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Some Disparities and Parallels in Jewish and American Law

MICHAEL MALINA

Writing in honor of Rabbi Neil Gillman is a privilege for me. From the perspective of the American rabbinate, he has, for a half-century, brought a deeply needed understanding of the nature of God and the importance of theological discourse into the training of America's Jewish religious leadership. From my personal perspective as his student and, I like to think, his friend, he has, in the more than five years that I have come to know him, strengthened my love for and appreciation of the richness of the intellectual and spiritual aspects of the Jewish heritage. Perhaps most importantly, from the perspective of the American Jewish community, Rabbi Gillman has truly in the spirit of Maimonides helped thinking American Jews bridge the gap between secular philosophy, as they confront its issues on a daily basis in their professional and personal lives, and the religious tenets of a tradition which seemed to be losing ground during the twentieth and twenty-first century battle for the minds and spirits of this country's Jewish citizens. For that, we should all be grateful.

This paper focuses on one small (and indeed, highly controversial) segment of Rabbi Gillman's teaching: his urgent call for a reassessment of the Conservative movement's approach to halakhah—Jewish law. In an address delivered to the 2005 United Synagogue convention (a version of which was published in this journal), he questioned whether the movement should continue to label itself halakhic in light of its consistently applied view that Jewish law must, to be a meaningful reflection of our perception

of what God expects from the Jewish people, constantly be reevaluated in light of the needs of the contemporary Jewish community.

Starting from his deep-felt understanding that our approach to law cannot be separated from our theological understanding of the nature of the revelatory act at Sinai, which began the Jewish civilization's confrontation with jurisprudence, he focuses on the chasm between the theoretical underpinning of the halakhic system as understood by the Orthodox and the philosophy (or, if you will, theology) on which the scholarship taught in Conservative seminaries is premised. Unlike the Orthodox, who posit that the written Torah (that is, the Pentateuch) contains the verbatim words of God as revealed to Moses, Rabbi Gillman notes that it is generally accepted among Conservative thinkers that the text is not God-given word-for-word and that, whatever God's role in revelation was, "the text of Torah as we have it is the creation of our ancestors who determined what constituted God's will for Israel in matters of belief and practice."¹ Further, Rabbi Gillman asserts that since Torah is at the very least partially a human product, its authority must find its origin in human beings—more explicitly, the community of Israel. Yet, as he sadly goes on to note, this generally accepted philosophy is not stated "openly and explicitly, in our preaching and teaching."²

In reading Rabbi Gillman's address, it occurred to me that there are striking similarities between Jewish law and the secular law applicable in the United States—particularly the jurisprudence of the Supreme Court in interpreting the United States Constitution—in the ways in which the two systems approach today's problems. There are also striking differences between the two jurisprudential systems, but one nonetheless finds in both a pattern of struggle by judges to be true to the tradition on which the law is based and, at the same time, to apply (or perhaps, more accurately, to adapt) a legal system that reflects the values of the people it serves.

To begin with the most obvious difference between American law as promulgated by our judiciary and the Jewish legal system, one cannot help observing that the law applied by the American courts has pragmatic consequences that Jewish law, in one sense at least, does not: for the secular legal system entails enforcement by the application of the power of the state. When, for example, the Supreme Court decrees that the United States Constitution does not permit any governmental entity within the nation to seg-

regate its public schools on the basis of race, a local school board or a state of the union is not free to decide for itself that it will reject the ruling and continue past segregationist practices. The Court's decision, in other words, has real teeth in that it is enforced by sovereign state power. The same is true, of course, with respect to all aspects of the legal issues that come before American courts. If a court, in a civil action, determines that I am liable for a breach of contract, it can order me to pay damages to the other contracting party or, in an appropriate case, it can require me to perform my side of the agreed-upon bargain; and my failure to comply with such an order, if I have the temerity to take such action, could lead to very dire consequences. By the same token, if I commit a crime—or even a traffic violation—and am apprehended by state authorities whose very function is to enforce the law, I may be fined, imprisoned, or both depending on the severity of the infraction. In all such cases, the law is backed up by the full power of the secular state.

Jewish law, as applied in the twenty-first century, is not enforced by state power. For the Jewish community is no longer self-governing.³ Indeed, in a somewhat ironic sense, Jewish law is more in keeping with America's Declaration of Independence and the Lockean liberal philosophy on which it is predicated in that its power stems one hundred per cent from the "consent of the governed." If a Jew decides that he or she does not desire to observe Shabbat or kashrut—or, indeed, not to accept as binding upon her any of the written and oral Torah's strictures governing interpersonal relations—Jewish law becomes irrelevant to her. If the conduct in question does not run afoul of the secular legal system (and in America, fortunately, the ritual requirements of Jewish religious law are not enforceable by the secular state), it simply does not matter whether an individual obeys them if she decides she does not wish to do so.

Some jurisprudentialists (Hobbes is the classic example) take the position that enforcement by the sovereign is a *sine qua non* of any law; that absent the enforcement power, there is no law. If Hobbes is right, Jewish law in America today simply is not law at all because it does not have the power of the sovereign government behind it. Interestingly enough, almost 340 years ago Baruch Spinoza took that very position, proclaiming that Jewish law had been promulgated to govern the Jewish Commonwealth in the Land of Israel and that, since that Commonwealth no longer existed, there

was in fact no longer any Jewish law.⁴ Even more recently, Rabbi Mordecai Kaplan took the same view of Jewish law as being obsolete (as a legal system) in the absence of the power of enforcement.⁵ On the other hand, the notion that there is no law in the absence of enforceability is a bit too simplistic. After all, I would expect that many, if not most of us, would stop at a red light at 3:00 A.M. on an empty road, even though the likelihood of a police officer being present to catch us in an offense is slight at best. As Rabbi Elliot N. Dorff has recently put it in his comprehensive study of Jewish legal philosophy, “for the law to govern effectively, most people must adhere to it for other reasons” than its enforcement.⁶ Indeed, as America’s unhappy experience with Prohibition teaches, even a concerted effort to enforce a law which is fundamentally rejected by those it purports to regulate is doomed to ultimate failure.

Another critical difference between the American and Jewish legal systems is that the religious law, at least in the eyes of two thousand years of tradition, is God-given and, hence, not subject to human amendment; while the American Constitution contains a precise methodology for amendment which, while cumbersome—as one might expect a Constitution should be when it comes to changing its terms—nonetheless allows for change when circumstances require it (the abolition of human slavery in the post-Civil War amendments is a good example). As we shall see, however, the flexibility built into halakhah by the principle that rulings by the rabbinic authorities of each generation must be followed minimizes the importance of the theoretical eternal validity of the religious law.

There are, on the other hand, some marked similarities between American secular law and traditional Jewish law. The most significant is that in both legal systems it is the judges who have the last word on what the law is and how it should be applied to particular factual situations. Looking first at the secular law, it is true that under the American Constitution it is the federal Congress and the state legislatures that, as a matter of theory, “enact” the laws. This of course applies to statutory laws—written legislative enactments like the criminal and tax codes (or, indeed, the federal antitrust laws which I spent forty years trying to understand). Yet even with respect to statutes, it is the judges who have to interpret them and apply their terms to specific cases. What is more, particularly in the state legal systems, much of the “law” is not contained in enacted statutes but, rather,

is “common law,” that is, law made by judges in the process of deciding the cases brought before them. When it comes to the Constitution, the fundamental law providing the ultimate authority for government, it is again the judges who decide what the words of the text mean and how they are to be applied. Interestingly, the judicial power to construe the nation’s fundamental law and declare both federal and state statutes invalid, if in the Court’s view they violate the Constitution (the power of “judicial review”) does not appear in the words of the Constitution itself. Rather, that power is implied in the so-called “supremacy clause” which renders the Constitution and the laws passed pursuant to it the “supreme law of the land.” In Chief Justice Marshall’s seminal decision in *Marbury v. Madison*, the Supreme Court decreed that in deciding cases properly brought before it, it must apply the supreme law—including the Constitution—and if such application requires that a statute be declared invalid, the Court has the power, indeed the obligation, to do so.⁷ The upshot is that, as a result of the power of judicial review, it is the judges who have the last word. Governor Charles Evans Hughes, later Chief Justice of the United States, notably put the point this way: “We are under a constitution, but the Constitution is what the judges say it is.”⁸

The parallels to Jewish law are striking. There as well we have statutory law (the written Torah) and a non-statutory adjunct (the Rabbinic oral law).⁹ In both cases it is the judges (that is, of course, the rabbis) who decide what the law is and how it is to be applied to particular situations. Indeed, in Jewish law the ultimate authority of the rabbinic judiciary appears in the written Torah: “You shall act in accordance with the instructions given you [by the judges at the time of the inquiry] and the ruling handed down to you; you must not deviate from the verdict that they announce to you either to the right or to the left.”¹⁰ In fact, while the authorities do not appear to be unanimous on the point, Jewish law in the view of some goes so far as to instruct us that the rulings of the rabbinic authorities must be followed even if they decide that right is left and left is right.¹¹

The most interesting comparison between Jewish law and American Constitutional adjudication turns on the methodology to be followed by the judges who, as we have seen, are the ultimate authority in both systems. In the secular world, the debate is between so-called “originalists” and

those who read the Constitution as a “living” document which must be interpreted in light of ever-changing circumstances. The issue is a stark one: Does the Constitution mean the same thing today as it meant when it was written? As Justice Antonin Scalia—probably the foremost current proponent of the originalist idea—explains, the Constitution should be interpreted according to “the original meaning of the text. . . .”¹² According to Scalia, in determining what a Constitutional phrase means, the judge must look to how the framers would have applied the constitutional language to the question before the court. To be sure, analogy can be used to decide how the words should be applied to unforeseen issues—such as those posed by new technology. However, in his view it is not permissible to decide that “the *very acts* that were perfectly constitutional in 1791 . . . may be *unconstitutional* today.”¹³

The contrary judicial position may be denoted the concept of “the living Constitution.” It posits that the meaning of the Constitution’s words cannot be determined solely by looking to what they were expected to mean at the end of the Eighteenth Century. Rather, decisions should be made on the basis of the current society’s needs and expectations, of course giving due weight to the words of the text at issue. To quote Chief Justice Earl Warren in what was probably his most significant opinion, in deciding whether public school racial segregation runs afoul of the Fourteenth Amendment, “we cannot turn the clock back to 1868 when [the Amendment] was adopted . . .”¹⁴

There is a parallel to this type of debate in Jewish law. While we don’t find authorities arguing that halakhah is totally static, many halakhists tend to view “older” as “better.” The extreme position is that taken by Ḥatam Sofer, a leading rabbinic authority in nineteenth century Europe. In an often quoted aphorism, he stated: “*ḥadash assur min haTorah*”—any innovation is forbidden by the Torah.¹⁵ Taken at face value, this would leave little room for ritual or interpersonal innovation in Jewish law; and I fear it represents the outlook of many fundamentalist halakhists today. It isn’t hard to understand the roots of such a position. If one starts with the axiomatic proposition that the written Torah (as set forth word-for-word in the Pentateuch) and the oral Torah (as set forth in the Talmud and later authorities) were revealed at Sinai, any innovation would, by definition, be contrary to the divinely ordained law and, hence, invalid. Yet there are

other strands of accepted authority which do, in fact, leave room for innovation.

To begin with, there is a line of analysis which posits that when Moses received the oral Torah, he was given not only explanations of those parts of the written text that required explication—one example would be the identification of the fruit to be taken on Sukkot as an etrog—but also the substance of all the rabbinic rulings to be made by proper authorities in the future. This would render future innovative rulings part of the original revelation and, hence, not new.¹⁶ At the same time, however, if this approach is adopted, there is little left of the Ḥatam Sofer's aphorism, for there would be nothing innovative to which it would be applicable. I suppose his pronouncement was really directed to those Reform and Haskalah representatives whose authority to decide questions of halakhah he would denigrate, if not outrightly reject—in other words, as rejecting “legal” decisions by persons whose authority to rule he would deny.

Second, there is powerful Talmudic support for the proposition that, once the Torah was revealed, the sole authority to interpret and apply it rests with the Jewish community's authoritative rabbinic *poskim*. I refer, of course, to the Gemara's discussion of the Oven of Akhnai.¹⁷ To capsulize a long Talmudic narrative, despite heavenly manifestations (including a clear voice from Heaven itself) that Rabbi Eliezer was correct in his disagreement with a majority decision as to the purity of the oven in question, the court refused to change its ruling because the Torah (having been revealed to Israel at Sinai) was no longer in heaven and, indeed, because the law itself commanded that the majority of a properly constituted halakhic court had the power to rule—even when the ruling was contrary to God's understanding of His commandment. This is the equivalent, in my view, of Chief Justice Warren's understanding of how the United States Constitution is to be interpreted. What God actually intended at Sinai is no longer relevant, so long as the rabbinic court is properly constituted and halakhic principles are applied in reaching a decision. In his teaching, Rabbi Gillman points to this Talmudic discussion as evidence that, whatever may have been divinely revealed at Sinai, the substance of Jewish law rests entirely in human hands, thereby allowing not only innovative solutions to new problems but even corrective measures to remedy past mistaken understandings of God's will. This, of course, does not solve the central problem of which human author-

ities are empowered to do so, and within what limits. And there lies the rub. More and more in the modern world of ascendant fundamentalism (in both Judaism and the other monotheistic religions), traditionally minded authorities are loath to innovate. Fortunately, the Conservative movement has not followed this trend, as its innovative understanding of the Jewish law on such issues as Sabbath observance, gender equality, and sexual orientation readily reveals.

In the final analysis, the secular American and Jewish legal systems must confront the tension between healthy respect for the past (as reflected in the doctrine of *stare decisis*—which militates in favor of a court’s following earlier precedent in the interest of legal legitimacy and continuity) and the pressing need to adapt the law to meet the important problems of the present day. Each system must find a proper balance, which is no easy task.

NOTES

1. Neil Gillman, “A New Aggadah for the Conservative Movement,” *Conservative Judaism*, 58:3 (Spring 2006), p. 36.

2. *Ibid.*, p. 37.

3. Even in Israel, where certain areas of life—particularly domestic relations, that is, marriage, divorce, custody, etc.—are governed by Jewish law as enforced by the state’s central rabbinate, that circumstance comes about because the organs of state government have granted that authority as a matter of secular law to the religious establishment.

4. Baruch Spinoza, *Theological-Political Treatise* (Indianapolis: Hackett Publishing Co., 2001), p. 59.

5. Mordecai Kaplan, *Questions Jews Ask: Reconstructionist Answers* (New York: Reconstructionist Press, 1956), pp. 264–76. Of course, Rabbi Kaplan placed enormous value on the ritual aspects of Jewish law, not as a legal matter but, rather, as reflecting a significant aspect of the religious civilization that he understood Judaism to be.

6. Elliott N. Dorff, *For the Love of God and People* (Philadelphia: Jewish Publication Society 2007), p. 131. For a full discussion of the reasons why people might choose to adhere to Jewish law despite its unenforceability, see pp. 131–182.

7. U.S. 137 (1803).

8. Charles Evans Hughes, *Speech Before Chamber of Commerce*, Elmira, New York; May 3, 1907. “Addresses and Papers of Charles Evans Hughes, Governor of New York,” p. 139 (1908).

9. Interestingly, the oral law today is studied in written form—the Talmud, the earlier and later authorities commenting on it and the codes which set forth what lawyers denote the “black letter” rules derived from the Talmudic discussion.

10. Devarim, 17:11.

11. See Rashi on Devarim 17:11, Sifre, Piska 154 and Song of Songs Rabbah 1:3. For the contrary view see, e.g., Shach, *Yoreh Deah* 242:31 (ruling that the judges’ decision must be followed only when they rule that right is right and left is left). For an extensive discussion of the role of the Rabbis in interpreting the written law, see Moshe Halbertal’s, *People of the Book: Canon, Teaching and Authority* (Cambridge: Harvard University Press, 1997), pp. 45–89.

12. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1998), p. 38.

13. *Ibid.*, pp. 140–41 (emphasis in original). For a more extensive discussion of Justice Scalia’s view, see Jack M. Balkin, “Fidelity to Text and Principle,” *Advance: The Journal of the ACS Issue Groups* 1:2 (Fall 2007), pp. 47–56.

14. *Brown v. Board of Education*, 347 U.S. 483, 492 (1954). Interestingly enough, I doubt that even Justice Scalia would look to the expected application of the Fourteenth Amendment when it was ratified in 1868; for it is well accepted today that the Amendment renders significant parts of the Bill of Rights (such as the First and Fourth Amendments) applicable to the states as well as the federal government, yet it would be an historical stretch to suggest that the men who adopted the Amendment had any such application in mind or even contemplated that their words might be so interpreted.

15. As I understand it, the aphorism is a pun on a Mishnaic statement in Orlah 3:9, referring to the consumption of new grain. By reading “ḥadash” to refer to anything new, Ḥatam Sofer was expressing his firm opposition to the Haskalah and Reform movements which he saw as a direct challenge to the authority of halakhah.

16. See Halbertal, 11, *supra*, at pp. 64–67.

17. B. Baba Metzia 59b.