

Chapter 12

Texts, Values, and Historical Change: Reflections on the Dynamics of Jewish Law

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The image of Jewish law as a self-contained fortress impervious to the slings and arrows of external fortunes or extra-legal ideologies and values has been nurtured by two very different forces. For centuries,

I am pleased to present this overview of a topic central to the work of any Orthodox rabbi to a man who has exercised his unique rabbinic responsibilities with surpassing eloquence and exceptional insight. The article had its origins in a paper presented at a conference of the Cardozo School of Law in October 2006. Subsequently, Daniel Sperber published two books of considerable relevance to this theme: *Darkah shel halakhah* (Jerusalem: Reuven Mass, 2007), and *Netivot pesikah* (Jerusalem: Reuven Mass, 2008). While I have not incorporated material from these works into the article, readers will profit from consulting them and some of the literature that they cite.

even millennia, Christian authors depicted Judaism as a legalistic religion indifferent to considerations of loving-kindness and grace. As Paul succinctly puts it, ‘The letter kills, but the spirit gives life’ (2 Cor. 3:6). An early Protestant joke told of a Catholic priest who mistakenly placed an inedible object in the mouth of a communicant; after waiting an intolerably long time for it to melt on his tongue, the parishioner exclaimed, ‘Father! You have made a mistake. You have given me God the Father. He is so hard and tough He will never dissolve.’

Under the impact of religious and intellectual transformations in the late nineteenth and early twentieth centuries, Christian scholars contrasted the legalism and ethical backwardness of rabbinic Judaism with the spiritually refreshing and ethically sensitive message of Jesus. Jews from across the religious spectrum denounced these assertions, contending that they were rooted in both ignorance and anti-Jewish bias.¹ As I have noted in earlier essays, some of these denunciations were not without their irony, since Reform Jews, who had abandoned many of the rituals of Judaism for reasons by no means alien to the rhetoric of Christian critics, now composed paeans of praise to the spiritually uplifting character of the minutiae of rabbinic law.² Now, however, we confront a very different irony. Some Orthodox Jews, acting out of the deepest loyalty to Jewish law and angrily rejecting hostile evaluations of Jewish ethics, respond to what they see as the utter abandonment of legal discipline advocated by Reform and even Conservative Judaism by reinforcing the view that halakhah is marked by a self-contained analysis of

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1. I have discussed the latter development along with the responses of Jewish apologists in David Berger, ‘“The Jewish Contribution” to Christianity’, in Jeremy Cohen and Richard I. Cohen (eds.), *The Jewish Contribution to Civilization: Reassessing an Idea* (Oxford: Littman Library of Jewish Civilization, 2007), 80–97, repr. in Berger, *Persecution, Polemic and Dialogue: Essays in Jewish-Christian Relations* (Boston, MA: Academic Studies Press, 2010), 312–32.
 2. David Berger, ‘Religion, Nationalism, and Historiography: Yehezkel Kaufmann’s Account of Jesus and Early Christianity’, in Leo Landman (ed.), *Scholars and Scholarship: The Interaction between Judaism and Other Cultures* (New York: Yeshiva University Press, 1990), 154 (repr. in Berger, *Persecution, Polemic, and Dialogue*, 296); and id., ‘“The Jewish Contribution”’. See also Christian Wiese, *Wissenschaft des Judentums und protestantische Theologie in wilhelminischen Deutschland: Ein Schrei ins Leere?* (Tübingen: Mohr-Siebeck, 1999), 162.

texts allowing for very little consideration of changed historical circumstances, external pressures, ideological concerns, and human sensitivities.

To a large degree, the debate about halakhic flexibility is carried out on both sides by recourse to straw men. On the one hand, a legal system whose practitioners have sincerely believed in its divine origin cannot reasonably be expected to have treated it as potters treat their clay; on the other, no legal system could have remained viable from the period of the Talmud to the contemporary age had it not responded to human needs and even ideological transformations in ways that looked beyond the straightforward meaning of its inherited texts.

In this overview, I will attempt to depict certain patterns of halakhic re-evaluation that emerged in response to new economic, humanitarian, and religious concerns. The significant variables determining such re-evaluation include, *inter alia*, the seriousness of the need, ideological convictions, the susceptibility of the text to reasonable reinterpretation, the severity of the prohibition in question, popular instincts regarding that prohibition, and the attitude of the decisor and his community to the likelihood that popular practice may be in error.

At the risk of classifying myself as the *golem*, or boor, of Mishnah *Avot* 5:7, who does not proceed in order but addresses the last point first, let me begin with the final variable. Practices of a purely ritual nature developed in various Jewish communities and sub-communities that stand in stark contrast to the apparently unambiguous requirements of Jewish law. Thus, Rabbi Moses Isserles testified that, in sixteenth-century Poland, only exceptionally pious Jews slept in a sukkah.³ Similarly, most hasidic and many non-hasidic Jews in the diaspora do not eat in a sukkah on the festival of Shemini Atseret even though the standard major authorities ruled that one must.⁴ In the months preceding Passover, a large majority of observant Jews eat grain that should presumably be classified as newly grown and hence prohibited; a generation ago, the vast majority of observant Jews in the United States were not even aware of the prohibition despite its explicit appearance in Leviticus. In these

3. Gloss on *Shulḥan arukh*, 'Orah ḥayim' 639:2.

4. See Aaron M. Schreiber, *Yesodot hanohag lehimana miyeshivah besukah bishemini atseret behuts la'arets* (Jerusalem: Netiv Haberkhah, 2004).

and similar cases, no broader issues are at stake; rather, the assumption that extensive sectors of pious and learned Jews would be engaging in blatant violations of the Torah was so unacceptable to rabbinic authorities that justifications were sought and found.

Haym Soloveitchik has argued that in the Middle Ages the self-image of a community was a central factor in determining whether or not popular custom would be maintained or overridden. Ashkenazi authorities were more likely to defend prevailing practice because they perceived their communities favourably, while Sephardi rabbis were more willing to assume that their fellow Jews were sinners out of either ignorance or indifference.⁵ In a celebrated article, Soloveitchik applies this insight to contemporary Jewry, arguing that in the last few generations, Orthodox Jews have lost confidence in the traditions that they learned from their parents, so that they have replaced a mimetic society with one that tests all prevailing practices against the standards established by texts.⁶

Ideological considerations have played an interesting and sometimes ironic role in the reception of that article. Many Modern Orthodox Jews have expressed satisfaction with its thesis because Soloveitchik's examples of deviation from traditional behaviours tend to involve text-based stringencies such as the increased size of the required measure of matzah, and such innovations are ideal grist for mockery directed at the Orthodoxies of the right. Modernist ideology, however, can also trump mimesis. Thus, some of those who lionize the mimetic society as they savour the anti-haredi uses of Soloveitchik's analysis are simultaneously impelled by feminist convictions to change generations of synagogue practice on the basis of textual analysis far more tenuous than the con-

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5. Soloveitchik formulates this point vigorously in his *Halakhah, kalkalah vedimui atsmi: hamashkona'ut bimei habeinayim* (Jerusalem: Magnes Press, 1985), 111–12, 116–19, seeing it as so central that he incorporates it into the book's title. Nonetheless, a key chapter (pp. 59–81) establishes and analyses a significant distinction between twelfth-century French and German authorities, where the argument about contrasting communal self-perceptions does not appear to apply. Recently, Soloveitchik has expressed reservations about the universality of the mediaeval Ashkenazi inclination to defend problematic popular practice. See his *Hayayin bimei habeinayim* (Jerusalem: Zalman Shazar Centre for Jewish History, 2009), 369.
 6. Haym Soloveitchik, 'Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy', *Tradition* 28/4 (1994), 64–130.

siderations that lead the traditionalist Orthodox to their usually more stringent deviations from the practices of the past. Affirmation or rejection of a mimetic ideal can depend very much on whose ox is being gored.

I shall soon return to women's issues in even more sensitive contexts, but let me first make some observations about the much-studied reactions of rabbinic decisors to serious economic pressures that beset Jews in the Middle Ages. When facing a prohibition of rabbinic rather than biblical status, the difficulties of ruling leniently in the face of economic necessity were substantially mitigated. Thus, in a particularly striking illustration of this point, Rabbi Yom Tov ben Avraham of Seville (Ritva, 1250–1330) made the frontal assertion that the rabbinic prohibition against business dealings with idolaters on pagan holidays lest they thank their gods was never intended to apply in cases where economic survival was at stake.⁷ The Tosafists appealed to a principle that can sometimes overcome even a biblical prohibition: that observing this restriction could generate hatred towards Jews. In this instance, they were able to cite compelling talmudic evidence that such a concern is decisive. Rabbenu Tam (1100–71) dealt with the challenge by restricting the prohibition to ritual objects.

Even more strikingly – and with consequences the mediaeval authorities were not likely to have foreseen – new assertions about the Jewish evaluation of Christianity, which has legal ramifications beyond its theological significance, emerged out of the crucible of these mediaeval economic realities. Thus, the Tosafists made the modest assertion that their Christian contemporaries, not being particularly pious, are unlikely to respond to a business arrangement with a thanksgiving prayer to their deity. When they formulated this point as 'contemporary gentiles do not worship idolatry', the potential was created for interesting conclusions to be drawn in subsequent generations. Rabbenu Gershom of Mainz (tenth–eleventh centuries) allowed transactions on Christian

7. *Vetu she'anu tserikhim latet velaset imahem mishum hayei nefesh*. To be sure, this point appears as the third in a series of four arguments for a permissive position. See *Hidushei haritva lerabenu yom tov berav avraham al-ishbili: masekhet avodah zarah*, ed. R. Moshe Goldstein (Jerusalem: Mosad Harav Kook, 1978), col. 16 (on BT AZ 6b).

holidays on the basis of a cryptic line in the Talmud affirming that ‘Gentiles outside the land of Israel are not idolaters; rather, they follow the custom of their ancestors.’ Here, too, the potential for a reading broader than the one intended by Rabbenu Gershom is self-evident.⁸ When Tosafot permitted another sort of business arrangement on the grounds that *shituf* (lit.: association; of other powers with God, which probably applied only to an oath) is not forbidden to Noahides, the seeds were sown for the later affirmation that Judaism considers the worship of Jesus along with God entirely permissible for non-Jews.⁹ In other words, when straightforward law is leavened by other considerations, it is not just the law in question that can be affected; despite what Soloveitchik once called ‘halakhic federalism’, a position initially intended to apply to a focused, restricted context cannot always be expected to know its place.¹⁰ *Bush v. Gore*, the United States Supreme Court decision that effectively resolved the 2000 presidential election in favour of George W. Bush, is, or at least may soon become, an instructive case in point.¹¹

All, or virtually all, of these mediaeval arguments for permitting problematic economic activity are perfectly plausible. The underlying question is whether, as Jacob Katz and others have taken for granted, the permissibility of such business dealings was absolutely predetermined by the economic realities that faced mediaeval Jews. Despite the instincts of historians, one cannot be utterly certain that the answer to this question is affirmative. Rabbi Yehiel of Paris told his interlocutors during the Paris disputation of 1240 that if Jews did not sincerely believe that contemporary Christians were different from ancient pagans in legally relevant ways, they would not suspend talmudic law affecting economic

8. A *locus classicus* presenting and evaluating these arguments is Tosafot *AZ 2a*, s.v. *asur*.

9. For a discussion of the various interpretations of the relevant Tosafot (*San. 63b* s.v. *asur*), see Appendix III of my *The Rebbe, the Messiah, and the Scandal of Orthodox Indifference* (London: Littman Library of Jewish Civilization, 2001); Heb. version, *Harebe melekh hamashiah, sha'aruriyat ha'adishut, veba'iyum al emumat yisra'el* (Jerusalem: Urim, 2005).

10. I made this point in Berger, ‘Jacob Katz on Jews and Christians in the Middle Ages’, in Jay M. Harris (ed.), *The Pride of Jacob: Essays on Jacob Katz and his Work* (Cambridge, MA: Harvard University Press, 2002), 60–1 (repr. in Berger, *Persecution, Polemic, and Dialogue*, 72).

11. See ‘Editorial Notebook’, *New York Times*, 15 Aug. 2006.

matters; after all, he said, we have provided abundant evidence that we are willing to die for our faith.¹² As it happens, the grounds for suspending those laws did not require the far-reaching re-evaluation of the status of Christians that Rabbi Yehiel proffered in the disputation; moreover, the embrace of martyrdom in moments of religious ecstasy may well be more probable than the willingness of an entire community to commit slow economic suicide. Still, the observation that Jews would not provide knowingly insincere excuses for violating the Torah is surely correct. Israel Ta-Shma, the distinguished scholar who dealt with some of these issues, once told me that one's initial inclination is to assume that rabbinic decisors would conjure up any available interpretation, however flimsy, to justify a conclusion required for economic survival. Nonetheless, he added, as one reads the arguments of a figure like Rabbenu Tam in detail, an unexpected reaction begins to develop, to wit, 'This conclusion is actually correct.' While this may be a tribute to Rabbenu Tam's genius, it says something important about the subtlety and complexity of the interplay between communal need and textual analysis.

Rabbenu Tam himself famously asserted in a related context that it is a mitzvah to provide Jews with sustenance,¹³ and this leads us to a key element in this discussion, namely, the overt consideration of concerns that are not part of the narrow textual discourse. I call these competing religious values, by which I mean that they compete with the legal conclusion that would follow from a simple reading of the directly relevant texts, and we shall encounter them in various guises in the course of our discussion. It is, moreover, important to note what Rabbenu Tam's formulation affirms, namely, that the recognition of economic needs is itself a religious value, so that it may legitimately be considered in choosing a plausible halakhic position over a competing one that would be more compelling in a world without real people and critical human needs.

Despite Katz's emphasis on the role of economic pressures in

12. *Vikuaḥ rabenu yeḥi'el miparis*, ed. Reuven Margaliyot (Lvov: 1928), 21.

13. R. Isaac b. Moses, *Or zarua*, no. 202. The passage is reproduced in Soloveitchik, *Halakhah, kalkalah, vedimui atsmi*, 136, document 21. (Note 26 on p. 66 mistakenly refers the reader to document 22.)

driving halakhic decision-making, he was not only cognizant of the role of texts but also emphasized the intuitively less-obvious impact of what he called ritual instinct. Such an instinct can sometimes overcome dire economic needs to the point where pious laypeople will not even ask their rabbis if a particular act might be permitted, given exigent circumstances. If the forbidden act has been avoided since childhood to the point where the prohibition is embedded in the deepest layers of the individual's psyche, it becomes almost unthinkable, especially if it requires an unmediated physical action.¹⁴

In examining this complex matrix of texts, instincts, needs, values, and convictions, let me now turn to competing religious values of two major sorts: ideological and humanitarian. These are independent categories, but they can interact in a striking fashion.

With the rise of both the Reform movement and the general estrangement from all forms of Judaism, Orthodox rabbinic authorities reacted in diverse and sometimes contradictory ways. Here, the religious value was the protection of the traditional community from deviation, a value with the potential for conflict with straightforward law. In some cases, this value extended to the need to establish a *modus vivendi* with a deviationist movement that could not be vanquished. To accomplish these ends, some authorities endorsed mild innovations like a vernacular sermon or a male choir. More significantly, there were rabbis in Central Europe who were prepared to classify Reform Jews under a talmudic rubric that exempted children brought up among non-Jews from the harsh sanctions applicable to heretics.¹⁵ In the twentieth century, no less a figure than the Hazon Ish (Rabbi Avraham Yeshayahu Karelitz, 1878–1953) famously argued that because of the absence in our time of

14. See his summary paragraph in Jacob Katz, *The 'Shabbes Goy': A Study in Halakhic Flexibility* (Philadelphia, PA: Jewish Publication Society, 1989), 231. Haym Soloveitchik emphasizes Jewish revulsion at drinking gentile wine as a decisive factor in determining actual behaviour in mediaeval Ashkenaz. See Haym Soloveitchik, *Yeinam: sahar beyeinam shel goyim: al gilgulah shel hahalakhah be'olam hama'aseh* (Tel Aviv: Alma, 2003), 104–21.

15. For a recent discussion, see Adam S. Ferziger, *Exclusion and Hierarchy: Orthodoxy, Nonobservance, and the Emergence of Modern Jewish Identity* (Philadelphia, PA: University of Pennsylvania Press, 2005), 99–105.

evident divine providence, the most extreme of those sanctions against heretics are no longer applicable at all.¹⁶

In contrast, there were simultaneously more stringent responses to Reform Judaism, which incorporated a rhetoric that went beyond the plain meaning of the controlling texts. Thus, rabbis mobilized the most extreme categories of Jewish law in prohibiting the construction of a synagogue without a platform in the centre or the recitation of public prayer in a language other than Hebrew. They did so more categorically than precedent could easily justify, and they subjected all innovation to intense suspicion and scrutiny.¹⁷

The imperative of retrieving Jews estranged from tradition created halakhic pressures of its own, which could also elicit either lenient or stringent approaches. Thus, Rabbi Moshe Feinstein and Rabbi Shlomo Zalman Auerbach, two of the twentieth century's most eminent decisors, took very different positions on the question of organizing events on the sabbath intended for non-observant Jews who would surely travel to the event in a manner that violates the sabbath.¹⁸ In this instance, Rabbi Auerbach's lenient view required the daring affirmation that the objective of enhancing observance in the long run meant that the organizer of the event is not leading people to sin in the technical sense of the prohibition.

Another historical development with profound ideological freight, religious and otherwise, was the Zionist movement and the state that it produced. Here, there can be no question that the decisor's ideological position can affect his ruling. Once we recognize that a competing religious value can legitimately play a role in reaching a

16. R. Avraham Yeshayahu Karelitz, *Hazon ish*, 'Yoreh de'ah' (Benei Berak: Harav Grainman, 1961 or 1962), 'Hilkhot shehitah' 2:16.

17. See, for example, Jacob Katz, *A House Divided: Orthodoxy and Schism in Nineteenth-Century Central European Jewry*, trans. Zipporah Brody (Hanover, NH: Brandeis University Press, 1998), 77ff.

18. For a brief summary, see R. David Sperling, 'Inviting Shabbat Guests Who Will Drive', www.nishmat.net/article.php?id=5&heading=0. Sperling also points to the permissive ruling of R. Moshe Sternbuch. See, too, the discussion in R. Yehuda Amital, 'Rebuking a Fellow Jew: Theory and Practice', in Jacob J. Schacter (ed.), *Jewish Tradition and the Non-Traditional Jew* (Northvale, NJ: Jason Aaronson, 1992), 127–38.

decision, much depends on whether or not the rabbi in question recognizes the legitimacy of that competing value. A striking example of this dynamic is Rabbi Avraham Yitshak Kook's letter in response to a rabbi who opposed the strategy of effecting a formal sale of the land of Israel to a non-Jew during the sabbatical year, so that Jews would be permitted to work the land:

I must stand in the breach against those who besmirch people who come to settle the land of Israel and who, in the absence of an alternative, are forced to depend on this permissive ruling, which has already become widespread and has a basis in the positions of the Talmuds and the decisors. Such besmirching damages the *yishuv* [Jewish population of the land] both spiritually and materially. Materially, because it is impossible for all to observe the laws of the sabbatical year without annulment, since if they will not export the goods... the land will literally become desolate, God forbid.... Spiritually, because publicizing the prohibition will close the door to entry into the land of Israel... to all loyal Jews, so that only those who throw the religion behind their backs will immigrate.

He goes on to posit that even religious Jews currently living in Israel will in large measure feel unable to abide by the prohibition, in which case they will come to see themselves as sinners and will stop observing the Torah in other respects as well. Although it is true, he concedes, that from a purely spiritual perspective it would be better to maintain a stringent position, this fails to take into account a reality in which clearheaded people will understand the unacceptable consequences of doing so.¹⁹

While Rabbi Kook insists in this letter that the old *yishuv* and the new one are intertwined, so that the destruction of the latter entailed by a stringent ruling would also destroy the former, in another letter he explicitly connects his permissive position to his conviction that

19. R. Avraham Yitshak Kook, *Igerot hare'iyah*, vol. 1 (Jerusalem: Mosad Harav Kook, 1985), no. 311, pp. 346–7.

strengthening and increasing the new Jewish settlement in the land of Israel will hasten the redemption.²⁰ A rabbi who did not support the Zionist enterprise would have been far more likely to affirm the stringent position that Rabbi Kook himself recognizes as preferable in the abstract. Rabbinic stands on other issues of Jewish law also vary to a significant degree depending on the decisor's attitude towards Zionism and the state, though there is certainly no absolute correspondence across the board. Examples include the propriety of exempting yeshiva students from army service, returning land to Arab states or ceding it to Palestinians, and matters that should theoretically have little or nothing to do with Zionism but operate in its penumbra, such as celebrating one day of a festival rather than two when visiting Israel and accepting the rabbinate's ordinary *kashrut* supervision rather than insisting on a more stringent standard.

In addition to these ideological factors, humanitarian values can also stand in tension with the plain meaning of legal texts. Here, too, historical developments create new situations in which such concerns become acute. Since issues of personal status tend to provide the most poignant illustrations, they will be the focus of our discussion.

Several movements and crises have forced Jews to face the question of whether a significant number of individuals who wanted to contract a marriage but whose status rendered such an action problematic should be permitted to do so. In the case of Karaism, whose adherents deny the authority of the Oral Law, the procedure for marriage was essentially the same as that of Rabbanites, but the divorce document did not meet rabbinic requirements. It appeared, then, that Karaite marriages may be valid and their divorces invalid. For those rabbinic authorities who embraced this position, a terrible consequence followed, to wit, that the child of a divorced woman's second marriage would be the product of an adulterous relationship and hence essentially unmarriageable. This conclusion was captured in a morbid play on words based on the law that garments rent in mourning over one's parents may never be repaired. *Hakera'im* (with an *ayin*) *einam mitaḥim le'olam* ('Torn garments can never be repaired'). By changing the *ayin* to an *alef*,

20. Kook, *Mishpat kohen* (Jerusalem: Mosad Harav Kook, 1966), no. 63, p. 129.

we produce a tragic variant: *Hakara'im einam mitahim le'olam* – 'The Karaites can never become brothers.'²¹ The most plausible argument for avoiding this unfortunate conclusion is that Karaite marriages do not take effect *ab initio* because the witnesses are invalid,²² and we shall have occasion to examine this approach as we proceed.

In the aftermath of the mass conversion of Jews in the crucible of late-fourteenth- and fifteenth-century Iberia, the problem of marriageability arose in a different context, generated by the law of levirate marriage. A childless *converso* couple would leave Spain for a location where they could observe Judaism. Upon the death of the husband, the widow would ask if she could remarry without obtaining the release (called *halitsah*) from her deceased husband's brother, a *converso* residing in Spain or Portugal. Any argument to permit such a marriage depended perforce on the assumption that the *converso* community is to be seen as a community of sinners, even of willing sinners. Thus, the original witnesses would be delegitimized or, in an even more extreme formulation, the levir would not be classified as a real 'brother'. In the context of the historians' debate over the beliefs and practices of this community, Yosef Hayim Yerushalmi argued, I think correctly, that one reason for questioning the historical validity of rabbinic assertions (in this context, that the *conversos* were in fact willing Christians) is that the decisors were facing a humanitarian imperative to relieve this woman's suffering. Their desire to achieve this result would incline them to accept judgements about *converso* sinfulness that they might otherwise have examined more critically.²³ This does not mean that their assessment was insincere, or even incorrect, only that we must approach it with care.

An extraordinary expression of the passions that swirled around this question, and the role of religious and human considerations that impinged upon it, appears in a remarkable outburst by Rabbi Moses

21. See R. Ben Zion Hai Uziel, *Sefer mishpetei uzi'el: mahadura tinyana*, 1st edn., part 2, vol. 1 (Tel Aviv: Jacob Levitski, 1935), 'Yoreh de'ah', no. 63, p. 218.

22. See, for example, R. David b. Solomon ibn Abi Zimra, *She'elot uteshuvot haradbaz*, vol. 1 (Jerusalem: Yerid Hasefarim, 2004), no. 73, p. 52.

23. Yosef Hayim Yerushalmi, *From Spanish Court to Italian Ghetto: Isaac Cardoso, A Study in Seventeenth-Century Marranism and Jewish Apologetics*, rev. edn. (Seattle, WA: University of Washington Press, 1981), 25–6.

Kapsali, the leading Turkish rabbi during the period of the expulsion from Spain. He permitted such women to remarry, and those who, ruling stringently, did not permit them to do so were in his view

agents of idolatry, whose intention [!] is only to prevent these forced converts from worshipping God, may He be blessed. For if these women will believe after hearing such rulings that they will be unable to marry, they will not return to the worship of God... and will return to their improper path. And those rabbis are close to being instigators [to idolatry], and it is almost the case that they are subject to the death penalty in accordance with the law that applies to a seducer and instigator.²⁴

In contemporary times, the strategy of invalidating a marriage on the grounds that the witnesses were not observant Jews is associated most prominently with Rabbi Moshe Feinstein, who mobilized it to permit Reform Jews to remarry after a civil divorce, to permit Reform divorcees to marry – or at least to remain married to – men of priestly lineage, and to remove the taint of illegitimacy from the children of the second marriage of Reform divorcees.²⁵ While some prominent authorities disagreed with this position, it has largely won the day as a result of its humanitarian consequences as well as its preservation of marriageability across denominational lines, and, ironically, because the invalidating of Reform witnesses appeals to the anti-Reform ideology of traditionalist Orthodox Jews, who might otherwise have resisted such a lenient decision.

Another ruling promoting Jewish unity has also more or less prevailed in a somewhat ironic fashion. Ethiopian Jews have been declared unequivocally Jewish by Rabbi Ovadiah Yosef on the basis of a sixteenth-century responsum affirming their descent from the tribe

24. Quoted in R. Benjamin b. Mattityahu, *She'elot uteshuvot binyamin ze'ev* (Jerusalem: Defus Safra, 1959), no. 75. The author (no. 76) rejects R. Kapsali's position. Cited along with additional sources by Simcha Assaf, *Be'oholei ya'akov* (Jerusalem: Mosad Harav Kook, 1943), 178–9.

25. R. Moshe Feinstein, *Iggerot mosheh*, 'Even ha'ezer' (New York: Moriah, 1973), sec. 3, no. 23, pp. 445–6.

of Dan.²⁶ The historical evidence militates strongly against this position, but Modern Orthodox Jews, who sometimes denounce traditionalist authorities for excluding non-traditional evidence from their purview, are happy to endorse this unhistorical conclusion because it serves needs with which they identify.²⁷

Finally, the spectrum of positions on proper standards of conversion also reflects concerns about unity and social cohesion. The classic prohibition against conversion in contemplation of marriage has been dismissed by many authorities as inapplicable in an age when civil marriage and even cohabitation are socially acceptable alternatives to religious marriage. But the question of recognition, before or after the fact, of a convert who did not genuinely accept the obligation to observe the Torah, as Orthodoxy understands it, remains a matter of deep contention. De jure, and to a growing extent de facto, the stringent position dominates, but the Jewish social fabric, especially in Israel, is imperilled in different ways by all the positions, and there is no question that decisors have been influenced by their varying perceptions of the imperatives of national/communal unity.

Have rabbinic decisors, then, allowed their rulings to be affected by economic and communal needs, by ideological commitments, and by humanitarian concerns? Of course they have. Have these influences operated primarily on a subconscious level? I do not think so. Rabbinic authorities generally know what they are doing, and they are well aware of the factors that they weigh in rendering a decision. Jacob Katz noted a striking interpretation by Rabbi Moses Sofer (Hatam Sofer, 1762–1839)

26. R. Ovadiah Yosef, *Shut yabia omer*, 'Even ha'ezer', vol. 8 (Jerusalem, 1995), no. 11, pp. 404–09. The responsum also rules leniently with respect to the question of marriageability, and in the course of the discussion, surveys opinions on the marriageability of Karaites as well.

27. I made this point in 'Identity, Ideology, and Faith: Some Personal Reflections on the Social, Cultural, and Spiritual Value of the Academic Study of Judaism', in Howard Kreisel (ed.), *Study and Knowledge in Jewish Thought* (Be'ersheva: Ben Gurion University of the Negev Press, 2006), 25–6, repr. in Berger, *Cultures in Collision and Conversation: Essays in the Intellectual History of the Jews* (Boston, MA: Academic Studies Press, 2011), 17. On the historical evidence, see Steven Kaplan, *The Beta Israel (Falasha) in Ethiopia: From Earliest Times to the Twentieth Century* (New York: New York University Press, 1992).

of a prayer that entreats God to provide us our livelihood in permissible rather than forbidden ways. This means, said the Hatam Sofer, that we ask not to be put in a position in which we have to permit something that, on a straightforward reading, would be prohibited.²⁸ On rare occasions, we can envision pressures so powerful that Herculean efforts would be exercised to bend the texts towards a predetermined conclusion. To take a contemporary example from the realm of technological change, we need only reflect on the challenges of sabbath observance in a world where lights go on and off as you stroll past homes, walk through the corridors of hotels, or enter the rest rooms of hospitals. In a recent article in a Torah journal about this topic, the author noted with complete candour that he was making extreme efforts to reach barely plausible conclusions in cases where avoiding problematic behaviour entailed overcoming the most daunting difficulties.²⁹

The goal of maintaining fidelity to the law while striving to accommodate humane concerns is given moving expression in a responsum by Rabbi Feinstein that encapsulates the challenges faced by men of learning and integrity bearing a burden that mere observers have no way of understanding in its fullness. Rabbi Feinstein had been asked by a European rabbi about the marriageability of a pious young woman whose lineage was problematic, and he responded with a permissive ruling. But the rabbi who had sent the initial inquiry was plagued by a guilty conscience, wondering if he had formulated his question in a manner likely to skew the ruling in a direction supportive of a woman whom he so badly wanted to help. And so he sent a second letter sharing these doubts. I conclude with Rabbi Feinstein's reply:

As to [your] concern about your effort to permit this young woman, who is a precious, wholehearted soul – on the contrary, it is appropriate, decent, and desirable in the eyes of God to exercise effort on behalf of modest and precious women, just as we have been commanded to attempt to permit the marriage of

28. R. Moses Sofer, *Shu"t hatam sofer*, no. 59, cited in Katz, *The 'Shabbes Goy'*, 190.

29. R. Ya'akov Shlomo Mozeson, 'Be'inyan halikhhah beli kavanah leyad ayin elektroni vehamista'ef', *Kovets beit aharon veyisra'el*, 72 (Av-Elul, 5757 [1997]), 63–8.

agunot, provided that this effort is made in accordance with the laws of the Torah in truth.³⁰

There are no magic formulas for the balancing of humanitarian and ideological concerns, on the one hand, and the straightforward meaning of texts on the other. For this task to be accomplished with integrity from the perspective of Orthodox Judaism, the decisor must genuinely believe in the authority of the Torah, in its divine origin, and in its eternal validity. In other words, what is nowadays described as 'the halakhic process' rests upon a foundation consisting of theology as well as legal analysis. It is not just that one who does not share the theological premises of Orthodox Judaism is excluded in principle as an authority. The legal arguments themselves become suspect because of the concern that they are unrestrained by the discipline of faith, that one pole of the dialectic between authoritative text and personal or communal need is deficient. Both elements of that dialectic have been essential to the dynamic of Jewish law; to undermine either of them is to distort not only halakhah, but the history of halakhah as well.

30. R. Moshe Feinstein, *Iggerot mosheh*, 'Even ha'ezer', sec. 3, no. 10, p. 432.

RADICAL RESPONSIBILITY

Celebrating the Thought
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