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ORDEAL OR PSYCHODRAMA?

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# THE CASE OF THE SOTAH IN JEWISH LAW: ORDEAL OR PSYCHODRAMA?

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## I. INTRODUCTION

The rabbis of the talmudic period often differed with each other in interpreting the Scripture, and many times arrived at mutually contradictory conclusions. *Lex talionis* is the best known example of the rabbis interpreting the Scripture in a manner inconsistent with its literal meaning. It was speculated that perhaps the biblical command of an “eye for an eye”<sup>1</sup> required exact retribution, but it was held that it called for monetary compensation.<sup>2 3</sup> It was even suggested that the offender choose which punishment he preferred.<sup>2</sup> Less known but no less sharp is the controversy with regard to the “beautiful captive”.<sup>4</sup> A dispute existed as to the very nature and purpose of the law which was only articulated clearly in its details. The rabbis differed on the issue of whether she was to cut her nails or let them grow. This minor dispute was fundamental in understanding whether the “beautiful captive” was to remain voluntarily in the home of her captor, or not. One rabbi held one view; another rabbi held the opposite.<sup>5</sup>

It is the thesis of this essay that the rabbis also held antithetical views regarding the ritual of the *sotah*,<sup>6</sup> the indiscreet wife. One group maintained that the ritual was an ordeal by which God’s intervention proved her guilt or innocence. The other group did not clearly state its rejection of this view, but all its prescriptions indicate such a stance. This latter group of rabbis were not free to verbalize why they did not accept the supernatural approach for they feared that public criticism of the supernatural approach would have vitiated the value of the *sotah* ceremony as they perceived it. Even for them, however, the ceremony had great probative and social significance. They instead adopted legislation which converted this apparent ordeal into a pseudo-judicial event designed to extract a confession from the accused if she was guilty, whereupon she would be divorced and would only forfeit her monetary rights under her

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1. *Exodus* 21:24; *Leviticus* 24:20; *Deuteronomy* 19:21.

2. BABYLONIAN TALMUD, *Bava Kamma* 83b-84a; 12 ENCYCLOPEDIA TALMUDIT 695 (1974).

3. *Id.* at 83b.

4. *Deuteronomy* 21:10-14.

5. BABYLONIAN TALMUD, *Yevamot* 48a.

6. *Numbers* 5:11-31. The noun *sotah* is derived from the Hebrew verb *sth*, to deviate.

*ketubah*.<sup>7</sup> On the other hand, her innocence would be established if she was so, thus restoring her husband's erstwhile love and confidence. To this group of rabbis, the *sotah* procedure was designed to remove doubt in a framework where there was little penalty for honesty.

The existence of the implied latter view enables one to better understand the talmudic literature on the subject. It is also consistent with the general spirit of Jewish law. Furthermore, there is reason to believe that it is more in consonance with the original intent of the scriptural passages when read in the light of the Code of Hamurabi. The biblical intent would be, as is thought in many other cases, to protest against an ancient idolatrous practice by prescribing something similar in many ways, but diametrically opposite in purpose.<sup>78</sup>

## II. THE RITUAL OF SOTAH

The biblical verses are relatively clear:<sup>9</sup> if a wife shall "go wrong" and be unfaithful to her husband without the presence of witnesses, the husband can bring her to the priest, taking along with him a very simple meal offering. The priest then places "holy water" in an earthen bowl and puts some earth from the floor of the tabernacle in it. As she thus stands before God, the priest dishevels<sup>10</sup> her hair and places the meal offering in her hands. An oath is then administered to the wife, who attests to her innocence<sup>11</sup> and says *amen*. The oath (or curse) is written on parchment and placed in the water so that the words are erased in the solution. The wife drinks the water and the priest performs a prescribed ritual with the meal offering. If she is innocent, nothing happens to her

7. A *ketubah* is a prenuptial agreement authorized by the husband and wife establishing the rights of each party in cases of divorce or death. It can be forfeited upon misconduct. See BABYLONIAN TALMUD, *Ketubot* 72a-b.

8. Another example of this phenomenon can be found in the interpretation of *Exodus* 21:31, where the Bible commands that the law shall be identical whether the negligence of a person kills the claimant or the claimant's children. This is in contrast to the Code of Hamurabi's decision that "if a builder build[s] a house for a man and do[es] not make its construction firm, and the house which he has built collapse[s] and cause[s] the death of the owner of the house, that builder shall be put to death. If it cause[s] the death of a son of the owner of the house, they shall put to death a son of that builder." THE CODE OF HAMURABI, KING OF BABYLON § 229-30 (R.F. Harper trans. 1904). See also G.R. DRIVER & J.C. MILES, 2 THE BABYLONIAN LAW 217, 282-83, 407-08, 439-40, 43-44, 95-96 (1952).

9. *Numbers* 5:11-31.

10. Perhaps "uncovers" rather than dishevels; see Y. WEINBERG, 3 SREDAI EISH 30.

11. *Numbers* 5:19-20.

The priest shall administer an oath to the woman, saying to her, "If a man has not lain with you, and you have not committed adultery so as to be defiled to your husband, you shall be unharmed by this curse-bearing bitter water. But if you have committed adultery against your husband and have become defiled, and if a man other than your husband has had intercourse with you . . ." [At this point] the priest shall administer to the woman [the part of] the oath containing the curse. The priest shall say to the woman, "[in such a case], God will make you a curse and an oath among your people, causing your thighs to rupture and your belly to blow up."

Translation from A. KAPLAN, THE LIVING TORAH 396-98 (1981).

and she will even soon bear children.<sup>12</sup> If she is not innocent, the curse is fulfilled, and her thighs and stomach will provide evidence of her guilt.<sup>13</sup>

These verses inevitably create the impression that trial by ordeal was sanctioned by Judaism. Undoubtedly, many rabbis believed that the water was endowed with supernatural power. These rabbis maintained that if a guilty woman drank the water, not only would she die, but her illicit lover as well.<sup>14</sup> Moreover, some believed that a similar result was achieved by Moses after the Jews had made the golden calf.<sup>15</sup> The Mid-rash states that Moses ground the calf into a powder and forced the Jews to drink it. Those guilty of idolatry perished while the innocent survived.<sup>16</sup> Yet, it is perplexing that in all of talmudic literature there is but one report of an actual case in which a woman drank the water or the ritual was used.<sup>17</sup> What happened to the woman is not stated and the entire passage is ambiguous.<sup>18</sup> Indeed, the propriety of giving her the water was questioned in a talmudic discussion, where one rabbi even suggested that it was all a hoax.<sup>19</sup> Certainly, one of the reasons to doubt that the ritual was regarded by many rabbis as one designed to prove guilt or innocence is the almost complete absence in Jewish literature of accounts of the use of this procedure.

First and foremost, the rabbis debated in the Talmud whether the ritual was mandatory or permissive.<sup>20</sup> The question arose as to when it was permissive for Jewish authorities to look the other way when the commission of a crime had been alleged. The majority may have held that it was a *mitzvah* (a religious duty and a legal obligation) to pursue this matter, like any other criminal prosecution.<sup>21</sup> However, the fact that some dissented from this view and believed that the ritual was permissive, proves that some authorities must have maintained that the purpose of the mission was not punishment but something else. These rabbis believed that the *sotah* proceeding served a didactic purpose—by teaching the sanctity of family life and the high cost of infidelity. Yet, the ritual was instituted not to gather judicial proof of the alleged infidelity, but to calm the husband and afford the wife with an opportunity to establish her innocence or confess her guilt with less than fatal

12. *Numbers* 5:28.

13. *Numbers* 5:27. (If the woman who drinks the water has been defiled and untrue to her husband, the curse-bearing water will enter her body to poison her, causing her belly to blow up and her thighs to rupture. Translation from A. KAPLAN, *supra* note 11.)

14. SEDER NASHIM, MISHNAH SOTAH 8:1.

15. *Exodus* 32:1-35.

16. BABYLONIAN TALMUD, *Avodah Zara* 44a.

17. SEDER NEZIKIN, MISHNAH EDUYOT 5:6.

18. *Id.*

19. *Id.*

20. BABYLONIAN TALMUD, *Sotah* 3a.

21. The law is codified in accordance with this position. See MAIMONIDES, MISHNEH TORAH, SEFER NASHIM, *Hilchot Sotah* 4:18.

consequences.

Second, the Talmud's description of the effect of drinking the water does not coincide with what the Bible predicts.<sup>22</sup> <sup>23</sup> Some commentators try to reconcile this inconsistency by suggesting that the Talmud mentions ill effects that will follow those that the Bible mentions.<sup>24</sup> <sup>25</sup> Yet, it is interesting that while the Mishnah does not mention the biblical effects at all, those which the Mishnah does mention could well follow any subjection to stress.<sup>23</sup> The same effects could even now accompany the application of a lie detector test.<sup>26</sup>

All of this is relevant to my thesis only insofar as it reveals the lack of evidence that the ritual was ever consummated to the very end. If a procedure actually existed which was regarded as capable of actually conclusively proving guilt or innocence, it would have certainly been resorted to with great frequency; rather, this Mishnah establishes that the rabbis were describing symptoms that they felt would occur after one was subjected to a stressful situation, such as the *sotah* procedure.

Third, the Code of Hamurabi states that a woman accused of adultery, but who has not been caught in the act "shall leap into the river for her husband."<sup>27</sup> This is the typical ordeal by water against which the more humane biblical ritual is to be understood. The Bible substitutes a drink of special water for the leap into the river. Usually when the Scripture orders, in a similar state of facts, something radically different from the Code of Hamurabi, the intention is to ameliorate rather than cause greater suffering.<sup>28</sup> Without a doubt, the immediate danger from drowning is greater than that of a drink whose ill effect only God could precipitate. Most significantly, the biblically mandated ritual required a miracle in order for harm to befall its victim; the Hamurabic Code required a miracle in order to survive. However important this difference is between these two apparently similar rituals, I believe it unlikely that the amelioration intended would be limited only to this. Although some rabbis have held this belief, others have seen in the biblical prescriptions, as contrasted with that of Hamurabi, a design to give the proceeding a more radical departure from prevailing mores and methods of proof.

22. The problem confronted in these situations is simple: to design a process which not only establishes facts but also re-establishes confidence by both partners in each other by removing doubt.

23. SEDER NASHIM, MISHNAH SOTAH 3:4. "She hardly finished drinking when her face turned sallow, her eyes burst and her veins swelled." See also BABYLONIAN TALMUD, *Sotah* 20a.

24. MAIMONIDES, MISHNEH TORAH, SEFER NASHIM, *Hilchot Sotah* 3:16, and commentaries *ad locum*.

25. L. TAYLOR, SCIENTIFIC INTERROGATION 318-29 (1984) (stress as a form of interrogation).

26. *Id.*

27. CODE OF HAMURABI, *supra* note 8, at § 132.

28. See G.R. DRIVER, *supra* note 8.

### III. THE ROLE OF REASON IN JEWISH LAW

What makes the literal view so untenable and what prompted rabbis to take another view without diminishing from the psychological value of the proceeding to accomplish what they thought it was intended to accomplish? The answers to this question are many. First, while the basic premise of Judaism is that its laws reflect the will of God, it is paradoxical that more than any other system of law in antiquity, Jewish law firmly denied God any role in its legislative and judicial processes. Legislators and judges were expected to fulfill God's will as revealed in His words and in the oral traditions which emanated from Him. God could not intervene by miracles, supernatural phenomena, dreams, or ordeals. Nor did the rabbis believe that God would ever appear again to modify his commandments. It was believed that human reason, experience, and thought alone determined the outcome, especially when establishing judicial proof. It was as if God had said to man, "I have given you enough guidelines to proceed on your own."

This should not come as a surprise to students of Jewish thought. The practice of any form of magic, sorcery, witchcraft, divination, and necromancy was forbidden in Judaism,<sup>29</sup> and in fact, the use of the *urim* and *tumim*<sup>29 30</sup> was abandoned early in Jewish history.<sup>31</sup> Maimonides disparaged those who took astrology seriously, even though he himself believed that the heavenly host possessed consciousness.<sup>32</sup> According to Jewish thought, humanity must rely only upon the faculties with which God blessed them, such as reason and sense experience. Even one's faith must be consistent with them. The goal of much of Jewish philosophy, particularly the Maimonidean tradition,<sup>33</sup> was to prove this theory. Most significantly, judges who had to determine guilt or innocence, the existence of obligation, and the measure of damage or punishment, were bound to disregard anything other than that which could be demonstrated by human faculties.<sup>34</sup> This was a major contribution of Judaism to western jurisprudential philosophy.

One of the most famous talmudic texts, in tractate *Bava Metzia*,<sup>35</sup> justifies the conclusion that God is estopped from intervening in debates

29. At least five verses in the Bible prohibit such practices: *Exodus* 22:17; *Leviticus* 19:26 and 31; *Leviticus* 20:27; and *Deuteronomy* 18:14. These were prohibited according to some commentators even though they actually did work. See NACHMANIDES, *commenting on Leviticus* 19:26.

30. The *urim* and *tumim* were used by the High Priest to communicate with God. See 16 ENCYCLOPEDIA JUDAICA 8 (1972).

31. See SEDER NASHIM, MISHNAH SOTAH 9:12; See also 1 ENCYCLOPEDIA TALMUDIT 391-97 (1978).

32. MAIMONIDES, MISHNEH TORAH, SEFER MADA, *Hilchot Avodat Zara* 9:16.

33. See, e.g., J.B. SOLOVEITCHIK, THE HALACHIC MIND 85-100 (1986).

34. BABYLONIAN TALMUD, *Sanhedrin* 6b ("A judge only has that which his senses can use").

35. BABYLONIAN TALMUD, *Bava Metzia* 59b.

between rabbis as to the meaning or application of biblical verses. In this famous case, Rabbi Eliezer called upon the heavens to provide proof of the authenticity of his position and the invalidity of the majority's approach. Although God provided confirmation supporting Rabbi Eliezer, the rabbis refused to change their position.<sup>36</sup> This incident demonstrated that once God gave the Bible to man, it became theirs to interpret without the assistance of heavenly signs or sounds. The Talmud concludes this incident with the classical statement: "It [the Bible or the commandment] is not in heaven" (*10 bashamayim he*).<sup>37</sup> Professor Moshe Silberg derives from this text the primacy of the rule of law in Judaism. Even God is bound by it. God is subjected to man's jurisdiction and their conception of his legislative intent is binding also on Him.<sup>38</sup>

Another talmudic text<sup>39</sup> seems to say that a heavenly omen is accorded respect when it is supportive of the majority decision of the rabbis.<sup>40</sup> Needless to say, a majority must feel favored when, after reaching a decision, a voice from on high commends them. It is important to realize that although God may commend the majority for their decision, His opinion is not dispositive. This is dramatically demonstrated by the case of Rabbi Eliezer, discussed above, where a majority decision was not reversed even though God had intervened against them. The rabbis used God's own mandate to the effect that one must abide by the majority will, even when it is against God's own will.<sup>41</sup>

One of the assumptions of traditional Jewish law is that the legislation promulgated in the Pentateuch is divinely revealed and all that came after enjoyed a lesser status as rabbinical legislation. It appears from the Talmud that in rare instances God does communicate with the prophets in order to give new rituals to the Jewish people, and some of these rituals have virtually the status of the divine law contained in the Penta-

36. *Id.*

[R. Eliezer] said: Let this carob-tree prove that the Halakha prevails as I state, and the carob was . . . thrown off to a distance of one hundred *amot*. . . But they said: The carob proves nothing. He again said: "Let, then, the spring of water prove that so the Halakha prevails." The water then began to run backwards. . . He again said: "Then, let the walls of the [Beit Medrash] prove that I am right." The walls were about to fall. . . They did not fall for the honor of R. Joshua . . . He said again: "Let it be announced by the heavens that the Halakha prevails according to my statement", and a heavenly voice was heard, saying: "Why do you quarrel with R. Eliezer, who is always right in his decisions!" R. Joshua then arose and proclaimed (*Deuteronomy* 30:12) "The law is not in the heavens." (M. Rodkinson trans. 1918)

37. *Id.*

38. M. SILBERG, *TALMUDIC LAW AND THE MODERN STATE* 65 (B. Bokser trans. 1973); *but see* DRASHOT HA'RAN, *derasha* 11 (1973).

39. BABYLONIAN TALMUD, *Yevamot* 14a.

40. TOSAFOT, *commenting on* BABYLONIAN TALMUD, *Bava Metzia* 59b (starting with the words *10 bashamayim he*) and RABBENU NISSIM, *quoted in* SHITA MEKUBEZET, *commenting on id.* *See also* 5 ENCYCLOPEDIA TALMUDIT 1 (1986).

41. BABYLONIAN TALMUD, *Bava Metzia* 59b.

teuch.<sup>42 43</sup> For example, the prophets mandated a ritual observed on the seventh day of the *Succot* festival with willow branches.<sup>42</sup> These revelations, however, never involved matters that could result in litigation.

Undoubtedly, Jewish law allowed for the invocation of the divine in the area of ritual; it was only in the areas of law that involved man's relationship with his fellow man that divine intervention would not be sanctioned. In none of the sources discussing divine additions to the law does one find any discussion of topics involving areas where litigation is possible. Jewish law never resorted to anything other than reason and sense experience in the judicial process. More significantly, the new rules of law or new interpretations which came from sources other than reason and sense experience never involved anything other than an individual's religious behavior vis-a-vis God, and not matters which could have precipitated a justiciable controversy in court.<sup>44</sup> Those areas where the implications from the prophets changed biblical law in relationships between persons were not followed.<sup>45</sup>

Another famous example, this time from the medieval period, of an attempt to resort to the divine to settle disputes, is the discussion regarding the use of a defective myrtle as one of the four species in the ritual of the festival of Tabernacles (*Succot*).<sup>46</sup> Maimonides deemed it usable.<sup>47</sup> Rabbi Abraham Ben David, on the other hand, did not, because "The Holy Spirit appeared in our house of learning years ago and we have rejected it as unusable."<sup>48</sup> What is of interest in this case, as in many others, is that not everyone in Israel was as impressed as Rabbi Abraham Ben David with the appearance of the Holy Spirit in his house of learning. Rabbi Caro, for example, defended the view of Maimonides and ignored the revelation to Maimonides' controversialist,<sup>49</sup> despite the fact that he was a mystic and cabalist.<sup>50</sup>

Jewish law did allow judges to use their own sense experience even in the face of contrary evidence. According to the Bible, at least two wit-

42. See Urbach, *HaHalacha v'Nevuah*, 18 TARBIZ 6-27 (1947). Professor A.J. Heschel has assembled data trying to establish that even during the post-talmudic period much law was established by mystical experiences, messages from the Holy Spirit, and even dreams. Heschel, *Ruach HciKodesh Beyemai HaBainayim*, SEFER HAYOVEL LICHVOD ALEXANDER MARX 175-208 (1950).

43. Urbach, *supra* note 42, at 10-14.

44. See *id.* for a complete list of the locations.

45. See *Ezekiel* 44:22 for one example of a statement in the prophets which differed in a legally significant way from that of the Bible.

46. See J. CARO, SHULCHAN ARUCH, *Aruch Chaim* 645:1-4.

47. See MAIMONIDES, MISHNEH TORAH, SF.FER ZEMANIM, *Hilchot Lulav* 8:5.

48. ABRAHAM BEN DAVID (RABAD), HASAGOT; MAIMONIDES, MISHNEH TORAH, SEFER ZEMANIM, *Hilchot Lulav* 8:5.

49. See J. CARO, SHULCHAN ARUCH, *Aruch Chaim* 646:1; and glosses of M. ISSERLES on *id.* See also DON VIDAL DE TOULOUSE, MAGGID MISHNEH, *commenting on* MAIMONIDES, MISHNEH TORAH, SEFER ZERAIM, *Hilchot Lulav* 8:5.

50. See J.R. WERBLOWSKY, JOSEPH KARO: LAWYER AND MYSTIC 148-69 (1962).



nesses are required to establish any fact.<sup>51</sup> Yet, judges can be creative and establish facts by resorting to other means, such as intuition, and can resist uncontradicted, unimpeached testimony of two or more witnesses if they feel that a miscarriage of justice might result.<sup>52</sup> <sup>53</sup> While help from the supernatural is not permitted, intuition and creative discovery may be employed.

The classic case for judicial creativity (without regard to the biblical requirement that every issue shall be resolved by the testimony of at least two witnesses) is that of King Solomon and the two mothers who appeared before him; each had recently given birth and both claimed the surviving child as her own. Solomon ordered the child to be cut into two; a decision which evoked the immediate reaction of the real mother who waived her rights rather than see the child killed.<sup>55</sup> Solomon's decision was apparently not within a judge's power to make. The proper procedure was to seek witnesses to ascertain which child belonged to whom, or at least to discover other forms of testimony (visual, medical, etc.).<sup>54</sup>

Can any judge take it upon himself to act similarly? The Meiri, in his commentary on the Talmud,<sup>55</sup> says that only the very great may do so. The Talmud recounts a story about one such person—Rabbi Bana.<sup>56</sup> A man overheard his wife counseling her daughter to be more discreet in her promiscuous behavior. The mother said that she was sufficiently wise in her day to have had ten sons, only one of whom was her husband's. The husband, overhearing this, left his entire estate to his one and only son whose identity was unknown. When the case came before Rabbi Bana he ruled that the man's grave should be reopened for consultation. One son refused to participate in the procedure, since it would have been disrespectful to his father's remains. Rabbi Bana then ruled that this son was entitled to the entire estate. The other sons informed against him to the ruling authorities and accused the rabbi of expropriating heirs "without witnesses and without proof."<sup>57</sup> <sup>58</sup> Although their complaint was well founded, the Talmud did not reject Rabbi Bana's verdict.

The Meiri maintained that only one who is endowed with exceptional wisdom and analytical skills greater than those of all his contemporaries may resort to this type of proof.<sup>5\*</sup> Because the case is so exceptional, one commentator ventured the thought that the father knew who the real son

51. *Deuteronomy* 17:6.

52. J. CARO, SHULCHAN ARUCH, *Choshen Mishpat* 16:3, and glosses of M. ISSF.RLES (REMA), *on id.*

53. I *Kings* 3:16-28.

54. For one example of the proper procedure of a court in such a case see J. CARO. SHULCHAN ARUCH, *Even Haezer* 3:9 and commentaries *ad locum*.

55. M. MEIRI, BEIT HABECHERA, *Hava Batra* 58a.

56. BABYLONIAN TALMUD, *Bava Batra* 58a.

57. *Id.*

58. M. MEIRI, *supra* note 55.

was, and so did Rabbi Bana. The suggestion that the body be disinterred was only a device to make the verdict seem plausible.<sup>59</sup> While this type of adjudication is not in accordance with the classical rule of law, one cannot argue that it involved omens or the supernatural. One may argue that judges should not be allowed such latitude in the exercise of their judicial functions, though certainly it was clearly an exercise of reason that led Rabbi Bana to decide as he did. However, one should still ask whether a judge can legally ignore incontrovertible proof, oral or documentary, simply because he is not convinced that the case is free of deceit, fraud, conspiracy or the like. In talmudic literature, such a case is called *din merumeh*.<sup>60</sup> The judge may also feel that there is a great deal that is being concealed at the trial and for that reason is loath to render a verdict. In all such cases the judge may rely on his feelings, insight, and intuition. None of these can be equated precisely with reason or sense experience, but certainly all are related to such perceptions.

A judge can only rely on his instinct to a certain extent. According to some authorities, he may do no more than withdraw from the case and let another judge deal with it.<sup>61</sup> According to others, he may even make a final disposition of the case.<sup>62</sup> Still other authorities try to make a fine distinction as to when he may take one of the courses available to him.<sup>63</sup> Yet, the only cases in which he may so act, are cases that involve the suspicion that the parties are guilty of fraud, concealment, or similar offenses against the court. The judge may not so act because he has had visions, mystical experiences or heard voices from above guiding him in his decision.<sup>64</sup> Unfortunately, the sources do not reveal whether the judge must indicate in his decision that he decided on the basis of his suspicions when in fact that was the case. In any event, resort to the supernatural as a source for judicial decision in a litigated controversy was simply non-existent.<sup>65</sup>

Against the background of a logical, rational jurisprudential system, it is difficult to accept the possibility that the guilt or innocence of a woman would be predicated on a supernatural revelation. Even when debating legal issues, a rabbi was not permitted to summon a heavenly voice to prove that he was right.<sup>66</sup> In all of biblical and talmudic litera-

59. See COMMENTARY OF THE GEONIM, *commenting on* Y. HABIB, EIN YAKOV, *Bava Batra* 58a.

60. BABYLONIAN TALMUD, *Sanhedrin* 32b.

61. MAIMONIDES, MISHNEH TORAH, SEFER SHOFTIM, *Hilchot Sanhedrin* 24:3.

62. J. CARO, BEIT YOSEF, *commenting on* JACOB BEN ASHER, TUR, *Choshen Mishpat* ch. 15.

63. ASHER B.F.N YF. CHIEL (ROSH), RESPONSA 68:20.

64. See J. CARO, BEIT YOSEF, *commenting on* JACOB B.F.N ASHER, TUR, *Choshen Mishpat* ch. 15; J. CARO, SHULCHAN ARUCH, *Choshen Mishpat* 15:3; and glosses of M. ISSERLES on *id.*

65. See also BABYLONIAN TALMUD, *Temurah* 16a (supernatural cannot even be used to re-learn that which had been forgotten).

66. See text accompanying notes 35-41.

ture there is only this one procedure where apparently a court is to act (jointly with the High Priest) in arriving at a verdict and punishment by a method resembling witchcraft or sorcery. In no other cases, civil or criminal, is this allowed. Therefore, its anomalous character begs for another interpretation.

#### IV. THE PURPOSE OF THE OATH IN THE LAW OF SOTAH

The second anomaly in the law of *sotah* is the unique type of oath used. While oaths are generally regarded by legal historians as partaking of the character of ordeals in other cultures,<sup>67</sup> they played quite a different role in Jewish judicial procedure. Their role was not to establish facts or constitute proof. The only purpose they served was to clear one of suspicion.<sup>68</sup> That is all. It is difficult to reconcile the fact that while so little probative value is accorded to oaths generally, the oath of the *sotah* would be designed literally as a procedure to ascertain guilt or innocence.

If one assumes that the procedure was indeed an ordeal with metaphysical intervention to establish guilt or innocence, there was no need for a long period of importuning by the presiding officials to the woman to confess.<sup>69</sup> It was unnecessary then to plead with her that if guilty she need only say so and all that would happen would be that she would forfeit her *ketubah* and be divorced.<sup>70</sup> If she was guilty, was it not their duty to see that she received the appropriate punishment? Rather, this is an indication of a more humane purpose to the law.

In all of Jewish law the anomaly of judges pleading for a confession does not exist. Witnesses in a capital case were often urged to tell the truth and not cause an innocent person to suffer the death penalty.<sup>71</sup> The judges never pleaded with the accused. It is hard to believe that they urged the woman to confess because they wanted her to be spared the writing of God's name on parchment and its erasure in the prescribed waters.<sup>72</sup> The Bible ordered this procedure to be done<sup>73</sup> and there is no reason why they would want to avoid it. Furthermore, at least on a superficial level, the Bible ordered it because it wanted to punish a guilty woman. This is an important mandate of the Bible "to exorcise the evil" from amongst us.<sup>74</sup> Why then this hesitancy to conform to the ritual? In addition, since Jewish law did not accept the validity of confessions as

67. See, e.g., CODE OF HAMURABI, *supra* note 8, at § 131. See also Anderson, *Oaths as Old as a Belief in God*, 61 L. INST. J. 502 (1987); Levinson, *Constituting Communities Through Words that Bind: Reflections on Loyalty Oaths*, 81 MICH. L. REV. 1410, 1447-48, 461-62 (1986).

68. J. CARO, SHULCHAN ARUCH, *Choshen Mishpat* 34:5. See also *infra* notes 88-89.

69. SEDER NASHIM, MISHNAH SOTAH 1:4; BABYLONIAN TALMUD, *Sotah* 8a-b.

70. SEDER NASHIM, MISHNAH SOTAH 1:5; BABYLONIAN TALMUD, *Sotah* 8a-b.

71. J. CARO, SHULCHAN ARUCH, *Choshen Mishpat* 28:7-8.

72. BABYLONIAN TALMUD, *Sotah* 8b.

73. *Numbers* 5:23.

74. *Psalms* 104:35.

part of the criminal process<sup>75</sup> it is difficult to understand why they should do so here. Yet, precisely in this instance, the cardinal feature of the ritual was to elicit the confession.

It was well established in the Talmud and Mishnah that even if the woman had already drunk the water and presumably established her innocence by surviving it, she could still be proved guilty at trial through the judicial process.<sup>76</sup> It is hard to explain the fact that more credibility was given to human testimony than to what was a divinely established fact. In order to sustain belief in the supernatural power of the waters it was then necessary to argue that the waters only established facts when there were no witnesses on earth who could tell the tale.<sup>77</sup> However, if this is so, the rabbis made the ceremony quite useless. The husband will hardly deem her innocent; if nothing happens to her he will assume that there are witnesses somewhere on earth who will one day establish guilt. If so, the ritual prescribed by the Bible is even more cruel than that of Hamurabi's Code. Since it can only establish guilt and never innocence, it is unlikely that the Bible would mandate this ritual.

Additional problems abound: if the ritual had probative value, the guilty man should have been punished too—his identity was known.<sup>78</sup> The Talmud states that he would be punished by God,<sup>79</sup> but if the rabbis had faith in the ritual's efficacy, why did they not rely upon it to pursue the punishment themselves? Also, if there were witnesses to the act of adultery, there was no ritual even if the witnesses' testimony failed to accomplish its purpose.<sup>80</sup> This is true even if the testimony would not be admissible in court.<sup>81</sup> The Talmud also lays much emphasis on the fact that God wanted His name to be erased (after it was written on parchment) to restore domestic peace.<sup>82</sup> Perhaps His name was to be used to establish guilt. The assumption of the law appears to be that, typically, nothing would ever happen to the woman and she would be restored to her husband who would have at least some assurance of her innocence. Even if there might be witnesses elsewhere, the mere fact that she resisted the enormous pressure to confess would give him peace of mind.

75. See A. KIRSCHENBAUM, SELF INCRIMINATION IN JEWISH LAW 3-25 (1970).

76. SEDER NASHIM, MISHNAH SOTAH 4:2; BABYLONIAN TALMUD, *Sotah* 26a-b.

77. BABYLONIAN TALMUD, *Sotah* 28a-b.

78. The *sotah* ritual mandated that the husband warn her against isolation with a particular person. SEDER NASHIM, MISHNAH SOTAH 1:1; BABYLONIAN TALMUD, *Sotah* 2b-3a. Hence, his identity must be known.

79. SEDER NASHIM, MISHNAH SOTAH 5:1; BABYLONIAN TALMUD, *Sotah* 27b-28a.

80. SEDER NASHIM, MISHNAH SOTAH 6:2; BABYLONIAN TALMUD, *Sotah* 31b.

81. *Id.* See also MAIMONIDES, MISHNEH TORAH, SEFER NASHIM, *Hilchot Sotah* 1:16.

82. BABYLONIAN TALMUD, *Sotah* 18a.

## V. SOTAH AS A PSYCHOLOGICAL PROCEEDING

For the above reasons, I submit that many of the rabbis saw in the ritual a sophisticated psychological device—virtually a drama to reconcile a suspicious, jealous husband to his indiscreet, but innocent wife. In this connection, one must bear in mind that if there was a charge of adultery by witnesses who saw the act, there was no ritual, even if the witnesses were finally discredited, since, at that point, it was appropriate to run a judicial, not a psychological, hearing. Proof adequate for the criminal punishment of adultery was therefore rare, since adulterers do not usually cohabit before witnesses and such evidence was a prerequisite to punishment.<sup>83</sup> As a matter of fact, the witnesses were required not only to see the act of adultery with their own eyes, but also to warn the offenders in advance of the gravity of the offense they were about to commit,<sup>84</sup> an unlikely situation. If witnesses claimed that they saw an adulterous act, the ritual was not applicable even if punishment could not occur. The husband might divorce his wife,<sup>85</sup> but there was no activity before a priest.

The ritual applied only when the husband had suspicions but no proof. He ordered the wife not to be alone with a particular man and witnesses saw her flouting his will. She was disobedient but there was no proof of adultery. In such a case, how does one reassure a husband who, in his fury, might resort to violence or divorce? The rabbis saw in the biblical mandate a readiness on God's part to let His name be erased for the sake of restoring domestic tranquility by certifying to the woman's innocence, or on rare occasions producing a confession. The woman drank water in which was placed a piece of parchment with verses and God's name among them. Before she drank she was urged, if guilty, not to drink, but to confess and forfeit her *ketubah* and nothing more. There was no criminal punishment based on her confession. If she was innocent she was urged to drink the water and be reconciled to her husband.

Of course, the ritual could only achieve its purpose as long as people believed that it was in fact a means of establishing the truth. In actuality, it required a miracle to punish her as the mixture was medically harmless.<sup>86</sup> Nothing was ever established from a judicial point of view - if the woman confessed, the court did not punish her. If she drank and noth-

83. There is a dispute in the Talmud as to what precisely the witnesses must see, and this dispute is not resolved by the decisors of Jewish law. Some authorities maintain that the intercourse itself must be seen; others maintain that circumstantial evidence of actual intercourse may be used. See BABYLONIAN TALMUD, *Makol* 7a, and the commentaries *ad locum*.

84. BABYLONIAN TALMUD, *Sanhedrin* 8b.

85. It is possible that she will also suffer certain monetary penalties. See J. CARO, SHULCHAN ARUCH, *Even Haezer* 116:2-4.

86. The mixture consists only of water, dust, wormwood (or any other bitter, but not poisonous substance), ink, and paper. MAIMONIDES, MISHNEH TORAH, SEFER NASHIM, *Hilchot Sotah* 3:9-10.

ing happened to her, she was assumed innocent and reconciled to her husband.

I am driven to the conclusion that the *sotah* ritual was a psychological proceeding and not an ordeal. First, because of the accent in talmudic literature on the fact that the rabbis praised God for having permitted His holy name to be used for the purpose of restoring domestic tranquility in a troubled home.<sup>87</sup> They did not say that God is to be praised because He permitted the use of His name to establish the guilt of a woman. The guilt established by eliciting a confession involved no punishment other than the termination of the marriage and the forfeiture of the *ketubah*.

Second, proof that the ritual was essentially a psychological technique for establishing innocence rather than guilt can also be gleaned from the fact that some of the principal rules pertaining to oaths in Jewish law are derived from this law of the oath of the indiscreet wife. All oaths exacted from parties in accordance with biblical provisions were exculpatory, designed to clear a defendant of guilt. If a defendant denied the claim of a plaintiff, the plaintiff maintained the burden of proof and the defendant did nothing. However, if there was one witness to the claim instead of the required two,<sup>88</sup> or if the defendant made a partial admission of the claim,<sup>89</sup> then—since he was already under some cloud of suspicion because of his own admission or the testimony of the one witness—he took the oath and cleared himself. This, says the Talmud, is the nature of all biblical oaths: the defendant swears and does not have to pay.<sup>90</sup>

The Talmud's generalization that all biblical oaths were for the sake of clearing defendants from suspicion and its linking of all oaths with the oath administered in this so-called "ordeal of jealousy" warrants the assumption that the wife's oath is also for the sake of clearing her of suspicion.<sup>91</sup> Indeed, the alleged male adulterer is not at all involved, though by Jewish law, if he is guilty, the death penalty is due him as much as to the married woman with whom he cohabited.<sup>92</sup> <sup>93</sup> Yet, the court ignores the charges against him. It is true, however, that in the time of the Mishnah, oaths had a purpose beyond that of clearing a defendant of suspicion. For instance, under rabbinic legislation, some claimants were given the privilege of proving their case by simply taking an oath that money was due them.<sup>92</sup> Yet, from the point of view of the

87. BABYLONIAN TALMUD, *Sotah* 18a.

88. BABYLONIAN TALMUD, *Shevuot* 40a.

89. SEDER NEZIKIN, MISHNAH SHAVUOT 7:1.

90. *Id.* at 8:1.

91. The use of the *sotah* procedure as a paradigm of oaths is common in the Talmud. See, e.g., BABYLONIAN TALMUD, *Shavuot* 29b, 32a-b, 33b, 36a.

92. MAIMONIDES, MISHNEH TORAH, SEFER KEDUSHAH, *Hilchot Isurai Biah* 1:1, 6.

93. Various categories of people were allowed to swear and collect according to rabbinic law. See JACOB BEN ASHER, TUR, *Choshen Mishpat* ch. 89 for a complete list.

court, it simply meant that in a particular kind of case, the burden of proof shifted from the plaintiff to the defendant, and the plaintiff could make out a case by simply taking an oath that money was due him.<sup>94</sup>

One thing is clear however, oaths cannot serve to prove facts. Pressure could be put, by means of an oath, on a reluctant witness to testify.<sup>95</sup> People respected the oath and were hesitant to abuse it, not only because perjury might result in punishment.<sup>96</sup> If a man was a proven perjurer, he would be denied the option of taking the oath in any lawsuit in which he might be obligated to take one. Instead, his adversary would be privileged to take the oath instead of proving his case by witnesses or documents. The plaintiff would then recover the amount alleged to be due.<sup>97</sup> Thus, anyone who would be reckless with oaths made litigation more difficult for himself. He placed himself at the mercy of unscrupulous claimants who, with proof adequate only to place upon him the burden of an oath, would prevail in their causes merely by taking oaths themselves, since their victim had been precluded from clearing himself.<sup>98</sup>

The talmudic association of the law of oaths with the ritual of the indiscreet wife yields a common denominator. In both cases, the objective was to clear the suspicions that attached either to an accused woman or a defendant against whom a monetary claim was made. This association is suggestive of how rabbis must have regarded the so-called ordeal of the indiscreet wife.

The fact that the woman was not forced to drink the water after she confessed her guilt is virtually conclusive proof that what was sought was not punishment. If punishment was regarded as the objective, the water would have been administered once she confessed, or, at the very least, some other significant criminal action would have been instituted. The rule, however, was precisely the reverse. Once there was a confession, no

94. For example, a daily worker may claim his pay at the end of the day. If the employer claims that payment was already made, what is the legal result? How can the plaintiff in such a case prove that he was not paid? The rabbis decreed that the employee should take an oath that he was not paid, and, in the absence of any other proof, it would be sufficient. In such a case, one can hardly call the use of the oath a form of proof which is beyond the exercise of reason and sense experience. The rabbis shifted the burden because the employer was better able to protect himself against a false claim by demanding a receipt from the worker. See J. CARO, SHULCHAN ARUCH, *Choshen Mishpat* 89:1-3.

Another example is a claim by a widow for payment of the *ketubah* due her. In this case there is no shift of the burden of proof. It is sufficient that she has written evidence of the claim while the heirs cannot prove payment. Yet, it might be that, during the marriage, the husband had made payment and did not disclose it to anyone. Therefore, as added reassurance to the heirs, the widow takes an oath that she was not paid. See SF.DER NASHIM, MISHNAH KETUBOT 9:7; SEDER NEZIKIN, MISHNAH SHAVUOT 7:7.

95. This was already clearly realized in tannaitic times; see SEDER NEZIKIN, MISHNAH SHAVUOT ch. 5 for various scenarios where swearing could be a tactical strategy.

96. TOSEFTA, MAKOT 4:5.

97. SEDER NEZIKIN, MISHNAH SHAVUOT 7:1, 4; J. CARO, SHULCHAN ARUCH, *Choshen Mishpat* 89:1.

98. See Rackman, *Legal Sanctions for Moral Obligations*, in JUSTICE, JUSTICE SHALT THOU PURSUE 151-53 (1975).

further action was taken. Additionally, if the goal was either a confession or the restoration of domestic tranquility, one can understand why it was that the Talmud states that there was no proceeding if her husband and she cohabited after he had accused her." It was apparent in that case that a reconciliation was achieved and there was no reason for anything further. In addition, the danger that the husband might harm his wife while in a rage was now greatly reduced. The ritual was therefore not needed.

Since the principal objective was either a confession of guilt or the restoration of peace to the home, it is understandable why in the course of the ritual so many things were done to induce a psychological drama: excessive walking up and down the mountain,<sup>99</sup> <sup>100</sup> carrying a load,<sup>101</sup> and seeing with her own eyes how the potion was being prepared for her to drink.<sup>102</sup> All of these rituals can only be explained if the objective was to create a psychological drama rather than a judicial proceeding and punishment. If my thesis is correct, the ritual of *sotah* does not constitute an anomaly in Jewish law and is not a judicial procedure to establish facts by appealing to divine intervention. If anything, it stands in beautiful contrast to the true ordeal mandated by the Hamurabic Code. It is a brilliant libretto to evoke a confession or establish domestic peace by removing psychological uncertainty. If witnesses were available at any time before or after the ritual, then, of course, a judicial proceeding occurred. But in the absence of witnesses, the goal was divorce or reconciliation, not punishment.

After this analysis, one must inevitably ask if the biblical verses provide any justification for some rabbis' radical re-interpretation of the simple meaning of the verses. I submit that they do. The most obvious hint that the ceremony was designed to evoke a confession and not to try the accused and punish her, is the uniqueness of the oath which was administered. It was unlike any other oath in the Bible. Normally, one swears in order to establish a fact, and in the absence of any contradictory evidence, it is final. In the instant case, however, the oath established no fact - it was nothing more than a dramatic statement of the ritual's nature.<sup>103</sup>

The anomalous character of the oath, therefore, suggests the interpretation that I maintain. It was in this spirit that the rabbis drafted the text to be read to the woman who hesitated to drink although she protested her innocence: "Our daughter, if you are sure that you are innocent,

99. BABYLONIAN TALMUD, *Sotah* 7a. If he divorced her after they had cohabited, she received all the financial rights associated with divorce. *Id.*

100. SEDER NASHIM, MISHNAH SOTAH 1:5; BABYLONIAN TALMUD, *Sotah* 7b; MAIMONIDES, SEDER NASHIM, *Hilchot Sotah* 3:3.

101. BABYLONIAN TALMUD, *Sotah* 7b.

102. *Id.*

103. *Numbers* 5:19-22.



drink, because the waters are like a dry poison placed on live flesh. If there is a wound, it will penetrate the body, but if there is no wound, it accomplishes naught.<sup>104</sup> Thus, as much as she was urged to confess if guilty, so she was urged not to fear the waters, if innocent.

## VI. CONCLUSION

It is a fact that the biblical verses regarding *lex talionis* are ambiguous. Dr. Joseph B. Soloveitchik has stated that many times the Bible deliberately states the "ought" even if that "ought" is difficult or impossible to enforce. He who removes the limb of another deserves to have his limb removed, but, since precise, exact retribution is never possible, the courts can do no more than force him to pay for the injury he caused.<sup>104 105</sup>

The biblical verses regarding the *sotah* are also ambiguous. One can see in them the typical ancient middle eastern ordeal. One can also interpret them as mandating a psychological drama designed to either evoke a confession or reinvigorate a marriage plagued with doubt, but not as a prescription for an ordeal. It is obvious that here the ambiguity was necessary. The ritual would have no value if the latter interpretation became publicly known. Yet, certainly it is the latter interpretation that is consonant with all of Jewish law and philosophy while the alternative view makes it an anomaly in Jewish jurisprudence.

*The Kuzari* states that the Bible was given at Mount Sinai to hundreds of thousands of people openly and without any secrecy.<sup>106</sup> Judaism must always be exoteric and not esoteric. Judaism relies only on what was available to all - reason and sense experience. Furthermore, Jewish law invites all to judge for themselves how just are God's laws.<sup>107</sup> This is an appeal to reason and sense experience. The Law can only be appreciated in this way. Indeed, to effectively transmit the Law to succeeding generations one appeals to them on the basis of those faculties available to everyone. The Jewish faith requires none to believe in the absurd. The faith itself rejects the irrational. The processes of the law must be similarly rational and natural.

104. Tosefta, Sotah 1:3.

105. Most likely, Rabbi Soloveitchik was trying to explain the position taken by Maimonides in his *GUIDE TO THE PERPLEXED* where he maintains that ideally, retribution should be the law. See *MAIMONIDES, 3 GUIDE TO THE PERPLEXED* ch. 43 § 3 (S. Pines trans. 1963). The position of Rabbi Soloveitchik can be found in a taped lecture, see *RABBI J.B. SOLOVEITCHIK, TAPED LECTURE ON PARSHAT KORACH* (available on file at the NAT'L JEWISH L. REV.).

106. Y. HALEVI, *KUZARI* 87:1 (Y.E. Shmuel trans. 1973).

107. *Deuteronomy* 4:8.