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## REFLECTIONS ON THE LAW OF THE RABBIS: Matrices and Dimensions

### PART I

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#### To Judy, for challenge and balance.

Wherever in text or notes the first letter of the word “Rabbis” is capitalized, the reference is to the Sages (“*hazal*”), i.e., the scholars of *Mishna*, *Baraita*, *Tosefta*, *Gemara*, and the Talmudic *Midrashim*; where the term is used without the capitalization, reference is to later rabbinic scholars or inclusively to both.

The disclaimer stated by the writer in the introduction to the notes of a preceding article (David W. Weiss, “Judaism and Evolutionary Hypotheses in Biology: Reflections on Judaism by a Jewish Scientist,” *Tradition*, 19 (1), 3-27, 1981) is appropriate for the present essay as well. The citation of sources has been, perforce, exceedingly limited and selective; only one or a very few references could be given in support of each of the arguments presented. In many instances, the choice reflects largely the writer’s personal preference; the reader must be aware that a vast corroborative literature could, in fact, be quoted in most instances, and that in others, divergent opinions from within the mainstream of Orthodox Jewish thinking could be brought forward. In choosing the citations here given, the writer has sought to have recourse to those most readily available to the general reader, where possible in English translation, and to those that are representative of normative positions.

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HALAKHAH AND ETHICS: A CRISIS OF DISASSOCIATION

*Attrition*

Misapprehension of the nature, purposes, and process of halakhah, always a signal danger to the perseverance of the Jewish people, has taken on new ominousness today.

Attack on halakhah is declamatory and vociferous from some quarters. Mounted without abashment in rejection of classic, normative Judaic conceptions of the world and of man's function, the incursions often come under the banner of Jewish "pluralism" and as a striving for legitimate, and indeed superior, alternatives. Halakhic matrices of Jewish being are dismissed, often out of hand, not merely as dispensable but as standing in essential confrontation with Judaic morality.

The inroads from other directions are perhaps no less serious for being implicit, in attitudes and action, rather than exhortative. The salient characteristic common to the undermining of halakhah from widely diverse sources is a startling disjunction of halakhah from ethics.

Exit from the Jewish community has been from the beginning a consequence, whether ostensibly unintended or frankly pursued, of denying halakhah's validity and of gross departures from its norms and means. In the past, however, the perennial challenge from the margins of Jewish thinking was usually transparent, demarcated by the latitudes of the extremisms from which it was engendered. Not so today. The hazard is far more insidious. Erosion of understanding of the dimension of halakhah, of its tenets, applications, and guardianship, is taking place over a broad range of the Jewish community's fractional movements, and is impelled by a leadership whose motivations of fealty to the Jewish people, and even personal observance, are often beyond question. Unless braked and reversed, the decay must lead to enfeeblement of the unique vehicle of continuity of the nation.

The writer essays these reflections on halakhah not, regrettably, from a springboard of expertise in Judaic law or philosophy, but rather from a sense of personal urgency. No matter how often, and how far better, the task has been undertaken, at a time when Torah is in peril of overthrow, rally anew to its defense is incumbent, individually, on every Jew.

Analytic dissection of the evolution of the present menace is beyond the scope of this article. Only the briefest allusion is possible, and it is requisite: Without at least a rough delineation of its convergent lines of descent, the crisis with which we are confronted cannot be brought to focus.

*Lines of Descent*

A root cause of the modern dilemma of the Jew who would be a Jew can be traced to a betrayal of courage at a crucial juncture in Jewish history: Emancipation and Haskalah in the wake of Napoleonic conquest.

The classic formulators of Judaic belief had perceived Torah as a vast domain,<sup>1</sup> to which nothing in science nor much in literary and artistic endeavor is intrinsically alien<sup>2</sup> or hostile.<sup>3</sup> Their intimate, encompassing engagement with the world was living attestation, and legacy, of confidence in Judaism triumphant. Attribution of wisdom, accomplishment, and virtue to human beings of other nations is matter of fact in scriptural and talmudic literature; had Torah not been given, R. Yochanan proposes, ethics and etiquette could have been taught us even by the beasts.<sup>4</sup> Knowledge of the cosmos is a vehicle of grace and devotion for the Psalmist (“For thou, O Lord, has made me rejoice through Thy work. I will exult in the work of Thy hands. How great are Thy works, O Lord, Thy thoughts are very deep. A brutish man knoweth it not, neither does a fool understand it. . . .”);<sup>5</sup> for Maimonides, involvement with all the spheres of wisdom is enjoined in the quest for understanding of God’s ways: “The person should therefore devote himself to the understanding and comprehension of sciences and studies that will inform him concerning his Master, to the full extent of the human faculty to comprehend and attain . . . .”<sup>6</sup> The biblical exhortation “After the doings of the land of Egypt . . . shall ye not do; and after the doings of the land of Canaan . . . shall ye not do; neither shall ye walk in their statues”<sup>7</sup> has long been read selectively, to proscribe every semblance of idolatry and every pattern of behavior in clash with Judaic norms of morality<sup>8</sup>—not as prohibition to “build or plant in the style of other nations.”<sup>9</sup> The prerogative, indeed the exigency, of intelligent discrimination was already aphoristic in the talmudic defense of R. Meir, charged with not refraining from continued study with Elishah ben Abuyah, the master become apostate: “He found a pomegranate; he ate the fruit within it, and the peel he threw away!”<sup>10</sup>

The confidence crumbled together with the physical enclosures that had kept Jews at distance from Western culture. Rabbinic authorities strove to replace the ghetto walls with barriers of an ideology that was, in fact, dissonant to powerful strains in normative Judaic teaching. We tilted mortally against windmills. Too many rabbis of the 19th century fought rearguard battles of retreat from the world. Modernity was perceived as holding in itself, in its many manifestations, the seeds of apostasy, and especially where ideas and values of the outside world seemed

at first sight of sufficient analogy to those of Judaism to be feared competitive.

We failed, in our anxiety, to discriminate between the universality of ethical impulse and the singularity of Judaic apperception and composition. The failure spelled denial of Judaism's integrative grasp of the human situation, of the indivisibility of ethical thrust, and the corpus of its commandments and statutes. Definition of what is specifically Jewish narrowed, and in the mandates of Torah uniqueness came to be sought with mounting insistence on that which seemed most dissimilar from ambient environments of conduct and achievement. The ever growing stress on the more cursorily distinguishing aspects of Jewish law, custom, and behavior in all its branching derivations brought with it unavoidably the implication, no less forceful for being tacit, that in the realm of moral concerns and strivings Judaism has little to offer that is characteristic and exceptional.

In their implied abdication from faith in the eternal distinctiveness of its ethical address to humanity, the camp of loyalists lent strength and credence to the advocates of Judaism's equalization with renascent streams of common Western humanism. Avowedly or by inference, Judaism was thus lowered to one among many, parallel approaches to social justice, classified in its putative proximity to the best of Christianity's arrogations a constituent of the amorphous "Judaean-Christian heritage." The groundwork of pluralistic reduction of Judaism's uniqueness by a Jewish elite was complete more than a hundred years ago.

The groundwork has been re-enforced by murderous malevolence from Gentile nations. Unrelenting, violent enmity from adjacent communities can make not only for physical but also for inner, spiritual flight; it does not favor golden ages of intellectual exploration and confidence. Preparedness to study and weigh ambient secular culture has been renounced repeatedly in Jewish history, sometimes with passion, in recoil at persecution. In the negation, there was often little attempt to differentiate between secular values that were in fact posited in opposition or contradistinction to Judaic creed, and realms of creativity wholly apart from the terrain of religion, neutral and unforbidden.

The resonant reaffirmation of light and grace, from out of the Judaic tradition, that was the hasidic riposte to Cossack destruction of South-eastern European Jewry is assuredly not the only reaction that can be marshalled to disaster. Perhaps, indeed, such rejuvenation was impossible to a European Jewry visited recurrently in the 19th and 20th centuries by massacre, and struggling simultaneously against both very real and spectral threats of assimilation. (It might be questioned if even the answer

of hasidism to the previous holocaust was unalloyed in its celebration of life and being. It is halakhah—the walking—which contours the tracks of daily engagement of the Jew, and anti-nomianism was not an insignificant strand in early hasidism. In the quest for closeness to God and knowledge of His ways, impatience with pedestrian halakhic mappings, and gropings for recondite substitutes, were clearly apparent elements.<sup>11)</sup> What has, in fact, been transmitted by many of the faithful among the survivors of recent cataclysms has been a further withdrawal, a turning inwards and a selective, clinging accentuation of those aspects of Jewish life that can be dismissed all too readily as restrictedly ceremonial, ritual, and even atavistic. It is a rejoinder of fear and trembling to physical decimation: If any bonds are loosened, if there not be closed out the world which gave birth to genocidal persecution, shall anything be maintained of that so precariously left in the shambles? For all the charity there may be in the internal relationships of “ultra-Orthodox” communities in the latter half of our century, the impression unmistakably communicated outwards is not rarely that of a regressive and insensitive obscurantism—of a stance foreign and contrary to the thrust of halakhah.

The impression is not entirely gratuitous. Priesthoods are, in reality, judged by the demeanor of priests. Stress on halakhic minutiae *can be* a sentient affirmation of the ultimate, divine authority at the basis of all Judaic action, and thereby of the *spiritual* equivalence of all commandments—“Be heedful of a light precept as of a grave one!”<sup>12</sup> But we witness such stress today by groups who claim the status of guardians of the faith and yet in this role invert ancient halakhic imperatives of resolution between conflicting religious demands.<sup>13</sup> Deprecation of the vivifying aggadic domain of Judaism has been evident for long in the curricula of Eastern European yeshivot. What is now evident in addition aggravates the seriousness of a constricting halakhic sequestration and a jettisoning of due halakhic process: A claim to the stature of *defensor fides* must be confirmed and vindicated, in Judaism, by compatible fidelity of deportment and by incisive, discerning erudition; in their interactions with others, even *ex cathedra*, and in their learning, some at least of our guardians fall far short, far too often, of irreducible Judaic ideals.<sup>14</sup> The message taken, then, is inescapable: halakhic legalism, cut adrift from Judaic credo and tenets, has a *raison d’etre* of its own, and it is that which is at the heart of authentic Judaism.

The conclusions unavoidably drawn in the recoil from this distorted image of Judaism have in turn lent substance to the dread of 19th century rabbis. Stigma need no longer attach to the rejection of Jewish identity; it can be framed a matter of principle, not as a sneaking away for cra-

venness or profit. If halakhah and Judaic ethics are not confluent and coincidental, but divorced from each other and in fact in rivalry for the Jew's allegiance, then choice must be made, and Jews of imagination and moral sensibility will search for ethics unencumbered by a contradictory, or at least superfluous, halakhic construct.

Rearguard holding actions are at times exigent. They are never in themselves attractive; they cannot propel forward. If it is a morally opaque formalism that is heard as Judaism's contribution to the age, the loss to the Jewish people of so many of its gifted and spiritually assertive members should not be astounding. If only gropingly, intelligent Jews often test what is purveyed as authentic Judaism by Judaism's own yardsticks. When the offering is not in keeping with the cognomens of Torah itself—"light," "mercy"—nor with its avowal: It is a law of and for life!,<sup>15</sup> then there is falseness in the missive or in its transmittal, and less ambiguous pathways deserve exploration. And the camp-followers always poised to yearn for tinsel gods and ease, follow at the lead.

It is shocking, though not altogether surprising, to see proffered today in the agora of Jewish thought contentions such as these:

There is need for some passionate adherence to a position . . . which states clearly that we are living and must continue to live in a post-halakhic era. . . . The idea . . . that changes in law must be made only from within the halakhah itself and not as result of outside influence is plain nonsense . . . we ought now to acknowledge that we need a new philosophy for the legislation of law in Jewish life . . . there is little likelihood that most of the Orthodox will be open to real dialogue on the subject, but they should be viewed by us as . . . incapable of going beyond the confines of an Oral Law. . . . If it is to be argued that halakhah is after all a matter of *mitsvot maasiyot* (practical commandments) can we expect that questions of home ritual, public prayer, diet and the like should any longer be subsumed under law? . . . aren't we really talking about the areas of life which no enlightened society can legislate?<sup>16</sup>

and:

. . . for the rabbis of the Talmud, and assumedly for contemporary halakhists, in a conflict between morality and halakhic precedent, morality must recede. The Rabbis could offer no conscious consideration to morality in their alteration of the law, since such an argument would impugn the divine Lawgiver with a lack of moral sensitivity . . . whatever subconscious moral factors we may sense lying behind rabbinic changes, only exegetical and casuistic arguments were deemed rabbinic, stand independent of moral reason; or is the law derivative of moral imperatives? . . . not the sociology or the psychology but the morality of halakhah is the hard question. Does halakhah exemplify the moral imperatives of Judaism acceptable . . . Is Law separate or derived from morality? . . . At the heart of the halakhah issue lies the question of moral theology. . . . Does the Law, biblical or

and in that sense is divine, or does halakhah transcend and even demolish the mountains of morality before its judgments. . . . If the laws are impervious to moral argument, do we not risk the sanctification of immoral judgment?<sup>17</sup>

So, we have come to this, by men occupying Jewish pulpits: Halakhah a blind monstrosity, a juggernaut devouring peaks of morality; the rabbis of the Talmud, rishonim and *aharonim*, the authors of the responsa literature, martinets drilling to no purpose on parade grounds of casuistry; and the divine Lawgiver Himself—in the rather remote event of there being such an entity—a desiccated legalist-accountant shut-off, and shutting-off deluded believers, from brave new ages of post-halakhic enlightenment.

The concatenation of circumstances that has led to this pass can be understood, but understanding must not be equated with acquiescence. Without the framework of halakhah, Judaism cannot be. The understanding on which the future of the Jewish people is conditioned is that of its halakhic tradition. The fact of this tradition is halakhah as *anima mundi* of Judaism's universe, the matrix and impellant of Judaic ethics.

#### HALAKHAH: THE REALIZATION OF JUDAIC ETHIC

Halakhah has been viewed from many perspectives, its interpretation and appreciation given diverse accent. An authentic, keystone conception of halakhah, however, must proceed from the recognition that halakhah is the groundsubstance of Judaism, and that the walking and doing are sighted as the constant destination of *imitatio* and *cognito dei*. And as Judaism's unequivocal perception of the divine essence has been, unwaveringly for all the inexplicability of evil in the world, that of justice subjugated by mercy and compassion, the pursuit of halakhah is, by its nature, to mirror this ethic. The goal held out by halakhah lies in perseverance in the quest.

#### *Imitatio and Holiness*

*Halakhah* is the only tangible link between God, ineffable paradigm, and the Jew commanded to imitate. R. Hama son of R. Hanina asks:<sup>18</sup> "What means the text 'Ye shall walk after the Lord your God?'"<sup>19</sup> Is it, then, possible for a human being to walk after the *Shechinah*; for has it not been said 'For the Lord thy God is a devouring fire?'"<sup>20</sup> And the Gemara answers:

"But the meaning is to walk after the attributes of the Holy One, blessed be He.

As He clothes the naked . . . so do thou also clothe the naked. The Holy One, blessed be He, visited the sick . . . so do thou also visit the sick. The Holy One, blessed be He, comforted mourners . . . so do thou also comfort mourners. The Holy One, blessed be He buried the dead . . . so do thou also bury the dead.”

Holiness, the aim of the imitation, to be attained in *tsedek* and *hesed* (justice and compassion, or “loving-kindness”) toward other human beings.

The theme of holiness is relentless in Scripture and its rabbinic exposition, and the formula unswerving: The commonplace act takes on transcendence as the doing is directed in imitation of God. Redemption from bondage is to establish His overlordship the sole authority over the House of Israel as organic society. The testament of statutes and laws, both those morally self-evident and those arcane, is bracketed recurrently throughout the pentateuchal text:

“For I am the Lord your God; sanctify yourselves therefore, and be ye holy; for I am holy; . . . for I am the Lord that brought you up out of the land of Egypt, to be your God: ye shall therefore be holy, for I am holy; Ye shall be holy; For I the Lord your God am holy; I am the Lord your God; Sanctify yourselves therefore, and be ye holy; for I am the Lord your God. And keep ye my statutes, and do them: I am the Lord who sanctifies you; I am the Lord your God, who has set you apart from the peoples; And ye shall be holy unto me; for I the Lord am holy, and have set you apart from the peoples, that ye should be mine; And ye shall keep my commandments, and do them: I am the Lord. And ye shall not profane my holy name; but I will be hallowed among the children of Israel: I am the Lord who hallow you, that brought you out of the land of Egypt, to be your God: I am the Lord.<sup>21</sup>

There is an importunate rhythm of Divine disclosure in the Law’s juxtaposition of the prosaic to the sublime. God is the ubiquitous preceptor; the teaching is cadenced by a reciprocity of love. The placing of *tefillin* (phylacteries) is contrapuntal celebration:

R. Nahman b. Isaac said to R. Hiyya b. Abin: What is written in the *tefillin* of the Lord of the Universe? - He replied to him: “And who is like thy people Israel, a nation one in the earth.” Does, then, the Holy One, blessed be He, sing the praises of Israel?—Yes, for it is written: “Thou has avouched the Lord this day . . . and the Lord hath avouched thee this day.” The Holy One, blessed be He, said to Israel: You have made me a unique entity in the world, and I shall make you a unique entity in the world. . . .<sup>22</sup>

God teaches Israel to pray.<sup>23</sup> He demanded sacrificial offerings so as to wean His children away from alien tables to His own.<sup>24</sup> In the hours of



His day He Himself sets standards for the pursuits of the nation:

Rab Judah said in the name of Rab: "The day consists of twelve hours; during the first three hours the Holy One, blessed be He, is occupying Himself with the Torah, during the second three He sits in judgment on the whole world, and when He sees that the world is so guilty as to deserve destruction, He transfers Himself from the seat of Justice to the seat of Mercy; during the third quarter, He is feeding the whole world, from the horned buffalo to the brood of vermin . . ." <sup>25</sup>

In their celebration of Him as God of Justice, the rabbis, talmudic and post talmudic, consistently perceive the theme of *middah k'neged middah* (measure for measure) as transected and transformed by a divine attribute beyond equity—compassion. It is compassion which is the ultimate miracle,<sup>26</sup> and which in *imitatio dei*, becomes morally incumbent on man: to act *lifnim mishurat hadin* (beyond the *stricture* of the Law).

### *Lifnim Mishurat Hadin*

Rav Aharon Lichtenstein points out in his lucid essay "Does Jewish Tradition Recognize An Ethic Independent of Halakhah?"<sup>27</sup> that the "impetus for transcending the *din* (in its narrow reading, law as specified precept; judgment, as even-handed dueness—DWW) is itself part of the halakhic corpus." The Jew turns constantly to God in supplication to be reckoned *lifnim mishurat hadin*; that His "*hesed*, endureth forever"<sup>28</sup> is an article of faith. And in the integrative skein of the *imitatio dei* which makes halakhah the dialectic between God and man, it is to the realization of *lifnim mishurat hadin* in *His* deeds that the Jew is directed.<sup>29</sup>

The "four ells of the Law"<sup>30</sup> circumscribe intimately the life of the Jew:

R. Phineas b. Hama said: Wherever you go, pious deeds will accompany you. "When thou buildest a new house then thou shalt make a parapet for thy roof" (Deuteronomy 22:8); If you have made for yourself a door, the precepts accompany you, as it is said, "And thou shalt write them upon the door-posts of thy house" (Deuteronomy 6:9); if you have put on a new garment the precepts accompany you, as it is said, "Thou shalt not wear a mingled stuff" (Deuteronomy 22:11); if you have gone to cut the hair of your head, the precepts accompany you, as it is said, "Ye shall not round the corners of your heads" (Leviticus 19:27); if you have a field and you have gone to plough therein, the precepts accompany you, as it is said, "Thou shalt not plow with an ox and ass together" (Deuteronomy 22:10); if you are about to sow it, the precepts accompany you, as it is said, "Thou shalt not sow thy vineyard with two kinds of seed" (Deuteronomy 22:9); and if you reap it, the precepts accompany you, as it is said, "When thou reapest thy harvest in thy field, and hast forged a sheaf in the field" (Deuteronomy 24:19).

God said: "Even if you are not engaged on any particular work but are merely journeying on the road, the precepts accompany you. Whence this? For it is said, "If a bird's nest chance to be before thee in the way (Deuteronomy 22:6) . . . "31

The Law is the unique mystery in the possession of Israel that mites the nation to God.<sup>32</sup> There are, to be sure, scales of exaltation in the stating of the Law, but the corpus is totally suffused by the motivating philosophy: Action in the similitude of a Holy God whose being is compassion and justice. This is the ethics of Judaism. When the student scrutinizes any one aspect of the Law, his point of departure must be recognition of halakhah's monadic thrust; any analysis framed differently is foredoomed to distortion.

But perhaps this thesis of halakhah is an idealized one? It must be questioned whether these propositions are truly rooted in Scripture and in the writings of the rabbis? The answer is that they assuredly are.

The logos of the biblical address to man—"And now, Israel, what doth the Lord thy God require of thee, but to fear the Lord thy God, to walk in all His ways, and to love Him, and to serve the Lord thy God with all thy heart and with all thy soul;"<sup>33</sup> ". . . and what the Lord doth require of thee: Only to do justly, and to love mercy, and to walk humbly with thy God"<sup>34</sup>—is reflected in the dominant rhythms of Mishnah and Gemara and the subsequent unfolding of the Oral Law veraciously and pervasively. For the Jew, the realm of *torah she b'ktav* and *torah she-b'al-peh* are integral parts of one corpus, one teaching, one Torah. They cannot be divorced, and they cannot be understood in separation. Oral Law amplifies, interprets, modulates, and applies to the changing circumstances of individual and society the thrust of scriptural bidding. The Law derives inclusively from Sinai;<sup>35</sup> but also, the Law that has been addressed to the Jew at and since Sinai has been filtered and shaped by the Sages and by the scholars of later generations and is come down to us, in effect and practice, the Law of the Rabbis. In the broad area circumscribed, at the one edge, by categoric Pentateuchal directives, and on the other by injunctions of stated rabbinic authorship, it is indeed often exceedingly difficult to pinpoint the geneology of halakhot. The attributions *mi d'orayta* and *mi d'rabbanan* are at times uncertain and disputed. With the purpose of bringing a more recently formulated ruling under the aegis of scriptural imperative, or of underlining its sanctity, talmudic and later rabbis frequently seek to fuse halakhic authority to its bedrock origin. Thus, they invoke the overlying concept of *da' at ha'torah* ("in the spirit—or sense—of Scripture") to buttress the force of a ruling; or, designate it as consistent with the teachings of Moses, and as akin

