to Heaven but not evil to man, he is a wicked man that is not evil.'⁶³

So it seems that there are two standards towards which everyone must strive. There is the standard of Heaven⁶⁴: the strict understanding of the law; and there is the standard of behaviour expected of each person toward his fellow. This second standard of

⁵⁹Deut. 22:6-7

⁶⁰Isaiah 3:10

⁶¹Therefore the verse refers to the first instance, in connection with whom 'they shall eat the fruit of their doings,' that is, they are rewarded in this world. But dismissing the mother bird is 'good to Heaven only', that is, it is obedience to God's will, but no benefit to man.

⁶²Isaiah 3:11

⁶³Kiddushin 40a

⁶⁴This standard of Heaven is not to be confused with the "law of Heaven" discussed above. Here, Heaven refers to the strict interpretation of the law and its minimum requirements.

behaviour is what ultimately determines whether a righteous man is good or not, and whether a wicked man is evil or not.

By drawing a distinction between these two measures of right and wrong, the Rabbis admit that there is an ethic outside the halacha. But it seems that this ethic cannot be quantified or defined since it varies with every situation. It is the behaviour that is expected of a good righteous person, striving to live by God's laws and by the spirit of God's laws--striving to be God-like. It is the behaviour of a *mensch*.

Time and again the Rabbis hold each other and their fellow Jews to a standard higher than the strict letter of the law. We find statements such as Rav Yohanan's who blamed Jerusalem's destruction on the unwillingness of its inhabitants to go beyond the strict letter of the law in their judgements. All of this evidence points toward a conclusion: the Rabbis held a higher standard than was necessary given the requirements of the laws of the Torah. What was that standard? In the next two chapters we will see examples of instances in which the Rabbis upheld the law, over-interpreted it, and even changed it in order to comport with their understanding of this extra-legal standard.

In the case of the Sotah, the woman accused of adultery, the Rabbis found a way to declare the laws inoperable. In the case of our responsibilities to Gentiles, the Rabbis found a way to extend them. In both cases the Rabbis held the behaviour of Jews to a separate standard, outside the strict sense of the halacha. In the concluding chapter, we shall discuss what that standard is called and what implications it has to the interpretation of Jewish law in general.

Chapter 2: The Case of the Sotah

The laws governing the ritual of the Sotah are of particular interest in this discussion not only because of the peculiar nature of this ritual—it seems magical and reeks of divination—but because of its rather convenient disappearance. We are talking about a ritual in which a woman whose husband suspects—in the absence of any witnesses—that she has committed adultery, is forced to drink a potion called “bitter waters” consisting of water, dust from the Temple floor, and shavings of parchment. The result of such ingestion is thought to determine her innocence or guilt. If she is guilty, the Bible tells us, “...her belly will distend and her thigh will sag; and the woman will become a curse among her people.”¹ Modern moral consciousness is at once repulsed by such a ritual: the husband needs no proof, only to feel that she has strayed; the woman’s voice is not heeded, she cannot defend herself; she is humiliated and forced to drink a potentially poisonous concoction that may kill her regardless of her innocence or guilt; if she refuses to drink the potion thus saving her life, she is understood to be admitting her guilt and is at once divorced leaving her without her ketubah. Such a ritual is appalling to the modern mind.

Perhaps this ordeal was equally appalling to the mind of the ancient Rabbis. Nowhere else in the Torah is there such a trial by ordeal. In all other cases, two witnesses are needed in order to convict a person of a crime; the person is tried in front of a

¹ Num. 5:27

court. The Sotah ordeal is the only such “legal” procedure performed in absence of a court or witnesses. This ritual could be a remnant of an older age when trials by ordeal were the norm, but as far as the Rabbis are concerned, its antiquity is irrelevant since the Rabbis do not believe in evolution—or, better yet, the Rabbis will not acknowledge that a law is obsolete, *per se*. Rabbi Akiva rules that it is the man’s obligation to warn his wife should he suspect that she is transgressing a commandment, but Rabbi Ishmael argues that the man does so voluntarily.² The Rabbis seem to agree that an adulteress needs to be dealt with and punished, but they seem ambivalent about the Torah’s way of doing this. It seems likely that the queasiness of moderns regarding the trial by ordeal is shared by the Rabbis.

In studying the Rabbis’ treatment of the Sotah ritual in their legislation and regulation of its application, we see that they impose many, and sometimes not immediately logical, restrictions on the ritual. This leads us to ask: Did their morality lead them to create midrash? That is, was their limiting of the ritual motivated by moral concerns? In order to approach any conclusions in this matter, we must closely examine how the Biblical ritual differed from the Rabbinic one and how the Rabbis justified their rulings.

In the Biblical ritual of the ordeal of the Sotah, the procedure is as follows. The man brings his wife to the priest; he also brings an offering. The priest stands her “before the Lord.” The priest puts dust from the floor into water held in an earthen vessel. The priest bares the woman’s head and places the offering in her hands. The priest says, “If no man has lain with you, if you have not gone astray in defilement while married to your

² Sotah 3a

husband, be immune to harm from this water of bitterness that induces the spell. But if you have gone astray while married to your husband and have defiled yourself, if a man other than your husband has had carnal relations with you may the Lord make you a curse and an imprecation among your people, as the Lord causes your thigh to sag and your belly to distend; may this water that induces the spell enter your body, causing the belly to distend and the thigh to sag." At which point the woman says, "Amen, amen." The priest then writes down the curses and rubs them off into the water. He takes the meal offering from the woman and presents it on the altar. The priest scoops out a token part of the offering and burns it on the altar. Finally, the priest makes the woman drink the water.³

The Rabbis, in creating the legal parameters which would regulate this trial by ordeal, added several requirements and distinctions not otherwise found in the Biblical text. First, it seems that the husband's accusations cannot come without a previous warning having been issued to the wife. "The husband himself must warn the wife,"⁴ otherwise she cannot be made to drink. The Rabbis specify that the alleged adultery must be with a man, not with a minor or with an animal.⁵ If there is one witness able to testify to her actions, she does not drink—that is, she is convicted and the ordeal is no longer needed to prove her

³ Num. 5:12-26

⁴ Sotah 2a; Mishneh Torah Sotah 1:1

⁵ Sotah 26b

guilt or innocence.⁶ The Rabbis, having a deep respect for the sanctity of God's name, ruled that the *beit din*, Rabbinical court, should try to frighten her into not drinking the water, thus confessing guilt, since this causes the Name to be blotted out.⁷ The *beit din* may even resort to tiring her out and humiliating her into confessing.

In fact, the priest dishevels her hair and uncovers her body! He puts the offering in her hands to weary her so that she will more readily confess.⁸ Furthermore, the priest encourages the woman to confess by adding these words to the adjuration of verses 19-20, "Wine can be responsible for much, or frivolity can be responsible for much, or childishness can be responsible for much. Many have been guilty before you and were swept away (when they refused to confess and then drank the water). Do not cause the great Name to be blotted out in the water of bitterness." He then tells her of the affair of Reuben and Bilhah⁹ and of Judah with Tamar.¹⁰ Both of them confessed and inherited life in the next world.¹¹

The Rabbis go in to detail as to how the priest must mix the bitter waters. In fact, they find that the prescribed recipe will not render the waters bitter enough, and require

⁶ Sotah 31a

⁷ Sotah 7b

⁸ Sotah 14a; Mishneh Torah Sotah 3:3-5

⁹ Gen. 35:22

¹⁰ Gen. 38:15ff

¹¹ Num. Rabba 9:17; cf. Sif. Num. 9

that the priest put a bitter substance in to the water.¹² Mishnah Sotah 2:2 describes how the priest was to mix the potion: "He would bring a new earthenware dish and put half a log of water into it from the laver. Rabbi Yehudah says, A quarter log; since just as we reduce the writing so do we reduce the water. He would go in to the sanctuary and turn to his right, and there was a place there [measuring] one amah by one amah, with a flagstone of marble into which a ring was fixed, and when he raised it he took dust from beneath it and put it [in] so that it would be visible on the water, as it is written, "And the dust which is on the floor of the Tabernacle the priest will take and put into the water." Rava notes that the priest writes the scroll after she takes her oath.¹³

The Rabbis, through exegesis, found textual support to exclude some individuals from partaking or causing one's wife to partake in the ordeal. Both the man and the woman must be sighted, able to hear, possess all limbs, and the man must be her husband, not her fiancé or levir.¹⁴ Finally, the Sotah is compelled to drink the bitter waters only by the Supreme Court of seventy elders who hold session in the Temple.¹⁵

It may be that the Rabbis "create" their midrash concerning the Sotah ritual simply for edification purposes and academic exercise. In other words, they may just be having fun with their midrashim. Since many of the midrashim were formulated after the

¹² Sotah 20a

¹³ Sotah 17b

¹⁴ Sotah 27a, b and Sotah 23b

¹⁵ Sotah 7b

ritual has already fallen out of existence, the Rabbis tried to understand the ritual in its purest and best form. Rather than legislating concerning a contemporary practice and knowing that their laws will directly affect their contemporaries, the Rabbis are speaking about an ancient thing which no longer affects the Jews insofar as it is no longer practised.

It is my assumption that the Rabbis do not create midrash which impacts upon real life without good cause, so let us probe deeper into their mindset and attempt to reveal their logic. The first extra-Biblical stipulation that they discuss is the requirement to warn the woman with regard to her behaviour vis-à-vis a certain man. The jealousy of which the Torah speaks in Num. 5:14 refers, say the Rabbis, to the warning, "He should say to her before [two] witnesses, 'Do not go off in secret with the man, So-and-so.'"¹⁶ Furthermore, Rambam reports, the secrecy spoken about in the Torah is with the same man about whom she was warned by her husband before two witnesses.¹⁷

Such added requirements seem to work in the woman's favour. She is warned that her husband is suspicious of her relationship with a specific man. She can then take precautions to ease her husband's mind thus making him less likely to subject her to the ordeal of the Sotah. Of course, she may also use this warning to ensure that she and her lover are more discreet in the future! Why would the Rabbis have required such a warning? The closest we come to a reason regarding the requirement to warn the woman in the presence of witnesses, is the statement made by Rabbi Meir, "If a person commits

¹⁶ Sotah 2a

¹⁷ *Ibid.*

transgression in secret, the Holy One proclaims it against him in public.” On this statement Rashi comments, “...this is to cause the heart of her husband to be jealous of her and publicise the matter.”¹⁸ This principle of *hatra'ah*, cautioning of the offending party is the legal courtesy paid to anyone who is in danger of transgressing a law. The Rabbis assume that no one would intentionally break a law, and so it must be out of ignorance that such behaviour is occurring. Thus they instituted the concept of *hatra'ah* wherein the party in danger of transgressing is given the benefit of the doubt and informed as to the forbidden nature of her actions and as to the consequences should she persist. This courtesy is given potential transgressors of other laws as well, not only the potential Sotah.

We will see that throughout most of their legislation regarding the Sotah ordeal, the Rabbis try to prevent the ordeal from taking place. The only reason given explicitly by them is that they want to prevent the unnecessary erasing of the divine Name, as we have seen above. I believe that it is this same concern which governs their legislation here. Their reasoning may have been as follows: too many innocent women are being accused of adultery and causing the Name to be rubbed out; if there is a warning, fewer woman will likely have to drink the waters; but men can claim that they issued a warning when in fact they did not; therefore, let two witnesses be required to be present at the time of the warning. If this is the case, their decision was not a moral one but a religious one. However, morals may be served as a by-product of their religiously motivated legislation.

Requiring the adultery to have taken place with a man and not a minor or an animal

¹⁸ Sotah 3a

further limits the application of this ordeal. This is an example of the Rabbis reading the text hyper-literally.

If there is one witness available to attest to the fact that the wife is an adulteress, she need not drink the bitter waters. This ruling is only logical, and is not much of an extrapolation from the biblical text, since the ordeal is used to identify a woman suspected of adultery based on no proof, but simply her husband's paranoia. Rambam tells us, "If one witness comes and testifies [to the husband] that she went off with him (the man) secretly after she had been warned and stayed with him [long enough] in order to become impure, if he (the husband) believes him (the witness) and he agrees with him, he goes and gives her the ketubah and if not (i.e., if he does not believe the witness), his wife is permitted to him."¹⁹

The Rabbis, being concerned with not destroying God's Name unnecessarily, occupy themselves with trying to prevent this from occurring. They explore several different tactics, all aimed at frightening the woman into declining from going through with the ordeal. As explained above, the Rabbis require the priest to add an extra, perhaps more pointed, adjuration to the original biblical version. The fear of causing God's Name to be rubbed out should cause the woman to admit her guilt. There is no possibility in this system of admitting innocence. If she knows that she is innocent and wants to be recognised as such, the ordeal must proceed.

The priests must also try to humiliate her and tire her in hopes that she will confess.

¹⁹ Sotah 66

"If she stands by her word that she is innocent, they bring her to the eastern gate of the Temple Courtyard that is across from the Holy of Holies. And they bring her from one place to another and dizzy her so that she becomes tired until her soul gets weak, that she might confess. If she stands by her word they bring her out from the eastern gate and stand her there. If she usually wears white clothing, they dress her in black. And if black is becoming to her, they dress her in clothes that are not becoming to her. They remove all her silver and gold jewellery that is on her. And they gather around her a large group of women so that all the women found there must see her as it is said,: "So that all women will be taught not to follow their lewdness."²⁰ Any man who wants to come to see her may do so. She stands among [the women] without a cloak or a veil, wearing only her clothes and a cap, as a woman dresses within her home."²¹

Throughout all of these descriptions as to how to coax the wife into confessing, the only reason given for these measures is that we must not rub out God's name unnecessarily. There is no mention of compassion for the woman, that is, that she may be harmed by the waters regardless of her guilt or innocence. For the Rabbis to admit such a motive would mean that they are admitting their unbelief in the power of the ritual of Numbers 5, or that the adulteress isn't so wrong after all. This would certainly be a heretical statement! Thus it is difficult to know if the Rabbis were motivated by a sense of morality at all. Indeed, if they had had any compassion for the woman's situation, they do

²⁰ Ezekiel 23:48

²¹ Sotah 7b

not let on; in fact, their legislation serves to humiliate the woman even further. Of course, the Rabbis may have been causing such humiliation “for her own good,” so to speak, but all of this is speculation.

That the Rabbis took extra measures to ensure the bitterness of the water certainly does not support a hypothesis that they found this ritual morally reprehensible. Through these actions they are making the ritual more unbearable for the woman. We could argue, though, that extra measures such as these are purely academic on the Rabbis’ part, since they would, inevitably, rule the entire ordeal out of existence. Thus the act of study and argument regarding the ritual became where the utility of the laws rested.

Next we have the problem of understanding the Rabbis’ exclusions of certain types of people from the performance of this ritual. Rambam tells us, “These are the women who are not fit to drink even though they want to drink or their husbands want to cause them to drink, but rather they go out without their ketubah: one who brings one witness to her secrecy after she has been warned, and she is forbidden to her husband forever. And fifteen [categories] are the women and these are they: a betrothed woman; one who is kept by a levir; a wife who is a minor; a woman who is wife to a husband who is a minor; wife of an androgynous man; wife of a blind man; the wife of one who limps or cannot speak; the wife of a deaf man; the wife of a man who is missing a hand; a woman who limps; a woman who cannot speak; a blind woman; a woman missing a hand; a deaf woman. All of these are not fit to drink.”²²

²² Sotah 23b

The Rabbis are able to pin each of these exclusions on to a specific biblical verse. For example, that a lame woman does not drink is derived from Numbers 5:18, "...the priest shall *stand* the woman before the Lord..."²³ That is, the woman must be physically able to stand. That a deaf woman does not drink is derived from Num. 5:19, "...and he *says* to the woman..."²⁴ Therefore, the woman must be able to hear his words. And so on. In each instance, the Rabbis read the text hyper-literally resulting in the exclusion of a group of people from partaking in the ritual. Why? Each ruling is justified through a strict reading of the text and not through real life practice. Are the Rabbis doing this to limit the scope of the ritual, or because they are philosophers of halacha? If the latter, their strict interpretation of the text does not seem logical. The Rabbis do not give an explanation for these rulings, outside of their textually based readings. They do not defend rationally the ruling that those who are in some way physically impaired should be free from partaking in the ritual. We may even say that these limitations seem unrelated to the law entirely. In effect, the Rabbis are even allowing the physically impaired to get away with adultery! Since their rulings here do not seem logical but rather they only use the text as a tool for saving some people from this ordeal, I am inclined to believe that the Rabbis were motivated by some sense of compassion in this case. It must be, therefore, that the Rabbis read the text in this fashion in order to limit the ritual.

²³ Sotah 27b

²⁴ *Ibid.*

The Rabbis do not stop here in their hyper-literal reading of the Sotah ritual. In Num. 5:27 we read, "Once he has made her drink the water-if she has defiled herself by breaking faith with her husband, the spell-inducing water shall enter into her to bring on bitterness, so that her belly shall distend and her thigh shall sag; and the woman shall become a curse among her people." The Rabbis highlight the words, "among her people" and use them as the governing factor for the performance of the ritual as a whole. "It was taught: When adultery increased, the bitter waters became inoperative, it being written, 'and the woman will be a curse in the midst of her people'-only when her people are moral, and not when they are promiscuous."²⁵ Rabbi Baruch Epstein comments on this midrash in his commentary of the Torah Temimah. He explains "[The ritual] was ceased even from among the pure [people], since the prostitutes increased. And the sense of the midrash seems simple, that in the time that the generation is pure and righteous, then an adulterous woman is as a curse among her people...but when prostitutes increased then even she [the wife] was like one of them, and it was impossible that she be seen as a curse among her people, and therefore it [the ritual] was stopped entirely even for the pure [people]."²⁶ The Rabbis leave us with this question: why did they make this a governing factor for the entire ordeal? Why allow the social conditions to govern religious practice, rather than holding Jews to the higher standard mandated by God?

²⁵ Yerushalmi Sotah 9:9; cf. Sotah 47b

²⁶ Torah Temimah on Num. 5:27, note 145

We may be able to answer this question through examination of the Rabbinic teaching, "The Torah was not given to the ministering angels."²⁷ In the midrash, God makes a point of giving the Torah to humans and not to the angels. In an explanation in Deuteronomy Rabbah, God tells the people, "My children, the law is too abstruse for the ministering angels, but for you it is not too abstruse." This is derived from the verse, "For this commandment which I command you this day, it is not too hard for you."²⁸ In other words, these commandments should not be too difficult for humans to follow, and if they are, they need to be adjusted so that humans are able to follow them. This principle gives the Rabbis the authority to use the Torah and its laws to aid human purposes. It teaches that humans, unlike angels, are fallible, and that God, in giving the Torah to humans, must have realised our imperfections. God does not want us to fail in every endeavour, and thus the standards of the Torah must be at least within human reach. Sometimes the standards must be lowered in order to prevent the vast majority of Jewish society from failing. Constant failure could lead to disenchantment with the Torah and laws as a whole, thereby leading people to apostasy. The Rabbis, in making the requirements more attainable, were in fact protecting the Jewish religion from earning a bad reputation and possibly disappearing altogether.

The Rabbis, always social critics, suddenly viewed their society as one filled with open prostitution. Once they noticed that adultery was happening in the open, they felt

²⁷ Shabbat 88b; Deuteronomy Rabbah 8.2

²⁸ Deut. 30:11

that the legal grounds for the ordeal were removed. That is, adultery was no longer a clandestine, unapprehended act, and the threat of the ordeal was no longer a deterrent. The Rabbis confirm this in *Tosefta* Sotah 14:2, "When adulterers became many, the ordeal of the bitter water was annulled, for the ordeal of the bitter water is performed only in a case of doubt. But now there are many who see [their lovers] in public." Rambam concurs, "When the number of people who openly committed adultery increased in the Second Temple era, the Sanhedrin nullified the use of the bitter water, relying on the verse in the [prophetic] tradition: "I will not punish your daughters when they commit harlotry..."²⁹ ³⁰.

It seems, though, that the Rabbis were not commenting only on the promiscuity of the women. The prostitution and lewdness of which they spoke referred to the men as well. Upon first examination of the biblical text it would seem that the action of the man is irrelevant to the administration of the bitter waters, but the Rabbis, still deriving their readings from the text, argue otherwise. The Rabbis notice that there is a repetition of the phrase, "enter her," referring to the water, in verses 22 and 24, and they wonder why there is such a repetition. Since every word of Torah is valuable, the language cannot be superfluous but must have meaning of its own. They answer that this repetition is to teach that just as the waters probe her, so do they probe him (i.e., the husband) [when they are administered to her.]³¹ Perhaps this is the way in which the Rabbis seek to deter the

²⁹ Hosea 4:14

³⁰ Mishneh Torah Sotah 3:19; Sotah 47b, ruling made by Rabbi Yohanan ben Zakkai

³¹ Sotah 27b

husband from testing his wife's fidelity, or this may simply demonstrate the Rabbis' sense of equity. They go further, "The Rabbis taught: 'And the man will be free of sin'-when the husband is free of sin, the waters probe his wife; when the husband is not free of sin, the waters do not probe his wife. Therefore, when promiscuity increased, the bitter waters became ineffectual (i.e., ceased)."³²

Rambam sheds some light on the Rabbis' train of thought, "If [a husband] transgressed and compelled his wife to drink [the bitter waters] although he previously entered into a forbidden relationship, he adds further transgression to his sin. For he causes God's Name [which is not] pronounced to be blotted out on the waters for no reason and defames the reputation of the waters [used to test] a Sotah. For his wife will tell others that she committed adultery and that the [bitter] waters did not harm her, without knowing that it was her husband's deeds that prevented the waters from checking her [fidelity]."³³ So the Rabbis are protecting the reputation of the Biblical ritual, as well as upholding a sense of equity. Their argument that only a faultless husband in this regard can have his wife legitimately tested through this ordeal reveals their sense of fairness: why should a woman be held to higher standards than her husband?

In interpreting their surroundings and social situation in this way, the Rabbis demonstrate their practical logic. If they notice that adultery is increasing and that women are generally unfaithful to their husbands, they must conclude that these women are

³² Sotah 47b

³³ Mishneh Torah Sotah 3:18

being unfaithful with men, most of whom are married. Since marriage is the natural and common state for any Jewish male, the Jewish woman must be committing adultery with a married man. If this is the case, then the men are also committing adultery with Jewish women. I believe that the Rabbis recognised this reality and were unwilling to hold women to a standard which men could not attain.

We also have the issue of perspective to consider. Analysts usually view their own time as corrupt and/or persecuted. Teachers in every age lament the state of their own generation and pray for the return to the "purer" ways of the past. The answer to such a predicament for religious leaders is always salvation through the Messiah for whom our Sages encourage the people to wait. There is comfort in knowing that the Messiah will purify the people and their conditions. The Rabbis may be using this commonly accepted belief in the corruption of the current generation as a justification for removing the ordeal of the Sotah. Since we usually talk about ourselves as less moral than our ancestors, the Rabbis know that their audience will accept their train of thought. It would seem natural, then, to limit or even to declare the ritual on hold, so to speak, until such a time as the generation is not corrupt--that is, when the Messiah has arrived.

We now return to our original question: were the Rabbis motivated by morality to cancel the ordeal of the Sotah? The above examination of the Rabbis' activity concerning the Sotah has led to a decisive answer to our problem: we do not know. Since the Rabbis do not explicitly state their moral position on the issue, we can only guess at their motivations. Perhaps it was not morality which motivated them to create midrash, but some other concern entirely. Their creation of midrash may have been motivated by one or more

reasons: they may have approached such midrash-making as an academic exercise knowing that the ritual was not to be performed in any case; they may have made such midrash out of concern for equity and equal standards for both men and women to uphold; they may have been repulsed by the notion of a trial-by-ordeal present in our justice-obsessed Torah.

The Rabbis may have considered one or more of the preceding list of reasons in ultimately putting an end to the ordeal of the Sotah. The fact that they did not try to salvage the practice, or even manipulate it to fit their modern needs speaks volumes to the fact that they saw something inherently wrong with the law. Respecting God's infallibility but also wishing to be true to humanity, the Rabbis worked the text through many channels in order to find a sufficient loop hole for abrogating the text. It is the Rabbis' respect for the sacredness of the text coupled with their concern for the human ability to relate to that text in a positive way that combined to present the result with which we are confronted today: a text, Num. 5:12 ff., that is no longer useful in practice but is infinitely edifying to all scholars and curious onlookers of the Hebrew Scriptures.

Chapter 3: The Case of Jewish Responsibility Toward the Gentile

Jewish law is replete with injunctions regarding the responsibility of Jews toward their fellow Jews. Deuteronomy 1:16 tells us, "...Hear out your fellow men, (*achei-chem*, lit. your brothers) and decide justly between any man and a fellow Israelite (*achiv*) or a stranger (*geiro*).” Concerning control of a person as a slave, the Torah tells us, “If a fellow Hebrew, man or woman, (*achicha ha'ivri*) is sold to you, he shall serve you six years, and in the seventh year you shall set him free.”¹ The law limits the amount of time one Israelite may control another. Only foreigners may be owned in perpetuity and passed on to heirs. The phrase “Hebrew brother” reminds one of special brotherly obligations toward fellow Israelites.² What is implicit in these preceding passages is made explicit in the laws regarding the lending of money, “Every seventh year you shall practice remission of debts. This shall be the nature of the remission: every creditor shall remit the due that he claims from his fellow (*re'ehu*); he shall not demand payment from his fellow (*re'ehu*) or kinsman (*achiv*), for the remission proclaimed is of the Lord. You may demand payment from the foreigner (*nochri*); but you must remit whatever is due you from your kinsmen (*achicha*).”³ And so we see that there is a clear legal favoritism of the fellow Israelite —the kinsman, the brother.

¹ Deut. 15:12

² Tigay, *Jewish Publication Society Commentary: Deuteronomy*, p. 128

³ Deut. 15:1-3

In the Holiness Code of Leviticus 19 we encounter many laws regarding our behaviour toward our “neighbour”, *re’echa*. We just saw, above that our “neighbour” is intended to mean our Israelite neighbour. The non-Israelite is referred to as a “foreigner,” or a “stranger.” What are our responsibilities to our Israelite neighbours? We must not defraud each other, we must not rob, or hold our neighbour’s wages until the following day.⁴ We must judge justly.⁵ We must not gossip at the expense of our kinsmen, we must not stand idle while our neighbour bleeds.⁶ We must not hate our brother. We must reprove one another.⁷ We must not hold grudges or take vengeance. We must love our neighbours as ourselves.⁸ Given the clear distinction between the Israelite and the non-Israelite as is so apparent especially in Deuteronomy 15, we must ask: what are Jewish obligations, if any, toward our Gentile neighbours?

The Rabbinic tradition, basing itself on the inherited Biblical tradition, also notes these differences between the Jew and the Gentile and draws distinctions between them. Deuteronomy 22:1-3 reads, “If you see your fellow’s ox or sheep gone astray, do not ignore it; you must take it back to your fellow.... You shall do the same with his ass; you shall do the same with his garment; and so too shall you do with anything that your fellow

⁴ Lev. 19:13

⁵ Lev. 19:15

⁶ Lev. 19:16

⁷ Lev. 19:17

⁸ Lev. 19:18

loses and you find: you must not remain indifferent.” The Gemara understands this injunction to speak strictly of the lost articles of Israelites, “His (the Gentile’s) lost article it is permitted [to keep], for Rav Hama bar Guria said in the name of Rav: From where do we learn that the lost article of a Canaanite is permitted? As it is written, “With all lost things of your *brother’s*”⁹. To your brother do you return [the item] and you do not return it to a Canaanite.”¹⁰

The Rabbis go even farther than the Biblical text, though, as they seek to justify the Jewishly-biased legal system which they uphold. We see this illustrated especially in Baba Kama 38a in the context of a discussion dealing with the teaching, “Where an ox belonging to an Israelite has gored an ox belonging to a Canaanite there is no liability, but if an ox of a Canaanite gores an ox of an Israelite... the payment is to be in full.” The Rabbis point out the inequality in the system of justice since the law on which this is based reads, “When a man’s ox injures his neighbour’s ox and it dies, they shall sell the live ox and divide its price; they shall also divide the dead animal.”¹¹ The Rabbis understand this verse to be dealing solely with fellow Israelites, thus when the ox of an Israelite gores the ox of a fellow Israelite they will compensate each other, but when the ox of an Israelite gores the ox of a non-Israelite, since he is not a neighbour, no compensation must be made. The inequality happens in Israelite law when the ox of a non-Israelite gores the ox

⁹ Deut. 22:1-3

¹⁰ *Baba Kama* 113b

¹¹ Exodus 21:35

of an Israelite. Israelite law requires payment to be made by the non-Israelite even though from the non-Israelite's point of view the Israelite is not a neighbour and would not merit compensation. The law clearly favours the Israelite.

The Rabbis recognize this dilemma and discuss it: "If the implication of 'his neighbour' has to be insisted upon, then in the case of an ox of a Canaanite goring an ox of an Israelite, should there also not be exemption? If [on the other hand] the implication of 'his neighbour' has not to be insisted upon, why then even in the case of an ox of an Israelite goring an ox of a Canaanite, should there not be liability? R. Abbahu thereupon said: The Writ says, 'He stood and measured the earth; he beheld and drove asunder the nations,'¹² [which may be taken to imply that] God beheld the seven commandments which were accepted by all the descendants of Noah, but since they did not observe them, He rose up and declared them to be outside the protection of the civil law of Israel [with reference to damage done to cattle by cattle].¹³ Here we see a need on the part of the Rabbis to justify the unequal treatment of the Gentiles. They recognize the inequality, justify it, but do not apologize for it.

When faced with discontent from the Gentile community concerning laws such as this law of the goring ox and of permissible theft from Gentiles, Rabban Gamaliel reconsidered what might have been understood as the strict sense of the Biblical text. "The [foreign] Government sent two officers to study Torah from Rabban Gamaliel. They

¹² Hab. 3:6

¹³ B.K. 38a

studied with him Scripture, Mishnah, Talmud, laws, and lore. At the end they said to him, "The whole of your Torah is beautiful and praiseworthy, except for these two rules which you state: 'An Israelite girl should not serve as a midwife to a Gentile woman but a Gentile woman may serve as a midwife to an Israelite girl. An Israelite girl should not give suck to the child of a Gentile woman, but a Gentile woman may give suck to the child of an Israelite girl when it is by permission.'¹⁴ 'What is stolen from an Israelite is prohibited, but what is stolen from a gentile is permitted.' At that moment Rabban Gamaliel decreed concerning theft from a Gentile that it is forbidden, because of desecration of the Name."¹⁵

It seems that Rabban Gamaliel had some sense of a morality outside of the halacha. He was comfortable taking the accepted interpretation of the Torah text and ruling that it was not morally correct, and in fact, did a disservice to God's Name. For Gamaliel to admit that one of God's laws desecrates His own name is tantamount to contradicting God Himself! Gamaliel's revelation could have enormous consequences if his colleagues would follow his example—surely this is not the only law that warrants abrogation. But Gamaliel ruled in such a way so as to avoid violating the law of Leviticus 22:32, "You shall not profane My holy Name." He does not say that the Torah law is morally objectionable, but he finds that it is giving the Jewish people bad publicity, thus the law against profaning God's name should take precedence. This, at least, is the costume in

¹⁴ M. *Avodah Zara* 2:1

¹⁵ Y. Baba Kama 4:4, cf. Baba Kama 38a in which Gamaliel is not specified, nor is the law overruled, but rather the Government officials promise not to report the matter to their superiors.

which his reasoning must be dressed. Perhaps it conceals the moral sense of the Rabbis beneath the legally reasoned exterior. In a perfect world, the Gentiles would not know of our laws—this is illustrated in the Babylonian Talmud's continuation of the story: the foreign officials "forget" their criticisms of the Jewish law. This reality is illustrated by the fact that we see no justification given for the moral and legal imbalance which puts the Gentiles at a disadvantage. The legal system *should* favour Jews—so say the Rabbis.

Just as Rabban Gamaliel was compelled to change the law to have the law comport with his and society's sense of right and wrong, the tradition is challenged when confronting the laws concerning the saving of lives, especially of Gentile lives, on the Sabbath. Before we may approach the issue of saving a Gentile life on the Sabbath, we must first look at the law concerning the saving of Gentile lives altogether, and then consider the argument for allowing desecration of the Sabbath to save a Jewish life.

Maimonides writes, "We do not make contracts with [those of] the seven nations in order to make peace with them and leave them to worship their idols, as it is said, 'Do not make a covenant with them'¹⁶ rather leave from their [idolatrous] service or kill them. And it is forbidden to have mercy on them, as it is said, 'And do not have mercy.'¹⁷ Accordingly, if one should see one of them perishing or drowning in a river, do not raise him out. If one sees him inclined to die, do not save him but let him perish by his own hand but pushing him into a pit and the like is forbidden because they are not fighting a

¹⁶ Deut. 7:2

¹⁷ *Ibid.*

war with us do not want to start a war with them. ... From here we learn that it is forbidden to treat idol worshippers medically even for pay. And if he was afraid of them or if he was concerned that he might cause hostility, he may treat him for pay but [to treat him] for free is forbidden.”¹⁸ Rambam’s reason for not causing harm to Gentiles is most disturbing. His reason has nothing to do with respecting the lives of God’s creatures, but it is simply pragmatic: we do not want to start a war. It would stand to reason, that in a place where there is no such danger (i.e., Jews are in the majority) Jews could halachically cause harm to Gentiles, especially those belonging to the seven nations, and have Jewish legal justification for their actions!

Rambam is in agreement with the teaching in the Gemara: “Rav Yosef said...in regard to what has been taught that in the case of idolaters and shepherds of small cattle one is not obliged to bring them up [from a pit] though one must not cast them in it—that for payment one is obliged to bring them up on account of hostility. Abaye, however, said to him: He could offer such excuses as, ‘I have to run to my boy who is standing on the roof,’ or ‘I have to keep an appointment at the court.’”¹⁹ Here we see that Rav Yosef does not require Israelites to take heroic measures to save the life of a Gentile, but he requires Israelites not to harm them. His reason for allowing them to help Gentiles after all, is “on account of hostility.” That is, Jews do not want to cause Gentiles to have hostile feelings toward them lest the Gentiles decide to act out their hostility in a violent

¹⁸ *Mishneh Torah, Avodat Kochavim* 10:1,2

¹⁹ *Avodah Zara* 26a

manner. Rabbi Yosef, like Rambam, is pragmatic in his ruling, but unlike Rabban Gamaliel, does not make a judgemental statement as to the nature of the law in the first place.

Strictly speaking, the Sabbath should not be desecrated by doing any "work" whatsoever. But the Rabbis assume that desecrating the Sabbath is permitted when it is for the purpose of saving a Jewish life. After making this assumption, they seek to prove it from text. They ask: "From where textually do we learn that saving a life takes precedence over the Sabbath? ... Rabbi Shimon ben Menase says, 'The Children of Israel shall keep the Sabbath.'²⁰ The Torah says that one may profane one Sabbath in order to keep many Sabbaths.' Rav Yehudah said in the name of Shmuel, 'If I had been there I'd have told them something better. 'And live by them,'²¹ and not die by them. ...'²² Rav Yehudah argues in the name of Shmuel that life must be preserved above all else, and so anything that hinders that life from persisting must be avoided, or postponed, like the Sabbath.

The discussion from B. *Yoma*, above, concerns the saving of Jewish lives. The Rabbis also attempt to deal with the matter of saving a life on the Sabbath if there is doubt as to whether or not the person is Jewish. The Mishnah says: "Rabbi Matthia b. Heresh says: if one has a pain in his throat, he may pour medicine into his mouth on the Sabbath,

²⁰ Exodus 31:16

²¹ Lev. 18:5

²² B. *Yoma* 85a, b

because it is a possibility of danger to human life and every danger to human life suspends the [laws of the] Sabbath. If debris falls on someone and it is doubtful whether or not he is there, or whether he is alive or dead, or whether he is an Israelite or a heathen, one should open [even on the Sabbath] the heap of debris for his sake. If one finds him alive one should remove the debris, and if he be dead one should leave him there [until the Sabbath day is over].”²³ The Gemara seeks to expand the discussion: “If debris had fallen on him, etc. What does this mean? It states a case of ‘it is not required.’ That is to say, it is not required if there is doubt as to whether or not he is there as long as one knows that he is alive if he is there; but even though it is doubtful whether he is alive or not, he must be freed from the debris. Also, it is not required if it is doubtful whether he be alive or dead, as long as it is definite that he is an Israelite; but even if it is doubtful whether he is an Israelite or a heathen, one must, for his sake, remove the debris.”²⁴ The Rabbis would rather err on the side of caution. If there is any doubt as to the identity of the buried person, or as to his physical condition, we assume that he is a live Israelite and save him.

Maimonides considers the same predicament and seems to require that we bend over backwards to save the Jew, but, again, no heroic measures are to be taken on behalf of the Gentile. “If there is a courtyard in which idol worshippers and Israelites are, even if there is one Israelite and a thousand idol worshippers, and debris falls on them, we open [the heap] for all of them for the sake of the Israelite. If one had separated from them to

²³ B. *Yoma* 83a

²⁴ *Ibid.* 85a

another courtyard, and debris fell on them in that first courtyard, we open it even if the one who separated was the Israelite and the rest were idol worshippers.”²⁵ However, Maimonides continues, “If the entire group uprooted itself to go to another courtyard and at the time of their uprooting one of them separated from them to enter into another courtyard and debris fell on him and we do not know who he is, we do not open the heap for him. For when the group uprooted itself, there was not an Israelite there and whoever separates from them when they are walking he is held as one who separates from the majority. Accordingly if the majority had been Israelites even though everyone uprooted and one separated from them to another courtyard and debris fell on him, we do open the heap.”²⁶

We see that there are problems in permitting for the desecration of the Sabbath in order to save a non-Jewish life. As Rav Shimon ben Menase said above, the purpose of saving a life is to make it possible for that person to serve God. But non-Jews do not serve God—some are idol worshippers—or at least do not serve our God in a Jewish way. Rabbi Abaye teaches that a Jewish midwife could make an excuse for refraining to birth a non-Jewish woman on Shabbat by explaining, “Only for our own who keep the Shabbat may we waive it, but we must not waive the Sabbath for you who do not keep it.”²⁷ Abaye obviously relies on the text of *Yoma* 85a, quoted above, and maintains that the purpose of

²⁵ *Mishneh Torah, Shabbat* 2:20

²⁶ *Ibid.* 2:21

²⁷ *B. Avodah Zara* 26a

life, in fact, is to keep the Sabbath.

There seems to be a fundamental conflict between the idea that Jewish lives are more valuable and thereby worthy to save at the cost of the Sabbath, and the idea that everyone is created in God's image,²⁸ and that God weeps for all of His children. Indeed, we learn from our Aggadah, "Our Rabbis taught: When the Egyptian armies were drowning in the sea, the Heavenly Hosts broke out in songs of jubilation. God silenced them and said, 'My creatures are perishing, and you sing praises?'"²⁹ I believe that our ancient Rabbis detected this conflict as well. Though they may not have expressed this idea so explicitly, their concern with avoiding the hostility of the Gentiles and Rabban Gamaliel's prohibition of stealing from a Gentile despite the law reveal that there was a recognition that the law was not "politically correct." I believe that the problem for the Rabbis was not just a practical one—making allowances for medically treating Gentiles on the Sabbath in order to avoid hostility—but primarily a moral one. It seems that Gamaliel was the only one willing to make an explicit statement refuting the acceptability of the law. As we saw with the case of the Sotah, the majority of the Rabbis is reluctant to admit that there is a problem with the law, for this would be blasphemous, so they find other considerations and reasons for modifying the law in order to pin their reformulation of the law on to another reason. Thus their goals are achieved, but the integrity of God's Torah remains intact.

²⁸ Gen. 1:26

²⁹ B. *Sanhedrin* 39b

Modern rabbis have grappled with this problem as well. In his *Mishnah Brurah*, Rabbi Yisrael Meir HaCohen Kagan tells us that doctors are travelling and violating Shabbat in order to save Gentiles and these doctors have nothing textual upon which to rely.³⁰ He says that they rely on responsa written by various later rabbis who seek to permit the medical treatment of Gentiles on the Sabbath. This is the *peshat*, or the plain meaning of the law. Rabbi Kagan states the law without apologizing or explaining, nor does he express any moral discomfort with it.

To work against the *peshat*, Rabbi Ovadiah Yosef writes an extensive examination of the problem and attempts to use the traditional sources in order to prove that a Jew may violate the Sabbath in order to save the life of a Gentile. He begins with the text we have examined, *Avodah Zara* 26a in which Rabbis Yosef and Abaye disagree as to whether or not a Jewish woman may act as midwife to a Gentile woman on the Sabbath. He reports that Rabbi Yosef is willing to permit the midwifery for a fee in order to avoid ill feeling, but that Rabbi Abaye prefers for the woman to make excuses and not desecrate the Sabbath. According to Abaye, she should say, "Only for our own who keep the Shabbat may we waive it, but we must not waive the Shabbat for you who do not keep it." Once again, he relies on *Yoma* 85b, as discussed above. Ovadiah Yosef states that in our day it would be impossible to offer Rabbi Abaye's excuse since this answer would only exacerbate the already hostile situation.

Next Ovadiah Yosef turns to the *Tosefot* to *Avodah Zara* 26a. From there he

³⁰ 330:8

learns that the only thing that is permitted to violate on Shabbat is something about which the Rabbis have legislated or extended the scope of the law, as it were. That is, one may not violate a Torah commandment. Hostility is not enough to permit us to do something against the Torah law.

Ovadiah Yosef is most successful in his mission with the support of Rabbi Joseph Kolon, the *Maharik* (c. 1420-1480). *Maharik* cites *Yevamot* 121a which describes the case of a Gentile who says to an Israelite, "Cut some grass, and throw it to my cattle on the Sabbath, and if you don't, I'll kill you just like I killed that other Israelite to whom I said, 'Cook for me a dish on Shabbat,' and whom, since he did not do so, I killed." The *Tosefot* on *Sanhedrin* 74b confirm that the commandments are postponed for the saving of a life, except for three (idolatry, incest and murder). Besides, writes *Maharik*, the cooking at issue is a Rabbinic prohibition and the cooking is needed by the Israelite only for the purpose of saving the his own life. It is categorised as "work that is not needed for its own sake," *malacha sh'eino tzricha l'gufah*. Such work is permitted on the Sabbath. Ovadiah Yosef explains that anything that one must do out of fear is not considered work for its own sake. In fact, Rav Shimon, as reported at *Shabbat* 94b, goes so far as to say that work that is not needed for its own sake falls into a category of work that is only forbidden Rabbinically, and one is not culpable for it.

We see the reasoning behind this ruling discussed on *Shabbat* 94a-b. The discussion concerns what may be carried [from a private domain to a public domain] on Shabbat. According to the Mishnah found on *Shabbat* 93b, "...If one carries out a corpse in bed he is culpable." But Rav Shimon argues that he is exempt from culpability even if

one carries a corpse out for burial. Why? He views this work as not needed for its own sake. That is, it is the dead person who needs to be buried; it is not this living person who needs to perform the burial. But if one carries out an object in order to use it for its own purpose—for example, he carries out a Torah Scroll in order to read it—he is culpable. Rav Shimon contends that though the action might be forbidden if considered from the outset, since the action is not required for its own purposes, the person performing the act is guilty only of transgressing a Rabbinic injunction for which expiation in the form of a sin offering is not required.

R. Yosef points out that Rambam³¹ disagrees with the Maharik and agrees with Rav Yehudah, thus also disagreeing with Rav Shimon³² and holds that one is liable for doing work of any kind. But most of the commentators agree with Shimon, that work not needed for its own sake is allowed.

The fear that we have today is a fear of transgressing the state law. The law says that we must regard everyone as equal and if one is to discriminate as to who one treats medically, that is punishable by the law of the state. So, by R. Yosef's reasoning, if a Jewish doctor's intention is only to avoid being punished by the law, then the work that he does in treating the Gentile is work not needed for its own purpose. That is, the work is needed only to avoid punishment. Ovadiah Yosef's line of reasoning shifts our concern from the Gentile to transgressing the law of the state. He ends his responsum with the

³¹ cf. *Mishneh Torah Shabbat* 1:7

³² cf. *Shabbat* 94a

sentiment that Jews must medically treat Gentiles “for the sake of peace.” That is, in today’s society in which there is a natural law expectation that everyone is treated alike, Jews must care for Gentiles because otherwise it would not look good.

Ovadia Yosef hints at ethics in his responsum, but ethics is not enough to persuade the legal argument. He is unable to make saving the Gentile a principle in and of itself, but does find a way to make it a necessity. He could not possibly argue that the doctor must help otherwise it would not be right, for this argument would mean directly refuting the Torah text. So he finds a way to relax the Shabbat prohibitions, or to understand the act of treating Gentiles differently, so that the action does not violate Shabbat. Ethics come in as a suggestion in this responsum that the doctor really ought to do this. The phrase “for the sake of peace” is a sign that we should want to present our Torah in its best light.

The contemporary Rabbi Avraham-Sofer Avraham, MD, author of *Nishmat Avraham* has also looked in to the dilemma or how to justify medical treatment of the Gentile by a Jew on Shabbat. He writes, “In our time it is permitted to care for a sick Gentile who has come into danger even at the risk of profaning the Shabbat as is forbidden in the Torah. And Rabbi Moshe Feinstein writes: that concerning the doctor who is found in a hospital in the Diaspora he should try not to be in violation on the Sabbath, and if he works in a private practice, it is his responsibility to close the office and establish the Sabbath for himself as a weekly day of rest.”³³

³³ *Nishmat Avraham*, volume 5, p. 174, par. 78

In his justification of this ruling, *Nishmat Avraham* draws on many of the same sources and texts as does Ovadiah Yosef. He considers the reasoning that Jews must treat Gentiles in order to prevent hostility, and quotes the Beit Yosef of Joseph Karo who brings the answer of the Rashba who ruled that the Jewish doctor is permitted to treat the Gentiles [on Shabbat] in order to avoid hostility, just like they are permitted to birth their children, just as Ramban testified to doing himself.³⁴ With this precedent, there is added incentive to try to support textually the allowance of such medical treatment. In the end, *Nishmat Avraham* relies on the responsum of Maharik who distinguished the medical treatment of Gentiles as “work not needed for its own sake.” Thus the primary concern is saving the Jewish doctor, and the Jewish community, for that matter, from hostility and perhaps violence on the part of the Gentile community. Furthermore, in today’s pluralistic society, the concern is for saving the Jewish doctors from breaking the law, thus being guilty of discrimination, by choosing to treat only Jewish patients.

The morality that factors into these decisions is one which is brought to the attention of the Jewish law makers by the surrounding secular society. That is, ancient Jewish morality tells us to care for Jews alone. But secular society tells us that all people are equal and are entitled to the same opportunities and medical care. When this belief became the prevailing opinion, it was necessary to prove that it is in agreement with the traditional sources. It was a pragmatic step that compelled the Jewish thinkers to make it possible to treat Gentiles. It is important to notice that the value, “all people must be

³⁴ *Nishmat Avraham*, vol. 1, p.225

treated equally," never becomes a part of the Jewish legal argument. That is not to say that the Jews formulating the laws did not believe in this value, but since it exists outside of the Jewish law which is divine, it would be impossible to cause it to enter into the Jewish ethical framework. That all people must be treated equally certainly was and is valued by Jews must not be overlooked. But the thinkers of the tradition could not state openly that the tradition missed the mark. That would be blasphemy. Instead, they found ways to divert the issue and to orchestrate a way to allow the end result to be satisfactory.

The easy way to permit the treatment of Gentile on the Sabbath would have been to argue that all people are equal, therefore a Jewish life is no more valuable than a non-Jewish life; hence, since it is permissible to profane the Sabbath for the sake of saving a Jewish life then it follows that it is permissible to profane the Sabbath for the sake of saving a non-Jewish life. But this type of argument would mean arguing against the Torah and some Rabbinical texts which do show preference for Jewish life over non-Jewish life. Instead of arguing against the text and tradition, the Rabbis diverted the question to consider what measures may be taken to prevent hostility, and what constitutes "work for its own sake." In so doing, the Rabbis were able to arrive satisfactorily at the same conclusion that the former procedure would have rendered: it is permissible to treat Gentiles medically on the Sabbath. The difference in these two procedures is that the former makes the equal treatment of all people a Jewish value, whereas the latter does not.

The conflict apparent in this scenario is between the secularly accepted morality and the Jewish morality inherent in the laws. This conflict has been present at least since the time of Rabban Gamaliel: it is not a modern problem. Perhaps the morality of the

Torah inherent in its laws is concerned with a utopian society in which “all acclaim [God] as their God, and, forsaking evil, turn to [God] alone.”³⁵ The ideal society for which the Torah laws are intended is an autonomous Jewish society. Naturally, when Jews are not the majority and are ruled by foreign leaders, the Torah laws will come into conflict with the laws and morals of the dominating society. So perhaps the Torah law in this case is not morally incorrect or inhumane, but it was intended for a scenario in which there would be no such conflict. Its reality is not our reality.

This realisation is implied through the way in which the Rabbis manoeuvre around the law. They are unwilling to speak against the law because they are praying for a time when the Torah’s reality will be attained.

³⁵ *Aleinu*, Gates of Prayer, p. 616

Chapter 4: Equity as the Normalizing Factor

We have just seen two examples of the Rabbis working around the strict sense of the law in order to uphold justice. In the case of the Sotah, the Rabbis found a loophole for repealing the law: namely, the waters of the Sotah only “work” when the accuser is himself pure. The Rabbis saw their society as impure with respect to fidelity, and so judged that women should not be held to a higher standard than their husbands. Furthermore, with the decline of society in this respect, the stigma that once came along with the accusation of adultery no longer held. Thus the laws were seen as ineffective.

In the case of the medical treatment of a Gentile on the Sabbath, the Rabbis found a way to adjust the laws which forbade such treatment. They argued that concessions must be made “for the sake of peace.” Furthermore, they argued, hostility would result from the refusal of a Jew to treat a Gentile, and so breaking the Sabbath in this way would be in order to avoid hostility (which otherwise could have dire results.) However, this was accompanied by strictly *legal* arguments; perhaps the “ethical” or “justice” consideration alone was not sufficient.

In both cases, the Rabbis were displeased with the law in its strict sense and saw the need for a modification of it--for the Sotah, though, this meant an indefinite suspension. The laws as passed down to the Rabbis and us were formulated in the abstract, with a general scenario in mind. They did not--indeed were unable--to foresee the changes in society and the individual circumstances which might lead to painful results if the laws were adhered to rigorously.

This is the necessary nature of law. The law must be clear, firm and unwavering so

that the citizen knows where she stands, and what she must and must not do. The law must be general and impartial in its application; fairness demands that there be one rule for all and that it not discriminate in any way. But we learn simply through our everyday lives, that the individual rather than the general--the concrete rather than the abstract--is true to life. And so the admirable firmness, clarity and generality of the law is, in the end, its undoing.

This is perhaps ironic. But it has been noticed and dealt with throughout the ages. Aristotle dealt with this issue and found that the solution is equity. Aristotle defines equity as the rectification of law where law is defective because of its generality. "Equity is that part of the law--legislative provisions, rules of adjudication, the prerogative of some high functionary, or other mechanisms--that interferes with a strict application of the law that otherwise would have resulted in undue hardship, unreasonable judgment, or miscarriage of true justice. Thus, making for fairness, equity, again according to Aristotle, is not different from justice, but a better form of it."¹ Equity serves as a corrective to the formalism necessary in recorded laws.

Jewish law has no term for equity. The Hebrew word, *yosher*, as it is used in responsa literature of the middle ages connotes fairness, uprightness and propriety, which is essentially similar to the meaning of the word in the Bible, and is close to, but not identical with the legal concept of equity. Legally, equity is the body of (English) rules and decisions that mitigate against the rigor of the (common) law.

In Hebrew, the word *mishpat* may alone stand for strict formal law. We read in

¹Kirschenbaum, p.4

Gen. 18:25, "...Shall not the judge of all the earth do right, *mishpat*?" But we see compound words constructed from this word, *mishpat*, in order to express a modification of the formal law. In Ezekiel we read, "[He] (i.e., the just man) does not give out money on interest, nor accepts any increase, withdraws his hand from iniquity, executes *true judgement* between man and man."^{2 3} True judgement, *mishpat emet*, seems to be different from strict judgement. If this were not the case then the text would not need to insert the word '*emet*'. Another type of *mishpat* is modified by *shalom*, whole or perfect. "These are the things that you shall do: speak every man the truth to his neighbour, render true and perfect justice in your gates."⁴ And the Torah itself tells us, "You shall appoint magistrates and officials for your tribes, in all the settlements that the Lord your God is giving you, and they shall govern the people with *due justice*."⁵ This is *mishpat tzedek*.

And so we see that even though the word 'equity' does not have a direct equivalent in Hebrew, the idea of modifying the strict law and applying it in a way that is truly just certainly does exist. Equity is concerned that justice exists, and that it be done properly, efficiently, and accurately.

We see this idea of modifying the law in order to achieve true justice in Rabbinic lore. In Midrash Rabbah we read, "Because the Earth is filled with violence (*hamas*)

²8:18

³Though these actions may already be illegal, not just immoral, I assume that these "illegal" acts are widespread and even normal behaviour, otherwise why is it so special that the just man behaves in this way?

⁴Zechariah 8:16

⁵Deut. 16:18

through them.” (Gen. 6:13)--what is ‘*hamas*’ (violence) and what is *gezel* (robbery)? Said R. Hanina: ‘*Hamas*’ (violence) refers to what is worth a *perutah*; *gezel* (robbery), to what is of less value than a *perutah*.⁶ And this is what the people of the age of the Flood used to do: When a man brought out a basket full of lupines [for sale], one would come and seize less than a *perutah*’s worth and then everyone would come and seize less than a *perutah*’s worth, so that he had no redress at law. Whereupon the Holy One, blessed be He, said: ‘Ye have acted improperly, so will I too deal with you improperly.’”⁷

In chapter one, we saw a similar response to the man who married a woman against her will. In that case, the Talmud explains, “...he treated the woman cavalierly and therefore the Rabbis treat him cavalierly and nullify his betrothal.”⁸ So we see that when the Rabbis feel that the law is being manipulated, and taken out of its benevolent spirit, they find no problem with manipulating the law in order to punish the manipulator! They seem to employ a sort of “what goes around comes around” type of attitude--Shakespeare would have said “measure for measure.” In both cases the punishment is equal to the crime and in both cases, the Rabbis seek to prevent individuals from using the letter of the law to abuse its spirit. This modification of the law in order to serve justice is a form of equity.

The Rabbis also modified the law in a formal way using *takkanot*. *Takkanot* are legislative enactments of a positive nature which serve to establish new practices.

⁶A *perutah* is the smallest coin; there is no punishment for its theft.

⁷Genesis Rabbah, 31:5, Soncino translation.

⁸Baba Batra 48b

“Among the manifold purposes for which the legal authorities passed these enactments throughout the ages, the prevention of the ill-effects of *de'oraita* (toraitic) formalism stands out as a major consideration.”⁹ To illustrate this point, Kirschenbaum calls our attention to the biblical requirement that a thief must restore the stolen object itself; payment of its value, under any circumstances--as long as the object is still in existence--would not suffice.¹⁰ Bet Shammai hold fast to the “under any circumstances” clause: “If a man has stolen a beam and built it into a structure, Bet Shammai declare that he must dismantle the entire structure in order to restore the beam [intact to its owner]; but Bet Hillel declare that [the owner] can claim no more than the monetary value of the beam in order to encourage people to repent their ways.”¹¹ Bet Shammai hold fast to the formal law, insisting that the house be dismantled in order to return the beam, but Bet Hillel see the spirit behind the formal law. Bet Hillel enacted a *takkanah* so that thieves would begin rehabilitating and repenting. Bet Hillel’s *takkanah* was adopted as normative law.

Rashi, naturally, agrees with Hillel’s decision, and explains it: “When the formal rules of interpretation do not provide sufficient guidance, the resultant ambiguities are to be resolved by the application of ‘the truth’ and ‘the upright.’”¹² Rashi is basing his statement on the ethical directives discussed above, “And you shall do that which is right

⁹Kirschenbaum, p. 35.

¹⁰*Ibid.*

¹¹B. Gittin 55a, as quoted in Kirschenbaum, p. 35.

¹²Rashi, s.v. “*Ahar she-ribbah*” (Yoma 42b)

and good in the sight of the Eternal One,¹³ and its interpretation--namely, that one must act in accordance with the content and the substance of the spirit of the law, which is often beyond the letter of the law, *lifnim mishurat ha-din*. Rashi, and others who upheld this ideal, realised that the formalism of the law does not exhaust the intent of the Lawgiver.

The ancient Rabbis relate the following midrash: "The Holy One, blessed be He, prays! What prayer does He recite? Rabbi Zutra, the son of Tuvia, said in the name of Rav: 'May it be My will that My mercy may suppress My anger and that My mercy may prevail over my other attributes, so that I may deal with My children according to the attribute of mercy (*middat harahamim*) and may act on their behalf above and beyond the dictates of strict justice (*middat ha-din*).'"¹⁴ Thus even God recognises that strict justice may not always be the best course of action. Sometimes mercy may be necessary due to the intricacies of a given isolated situation.

Maimonides, however, disagrees with the need for equity. He is willing to accept that the Torah does not pay attention to the isolated case, so as a result, the individual involved may suffer an injustice. For Maimonides, this is a small price to pay for the upholding of the Torah law.

Among the things you likewise ought to know is that the Law does not pay attention to the isolated. The Law was not given with a view to things that are rare. For in everything that it wishes to bring about, be it an opinion or a moral habit or a useful work, it is directed only toward the things that occur in the majority of cases and pays no attention to what happens rarely or to the damage occurring to the unique human being because of this way of determination and because of the legal character of the governance. For the Law is a divine thing;

¹³Deut. 6:18

¹⁴Berakhot 7a

and it is your business to reflect on the natural things in which the general utility, which is included in them, nonetheless necessarily produces damages to individuals, as is clear from our discourse and the discourse of others. In view of this consideration also, you will not wonder at the fact that the purpose of the Law is not perfectly achieved in every individual and that, on the contrary, it necessarily follows that there should exist individuals whom this governance of the Law does not make perfect. For not everything that derives necessarily from the natural specific forms is actualized in every individual. Indeed, all things proceed from one deity and one agent and *have been given from one shepherd*.¹⁵ The contrary of this is impossible, and we have already explained that the impossible has a stable nature that never changes.¹⁶ In view of this consideration, it also will not be possible that the laws be dependent on changes in the circumstances of individuals and of the times, as is the case with regard to medical treatment, which is particularized for every individual in conformity with his present temperament. On the contrary, the governance of the Law ought to be absolute and general, including everyone, even if it is necessary only for certain individuals and not necessary for others; for if it were made to fit individuals, the whole would be corrupted and you would make out of it something that varies. For this reason, matters that are primarily intended in the Law ought not to be dependent on time or place; but the decrees ought to be absolute and general, according to what He, may He be exalted says: *As for the congregation, there shall be one statute [huqqah] for you*.¹⁷ However, only the general interests, those of the majority, are considered in them, as we have explained.¹⁸

Maimonides seems wedded to the abstract idea of upholding the purity of the written word of Torah. Luckily, the majority of Rabbis and judges have disagreed with Maimonides and have seen the need to address individual situations and to apply equitable rulings.

Maimonides chose to understand the injunctions of Deuteronomy 6:18 differently

¹⁵Eccles. 12:11

¹⁶*Guide*, III 15.

¹⁷Num. 15:15

¹⁸*Guide of the Perplexed*, III 34. Translation by Weiss and Butterworth, p. 141-142.

than his predecessors; or perhaps he chose to disregard them altogether.¹⁹ In any case, “And you shall do what is right and good,” has been applied by the Sages of the Talmud in many instances, as we have seen. In particular, this principle is applied in the case of the law of the neighbour (*dina devar mitzra*). The person who has land bordering on the land of the seller enjoys a right of preemption with regard to the land that is for sale. If the seller proceeded to sell it to another, the person whose land borders the land for sale can displace the buyer by paying the same price which he paid to the seller.²⁰ But the Rabbis extend the legal parameters of the obligation: if the seller sells the land to another buyer who is not the neighbour with right of preemption, the neighbour may sue the buyer and the buyer will be forced to give him the land by a court of law. This injunction is held close to the level of law. It upholds the spirit behind the law which commands obligation because it is the “right” and the “good” thing to do.

We see a classic example of the principle which upholds acting beyond the letter of the law being applied in Baba Metzia 24b. The law states that if one finds an object after its original owners had despaired of its return, he is not obligated to return it.²¹ But we are told of a situation wherein the father of Samuel found donkeys in the desert and he returned them to their owners after twelve months--beyond the strict law. Though this type of behaviour cannot be coerced, it certainly reveals the Rabbis' preference for this

¹⁹Yet he follows Beit Hillel and the laws that are based upon those “equitable” principles. Perhaps he thinks of them as “law” and *not* as “equity”.

²⁰Baba Metzia 108a; Mishneh Torah Hilkhos Shekhenim 12:5; Rambam there explicitly cites Deut. 6:18 as the ground for this halacha. It seems that Rambam recognizes the Rabbis' use of this interpretation of Deut. 6:18 but would choose not to employ it himself.

²¹Baba Metzia chapter Elu Metzot in many places

type of consideration.

The third quasi-legal obligation which Maimonides seems to refute in his statement in *The Guide* III, 34, above, is behaviour that is judged “the spirit of the Sages is pleased with him,” or “to act so is the standard of saintliness.”²² An example of such pleasing behaviour is one who returns a debt in the sabbatical year.” About this person the Sages say, “the spirit of the Sages is pleased with him.”²³ Further, we read in Shabbat 120a, “Mishnah: One may save (from a fire on the Sabbath) a basketful of loaves of bread, even though there are in it enough for a hundred meals....And he may tell others, ‘Come and rescue for yourselves!’ But if they are wise, they make an accounting with him after the Sabbath. Gemara: What place is there for an accounting--they benefited from ownerless property?! Said Rav Hisda, ‘The standard of saintliness is referred to here!’” In other words, if one is to act not according to the law but according to equity, he returns the possessions to their original owner and he claims from him--if he wishes--compensation for his work of rescue.²⁴

Clearly then, we see that the Rabbis felt the need to raise the level of behaviour in order to uphold a society in which fairness is a virtue. Some moral obligations, as we saw above, are raised in importance and given quasi-legal status.

But it is not only the elite who are expected by the Rabbis to live up to a higher

²²But see Hil. Shemitah 9:28, Hil. Gezeilah 1:13; Hil. Mekhirah 7:8; Hil. Malveh veloveh 7:5; and Hil. Nachalot 6:11, where Rambam explicitly mentions this principle.

²³M. Sheviit 10:9

²⁴Silberg, p. 117.

moral standard. It would seem from our opening scenario of Rabbah bar Bar Chanan that only the Rabbis were expected to act above and beyond the expectations of the strict law. But this is not the case. We see a similar story recounted in the Palestinian Talmud:

Rabbi Nehemiah taught in a Baraita: A potter handed over his pots to a certain person. They were broken. The potter seized the worker's garment in payment for the damage. The worker came to Rabbi Yose bar Haninah. The rabbi said to him, "Go tell the potter, *So that you may walk in the way of good men.*"²⁵ He went and told him, and the potter then returned his garment. Then the rabbis asked the worker, "Did he pay your wages?" He answered, "No." The rabbi said to him, "Go tell the potter, *And you shall keep the paths of the righteous.*"²⁶ He went and told him, and the potter paid his wages.²⁷

Even the simple potter is responsible to treat his fellow according to "the right and the good" though such consideration is not called for in the strict sense of the law.

It is of the utmost importance to understand that in developing a sense of equity, the Rabbis did not lower the law from its high position and did not reduce it to subservience to pure morality. Jewish law views the Torah as God's word, while at the same time understanding that it never exhausts God's word. Just as the Written Torah is divine, so is the Oral Torah. Even so, the Oral Torah complements and supplements the Written Torah but it still does not encompass all that is God's word. The fulfillment of God's word is achieved when people engage in the process of applying the rules to individual cases. The Rabbis never said that they were superseding God's laws or that the laws were inadequate. They simply saw themselves as legislators whose job it is to

²⁵Proverbs 2:20

²⁶Ibid.

²⁷P. Baba Metzia 6:6

administer the law. This might entail making minor external modifications in order to preserve the law as God intended it.

Therefore I must conclude that the Rabbis saw themselves as protectors of God's laws. They saw themselves as part of the prophetic tradition that had been transmitted to them,²⁸ and they perceived certain sanctified values as making up the very basis of the legal system. As a result of this perception, they regarded all modifications of the traditional law that serve to bring the law in line with these underlying values as nothing more than the fulfillment of the sacred Torah itself.

And so, when morality and law conflict, the Rabbis employ their sense of equity--which is also part of the intent of the law--to correct the apparent conflict.

²⁸Cf. Pirkei Avot 1:1

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