

THE LIBRARY OF JEWISH LAW AND ETHICS
VOLUME IV
EDITED BY NORMAN LAMM
Jakob and Erna Michael professor of Jewish philosophy
Yeshiva University

CONTEMPORARY
HALAKHIC
PROBLEMS

by

J. DAVID BLEICH

KTAV PUBLISHING HOUSE, INC.
YESHIVA UNIVERSITY PRESS
NEW YORK
1977

Introduction: The Methodology of Halakhah

Judaism is unique in its teaching that study is not merely a means but an end, and not merely an end among ends, but the highest and noblest of human aspirations. Study of Torah for its own sake is a sacramental act, the greatest of all *mitzvot*. Throughout the generations Torah scholars were willing to live in poverty and deprivation in order to devote themselves to study. Every Jew, regardless of the degree of erudition he had attained, devoted a portion of his time to Torah learning. Those capable of doing so plumbed the depths of the Talmud. Others perused the Mishnah or studied the weekly Torah portion together with the commentary of Rashi. Even the unlettered recited psalms on a regular daily basis. To the Jew, Torah study has always been more than a ritual act; it has always been a religious experience.

The Jew has always perceived God speaking to him through the leaves of the Gemara, from the paragraphs of the *Shulhan Arukh* and the words of the verses of the Bible. The Sages long ago taught, "*kudsha berikh hu ve-oraita had.*" God and the Torah are one; the Torah is the manifestation of divine wisdom. God reveals Himself to anyone who immerses himself in the depths of Torah; the intensity of the revelation is directly proportionate to the depth of penetration and perceptive understanding. To the scholar, a novel, illuminating insight affords a more convincing demonstration of the Divine Presence than a multitude of philosophic arguments. It is a form of divine confrontation which must be experienced in order to be understood. Yet it is a relationship which every Jew may experience, at least *be-ze'er anpin*, in minuscule form, through Torah study.

Judaism is fundamentally a religion of law, a law which governs every facet of the human condition. The Torah contains not merely a set of laws but also canons of interpretation as well as principles according to

which possible internal conflicts may be resolved. Maimonides records the doctrine that the Torah will not be altered, either in its entirety or in part, as one of the Thirteen Principles of Faith. The divine nature of Torah renders it immutable and hence not subject to amendment or modification.

Although the Torah itself is immutable, the Sages teach that the interpretation of its many laws and regulations is entirely within the province of human intellect. Torah is divine but "*lo ba-shamayim hi*—it is not in the heavens" (Deut. 30:12); it is to be interpreted and applied by man. A remarkable corollary to the principle of the immutability of the Torah is the principle that, following the revelation at Sinai, no further heavenly clarification of doubt or resolution of ambiguity is possible. Clarification and elucidation are themselves forms of change. Since there can be no new revelation, a prophet who claims the ability to resolve disputed legal points by virtue of his prophetic power stands convicted by his own mouth of being a false prophet.

Once revealed, the Torah does not remain in the heavenly domain. Man is charged with interpretation of the text, resolution of doubts, and application of the provisions of its laws to novel situations. The Gemara, *Baba Mezi'a* 59b, presents a vivid illustration of the principle *lo ba-shamayim hi* in a narrative concerning a dispute between R. Eliezer and the Sages regarding a point of ritual law. R. Eliezer refused to be overridden by the view of the majority and went to great lengths in invoking heavenly signs in support of his own position. R. Eliezer had sufficient power to change the course of nature, to work miracles, and even to summon a heavenly voice in support of his position, but the Sages, quite correctly, failed to be impressed. Interpretation of Halakhah has been entrusted to the human intellect and, accordingly, human intellect must proceed in its own dispassionate way, uninfluenced and unprejudiced by supernatural phenomena. Even more dramatic is the narrative recorded in *Baba Mezi'a* 86a. Here we are told of a controversy between the Heavenly Academy and God Himself with regard to a case of possible ritual defilement. The Almighty is cited as ruling that there was no cause for ritual defilement, while the Heavenly Academy ruled that there was. The Gemara records that the matter was left for final adjudication by Rabba bar Nachmani, "who is singular [in his proficiency] in such matters." Certainly God did not need to be instructed in His Law by mortal man. The Gemara teaches that the Law was designed to be understood, interpreted and transmitted by man. Accordingly, man's understanding of

Torah must prevail. Man's interpretation is not only inherent in the content of revelation but is the one which God Himself wills to prevail.

Moreover, Jewish teaching recognizes that two conflicting conclusions may, at times, be derived from identical sources by different scholars. Which is correct? Both are correct! "These and those are the words of the living God," declare the Sages (*Gittin* 6b). If two conflicting conclusions may be derived from the same corpus of law, then both must be inherent therein. In the realm of theory both are correct, both are Torah. Of course, in matters of practice, in terms of *psak halakhah*, of definitive halakhic ruling, there must be a means of deciding between the conflicting views, else legal anarchy would result. To this end Halakhah, as a legal system, includes canons of *psak*, canons of judicial determination. While these may produce decisions which are of absolute binding authority, this does not imply that the view which is set aside is thereby rejected as a nullity. On the contrary, insofar as the study and pursuit of Torah is concerned, such a view is of undiminished importance. No one has ever suggested that it is not necessary to recite *birkhat ha-Torah*, the blessing pronounced prior to engaging in Torah study, before studying the words of *Bet Shammai* on the grounds that the normative decision is in accordance with *Bet Hillel*. In the eyes of God both are of equal validity. Definitive *psak halakhah* is a matter of practical necessity, but not a reflection upon transcendental validity.

The foregoing should not in any sense generate the impression that subjective considerations or volitional inclinations may ever be allowed consciously to influence scholarly opinion. Torah study requires, first and foremost, intellectual honesty. *Bet Hillel* did not purposively adopt a policy of permissiveness and *Bet Shammai* a policy of stringency; *Bet Hillel* did not set out to be easygoing and *Bet Shammai* to be hard and unbudging. Each reported sincerely held convictions, conclusions reached in as detached and dispassionate a manner as is humanly possible. It is a travesty of the halakhic process to begin with a preconceived conclusion and then attempt to justify it by means of halakhic dialectic. Neither Hillel nor Shammai nor any of their spiritual heirs engaged in sophistry in order to justify previously held viewpoints. The dialectic of halakhic reasoning has always been conducted in the spirit of "*yikov ha-din et ha-har*—let the law bore through the mountain." The law must be determined on its own merit and let the chips fall where they may.

"These and those are the words of the living God" is a dictum applicable only when fundamental prerequisites have been met. The corpus of Halak-

hah must be mastered in its entirety and accepted in its entirety as the content of divine revelation. Canons of interpretation, which are themselves an integral part of the Torah itself, must be applied in an objective manner. Then and only then are the resultant conclusions the "words of the living God." Then and only then may it be assumed that, from the time of the giving of the Torah, it was destined that these conclusions be reached. It is conceivable that two different individuals of equal intelligence and erudition, both possessed of equal sincerity and objectivity, may reach antithetical conclusions. Since the Torah was given by God and disparate human intellects were created by God, the inference is virtually inescapable: it was part of the divine scheme that both conclusions be reached. Since both conclusions are derived from accepted premises and both are defended by cogent halakhic argumentation, it follows that both are legitimate expressions of Halakhah and hence both are of equal validity. Of insights attained in this manner the Sages taught, "Even that which a conscientious student will one day teach in the presence of his master was already told to Moses at Sinai" (Palestinian Talmud, *Pe'ah* 2:4).

Of course the development of correctly formulated decisions governing matters of practice is of singular importance. The methodology by which some opinions are accepted and others excluded from application to practice constitutes a highly complex aspect of Halakhah. Halakhic decisions are not a matter of arbitrary choice. Decision-making is also bound by rules of procedure.

The verse "Judges and officers shall you make for yourself in all your gates" (Deut. 16:18) bestows autonomous authority upon the rabbinic judges in each locale. They are empowered to promulgate their views in the area subject to their jurisdiction. The local populace may, with complete confidence, accept the teaching of the local *bet din*. Thus, in the city in which R. Eliezer was the chief authority the populace chopped trees, built a fire, and boiled water on the Sabbath in preparation for a circumcision, while in a neighboring town such actions constituted a capital offense. R. Eliezer's opinion to the effect that Sabbath restrictions are suspended not only for circumcision itself but even for preparation of the necessary accouterments of this rite was authoritative in his jurisdiction. The contradictory opinion of his colleagues was binding in their jurisdictions. Only upon a decision of the supreme halakhic authority,

the *Bet Din ha-Gadol*, sitting in Jerusalem, did a given view become binding upon all of Israel.¹

A rabbinic authority may issue decisions in accordance with his own views when such views are not in conflict with a position already binding upon the community of Israel as a whole. He may rely upon his own opinion only if he has attained the requisite degree of Torah scholarship and erudition and if the conclusion is genuinely arrived at on the basis of his own study and analysis. It goes without saying that his decisions are authoritative only if his personal piety and religious probity are beyond question.

Frequently, however, the rabbinic decisor is lacking in comprehensive scholarship or has not formulated a strongly held opinion of his own. In such cases, he must decide in accordance with one of a number of views expressed by his predecessors or colleagues. The ability to formulate definitive *psak* is the product of highly specialized skills. It is in choosing between conflicting precedents and opinions that the consummate expertise of the decisor becomes apparent. The decisor may not arbitrarily seize upon an individual opinion or a solitary source to the negation of the weight of halakhic precedent or consensus. He most certainly may not be swayed by the consideration that the resultant decision be popular or expedient or simply by the fact that it appeals to his own personal predilection. He must carefully weigh and balance opinions and decisions, assigning weight not merely on the basis of sheer number but also on the relative stature of the scholars whose opinions are under consideration, and must at the same time assess the complexities and relative importance of any number of component factors.

In order to understand the manner in which halakhic rulings are formulated, it is necessary to focus attention upon the deductive process by means of which definitive rulings are derived from fundamental principles. If the resultant halakhic discussion is at times somewhat involved, it must be emphasized that only by means of the halakhic dialectic is it possible to appreciate the halakhic process as it is employed *le-hasik shematteta aliba de-hilkhata*, in reaching definitive conclusions on the basis of pertinent sources.

The present work was not undertaken without feelings of trepidation. Is it possible to synopsize and compress complex discussions without

1. For a discussion of other equally binding decisions, see R. Elchanan Wasserman, *Kuntres Divrei Soferim*, no. 2, appended to *Kovez Shi'urim*, II (Givatayim, 5720).

one possible complication resulting from the use of Oxford FSD. Use of this solution might conceivably soften tissues and lead to a breakdown of blood vessels. This may cause a subcutaneous collection of blood such as often results from a contusion. When a perceptible subcutaneous collection of blood is present the meat may not be salted unless the skin is first pierced and the blood allowed to drain. Accordingly, notes Dr. Levinger, should such a phenomenon indeed occur subsequent to use of this chemical, the blood should be drained prior to salting. Finding no impediment to its use, Dr. Levinger endorses the addition of Oxford FSD in cold-water processing of kosher fowl.

CHAPTER V

Medical Questions

The Holy One, blessed be He, does not smite Israel unless He has previously created a cure for them.

MEGILLAH 13b

In Jewish law and moral teaching the value of human life is supreme and takes precedence over virtually all other considerations. This attitude is most eloquently summed up in a talmudic passage regarding the creation of Adam: "Therefore only a single human being was created in the world, to teach that if any person has caused a single soul of Israel to perish, Scripture regards him as if he had caused an entire world to perish; and if any human being saves a single soul of Israel,¹ Scripture regards him as if he had saved an entire world" (*Sanhedrin* 37a). Human life is not a good to be preserved as a condition of other values but an absolute, basic, and precious good in its own right. The obligation to preserve life is commensurately all-encompassing.

The obligation to save the life of an endangered person is derived by the Talmud from the verse "Neither shall you stand idly by the blood of your neighbor" (Lev. 19:16). The Talmud and the various codes of Jewish law offer specific examples of situations in which a moral obligation exists with regard to rendering aid. These include the rescue of a person drowning in a river, assistance to one being mauled by wild beasts and aid to a person under attack by bandits.

The application of this principle to medical intervention for the purposes of preserving life is not without theological and philosophical diffi-

1. The phrase "of Israel" is omitted in the Palestinian Talmud and in the Munich MS of the Babylonian Talmud.

culties. It is to be anticipated that a theology which ascribes providential concern to the Deity will view sickness as part of the divine scheme. A personal God does not allow His creatures, over whom He exercises providential guardianship, to become ill unless the affliction is divinely ordained as a means of punishment, for purposes of expiation of sin or for some other beneficial purpose entirely comprehensible to the Deity, if not to man. Thus, while the ancient Greeks regarded illness as a curse and the sick as inferior persons because, to them, malady represented the disruption of the harmony of the body which is synonymous with health, in Christianity suffering was deemed to be a manifestation of divine grace because it effected purification of the afflicted and served as an ennobling process. Since illness resulted in a state of enhanced spiritual perfection, the sick man was viewed by early Christianity as marked by divine favor.

Human intervention in causing or speeding the therapeutic process is, then, in a sense, interference with the deliberate design of providence. The patient, in seeking medical attention, may be seen as betraying a lack of faith in failing to put his trust in God. This attitude is reflected in the teaching of a number of early and medieval Christian theologians who counseled against seeking medical attention. The Karaites, in turn, rejected all forms of human healing and relied entirely upon prayer. Consistent with their fundamentalist orientation, they based their position upon a quite literal reading of Exodus 16:26. A literal translation of the Hebrew text of the passage reads as follows: "I will put none of the diseases upon you which I have put upon the Egyptians, for I am the Lord your physician." Hence, the Karaites taught that God alone should be sought as physician.

This view was rejected by Rabbinic Judaism, but not without due recognition of the cogency of the theological argument upon which it is based. Rabbinic teaching recognized that intervention for the purpose of thwarting the natural course of a disease could be sanctioned only on the basis of specific divine dispensation. Such license is found, on the basis of talmudic exegesis, in the scriptural passage dealing with compensation for personal injury: "And if men quarrel with one another and one smites the other with a stone or with the fist and he die not, but has to keep in bed . . . he must pay the loss entailed by absence from work and he shall cause him to be thoroughly healed" (Exod. 21:18-19). Ostensibly, this passage refers simply to the financial liability incurred as the result of an act of assault. However, since specific reference is made to

liability for medical expenses, it follows that liability for such expenses implies biblical license to incur those expenses in the course of seeking the ministrations of a practitioner of the healing arts. Thus the Talmud, *Baba Kamma* 85a, comments, "From here [it is derived] that the physician is granted permission to cure." Specific authorization is required, comments Rashi, in order to teach us that "we are not to say, 'How is it that God smites and man heals?'" In much the same vein *Tosafot* and R. Solomon ben Adret, in their commentaries upon this passage, state that without such sanction, "He who heals might appear as if he invalidated a divine decree."

Nontherapeutic life-saving intervention is talmudically mandated on independent grounds. The Talmud, *Sanhedrin* 73a, posits an obligation to rescue a neighbor from danger, such as drowning or being mauled by an animal. This obligation is predicated upon the scriptural exhortation with regard to the restoration of lost property, "And you shall return it to him" (Deut. 22:2). On the basis of a pleonasm in the Hebrew text, the Talmud declares that this verse includes an obligation to restore a fellow man's body as well as his property. Hence, there is created an obligation to come to the aid of one's fellow man in a life-threatening situation. Noteworthy is the fact that Maimonides,² going beyond the examples supplied by the Talmud, posits this source as the basis of the obligation to render medical care. Maimonides declares that the biblical commandment "And you shall return it to him" establishes an obligation requiring the physician to render professional services in life-threatening situations. Every individual, insofar as he is able, is obligated to restore the health of a fellow man no less than he is obligated to restore his property. Maimonides views this as a binding religious obligation.

Noteworthy is not only Maimonides' extension of this concept to cover medical matters but also his failure to allude at all to the verse "and he shall cause him to be thoroughly healed." It would appear that Maimonides is of the opinion that without the granting of specific *permission* one would not be permitted to tamper with physiological processes; obligations derived from Deuteronomy 22:2 would be limited to the prevention of accident or assault by man or beast. The dispensation to intervene in the natural order is derived from Exodus 21:20; but once such license is given, medical therapy is not simply elective but acquires the

2. *Commentary on the Mishnah, Nedarim* 4:4. Cf. *Mishneh Torah, Hilkhot Nedarim* 6:8.

status of a positive obligation.³ As indicated by *Sanhedrin* 73a, this obligation mandates not only the rendering of personal assistance, as is the case with regard to the restoration of lost property, but, by virtue of the negative commandment, "You shall not stand idly by the blood of your neighbor" (Lev. 19:16), the obligation is expanded to encompass expenditure of financial resources for the sake of preserving life of one's fellow man. This seems to have been the interpretation given to Maimonides' comments by R. Joseph Karo, who, in his code of Jewish law, combined both concepts in stating: "The Torah gave permission to the physician to heal; moreover, this is a religious precept and it is included in the category of saving life; and if the physician withholds his service it is considered as shedding blood."⁴

Nachmanides finds that since the Torah gives permission to seek medical attention the physician's obligation to heal must also be deemed to be inherent in the commandment "And you shall love your neighbor as yourself" (Lev. 19:18).⁵ The obligation to heal the sick is an instantiation of the general obligation to manifest love and concern for one's neighbor. As such, the obligation to heal encompasses not only situations posing a threat to life or limb or demanding restoration of impaired health but also situations of lesser gravity warranting medical attention for relief of pain and promotion of well-being.

Nevertheless, in the absence of specific scriptural license to practice the healing arts, Jews would be forbidden to seek the therapeutic benefits of medical science. Accordingly, despite the serious nature of the halakhic imperative with regard to the preservation of life and health, it is not surprising that this imperative is somewhat circumscribed insofar as the practice of medicine is concerned. The limitations, few as they are, serve as a reminder that all healing comes from God.

Sterilization of Women

The halakhic implications of the sterilization of women are the subject of a brief monograph authored by Dayan Grossnass of London which

3. Cf. R. Baruch ha-Levi Epstein, *Torah Temimah*, Exod. 21:19 and Deut. 22:2. Cf., also, R. Abraham Danzig, *Hokhmat Adam*, 141:25.

4. *Yoreh De'ah* 36:1. See R. Eliezer Waldenberg, *Ramat Rahel*, no. 21, and *idem*, *Ziz Eli'ezer*, X, no. 25, chap. 7.

5. *Torat ha-Adam, Kitvei Ramban*, ed. Bernard Chavel (Jerusalem, 5724), II, 43.

has appeared as number 21 in a series of such responsa published by the London *Bet Din* and has been reprinted in three sections in the Shevat, Adar and Nisan 5732 issues of *Ha-Pardes*. The parents of a mentally incompetent daughter approached Dayan Grossnass with a particularly agonizing problem. Because of her mental condition the young woman in question was repeatedly subjected to sexual abuse and was ultimately found to be pregnant. Although the pregnancy did not pose a danger to her life, medical authorities deemed the pregnancy to be detrimental to her physical health. The parents sought a halakhic ruling with regard to the permissibility of surgical sterilization in order to prevent further pregnancies. Dayan Grossnass rules that an abortion cannot be sanctioned but that, under the circumstances, sterilization is permissible.

The Gemara, *Shabbat* 110b, derives the prohibition against castration of both male human beings and male animals from the verse "And that which is mauled or crushed or torn or cut you shall not offer unto the Lord; nor should you do this in your land" (Lev. 22:24). This verse is understood by the Gemara as having reference to the male sexual organs and hence the latter part of the verse constitutes a prohibition against emasculation. *Tosafot* and *Rashba*, in their commentaries on *Shabbat* 111a, indicate that this prohibition is limited to the removal of male sexual organs, and there exists no biblical prohibition with regard to the sterilization of a female. The terminology employed by Rambam, *Issurei Bi'ah* 16:11, and *Shulhan Arukh, Even ha-Ezer* 5:11, would seem to indicate that the position of the latter authorities is that surgical sterilization of women, while not an actionable offense, is nevertheless biblically proscribed. Although the reference in Leviticus 22:24 is limited to external male organs, R. Elijah of Vilna, *Bi'ur ha-Gra, Even ha-Ezer* 5:25-26, cites *Sifra* in explaining that the ban against the removal of the internal female sexual organs is derived from the formulation employed in the very next verse, Leviticus 22:25. Nevertheless, other authorities, including *Hatam Sofer, Even ha-Ezer* 5:22, maintain that, even according to Rambam, the prohibition against the sterilization of females is rabbinic in nature. *Turei Zahav, Even ha-Ezer* 5:6, goes beyond the position of other authorities in averring that there is no prohibition with regard to female sterilization *per se*, but that it is nonetheless forbidden to subject female animals to this procedure because of the general prohibition against causing pain to animals. Similarly, nontherapeutic sterilization of women would constitute an unlawful act of "wounding"—*havalah*.

In the case at hand, Dayan Grossnass rules that the woman may be

CHAPTER XIII

The Conversion Crisis

I am the one who drew Yitro nigh and did not repulse him. You, also, when a person comes to you to be converted and comes solely for the sake of heaven, draw him nigh and do not repulse him.

YALKUT SHIM'ONI, YITRO 268

The Jew today, no less than in the past, is the heir to an unbroken chain of tradition. The survival of the Jewish people is directly dependent upon the preservation of the divinely sanctified identity of the community of Israel. The sanctity of Israel is a concomitant of Israel's acceptance of the Torah on Mount Sinai, a Torah which is an inseparable whole comprised of both Holy Writ and the Oral Law. Thus, for Judaism itself, the question "Who is a Jew?" can have but one answer: A Jew is one whom Halakhah defines as a Jew.

Jews, jealous of their identity, have always heroically resisted any and all attempts to compromise their ethnic purity. As the Midrash queries, "Why did Jeremiah compare Israel to the olive? All liquids intermingle with one another; oil is immiscible, and remains apart. Similarly, Israel cannot be assimilated among the nations of the world."¹ Our survival as a people may undoubtedly be credited to our tenacity in preserving inviolate the identity of the Jew.

Yet the peoplehood of Israel is not founded upon racist attitudes nor has Judaism suffered from the maladies of xenophobia. Jewish identity has always been a matter of membership in a specific and unique faith-community. As such Judaism has always welcomed all individuals seeking to embrace the tenets of the Torah. Indeed, the *ger zedek* (righteous

1. *Shemot Rabbah* XXXVI, 1.

proselyte) is extolled in rabbinic literature and depicted as being the recipient of an extraordinary degree of divine favor. The *ger zedek* is regarded with awe and wonder. Whereas the Jews who experienced the giving of the Torah at Mount Sinai were so overwhelmed by the difficulties attendant upon the observance of the commandments that they had to be coerced in order to secure their acceptance of the precepts of the Torah, the proselyte voluntarily accepts this discipline: "Had they not witnessed the sounds and the flames, the thunder and the voice of the *shofrot* they would not have accepted the yoke of the kingdom of heaven. Yet this [convert] did not witness a single one of these and joins himself to the Lord and accepts the yoke of the kingdom of heaven. Can there be anyone more beloved!"² The delight which God takes in such converts is reflected in the explicit halakhic obligation making it incumbent upon the rabbinical courts to accept sincere and committed candidates for proselytization.

However, in the demands which it makes upon the proselyte, Judaism is uncompromising. Judaism is not merely a faith-community; its adherents are bound by a rigorous and demanding code of law governing every aspect of life. Commitment must be total. To be accepted as a member of the community of Israel the convert must not only subscribe to the beliefs of Judaism but must willingly agree to observe its precepts. Should the candidate refuse to accept any detail of this code, his conversion is *ipso facto* invalid.

In this Judaism is unyielding. The basic conditions of genuine conversion are clearly enunciated in Halakhah. As the guardians of a divine mandate, Jews must perforce refuse to recognize any conversion not performed in accordance with the norms of Halakhah. This stark reality cannot be altered by the fiat of any civil judicial body. Nor for that matter is any rabbinic court or other ecclesiastic body empowered to overlook the *sina qua non* of Jewish identity.

Present circumstances have added a new dimension to the "Who is a Jew?" problem. The high incidence of intermarriage, both in Israel and the Diaspora, has generated an unprecedented number of applications for conversion. Given the exigencies of the contemporary situation conversion may well be the solution to myriad personal, social and religious problems. On the other hand, improper procedure may not only reduce the conversion ritual to a meaningless charade but may also pose a threat to the very identity of the Jewish people.

2. *Tanhumah, Lekh Lekha* 6.