

BOOK REVIEWS:

Birth Control in Jewish Law, by DAVID M. FELDMAN (New York: New York University Press, 1968).

Reviewed by
Nachum L. Rabinovitch

As American Jewry grows in cultural stature, serious works of significant Jewish scholarship appear more frequently in English as well as in Hebrew. It is a sign of impending maturity that the most difficult and challenging discipline of all — the Halakhah — is beginning to find able exponents in English. One such book for the intelligent layman treating Jewish law in a sound scholarly fashion is Dr. David M. Feldman's *Birth Control in Jewish Law*.

Although the name of the book highlights "Birth Control," the subtitle more adequately describes its general character: "Marital Relations, Contraception and Abortion as set forth in the classic texts of Jewish Law." The book is well written — the author has a fine talent for exposition — and the treatment, though always lively, is never merely superficial. More importantly, it is well-researched — hundreds of

responsa are cited as well as the classic commentaries and codes and all are carefully analyzed and elucidated.

This is a book for the general reader, including non-Jewish. To this end it opens with an excellent chapter which describes briefly and lucidly (with one exception¹) the structure of Jewish law and the Halakhic process. Moreover, it features throughout comparative references to Christian teaching.

Rabbi Feldman's book, however, lacks perspective. He concentrates so carefully on the minute details of several closely interrelated aspects of marriage law, that somehow the overall concept of Jewish marriage, not to speak of the life of Halakhah in its totality, never comes through. In a monograph for scholars, this would naturally not be required, but then it would have been written in Hebrew and the treatment would be quite different.

In an entire book on the Torah law of marital relations, is it con-

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ceivable, that there are only a few oblique hints to the basic laws of abstinence during the state of *Niddah*? These would probably not be understood by the average reader: at most he might gather that at the beginning of the menses coitus is forbidden. I do not recall a single mention of *Mikvah*!² Thus one could master this whole treatise without learning that abstinence is commanded almost half of every month!³

On the other hand, a "delightful" comment of the *Ba'al Ha-Turim* (Deut. 24:5) is quoted, (p. 101) in which he points out that the *Mitzvah* of *Onah* applies every day of the year except *Yom Kippur* — as many days as the gematria (numerical value) of וְשָׂמָּה!⁴ What a picture of Jewish marriage!

Nonetheless, this book deserves a careful reading. Naturally in a work of this kind, spanning the vast literature of the centuries, exhaustiveness is not to be expected even on the topics actually examined. Rather we rejoice with the abundance that is served up for us.

Yet, it may not be amiss to note some omissions. In dealing with the *Baraita of Shalosh Nashim* whom R. Meir permits the use of *Mokh* while the Sages prohibit, Dr. Feldman (p. 194) states unequivocally: "As between R. Meir and the Sages, the law follows the Sages, of course, according to the majority rule principle." Of course, but it is of interest to know that in the *earliest* post-Talmudic codes, namely הלכות ראו attributed to R. Yehudai, Gaon as well as in הלכות גדולות only the view of R. Meir is cited.⁵

At the other end of the chain of tradition — there are no references to the several relevant responsa of the late R. Tzvi Pesah Frank, Chief Rabbi of Jerusalem which appeared in 1964. These are especially important since he records that his predecessor R. Shemuel Salant ruled similarly before him, thus establishing a tradition of הלכה למעשה.⁶

On a deeper level too, there is a lack of perspective. Rabbi Feldman is on solid ground as long as he is in the very limited area which is his major concern. As soon as he ventures into peripheral matters, even though still closely related, his footing seems insecure and this leads to greater or lesser lapses of scholarship. We can perhaps attribute it to oversight when he says *without qualification* (p. 256): "Yad Ramah and Tur . . . do not hold one to be forbidden to damage himself," although Maharshal (whom our author refers to very frequently on *his* subject) adds the very important proviso that even according to Ramah, "It is permitted only for sufficient need."⁷ But, no such explanation will do for an obvious misunderstanding of *mi'un* (p. 177).

In the many references to Christian and other views, Dr. Feldman's dependence on secondary sources is nearly complete. One would almost wish that he stayed more within the fold, where his reliability is his own responsibility. An amusing and illustrative, though trivial, example occurs when (p. 181) he quotes Noonan who quotes St. Albert who quotes "the eleventh century Arabic sage Ibn Sina."

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Now, while it is true that Ibn Sina was a Moslem and wrote in Arabic which was the scientific language of the world of Islam, it is not true that Ibn Sina was an Arab. His nationality is an issue between the Persians and the Turks, each claiming him for their own!⁸

It has been reported that a second edition of Dr. Feldman's book is planned in view of the enthusiastic reception accorded to it. If

that is the case I suggest that a good book might be made into an excellent one if the author would expand his treatment of marriage, and forego much of the comparative analysis. This would place his subject in its natural framework where it can be illuminated by integration rather than by contrast. In any case, he deserves commendation for a job well-done.

NOTES

1. In the first footnote (p. 4) the definition is given of "*halakhot* to Moses from Sinai." We are told that Rosh takes this "to mean laws as clearly accepted or as anciently understood as if they were derived from Moses on Sinai." This is misleading. Rosh is really saying that the phrase "*halakhah* to Moses from Sinai" is *sometimes* used to describe a law, not actually from Sinai, but which is so clearly accepted as if it were derived from Moses at Sinai.

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However, in most instances, the phrase is to be taken literally.

רא"ש הל' מקואת סימן א'

2. There is one reference (p. 127) to "ritual immersion . . . as part of the purification process for special purposes." That means for handling *Taharot*.

3. The nearest he comes to telling us this is on p. 247: "A woman conceives . . . after the purification following the end of the period twelve days after its onset."

On p. 245 there is a passage, the meaninglessness of which must be attributed to a printer's error or a proof-reader's nightmare:

"This would render the pills unusable for Jewish women because of *Niddah* laws, according to which the periodic menstruation is determined" (*my italics*).

4. Apparently the *Ba'al Ha-Turim* is thinking of a full lunar year which has 355 days, *ושמח* adding up to 354. Incidentally, our book reads 364 which is likely a typographical error, unless perhaps Dr. Feldman assumed the *Ba'al Ha-Turim* was using a plene reading *ושימח*!

5. *הלכות ראו סימן יו הלכות עריות*, Jerusalem 5727 reprint of 1886 edition, p. 114, *הוספות לתלמוד בבלי* as printed in *הלכות גדולות*, הל' מיאון, Jerusalem, section on *יבמות* p. 15. This follows the Hildesheimer edition. It is noteworthy that the wording is identical in this instance as in many others. Both sources are quoted also in *אוצר הגאונים* to *יבמות יב, ב*. However, only in the original is it clear that they cite R. Meir alone to the exclusion of the Sages.

9 שו"ת הר צבי יו"ד (Jerusalem 5724) nos. 155, 164.

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7. יום של שלמה בבא קמא סי' נ"ט. Incidentally the reference given to Tur Hoshen Mishpat should read 420 rather than 425.

8. See for example A. M. Sayili, "Was Ibni Sina an Iranian or a Turk?" *Isis* (31) 1939, p. 8-24.

Jewish Law in the Diaspora: Confrontation and Accommodation, by LEO LANDMAN (Philadelphia: Dropsie College, 1968).

Reviewed by A. Leo Levin

Dr. Leo Landman has written a rich and valuable work to explain three words of Samuel which appear in Tractate *Gittin: Dina D'Malkhuta Dina* — The law of the kingdom is the law. In eleven chapters the author ranged widely and probes deeply to explore the significance of this Talmudic concept, so central in the ability of Jews to accommodate successfully to diverse legal environments.

To the uninitiated it might seem strange that three words of text require, or even allow for so many chapters of explication. Perhaps it is for that very reason that a major contribution of Dr. Landman's work is the lesson it underscores, once again, that a Talmudic phrase does indeed require an understanding of context and that to quote a rabbinic saying is not yet to plumb either its significance or its limitations. A Talmudic text is no magic formula with which to provide simple solutions for complex problems. This our sages understood well and the author is entirely faithful to rabbinic tradition in refusing to be satisfied with simplistic interpretations. History and geography are relevant; perhaps most important is

careful attention to the facts of each case.

Dr. Landman considers all of these. The early chapters focus on historical periods. Subsequent chapters are organized in terms of practical problems: taxes, agents of the King, documents of a Gentile court. Here the author demonstrates his understanding of the significance of the precise factual context in determining the meaning to be given to a legal rule. The same approach is applied to a number of modern problems from unfair competition to rent control. What does the Halakhah say about a New York City landlord's overcharging a tenant? Is the inherent equity or inequity of the local government's scheme of control relevant? Landman deals with the modern sources (see n. 61 at p. 217) and concludes that, absent invidious discrimination, Jewish law prohibits not only violation of rent control, but of copyright law and customs regulations (p. 147).

No one would argue seriously that civil divorce, without more, allows a Jewish woman to remarry; a *get* is required. The theory is clear enough: Samuel's law does not extend to "religious" matters such as marriage and divorce. Of course,

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so unsophisticated a formulation is hardly adequate. From a traditional point of view, is there an area of Halakhah which is not "religious" in the obligations it imposes? If civil is to be considered synonymous with secular, is Jewish law to be rewritten without *nezekin* (torts), with the volumes upon volumes of discussion of *kinyanim* (regulations governing acquisitions and contracts) to be excised? Moreover, the search is not for a verbal formula alone. Basic theory is involved. May a *get* be given prior to a civil divorce or conditioned on a civil divorce? From the point of view of contemporary Jewish law, may a rabbi perform a wedding where the couple has not obtained a wedding license or undergone a blood test? Even here, Landman is helpful in citing French experience and British authority as he probes basic Talmudic and Rabbinic sources (p. 135 *et seq.*).

Dr. Landman's book adds yet another dimension to our understanding of the extent to which Jewish law developed early as a subtle, sophisticated system of jurisprudence. Talmudic sages, the early masters and the later masters (*Rishonim* and *Acharonim*) introduced and developed concepts which did not achieve recognition in Anglo-American law until long thereafter. The right of privacy is one example. This work suggests another area which the rabbis had developed to a fine point centuries ago, and which today is a fast-moving field in contemporary American law: Conflict of Laws.

Sophisticated systems of law recognize the need to look out beyond

the limits of the local jurisprudence to seek answers to legal questions in the law of other jurisdictions. Thus a judge sitting in New York may find that it is appropriate in a particular case to be bound by the law of Iraq or Iran, or of Idaho. The simplest example, readily understood in terms of elementary concepts of justice, concerns an automobile accident which may have occurred between two Americans working in Saudi Arabia and which results in litigation in New York. Obviously the standard of conduct which should be applied to determine which of the drivers was at fault should be based on the law of the place where the accident occurred, for it would be silly to say that if New York requires a driver to keep to the right that rule should also apply when the accident occurred in a jurisdiction with a different rule.

A similar analysis may be applied in the case of a contract, but the logic should not be pushed too far. Suppose a will is valid where executed — the requisite number of witnesses attest in the requisite manner. Does this assure probate in another jurisdiction with more stringent requirements?

There are far more subtle and more troublesome questions which present themselves as the result of torts committed in one state with litigation ensuing elsewhere. Suppose, for example, that Massachusetts imposes a limit of \$20,000 on the amount that a wife may recover for the death of her husband in an airplane crash which occurred because of the airline's negligence. Suppose further that it is a Penn-

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sylvania resident who is among the passengers killed when a plane sinks in Boston harbor. He sues, not in Massachusetts but in Pennsylvania where there is no limit imposed on what a widow or minor children may recover in such a case. What law governs? And what if the entire business is in a Federal court with no law of its own to apply, but with the obligation to look to the law of either one state or the other? These may appear to be questions of technical detail. However, they deal with basic issues and can change the lives of the litigants. The accident may have occurred in Massachusetts, but a destitute family resident in Pennsylvania may have to be supported by Pennsylvania welfare and Pennsylvania taxpayers. And is it significant whether the plane fell into Boston harbor or, relatively speaking, a few miles away in New Hampshire or Vermont?

These are contemporary problems of genuine significance. They are the source of sharp disputes and deep philosophical division concerning sources of law and purposes of law. But already in Talmudic times this was the stuff of which Samuel's Law was made. Already the rabbis were asking where and under what circumstances Jewish courts should be bound by contracts or conveyances issuing from

Gentile courts, prepared under the rules of foreign law. Theirs was the genius of accommodation, not so rigid as to render existence in the Diaspora untenable, nor so flexible as to render meaningless Jewish law and Jewish values in areas where it had to be meaningful. Marriage and divorce, e.g., are too sacred to be governed solely by secular standards. Iniquitous tax practices are not to be supported by the force of Jewish law. In other areas, accommodation was not only possible but desirable — and Samuel's dictum, as applied, was capable of achieving the needed balance.

Dr. Landman's contribution in this book is multi-faceted. In simplest terms, he has advanced our understanding of the subject with which it deals. In addition, it is a "law book" of significance to students of Jewish jurisprudence. Beyond this, it is rich in what it offers to the historian. Indeed, Dr. Solomon Zeitlin has characterized it as "indispensable for historians of the Middle Ages."¹ It is seminal in inviting inquiry concerning basic philosophical ideas as shown by Dr. Landman's use of some of this material as the beginning of an inquiry into the Jewish view of civil disobedience.² In short, we are indebted to Dr. Landman for a work of wide interest and major significance.

¹ Foreword, p. 14, Professor Zeitlin adds: "This is a remarkable accomplishment."

² Landman, "Civil Disobedience: The Jewish View," *TRADITION*, vol. 10, no. 4, p. 5, Fall, 1969.

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The Foundations of Jewish Ethics, by SIMON BERNFELD (New York: Ktav, 1968).

Reviewed by Carl Cohen

This book is not new, except for the learned Introduction by Samuel E. Karff.

As it is usual with most books and articles published in this country, German and Hebrew words are often misspelled. The reader may not be misled too much when (p. VII) the *Lehranstalt* becomes a *Lehrenstaat*, but, if his Jewish education is poor (and this is a book for the layman!), he might be confused (p. XI) when he reads *Mishneh Sotah* and is reminded of Rambam's *Yad*.

Rabbi Karff's remarks about the "liberal" approach to Jewish Ethics of the pre-Auschwitz period are very good. This reviewer, however, believes that Karff emphasized Auschwitz a little too much, while

failing to add that Judaism and its ethical values are not variables which could change in the course of events.

It is praiseworthy that Karff discussed the issue of freedom of will versus determinism. Here, we have the basic problem of all religious ethical systems, and the tension which owes its existence to the contradictory set of answers gave birth to a variety of answers. Karff gives the Jewish answer:

Man's freedom, itself a God-given gift, expands or contracts with his exercise thereof.

We are grateful to Rabbi Karff for his Introduction, aimed at the layman, Jewish and other. The rest of the book is well-known and needs no discussion.

Isaac Halevy (1847-1914) Spokesman and Historian of Jewish Tradition, by O. ASCHER REICHEL (New York: Yeshiva University Press, 1969).

Reviewed by Jacob Reiner

The name Yitzhak Isaac Halevy (Rabinowitz) is by no means a strange one. To the layman who may be somewhat versed in the varieties of Jewish literature Halevy was one of the giants in Jewish historical composition and to the scholar and historian he was a historiographer *par excellence*. His

magnum opus, *Dorot Harishonim*, recently republished in Jerusalem in six volumes, is a repository of Talmudic source material that is invaluable to any historical investigation that is related to or based upon the Talmudic narratives. The history of the Second Jewish Commonwealth and its representative institutions are enriched with Halevy's scholarly interpretation of the

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primary sources and his profound insight into the complexities of Talmudic literature.

Halevy, however, was more than a historian of note. He was a scholar who based himself on Jewish tradition, who approached Jewish law with reverence and who zealously upheld and defended the integrity of our law givers. While utilizing the Talmudic sources to reconstruct a most significant and productive era in our history, Halevy was the arch-spokesman for Jewish tradition standing in fearless opposition to Zecharia Frankel, Abraham Geiger, Nachman Krochmal, Heinrich Graetz and the other masters of the *enlightened* approach.

If Halevy was a familiar literary figure, few, however, were acquainted with his dynamic role as a leader of Orthodox Judaism in the 19th and early part of the 20th centuries. Few realized that Halevy was not the scholar who divorced himself from the problems of his day to channel his interests to the archives of an ancient period in Jewish history, but that he was very much involved in contemporary life and that he played a vital role in the institutional developments of his day.

For this added dimension to the life and the person of Isaac Halevy we are indebted to Dr. O. Asher Reichel. In his book, *Isaac Halevy, Spokesman and Historian of Jewish Tradition*, Reichel presents a discussion of Halevy's interests, relationships and accomplishments as a traditional leader. He bases his study upon an investigation of some 175 pieces of unpublished correspondence with such contemporary

luminaries as Dr. Heimann Kottke, the Rabbi of Bad Homburg, R. Salomon Breuer and R. Haim Ozer Grodzensky. Also included are Halevy's letters to R. Abraham I. Kook, R. Shalom Duber Schneerson, R. Haim Soloveichik, R. Jacob Rosenheim, Wolf Jawitz, and Halevy's son, Samuel.

The significance of these letters is immeasurable. Reichel earned for himself the distinction of being not only a *melaket* but virtually also a *mechadesh*, for he introduces us to a heretofore unknown Halevy. We see Halevy as the founder of the *Juedisch-Literarische Gesellschaft* (The Jewish Literary Society) through which he attempted to further the development of Orthodox oriented scholarship. We see Halevy who, with his forceful pen, stemmed the disrupting influence of the *Haskalah* in Orthodox Jewish life, stopped the publication of a "*Shulkhan Arukh* for modern times" by the *Mefitzei Haskalah* (the Society for the Propagation of Knowledge Among the Jews) and successfully intervened to stop the Society from founding a rabbinical seminary for religiously uncommitted students. We see Halevy as an active affiliate of the *Freie Vereinigung fuer die Interessen des orthodoxen Judentums* (the Free Association for the Interests of Orthodox Judaism), who, together with R. Salomon Breuer and R. Jacob Rosenheim, was a prime architect of *Agudath Israel*.

Through a close examination of this many-faceted correspondence that he was successful in obtaining, Reichel presents to us the picture of a man whose wide scope of ac-

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tivity — as a scholar, author and communal leader — was characterized by a singular purpose: to unite and to strengthen the forces of Orthodox Judaism and to protect the sanctified and endeared traditions of our people against the threats posed by the liberal *intelligentsia*. “Even in his portentous misfortunes and poverty, Halevy was always in the vanguard as the defender of his people’s spiritual heritage, on both the intellectual and communal battlefronts.” (p. 123.)

In this perspective *Dorot Harihshonim*, Halevy’s historical work, assumes a new significance. It is not to be viewed as an independent scholarly endeavor, but, consistent with Halevy’s determination, it represents a further attempt to safeguard Jewish tradition and the sanctity of *Halakhah* and its literature. Although Reichel alludes to this, he does not give it sufficient emphasis or illustration.

In his chapter on Halevy’s role as a historiographer (ch. 5, pp. 52-68) Dr. Reichel speaks generally of Halevy’s attempt to “unmask” the *maskilim* and “to reveal their deception.” Reference is made to his “holy mission” to defend tradition in Jewish scholarship. The author mentions Halevy’s objections against the German scholars who generally minimized the role of the Jewish people in the Second Commonwealth and who approached the study of Jewish history as they would the history of other nations, completely disregarding the sacred elements of tradition. The author reports that Halevy devoted himself especially to “those chapters of Jewish history which were not treated

in consonance with Jewish traditions.” This is the encomium which Reichel presents. But platitudes alone are hardly sufficient. Specifics are the basics of a presentation of scholarly research.

The opportunity for concrete illustration presented itself in the sixth chapter (pp. 69-76) where Reichel discusses Halevy’s concept of the Pharisaic-Sadducean controversy, but it was missed. Reichel writes, “The following is a distillation (*sic*) of Halevy’s views on but one era of Jewish history which he considered of vital significance.” His sketchy and unrelated series of paragraphs, however, do not portray the significance of Halevy’s views. The impact of Halevy’s historical approach can be noted *only* when contrasted with the non-traditionalist suggestions. It is not sufficient to report that Halevy viewed the Sadducees as “political opportunists” who adopted the Law “only as a matter of expediency,” and who never really were interested in developing an approach to the Torah. It should rather have been stressed that Halevy, in his reconstruction of the Sadducean “sect,” opposed the prevalent view of the 19th century that the Sadducees were the true defenders of tradition and that the Pharisees, at a later date, after the Maccabean period, were the rebels who sought to undermine tradition with their own innovations. Halevy recognized that this evaluation only denigrated the heritage and the *Masorah* of the *Chachmei Yisrael*.

It is perplexing that Reichel, in his exposition, did not use such a definite statement as the following

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which clearly depicts Halevy's motivation. Halevy wrote that it was the purpose of the non-traditional historians "to present the entire Torah as a late development, after the Hasmonaean era, and to transform the Sages of the Torah into some Pharisaic sect that emerged at that time. And the Sadducees, whose sole purpose was to preserve the Torah as it was, opposed the Pharisees. Krochmal and Graetz attempted with all their power to blacken the face of Israel and to spread evil rumor against all the sages of Israel, accusing them of seeking power and of treason against their homeland, accusations that have not been levelled against the leadership of Israel even by their foes." (*Dorot Harishonim*, 1c, p. 368). It was precisely against this approach that Halevy battled; it is this polemic that gives *Dorot*

Harishonim its particular significance. Reichel should have stressed this important element.

A study that will critically compare and contrast the historical reconstructions of Halevy with those of the other historians is still a desideratum. It not only would elucidate Halevy's historical philosophy, but also illustrate his profound attempt to combat the opponents of tradition on a scholarly level. The battle for tradition is an ongoing one, perhaps more severe today than in the days of Halevy. Hence, a thorough and organized investigation of Halevy's perspective is certainly warranted. Only when such is gained can we conclude with Dr. Reichel that "His (Halevy's) selfless dedication to his spiritual heritage will be a fount of inspiration for generations to come" (p. 128).

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